To be argued by:
BARBARA D. UNDERWOOD
30 minutes requested

Supreme Court, New York County, Index No. 401720/2005

State of New York
Court of Appeals

PEOPLE OF THE STATE OF NEW YORK BY ANDREW M. CUOMO,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

v.

MAURICE R. GREENBERG and HOWARD I. SMITH,

Defendants-Appellants.

BRIEF FOR RESPONDENT IN RESPONSE TO AMICI CURIAE and STATUTORY ADDENDUM

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Dated: March 14, 2013

The Attorney General submits this brief in response to the amicus curiae briefs filed in support of defendants. In addition, we provide for the Court's convenience an addendum reproducing the statutory provisions at issue in this appeal.

PRELIMINARY STATEMENT

Defendants' amici—several business organizations and a group of former government officials—contend that federal securities law preempts the Attorney General from obtaining a damages measure of recovery in this antifraud enforcement action.[1] But every indication of legislative intent shows that Congress did not intend to preempt either state securities fraud enforcement in general or damages remedies in particular, and in

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[1] Professor Stith's brief on whether inadmissible evidence may be considered on a summary judgment motion is irrelevant to the resolution of this appeal, because we have shown that indisputably admissible evidence alone defeats defendants' summary judgment motions. Br. for Plaintiff-Respondent (AG Br.) at 105-23. Professor Stith neither disputes that showing nor identifies a single piece of evidence that was inadmissible and improperly considered.

fact expressly preserved state authority to enforce and obtain remedies available under state law.

Defendants and their amici are of course free to take their policy complaints to Congress. But unless and until Congress actually determines that States should be preempted from obtaining a damages measure of recovery in the prosecution of frauds like those at issue here, defendants are accountable under the Martin Act and Executive Law § 63(12) for the harm to the investing public caused by their frauds.

ARGUMENT

THE ATTORNEY GENERAL'S DAMAGES CLAIM IS NOT PREEMPTED BY FEDERAL LAW

Defendants' amici principally argue that the Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998), expressly precludes the Attorney General's claim insofar as it seeks damages. Br. of Amici Curiae Chamber of Commerce of the United States of America et al. (Chamber Br.) at

14-31; Br. of Amici Curiae Former State & Fed. Gov't Officials (Former Officials Br.) at 20-24.[2] They assert that "in passing SLUSA, Congress sought to bar states from bringing *de facto* class actions against . . . issuers on the basis of state law." Chamber Br. at 30. But nothing in the text, purpose, or legislative history of SLUSA suggests that Congress had any intent to preclude a state attorney general or securities commissioner from suing to enforce a state securities fraud statute.

1. SLUSA's text refutes any claim of preemption. Defendants' amici do not address this Court's recent statement confirming that SLUSA precludes covered securities class actions

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[2] Defendants' amici also argue that federal securities law impliedly preempts the damages claim in this enforcement action, relying not only on SLUSA but also the Private Securities Litigation Reform Act and the National Securities Markets Improvement Act. *See* Chamber Br. at 31-38; Former Officials Br. at 24-27. We have already fully rebutted these arguments. AG Br. at 84-98. In 2012, Congress added a category of "covered securities" as to which NSMIA has preemptive effect, but reaffirmed that NSMIA preemption "relate[s] solely to State registration, documentation, and offering requirements" and emphasized that the amendment "shall have no impact or limitation on other State authority to take enforcement action." 15 U.S.C. § 77r note.

"brought by a private party." *RGH Liquidating Trust v. Deloitte & Touche LLP*, 17 N.Y.3d 397, 405 (2011), *cert. denied*, 132 S. Ct. 1016 (2012). Nor do they offer any reasonable reading of the explicit language in SLUSA barring only state-law "covered class actions" for damages that are "maintained . . . by any private party." 15 U.S.C. § 78bb(f)(1), (5)(B).[3] Amici seek to rewrite this language to reach any state-law securities action that would *benefit* a private party, but that is not what the statute says.

