SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW M. CUOMO, Attorney General of the State of New York,	:	
	:	Index No. 401720/05
Plaintiff-Respondent,	:	
- against -	:	
MAURICE R. GREENBERG and HOWARD I. SMITH,	:	
Defendants-Appellants.	:	
THE CHAMBER OF COMMERCE OF THE UNITED STATE OF AMERICA	:	
Amicus Curiae	:	

[PROPOSED] *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H St NW
Washington, DC
(202) 463-5337

Counsel for amicus curiae

Reproduced on recycled paper

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION 1

ARGUMENT 3

THE COURT OF APPEALS SHOULD HAVE AN OPPORTUNITY TO ADDRESS WHETHER THIS SUIT IS PREEMPTED BY FEDERAL LAW. 3

A. The Enormous Practical Consequences Of The Majority's Preemption Holding Necessitate Further Review. 4

B. The Majority's Preemption Ruling Is Incorrect. 10

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., *Barez,*
458 U.S. 592 (1982)....................12

In re Baldwin-United Corp.,
770 F.2d 328 (2d Cir. 1985)....................12

Dirks v. SEC,
463 U.S. 646 (1983)....................8

Dynamics Corp.,
481 U.S. at 90....................7

Lander v. Hartford Life,
251 F.3d 101, 111 (2d Cir. 2001)....................14

Louisiana ex rel. *Caldwell v. Allstate Ins. Co.*,
536 F.3d 418 (5th Cir. 2008)....................12

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. 71 (2006)....................2, 11

Pinter v. Dahl,
486 U.S. 622 (1988)....................6

TSC Indus. v. Northway, Inc.,
426 U.S. 438 (1976)....................8

STATUTES

15 U.S.C.
§ 77r(a)(2)(B)....................14
§ 77p(b)....................10
§ 77r(c)(1)....................14
§ 78bb(f)(1)....................10
§ 78bb(f)(4)....................11
§ 78bb(f)(5)(B)(i)(I))....................10
§ 78bb(f)(5)(E)....................11

TABLE OF AUTHORITIES
(continued)

Page(s)

National Securities Markets Improvement Act of 1996,
Pub. L. No. 104-290, 110 Stat. 3416 ....*passim*

Private Securities Litigation Reform Act of 1995,
Pub. L. No. 104-67, 109 Stat. 737 ....*passim*

Securities Litigation Uniform Standards Act of 1998,
Pub. L. No. 105-353, 112 Stat. 3227 ....*passim*

OTHER AUTHORITIES

143 Cong. Rec. S10475 (daily ed. Oct. 7, 1997) 2

22 N.Y.C.R.R. § 500.22 3

Comm. on Capital Mkts. Regulation, Press Release, *Latest CCMR Study Shows Deterioration in Competitiveness of U.S. Public Equity Markets in 2010 Compared to 2009* (Mar. 22, 2011) 9

H.R. Rep. No. 104-50 (1995)...7

H.R. Rep. No. 104-622 (1996)...1

S. Rep. No. 104-98 (1995) 7

S. Rep. No. 105-182 (1998) 2, 6, 7

Sustaining New York's and the US' Global Financial Services Leadership (2007), http://www. nyc.gov/html/om/pdf/ny_report_final.pdf 8, 9

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community. This case is of particular importance to the Chamber given the broad range of perspectives and experiences of its members, who are often the targets of suits asserting securities claims under state or federal law, and whose directors, officers and managers are often named as defendants in such suits.

INTRODUCTION

Uniformity of regulations concerning nationally-traded securities "promote[s] efficiency, competition, and capital formation in the capital markets," and "advance[s] the development of national securities markets * * * by, as a general rule, designating the Federal government as the *exclusive* regulator" of national securities markets. H.R. Rep. No. 104-622, at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 3878, 3878 (emphasis added). Given the critically important role that the securities markets play in the growth and sustenance of the Nation's econ-

omy, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

In recognition of these important interests, Congress has fashioned uniform standards for securities litigation seeking damages to compensate private parties. *See, e.g.*, 143 Cong. Rec. S10475 (daily ed. Oct. 7, 1997) (statement of Sen. Gramm) ("we have been moving toward national standards for national securities" which is generally consistent "with the principles behind the commerce clause of the Constitution"). The purpose of the federal statutes at issue in this case—the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737; the National Securities Markets Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, 110 Stat. 3416; and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227—was to ensure that no single state or jurisdiction could "impose the risks and costs of its peculiar litigation system on all national issuers." Sen. Rep. No. 105-182, 1998 WL 226714, at *5 (1998).

