

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

-----X
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. :
-----X

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

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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

Congress has explained that “[w]e live in an information age in which we have truly national, if not international, securities markets.” S. Rep. No. 105-182, 1998 WL 226714, at *4 (1998). The Court of Appeals similarly has recognized that the “national market system” creates the substantial need for “*uniform*” standards controlling the liability of market participants. *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 46 (1996).

To achieve the necessary uniformity, Congress enacted several laws that work together to regulate the national securities markets. In the Private Securities Litigation Reform Act of 1995 (“PSLRA”), Pub. L. No. 104-67, 109 Stat. 737, Congress specified the standards under which private litigants may bring suits against securities issuers. Less than three years later, recognizing that litigants were circumventing the PSLRA by invoking state-law causes of action, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), Pub. L. No. 105-353, 112 Stat. 3227, which explicitly precludes state law class actions, and other lawsuits that have the same effect as class actions, grounded in allegations relating to securities transactions. Finally, through the National Securities Markets Improvement Act of 1996 (“NSMIA”), Pub. L. No. 104-290, 110 Stat. 3416, Congress preempted the vast majority of so-called Blue Sky laws, which had imposed a multiplicity of registration standards on securities issuers.

NSMIA rests on Congress’s recognition that 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 3877, 3878. More recently, the Supreme Court succinctly explained that “[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).

When introducing SLUSA, Senator Gramm explained that “[l]egislatively, we have been moving toward national standards for national securities. The National Securities Markets Improvement Act * * * created national rules for many aspects of our national securities markets. [SLUSA] is an important step continuing in that direction, a step in line with the principles lying behind the commerce clause of the Constitution.” 143 Cong. Rec. S10,475 (Oct. 7, 1997). The purpose of the law was to ensure that a single State or jurisdiction may not “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).

These three laws—the PSLRA, SLUSA, and NSMIA—thus embody Congress’s determination that efficient securities markets require a uniform standard governing liability for private class actions. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 111 (2d Cir. 2001). Any effort to subvert that uniform federal scheme is barred by these federal statutes.

Here, the Attorney General has instituted a lawsuit for the benefit of private parties. As the Attorney General has made clear in recent filings in parallel federal securities litigation regarding the exact same conduct (litigation that is unquestion-

ably subject to the PSLRA), the only relief that essentially is at issue here is an award of damages for a worldwide class of AIG shareholders.

Federal law bars this action for two reasons. First, because this action is indistinguishable from a private class action, it is precluded by SLUSA's express textual prohibition of class actions—and their equivalents—grounded in state law. Second, taken together, the PSLRA, SLUSA, and NSMIA impliedly preempted any litigation that seeks recovery of damages on a class basis for securities fraud outside the strictures of federal securities law—and that is the essence of the Attorney General's claim here.

ARGUMENT

It is a fundamental feature of our federal system that “state and local laws that conflict with federal law are ‘without effect.’” *New York SMSA Ltd. P’ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) (per curiam) (quoting *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008)). Courts have recognized two kinds of preemption relevant to the present litigation: “express preemption, where Congress has expressly preempted local law,” and “conflict preemption, where * * * the local law is an obstacle to the achievement of federal objectives.” *Id.* at 104 (citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005)). *See also Guice*, 89 N.Y.2d at 39. Express and implied preemption each independently require dismissal of this suit.

Through SLUSA, Congress has explicitly precluded awards of damages to private parties in mass litigation—a class action or any litigation that aggregates more than 50 parties—alleging securities fraud in violation of state law.¹ The plain terms of that Act bar this suit. Here, the Attorney General is bringing a representative damages action on behalf of a broad class of AIG shareholders. Because the beneficiary of the State’s action is a class of private citizens, and because the claims arise under New York law, SLUSA applies with full force.