Defendants' amici also are mistaken in arguing that the reference in SLUSA's saving clause to "enforcement actions" brought by state officials excludes suits brought by state officials that seek damages. They turn the saving clause on its head by

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[3] We have elsewhere refuted the argument that this suit qualifies as a "covered class action" under SLUSA simply because it would benefit more than fifty victims. AG Br. at 76-77. The counting rule in SLUSA confirms this conclusion. The rule authorizes courts to look through the actual plaintiff to count potential beneficiaries of a lawsuit only in two defined situations, neither applicable here: (1) the plaintiff is authorized by a class action rule to recover damages for another in a representative capacity, S. Rep. No. 105-182, at 8 (1998); and (2) a plaintiff entity is formed for the purpose of the litigation, 15 U.S.C. § 78bb(f)(5)(D); *RGH Liquidating Trust*, 17 N.Y.3d at 413.

viewing it as a source of affirmative preemptive intent, rather than honoring its intended role of "reemphasiz[ing]" and "clarifying" the importance of state enforcement. S. Rep. No. 105-182, at 9 (1998); H.R. Rep. No. 105-640, at 17 (1998).

Amici argue that our reading of the statutory text renders the saving clause superfluous. Chamber Br. at 19-20. But it is common for Congress to use more than one means of accomplishing a desired result "out of an abundance of caution," *Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990), in order to "remov[e] any doubt" concerning its intent, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1176 (2013); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008). And the legislative history quoted above shows that this is in fact exactly why Congress included the saving clause in SLUSA.

Even if our reading could be thought to make the saving clause superfluous, amici's interpretation would fare no better because it would render the clause equally superfluous: they say the clause preserves only state actions seeking remedies other than damages, but such non-damages actions would not fall under

SLUSA's preclusion clause in the first place and would thus not require a saving clause to preserve them. "[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (quotation marks omitted); *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 (2006) (accepting redundancy in SLUSA removal provision where competing reading was also redundant).

Nor are defendants' amici able to offer any evidence that Congress used the term "enforcement actions" in the saving clause as some term of art that excludes suits by state officials for damages. As amicus the North American Securities Administrators Association has shown, in addition to New York, statutes in at least five States (California, Colorado, Illinois, Oregon, and Washington) expressly authorize state officials to obtain damages in actions alleging securities fraud, and other state statutes authorize broad relief that may include damages. *See* NASAA Br. at 25 & n.14. Congress nowhere suggested that SLUSA was intended to restrict the ability of state officials to

obtain damages authorized by state law. To the contrary, Congress expressly preserved state enforcers' ability to seek remedies "under the laws of [their] State[s]." 15 U.S.C. § 78bb(f)(4).

This reading makes good sense. When a state legislature authorizes a state official to obtain damages in an antifraud action, the legislature has thereby determined that the damages remedy serves public enforcement objectives.[4] This Court has recognized this: in *People v. Coventry First LLC*, the Court observed that antifraud "enforcement action[s]" for restitution and damages under Executive Law § 63(12) and General Business Law § 349(b) "serve the public interest." 13 N.Y.3d 108, 114 (2009).

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[4] The New York Legislature has authorized the Attorney General to sue for damages under numerous state statutes in addition to those at issue here. *See, e.g.*, Executive Law §§ 174-a(7), 175(2) (restitution and damages for unlawful solicitation of charitable donations); *id.* § 297 (damages for unlawful discrimination); General Business Law § 390-b(4) (damages for internet "phishing" of information); *id.* § 398-b(3) (restitution and damages for unlawful discrimination in car rentals); *id.* § 399-dd(3)(a) (consumer communications records privacy) (damages for fraudulent transfer of telephone records); *id.* § 899-aa(6)(a) (damages for unlawful failure to provide notice of breach of information security system).