The majority's holding in this case nevertheless permits the New York Attorney General ("NYAG") to do precisely what Congress sought to prevent: institute a lawsuit seeking monetary damages for a worldwide class of private individuals under state laws that impose far less stringent requirements than the federal se-

curities laws. As Justice Catterson's dissenting opinion explains, the majority's holding cannot be squared with Congress's express purposes in adopting the PSLRA, NSMIA, and SLUSA, or with the express language of those statutes.

Even more significantly for purposes of this motion, the majority's decision implicates a matter of tremendous practical importance. New York is the nation's, and the world's, preeminent financial center. By subjecting businesses and individuals to huge monetary liability under variable and uncertain state-law standards for violations of the securities laws, the majority's ruling will inhibit capital investment, impose enormous compliance costs on market participants, and discourage public companies from issuing securities here in the United States. These effects will have significant adverse effects on economic development in New York, where the financial services sector is a critically important generator of jobs and other economic activity.

This legal question presented here is therefore a "novel" issue and one of broad "public importance." 22 N.Y.C.R.R. § 500.22. Further review before the Court of Appeals, or alternatively, rehearing before this Court, is imperative.

ARGUMENT

THE COURT OF APPEALS SHOULD HAVE AN OPPORTUNITY TO ADDRESS WHETHER THIS SUIT IS PREEMPTED BY FEDERAL LAW.

As Justice Catterson recognized in his well reasoned dissent, the cause of action asserted by the NYAG is both expressly preempted by SLUSA and impliedly

preempted by the PSLRA, NSMIA, and SLUSA. And the proper resolution of the preemption question presented in this case is a matter of great importance to New York's ability to maintain its status as a world financial center and, therefore, to restoring and maintaining the vibrancy of the State's economy. Further review before the Court of Appeals is therefore warranted.

A. The Enormous Practical Consequences Of The Majority's Preemption Holding Necessitate Further Review.

The majority's preemption ruling is a matter of enormous practical importance for two, interconnected reasons. *First*, by permitting claims by the NYAG and inviting state attorneys general to file similar actions throughout the Nation, it will undo the national uniformity that Congress intended the PSLRA, NSMIA, and SLUSA to achieve. *Second*, by creating variable standards for legal duties of securities issuers and their officers and directors, the majority's preemption holding will inhibit capital investment, impose enormous compliance costs on market participants, and discourage public companies from issuing securities here in the United States. That will have very substantial adverse consequences for New York's economy.

1. The most immediate consequence of the majority's preemption holding will be the undoing of the uniformity the Congress meant to achieve by passage of the PSLRA, NSMIA, and SLUSA. As a result of the majority's holding in this case, any state attorney general may seek monetary damages on behalf of a mas-

sive, nationwide or worldwide class of private individuals, for violations of *state* law in connection with publicly-traded securities. That means liability for huge amounts of damages without satisfying the standards established by the PSLRA and SLUSA—even though the very same action, raising the very same claims, predicated on the very same facts would be preempted if brought directly by the beneficiaries of the suit themselves. In short, one state attorney general may, unilaterally, override the national standards governing securities class actions.

The holding in this case thus risks bringing about the uncertainty and lack of uniformity that the federal laws at issue here were meant to eliminate. Issuers of securities once again face the prospect of being held liable in a *de facto* class action in one state under the idiosyncratic liability standards of that state, and again in *another* state under the *different* liability standards of that *other* state. Such variability in liability standards is certain to disrupt the capital markets.