Additionally, federal law preempts this action by implication. In enacting the PSLRA, Congress has 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. 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*, 251 F.3d at 111. To be sure, a state attorney general may bring certain state *enforcement* actions as an exercise of the police power. But States may not use the guise of state authority to circum-

¹ Although SLUSA is often said to “preempt” state law, the Supreme Court recently clarified that the correct term is “preclusion” because the Act “does not itself displace state law with federal law but makes some state-law claims nonactionable.” *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006). The difference in terminology bears no substantive distinction.

vent carefully calibrated federal law controlling when and how private classes of securities buyers, sellers, and holders may assert claims against an issuer. The Attorney General’s claim in this case—which would allow a class of private individuals to recover damages for securities fraud without meeting the standards established by federal law—fundamentally conflicts with the comprehensive national balance that Congress has struck.

A. The Securities Litigation Uniform Standards Act Expressly Precludes This Action.

“Express preemption arises when ‘a federal statute expressly directs that state law be ousted.’” *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 101 (2d Cir. 2009) (quoting *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008) (per curiam)). The inquiry thus turns upon whether “Congress [has] manifest[ed] [an] intent to preempt state or local law explicitly, through the express language of a federal statute.” *New York*, 612 F.3d at 104 (citing *Altria Group*, 129 S. Ct. at 543). Here, SLUSA’s express language demonstrates precisely such an intent.

Finding that class-action litigants were bringing abusive litigation regarding nationally-traded securities, Congress adopted the PSLRA. That statute contained several procedural and substantive safeguards designed to counter this litigation abuse. Litigants, however, responded by simply moving to state courts and pursuing substantively-identical, and equally abusive, claims via state law. Congress

enacted SLUSA, less than three years after it enacted the PSLRA, to preclude litigants from circumventing the PSLRA’s carefully-drawn limitations on private damages for securities fraud.

SLUSA provides, in 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 Exchange Act of 1933 (*id.* § 78bb(f)(5)(E)). Interpreting the scope of this language, the Supreme Court has explained that giving effect to “SLUSA’s stated purpose” requires a “broad construction” of the statute. *Dabit*, 547 U.S. at 86.

Although SLUSA broadly preempts state law that would hold a security issuer liable for class-type damages for claims of fraud, misrepresentation, or the like, the statute nevertheless preserves a 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).

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.

1. This lawsuit is a “covered class action” under SLUSA.

To determine whether an action alleges that a defendant employed “manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security,” courts must look to “the substance of a complaint’s allegations in applying SLUSA. Otherwise, SLUSA enforcement would reduce to a formalistic search through the pages of the complaint for magic words and nothing more.” *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2009) (quoting *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009)).

The securities at issue here, shares of AIG stock, qualify as “covered” because they were traded on the New York Stock Exchange. *See* 15 U.S.C. § 78bb(f)(5)(E) (defining covered security by reference to 15 U.S.C. § 77r(b)). And the underlying claims undoubtedly allege activity that falls within the ambit of SLUSA. The Complaint, for example, specifically alleges “fraud, deception, con-

cealment, suppression, or false pretense” in connection with “the issuance, distribution, exchange, sale, negotiation, or purchase” of securities. Compl. ¶ 76. *See also id.* ¶¶ 4, 75, 77.

The Attorney General’s Motion for Partial Summary Judgment confirms that the claims here are “covered” under SLUSA. The Motion notes, for example, that individuals “have been convicted of federal securities law violations” for the Gen Re Transaction. NYAG Mot. for Summ. Judg. 2. Similarly, the State alleges that “the CAPCO transaction was simply a device to get AIG’s losses off its books by converting the underwriting loss into investment losses, which the stock market would perceive as less serious.” *Id.* at 3. This is precisely a situation “where plaintiff’s claims turn on injuries caused by acting on misleading investment advice—that is, where plaintiff’s claims necessarily allege, necessarily involve, or rest on the purchase or sale of securities.” *Romano*, 609 F.3d at 522 (quotation omitted).