Amici also argue that an antifraud action brought by state officials seeking damages is not an "enforcement action" because the *Securities and Exchange Commission* is not currently authorized to seek damages. Chamber Br. at 27-28; Former Officials Br. at 24. But there is no indication that Congress intended to limit state enforcers to the particular remedies that the SEC is authorized to seek. The SEC may not seek restitution either, yet defendants' amici concede that state officials may obtain that remedy, notwithstanding SLUSA. *See* Former Officials Br. at 14.

In fact, amici concede that both restitution and disgorgement generally may be obtained in an antifraud enforcement action. *See* Chamber Br. at 3 n.1, 13, 24; Former Officials Br. at 2 n.2, 14. But damages serve the same public functions as those other monetary remedies: deterring misconduct, compensating victims, and encouraging victims to come forward and cooperate with the government. AG Br. at 50-52. No matter what labels are applied to the measure of monetary recovery obtained in enforcement actions, state securities enforcers and the SEC frequently

distribute those funds to harmed investors. *See, e.g.*, Br. of Amicus Curiae AARP at 10; Br. of Professor James J. Park as Amicus Curiae (Park Br.) at 4. In the past three years alone, state securities enforcement has led to the recovery of more than $20 billion distributed to investors. NASAA Br. at 25-26.

Furthermore, damages share other important features with both restitution and disgorgement. Damages are measured not by the defendant's gain but by the victim's loss—as is restitution. *See People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 125 (2008). Indeed, the Legislature understood the authority to obtain "restitution" under Executive Law § 63(12) to encompass the recovery of damages; it later added "damages" as an explicit remedy under the statute to remove any doubt on the issue. *See* Mem. in Support, *reprinted in* Bill Jacket for ch. 539 (1977). The legislative history of the Martin Act and Executive Law § 63(12) shows that the availability of both restitution and damages was viewed as essential to achieving the statutes' purposes. *See id.*; Mem. of the Attorney General in Support for ch. 559, *reprinted in* 1976 N.Y.S. Legislative Annual 66. And damages are commonly

measured without reference to whether the victim's property or money is in the defendant's possession—as is disgorgement. *See SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987); *Applied Card*, 11 N.Y.3d at 125. Amici fail to offer any logical reason why, given these similarities, damages, alone, should be deemed to vindicate no public interest and should be unavailable in public enforcement actions.

Indeed, defendants are not consistent in their classification of these remedies. When it suits their purposes, they invoke the obvious similarities between damages and restitution—suggesting that when this Court held that a class-action settlement barred restitution (but not disgorgement) for certain victims under principles of res judicata, the bar applied also to damages. *See* Br. for Defs.-Appellants (Defs. Br.) at i-ii, 8-9, 16-17 (discussing *Applied Card*). This further demonstrates that the bright line defendants and their amici now seek to draw between damages and other monetary relief does not withstand scrutiny.

There simply is no platonic federal conception of an "enforcement action" that precludes suits for damages, as defendants' amici contend. Congress is right now considering a proposal to empower the SEC to recover a civil penalty measured by the amount of loss to victims—a de facto damages remedy. *See* Stronger Enforcement of Civil Penalties Act, S. 286, 113th Cong. (2013). The SEC has asked for this power because securities frauds often cause tremendous harm to investors without resulting in direct pecuniary gain to the perpetrators. The SEC explains that its deterrence objectives are frustrated by its present inability to obtain monetary relief in such cases that is commensurate with victims' losses.[5] This confirms the reasonableness of state enforcement programs that authorize a damages measure of recovery.

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[5] *See* Luis Aguilar, Commissioner, SEC, *Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws* (Oct. 18, 2012), *available at* http://www.sec.gov/news/speech/2012/spch101812laa.htm; Letter from Mary L. Schapiro, Chairman, SEC, to Hon. Jack Reed, Chairman, Senate Subcomm. on Securities, Insurance and Investment (Nov. 28, 2011), *available at* http://www.scribd.com/doc/74820022/Mary-Schapiro-s-Letter-to-Senator-Jack-Reed.