Making matters worse, which particular standards prevail in any given state and whether government officials in that state elect to pursue a lawsuit, will be determined primarily by local interests. In contrast to Congress—which is able to make a collective decision on behalf of the Nation as a whole—the targets of these local "enforcement" (but in reality "damages") suits, and the standards that govern them, often will have to bear the brunt of narrow, and perhaps parochial, deliberations. The result is a patchwork of state laws, inconsistent in their content and er-

ratic in their application. And because attorneys general (like the NYAG in this case) may well seek to enforce their States' idiosyncratic policies on behalf of citizens not only of their own States, but also of others, the additional consequence is the precise exportation of a single State's law over interstate borders that the PSLRA, NSMIA, and SLUSA were designed to foreclose. *See* Sen. Rep. No. 105-182, 1998 WL 226714, at *5 (1998) (SLUSA was meant to ensure that no single State or jurisdiction can "impose the risks and costs of its peculiar litigation system on all national issuers").

2. The disuniformity that follows as a consequence of the Court's holding in this case is not merely a matter of academic concern. The complex ways in which national and global companies participate in New York's securities markets—and the manner in which those markets are regulated—have national and, indeed, global consequences. *See* S. Rep. No. 105-182, at *4 (1998) ("We live in an information age in which we have truly national, if not international, securities markets."). As the Supreme Court has said, private securities litigation in this global age "demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). The alternative—a multiplicity of state-by-state standards for private liability under the securities laws—imposes enormous costs on the markets.

It is easy to see why. As Congress recognized prior to enacting SLUSA, state-law securities class actions, governed by variable standards for liability from

jurisdiction to jurisdiction, "created a ripple-effect that * * * inhibited small, high-growth companies in their efforts to raise capital" and "damaged the overall efficiency of our capital markets." S. Rep. No. 105-182, at *4. This inefficiency flowed from the variability in liability standards itself: Because all corporations "listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently," a state-by-state approach to securities regulation injects intolerable uncertainty into the marketplace. *Dynamics Corp.*, 481 U.S. at 90.

Without a single, uniform standard, national companies could never be certain of what securities laws governed what conduct, at what time, and in what location. Companies with presences across the country thus were forced to adopt policies to conform their practices, uniformly, with the most demanding state-law regulations. Of course, behavior like this, motivated solely by "[f]ear of litigation," is extremely costly in its own right and, for this reason, "keeps companies out of the capital markets." H.R. Rep. No. 104-50, at 20 (1995).

There are other, indirect burdens and costs of variability in standards governing securities class actions seeking damages. For example, unpredictable standards deter competent individuals from serving as independent directors on corporate boards. S. Rep. No. 104-98, at *21. Unclear or overly lax or oppressive liability standards furthermore risk chilling corporate disclosures of information, since

any disclosure could form the basis of a state action. Yet such disclosures are "necessary to the preservation of a healthy market." *Dirks v. SEC*, 463 U.S. 646, 658-59 (1983). Alternatively, issuers may respond to the threat of unconstrained liability with defensive disclosures that "bury the shareholders in an avalanche of trivial information." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976).

3. The adverse consequences of the majority's decision are not limited to capital markets participants—the decision also poses a significant threat to the vitality of New York's economy.

The importance to New York of its financial services sector is well recognized. But New York faces tough global competition in maintaining its preeminent status. A 2007 report commissioned by Mayor Bloomberg and Senator Schumer found that "[t]he threat to US and New York global financial services leadership is real * * *. It is clear that the country and the City need to take this threat seriously." *Sustaining New York's and the US' Global Financial Services Leadership* at 10 (2007), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf (hereinafter "*Sustaining New York's Leadership*").

That competition has only increased since the financial collapse of 2008. Hal S. Scott, the President and Director of the Committee on Capital Markets Regulation, recently reported that "[t]he size and value of U.S. capital markets declined in 2010. Many improvements that we saw in 2009 appear to have been a result of a

flight to quality. We now seem to have reverted to the long-term trend of continued loss of competitiveness." Comm. on Capital Mkts. Regulation, Press Release, *Latest CCMR Study Shows Deterioration in Competitiveness of U.S. Public Equity Markets in 2010 Compared to 2009* (Mar. 22, 2011).