This action also plainly falls within SLUSA’s broad definition of a “covered class action.” Instead of defining a “class action” by reference to a particular state or federal procedural device, SLUSA expressly focuses on the functional reality of the action; suits that seek damages for a group of private individuals—regardless of the action’s form or label—are covered. *See* 15 U.S.C. § 78bb(f)(5)(B). By pursuing money damages for a world-wide class of shareholders of AIG, the Attorney General assuredly seeks damages “on behalf of more than 50 persons” on a repre-

sentative basis for “unnamed parties.” 15 U.S.C. § 78bb(f)(5)(B)(i). In short, this action qualifies as a “covered class action” under SLUSA.

2. *Because the action is brought to vindicate private interests, federal law deems private individuals as the true parties in interest.*

The Attorney General in this action seeks to recover money damages on behalf of private investors, and this lawsuit is for that reason functionally indistinguishable from a private class action. Indeed, the Attorney General recently characterized this action, in a filing in parallel litigation in federal district court, as “seeking billions of dollars in damages for the victims of the [AIG] fraud.” *See* Letter from David N. Ellenhorn to the Hon. Deborah A. Batts, at 1, Jan. 25, 2011 (SR-3). And in a subsequent letter in the same case, the Attorney General made clear his view that he can use the Martin Act to “obtain damages on behalf of all AIG stockholders, no matter where they reside.” *See* Letter from David N. Ellenhorn to the Hon. Deborah A. Batts, at 4, Feb. 25, 2011 (SR-14).

The Attorney General himself has thus acknowledged that this action is being prosecuted to recover money damages on behalf of a world-wide class of private individuals. This lawsuit accordingly must be treated as an action brought “by [a] private party” (15 U.S.C. § 78bb(f)(1)), and not an action to protect sovereign interests.

Courts have long distinguished between suits brought by a State in its sovereign capacity and those actions a State brings for the private benefit of discrete,

individual citizens. When a State brings a suit on behalf of private claimants, federal law routinely treats that suit as private—and thus indistinguishable from an action brought by the individual claimants themselves. A State cannot circumvent otherwise applicable federal limitations simply by pressing citizen’s private disputes in the name of the State.

In the context of *parens patriae* suits, for example, the Supreme Court has recognized the “settled doctrine” that a State may sue in its sovereign capacity “only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer [for] the personal claims of its citizens.” *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). An action that involves “nothing more than a collectivity of private suits” implicates “[n]o sovereign or quasi-sovereign interests.” *Id.* at 666. In *Pennsylvania*, therefore, a State purportedly representing solely the private interests of its citizenry could not invoke the Court’s original jurisdiction to challenge the constitutionality of a neighboring State’s commuter tax.

Likewise, the Second Circuit has found that “when the state merely asserts the personal claims of its citizens, it is not the real party in interest” and therefore the State may not assert Eleventh Amendment immunity. *In re Baldwin-United Corp.*, 770 F.2d 328, 341 (2d Cir. 1985). *People of New York by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987), further supports this distinction. There, the Second Circuit found that a State lacks standing to sue in federal court for RICO

damages “[w]here the complaint only seeks to recover money damages for injuries suffered by individuals.” The fact that the underlying conduct “caused substantial injury to the integrity of the state’s marketplace and the economic well-being of all its citizens” did not provide federal standing because “the monetary relief sought by the complaint is not designed to compensate the state for those damages.” *Id.* at 1017-18. *See also People of New York by Vacco v. Operation Rescue Nat’l*, 80 F.3d 64, 71 (2d Cir. 1996) (“New York’s standing does not extend to the vindication of the private interests of third parties.”).

The Fifth Circuit has applied a similar analysis to Class Action Fairness Act cases, observing that “not everything a State does is based on its ‘sovereign character.’” *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 425 (5th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (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 and the limitations of the Class Action Fairness Act apply to the lawsuit; “[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.* at 426 (quoting *Snapp*, 458 U.S. at 602). In short, according to the Fifth Circuit, when a State seeks to obtain damages for a discrete set of residents—such as by “seeking to recover damages suf-

ferred by *individual policyholders*”—the action must be treated as a private suit. *Id.* at 429.