Indeed, other federal statutes already permit federal enforcers to recover damages or other monetary relief not denominated as damages that is nonetheless measured by the amount of victims' losses. For example, as to certain financial frauds, the U.S. Attorney General may seek monetary penalties up to the amount of the victims' pecuniary loss. 12 U.S.C. § 1833a(b)(3)(A). The Equal Employment Opportunity Commission is also authorized to seek compensatory damages, among other remedies, in civil actions for violations of federal antidiscrimination law. 42 U.S.C. §§ 1981a(a)(1)-(2), (d)(1)(A)-(b), 2000e-5(f)(1), (g)(1). The Supreme Court has made clear that Congress by this statutory regime authorized the EEOC to "evaluate the strength of the public interest at stake," and "determine whether public resources should be committed to the recovery of victim-specific relief." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-92 (2002). Therefore, the EEOC "vindicate[s] a public interest, . . . even when it pursues entirely victim-specific relief." *Id.* at 296. There is thus no principle in federal law that recovery of damages is precluded in enforcement actions.

2. Amici's cases do not preclude the Attorney General from seeking damages in an enforcement action where authorized by state law. Amici rely on a handful of cases, also cited by defendants, for the proposition that damages are precluded in enforcement actions. Chamber Br. at 21-22, 37; Former Officials Br. at 21-24. But none of those decisions interprets SLUSA, purports to define an "enforcement action," or addresses federal preemption of state law.

Most of amici's cases are inapposite because they concern a State's implied or common-law standing to bring claims in federal court under federal statutes with general standing provisions. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (federal employment preference for citizen migrant workers); *New York v. Operation Rescue Nat'l*, 80 F.3d 64 (2d Cir. 1996) (federal abortion-access law); *New York v. Seneci*, 817 F.2d 1015 (2d Cir. 1987) (federal antiracketeering law). Like *New York v. Holiday Inns, Inc.*, 656 F. Supp. 675 (W.D.N.Y. 1984) (federal antidiscrimination law), cited in Defs. Br. at 21, 24-25, these cases do not address claims in state court under New York statutes

expressly authorizing only the Attorney General to bring such claims, which is what is at issue here. To the extent state-law claims were also raised in these cases, they were dependent on the federal claims, either for their substantive content, or for pendent jurisdiction in federal court, and the decisions understandably do not separately address the Attorney General's standing to bring state-law claims.

We have already shown that neither *People v. Grasso*, 11 N.Y.3d 64 (2008), nor *People v. Grasso*, 54 A.D.3d 180 (1st Dep't 2008), supports defendants' arguments. AG Br. at 44 n.18, 53 n.24, 101-02. Moreover, the Appellate Division there erroneously relied on *People v. Lowe*, a case in which this Court expressly disclaimed reaching any holding about the Attorney General's authority. 117 N.Y. 175, 195 (1889). And *In re Baldwin-United Corp.*, did not discuss a State's standing to maintain a statutory enforcement action seeking damages, but merely held that the Eleventh Amendment did not bar an injunction under the All Writs Act prohibiting a State from initiating potential lawsuits at the eleventh-hour to influence a federal private class-action

settlement that was on the cusp of approval. 770 F.2d 328, 341-42 (2d Cir. 1985).[6]

Finally, if there were any suggestion in any of these cases that damages claims are not a proper element of an "enforcement action," it would not survive the authoritative subsequent decisions in *Coventry* and *Waffle House* recognizing that enforcement actions seeking victim-specific relief, including damages, vindicate public interests.