The Bloomberg-Schumer report found that "the unpredictability of the legal system" was a key factor that "caused New York to be viewed negatively" by executives charged with choosing where to raise capital. *Sustaining New York's Leadership* at 73. The risk of personal liability under unpredictable legal rules and the different standards applied by multiple law enforcement entities were identified as particular concerns. *Id.* at 76-77. As Mayor Bloomberg and Senator Schumer explained, "the highly complex and fragmented nature of our legal system has led to a perception that penalties are arbitrary and unfair, a reputation that may be overblown, but nonetheless diminishes our attractiveness to international companies." *Id.* at ii. The effect of variable liability standards in this era of globalized finance is therefore clear: In choosing among the world's capital markets, global companies are substantially less likely to choose U.S. markets if they view domestic issuance as opening the door to liability under multiple, uncertain standards in lawsuits that can be initiated by multiple parties.

Issuers require clear standards by which to conform their behavior; if U.S. markets cannot offer this essential feature, many global businesses will simply

move their securities to other markets that do. This, in turn, will make less capital domestically available for new and growing companies. And it will inflict very significant harm upon New York's economy.

These important consequences should not be inflicted on capital markets participants, and on the economy of the State as a whole, on the basis of a decision by a fractured panel of the Appellate Division. Review by the Court of Appeals is therefore essential.

B. The Majority's Preemption Ruling Is Incorrect.

Review is warranted for the additional reason that the majority's decision is wrong. As Justice Catterson explained in his dissent, the NYAG's lawsuit is barred by federal law.

1. SLUSA's express preemption clause provides, in relevant part, that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging * * * that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). *See also id*. § 77p(b) (materially same). The statute defines a "covered class action," in turn, as "any single lawsuit in which * * * damages are sought on behalf of more than 50 persons" (*id*. § 78bb(f)(5)(B)(i)(I)) and a "covered security" as any security regulated under the Securities and Ex-

change Act of 1933 (*id.* § 78bb(f)(5)(E)). The statute preserves a tightly limited role for state enforcement actions: "securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions." 15 U.S.C. § 78bb(f)(4).

Interpreting the scope of this language, the U.S. Supreme Court has explained that giving effect to "SLUSA's stated purpose" requires a "broad construction" of the statutory prohibition on state-law actions. *Dabit*, 547 U.S. at 86.

As we explained in our *amicus* brief on the merits (at 6-20), SLUSA preempts this action because (1) the Attorney General's claim qualifies as a "covered class action" that alleges use of a "manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security," (2) it is brought on behalf of a "private party," rather than in furtherance of sovereign state interests, and (3) it is not an "enforcement action" saved by the statute.

The majority appears to have rested its contrary conclusion solely on the last element. Slip op. 12. But not every suit brought by a State is an "enforcement action." What is required is an action brought by a sovereign (1) in its sovereign capacity, (2) seeking remedies not available to private litigants (3) to vindicate the public interest of the citizens of the State. When a state attorney general brings a securities suit that lacks these characteristics, it is not an "enforcement action" within the meaning of SLUSA.

That is the reasoning of *In re Baldwin-United Corp.*, 770 F.2d 328, 341 (2d Cir. 1985). In explaining that "when the state merely asserts the personal claims of its citizens, it is not the real party in interest," the Second Circuit made clear that not *all* actions by a state are brought in a sovereign capacity. As the Fifth Circuit has put it, "[n]ot all that a State does * * * is based on its sovereign character." *Louisiana* ex rel. *Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 426 (5th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* ex rel., *Barez*, 458 U.S. 592, 602 (1982)). Thus when "a State * * * attempt[s] to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest," it does not act in its capacity as sovereign; "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement." *Id*. (quoting same).

To distinguish *Baldwin* and the other cases recognizing that not all attorney general suits are brought in a "sovereign" capacity, the majority noted that the NYAG "has aims and seeks remedies broader than the restitution sought in *Baldwin*." Slip op. 15. But the majority never actually cited any broader goals or aims that might suggest this suit is anything other than a private class action. That is because there are none: any injunctive relief the NYAG could achieve has already been obtained by the SEC in consent decrees, and disgorgement is not available because the defendants never sold AIG securities in the relevant period. Rather, as

the NYAG has made clear in filings in federal court, its aim is to seek billions of dollars in recovery for private individuals—the exact same goal of the private litigants in the pending class action.