The approaches taken in *Baldwin* and *Caldwell* have been widely adopted by the federal courts. In *Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 31-32 (D.D.C. 2009), the Mississippi Attorney General brought an antitrust action for the benefit of Mississippi residents. Like *Caldwell*, the defendants contended that because the State was asserting private interests of its citizenry, the suit should be treated as if it had been brought by the individuals in interest—and not by the State—for purposes of removal analysis. The court agreed: because “any compensatory damages sought” in the action would be for the benefit of private citizens, “at least with respect to compensatory damages, the ‘persons’ who suffered injuries are the real parties in interest for such claims, not the Mississippi Attorney General, regardless of whether the Mississippi Attorney General is acting in a representative capacity on behalf of its citizens.” *Id.* at 32.

In *Ohio v. GMAC Mortgage., LLC*, 2011 WL 124187, at *8 (N.D. Ohio 2011), the Ohio Attorney General sued a mortgage company with respect to its foreclosure procedures. Applying *Caldwell*, the court concluded:

While this Court acknowledges that Ohio has a general interest in protecting its citizens against fraudulent mortgage foreclosure practices such as robo-signing, that is not what is happening here. Instead, the OAG has sought out one particular mortgage company to seek relief that will not, at a first order level, benefit all Ohio residents. The relief sought will primarily benefit those specific Ohio homeowners with

GMAC mortgages that are in foreclosure. While there are undoubtedly some secondary benefits to the Ohio economy in general—potentially fewer or more orderly GMAC foreclosures, less damage to property values, a deterrent against filing fraudulent court documents, and perhaps speculative benefits that other Ohio mortgage companies will be more careful in their foreclosure practices—these are not the primary, identifiable forms of relief that will be obtained from the Complaint.

Id. The suit accordingly was treated as if it had been brought by a private party. *See also West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010) (“West Virginia is not seeking relief for its residents in general but for a discrete group of Comcast’s premium subscribers. Therefore, for these claims, especially the treble damages claim, the state has no quasi-sovereign interest.”). The same analysis applies here: because the Attorney General is representing the private interests of AIG shareholders, this suit must be treated as one brought by those private parties.

To be sure, some disagreement has arisen with respect to cases in which a State brings both “sovereign” and “private” claims in a single lawsuit. While some courts treat each claim separately, parsing the “sovereign” claims from the “private,”² others have rejected the claim-by-claim approach, treating the entirety of

² *See, e.g., Caldwell*, 536 F.3d at 430; *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 450 (E.D. Pa. 2010) (“West Virginia is not seeking relief for its residents in general but for a discrete group of Comcast’s premium subscribers. Therefore, for these claims, especially the treble damages claim, the state

(cont’d)

such mixed actions as “sovereign.”³ There is little doubt, however, that the courts that parse a State’s sovereign claims from the claims brought for the benefit of private persons have much the better of the argument. This very case demonstrates why: if a State could render an action entirely sovereign in character simply by seeking some token measure of “sovereign” relief, States could add such claims to private securities damages actions for the sole purpose of avoiding the federal procedural or statutory rules applicable to private claims—and thereby circumventing the federal purpose underlying those rules.

In this case, for example, it is apparent that the *overwhelming* purpose of the suit is to recover private damages on behalf of shareholders. In fact, the Attorney General’s claims for injunctive relief and disgorgement are, as a practical matter, moot points: the injunctive relief sought is already provided for in certain SEC consent decrees, and disgorgement is simply unavailable here given that Defendant-Appellants never sold any AIG securities in the periods in question. Allowing

has no quasi-sovereign interest.”); *Hood*, 639 F. Supp. 2d at 33; *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 371-72 (D. Conn. 1979).