3. Congress enacted SLUSA to curb *private* securities class action abuses, not to limit public enforcement. Though defendants' amici assert that Congress intended SLUSA to curb certain state suits, they do not rebut our showing that the problem Congress set out to address when enacting SLUSA, and when enacting the earlier anti-abuse

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[6] We have also demonstrated that cases concerning the removal of state enforcement actions under the Class Action Fairness Act (Chamber Br. at 22-23, 25) are inapposite. AG Br. at 99-101. In any event, the U.S. Court of Appeals for the Second Circuit recently joined the majority of circuits holding that a state enforcement action is not a class action or mass action removable under CAFA. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d Cir. 2013).

statute known as the Private Securities Litigation Reform Act (PSLRA), had nothing to do with securities actions brought by state officials.

This Court recently confirmed that the PSLRA was intended to curb abuses in "frivolous private securities fraud class actions" that were brought by "opportunistic trial lawyers [who] were undermining the securities litigation system." *RGH Liquidating Trust*, 17 N.Y.3d at 404 (quotation marks omitted). Because the PSLRA did not apply to private securities class actions brought under state law, private attorneys and parties began bringing state-law suits to evade the statute. SLUSA was then enacted to "close this federal flight loophole." *Id.* (quotation marks omitted). This history suggests no intention to restrict securities suits brought under state law by state attorneys general or securities commissioners.

Not long ago, defendants' amicus the Chamber of Commerce expressly acknowledged in the United States Supreme Court that the PSLRA and SLUSA were passed to address private abuses. According to the Chamber, the statutes were aimed at class-action

law firms that maintained "a stable of professional plaintiffs" who would "lend[] their names to class action complaints that were filed within days or hours of any dramatic decline in share price." Br. of Chamber of Commerce of the United States of America as Amicus Curiae at 13-14 n.7, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) (No. 04-1371), *available at* http://www.chamberlitigation.com/merrill-lynch-pierce-fenner-smith-inc-v-dabit. Congress intended to stop these frivolous private strike suits aimed at inducing substantial settlements of meritless claims, *id.* at 7-8, but to preserve "meritorious securities claims" that would "[c]ompensate [i]nvestors" with genuine injuries, *id.* at 13, 16. The Chamber also acknowledged before that SLUSA "was intended to 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrated the objectives of the [PSLRA].'" *Id.* at 21 (quoting 15 U.S.C. § 78a note (SLUSA § 2(5)).[7] The PSLRA and SLUSA thus have no

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[7] *See also* Br. of Amicus Curiae Securities Industry and Financial Markets Association at 18, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525)

(continued on next page)

bearing whatever on state suits brought by state attorneys general or securities commissioners. No record was before Congress concerning any alleged abuses in such suits, Congress did not make any finding that abuses were occurring in such suits, and Congress expressed no intent to restrict such suits in any way.

The attempt by defendants' amici to transform a statute intended to curb private abuses into a limit on suits by public officials is deeply flawed. Their argument disregards the historic primacy of public enforcement in the area of securities fraud and the tenuous quality of private rights of action in the field. *See*

(SLUSA enacted to "limit abusive securities-fraud litigation by private plaintiffs"), *available at* http://www.sifma.org/issues/item.aspx?id=21503; Br. for Chamber of Commerce of the United States of America as Amicus Curiae at 29-30, *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010) (No. 08-905) (SLUSA enacted to curtail vexatious and abusive "private securities fraud litigation"), *available at* http://www.chamberlitigation.com/merck-co-inc-et-al-v-reynolds-et-al; Br. of Securities Industry and Financial Markets Association et al. as Amici Curiae at 20, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (No. 06-43) (SLUSA enacted to "stop private plaintiffs from circumventing the PSLRA"), *available at* http://www.sifma.org/issues/item.aspx?id=22419.

Park Br. at 2-4. *Cf. CPC Int'l, Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 276-77 (1987) (rejecting a private right of action under the Martin Act). Far from giving any indication that public suits should be restricted in the same way that private suits were, in SLUSA Congress *relied* on the continued presence of public enforcement as a reason why restricting private litigation would not result in underenforcement. Congress consistently qualified its findings about abusive practices with the word "private," and repeatedly reaffirmed the importance of "enforcement powers of State securities regulators" to help "protect investors and promote strong financial markets," at the same time that it precluded private state securities class actions. 15 U.S.C. § 78a note (SLUSA § 2(1), (4), (5)).