The mere fact that this suit has been brought by the NYAG on these private parties' behalf does not change the fundamental point that this a suit to recover money damages for private individuals. The NYAG cannot circumvent carefully calibrated federal law controlling when and how private classes of securities buyers, sellers, and holders may assert claims against an issuer. As Justice Catterson concluded, SLUSA bars "'de facto or de jure' actions on behalf of private shareholders"—and the NYAG's action plainly falls within that category. Slip op. 33.

2. The NYAG's suit here is also impliedly preempted by the broader federal statutory scheme comprising the PSLRA, NSMIA, and SLUSA. In enacting the PSLRA, Congress established uniform national standards for the recovery of private damages by shareholders alleging securities fraud. The standards include heightened requirements for pleading and proving fraud under the securities laws, including a requirement of scienter. In SLUSA, Congress made those standards uniformly applicable to actions under both state and federal law. And for its part, NSMIA "precludes states from imposing their own requirements for disclosure on prospectuses, traditional offering documents, and sales literature relating to covered securities." Slip op. 12.

Thus, as the U.S. Court of Appeals for the Second Circuit put it, taking the PSLRA "in concert" with SLUSA and NSMIA, it is clear that "Congress intended to provide national, uniform standards for * * * litigation concerning" "nationally marketed securities." *Lander v. Hartford Life*, 251 F.3d 101, 111 (2d Cir. 2001). The NYAG's suit—which seeks to impose liability without regard for the more stringent and uniform federal standards—stands as a clear obstacle to the statutory purpose embodied in these three laws. As Justice Catterson concluded,

> NSMIA further prohibits states from "directly or indirectly" imposing different disclosure requirements than federal law. 15 U.S.C. § 77r(a)(2)(B). Federal law requires a showing of scienter and reliance for securities fraud claims—elements that the NYAG and the court below assert are not required in this case. Accordingly the NYAG's action also conflicts with and is barred by NSMIA.

Slip op. 33.

In rejecting this argument, the majority appeared to rely (slip op. 12) on a provision of NSMIA preserving state authority "to investigate and bring enforcement actions with respect to fraud or deceit." 15 U.S.C. § 77r(c)(1). But this action does not fall within that category for the same reason it is preempted—it does not require a showing of scienter, which is the essential element of claims for fraud or deceit.

Permitting an attorney general, on behalf of a massive class of private citizens, to bring securities fraud claims to recover money damages under the Martin Act and other New York laws runs directly counter to the PSLRA, NSMIA, and

SLUSA's widely-recognized purpose of creating a single, federal standard to govern such suits. Offense to the federal interests is particularly acute here because this action will impose liability for the payment of damages to private parties without proof of precisely the heightened standards that Congress imposed on actions, like this one, to recover damages for private parties. Thus even apart from the question of express preemption, this suit is precluded by implication. On this basis alone, the motion for leave to appeal to the Court of Appeals should be granted.

Because the majority's preemption holding is wrong, and because it will have tremendous practical consequences, it warrants further review on rehearing or before the Court of Appeals. By permitting state attorneys general to side-step the uniform national standard for securities litigation on behalf of private litigants, the majority's opinion will undo the class-action uniformity that Congress sought to achieve through the PSLRA, NSMIA, and SLUSA. Subjecting businesses to variable liability standards for violations of the securities laws in suits seeking massive damages on behalf of private litigants will, in turn, impose enormous costs on market participants and thereby discourage domestic capital investment. And it will inflict serious harm on New York's economy. In light of these crucially important factors, it should be the Court of Appeals that has the final say on whether the NYAG may pursue private class actions like this one.

CONCLUSION

The Court should grant the motion for leave to appeal or, in the alternative, for rehearing.

Respectfully submitted,

Dated: May 25, 2012

MAYER BROWN LLP

By: ______________________
Andrew J. Pincus

Of Counsel:
Paul W. Hughes
Michael B. Kimberly*
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Robin S. Conrad*
Kathryn Comerford Todd*
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street NW
Washington, DC
(202) 463-5337
rconrad@uschamber.com

**not admitted in New York*

Counsel for proposed amicus curiae