Similarly, in a recent decision rejecting "scheme liability" for aiders and abettors of securities fraud in private federal suits, the Supreme Court emphasized that state enforcement would help protect against an enforcement gap. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008). The Court

thus stressed the ability of "state authorities to seek fines and restitution from aiders and abettors." *Id.*

Indeed, defendants' amicus the Securities Industry and Financial Markets Association urged that very rationale on the Court. SIFMA argued that a private action for "scheme liability" under federal law was not needed because "[s]tate penalties and recovery methods broadly encompass aiding and abetting securities-law violations," and "state attorneys general have actively pursued aiders and abettors."[8] As an example of such strong state enforcement, SIFMA cited *State v. McLeod*, an enforcement action seeking restitution and damages brought by the Attorney General under the Martin Act and Executive Law § 63(12). 2006 N.Y. Slip Op. 50942(U), at *10, *14-*15, *23, 2006 WL 1374014, at *8, *12, *20-*21 (Sup. Ct. N.Y. County Feb. 9,

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[8] Br. of Securities Industry and Financial Markets Association et al. as Amici Curiae, *supra*, at 28-29, *Stoneridge Inv. Partners*, 552 U.S. 148. *See also* Br. of Amicus Curiae Securities Industry and Financial Markets Association, *supra*, at 18, *Janus Capital Group*, 131 S. Ct. 2296 (arguing for limits on private action where "Congress has repeatedly provided broader remedies to the government than to private plaintiffs").

2006). SIFMA has now changed its tune, but it was right the first time. Strong state antifraud enforcement, including the recovery of damages in enforcement actions like *McLeod*, is crucial to the effective protection of investors, and has assumed more, not less, importance as private suits have been curtailed.

4. Amici's policy arguments should be directed to Congress, not the courts. Amici's policy arguments regarding the effect of the Attorney General's enforcement actions on other States and the New York and national economies are unfounded and provide no basis for preempting the damages claim.

First, amici invoke a nebulous conception of federalism to criticize the use of the Martin Act against out-of-state defendants. Former Officials Br. at 29-30. That complaint that has no bearing here because AIG is headquartered in New York, and defendants proposed, negotiated, and implemented the fraudulent transactions in this State. Amici also claim that New York's enforcement actions may have negative effects on other States' investors, workers, and economies. *Id.* at 31. That unsupported assertion is difficult to square with the fact that two neighboring

States, as well as NASAA, which represents the securities administrators of all forty-nine other States, support the Attorney General's enforcement authority here.

Second, amici warn that the damages claim in this action threatens to undermine national uniformity in the field of securities, thereby inhibiting capital investment and harming New York's economy. Chamber Br. at 5-11. Amici do not show, or even seriously attempt to show, that these consequences will follow; the two reports that amici cite focus on the burden of *federal* regulation, not state enforcement. *See* Chamber Br. at 9-10. Furthermore, the securities markets have been regulated by both federal and state authorities for nearly a century, and the sky has not fallen. To the contrary, New York has for decades thrived as a leading financial center under the very Martin Act that amici now try to paint as a dire threat.

In any event, the right forum for amici's policy arguments is Congress, not this Court. It is not the Court's role to second-guess Congress's carefully considered policy judgments. Because Congress considered arguments for national uniformity yet

expressly preserved state antifraud enforcement authority, it would be inappropriate "for the judiciary to make its own further adjustments." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013) (quotation marks omitted).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Attorney General's principal brief, the Court should affirm the decision of the Appellate Division and remand the case for trial.

Dated: New York, NY
March 14, 2013

Respectfully submitted,

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