³ See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 560593 (N.D. Cal. 2011) (states sought injunctive relief and civil penalties); *Connecticut v. Moody’s Corp.*, 2011 WL 63905 (D. Conn. 2011); *Illinois v. SDS West Corp.*, 640 F. Supp. 2d 1047, 1052-53 (C.D. Ill. 2009); *Illinois v. LiveDeal, Inc.*, 2009 WL 383434, at *3 (C.D. Ill. 2009); *Ohio ex rel. Dann v. Citibank (South Dakota), N.A.*, 2008 WL 1990363, at *3-4 (S.D. Ohio 2008); *Commonwealth ex rel. Stumbo v. Marathon Petroleum Co.*, 2007 WL 2900461, at *5 (E.D. Ky. 2007); *Wisconsin v. Abbott Labs.*, 341 F. Supp. 2d 1057, 1063 (W.D. Wis. 2004).

the Attorney General’s private recovery action to proceed simply because he also included two sovereign claims that cannot make any practical difference in the outcome of the case would be the ultimate elevation of form over substance.

This Court’s own decisions support the same conclusion. When the Attorney General “seeks only a money judgment that would inure to the benefit of a for-profit entity and its direct and indirect owners,” such an action “vindicates no public purpose.” *People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 195-96 (1st Dep’t 2008). And the Southern District of New York previously has evaluated a Martin Act claim brought by the Attorney General and determined that when the purpose of the suit is to benefit private parties, the intended beneficiaries are the true parties in interest. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia*, 311 F. Supp. 149, 156-58 (S.D.N.Y. 1970).

Here, the Attorney General is seeking an award of damages for private parties. This suit, accordingly, is an effort through the *parens patriae* authority to benefit a discrete class of private citizens—those who purchased or sold AIG stock. In these circumstances, federal law requires that the action be governed by the federal rules relating to private-party suits. Because this action is considered for purposes of federal law to be “private,” it qualifies as an action by a “private party” that triggers SLUSA. That federal law compels this result is of little surprise: it is settled that, with respect to federal claims in federal courts, “[t]he state cannot merely

litigate as a volunteer the personal claims of its competent citizens.” *People of New York by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987).

3. *The savings clause for state enforcement actions is not applicable.*

For similar reasons, this action does not come within SLUSA’s savings clause preserving the ability of a State “to investigate and bring enforcement actions.” 15 U.S.C. § 78bb(f)(4). Because this action is in purpose and effect a private suit on behalf of the real parties in interest (*i.e.*, the private individuals who would receive an award of damages), it simply cannot qualify as an “enforcement action” contemplated by SLUSA.

The term “enforcement action,” has a specific meaning in the context of securities law: it means an action brought by a sovereign *in a sovereign capacity*. To qualify as an “enforcement action,” therefore, a suit by an attorney general must assert uniquely sovereign interests—*i.e.*, remedies not available to private litigants, such as injunctive relief (*e.g.*, 15 U.S.C. § 77h-1) or civil penalties or fines (*e.g.*, 15 U.S.C. § 78u-1).

The Securities Exchange Act itself, for example, distinguishes between “enforcement actions” and “private actions”—that is, Section 21(g) “bars the ‘consolidation and coordination’ of an enforcement action brought by the SEC with a private action.” *SEC v. Prudential Sec., Inc.*, 171 F.R.D. 1, 3 (D.D.C. 1997). The Act expressly provides that “no action for equitable relief instituted by the Commission

pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.” 15 U.S.C. § 78u(g).

In establishing this prohibition against consolidation of private and enforcement actions, Congress understood that enforcement actions are distinct from private actions not because of the nature of a governmental entity as plaintiff, but because enforcement actions entail equitable remedies whereas private actions do not. The Senate Report bears this out, noting that a government “suit for injunctive relief brought pursuant to express statutory authority and a private action for damages” are “really very different” because, whereas “[p]rivate actions for damages seek to adjudicate a private controversy between citizens” (as in this case), a government “action for civil injunction is a vital part of the Congressionally mandated scheme of law enforcement in the securities area.” S. Rep. No. 94-75 at 76 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 254.

Substantial case law also confirms this understanding. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), for example, the Supreme Court characterized suits by the SEC involving recoveries of civil penalties as “enforcement actions.” *Id.* at 166. And in *Aaron v. SEC*, 446 U.S. 680 (1980), the Court described an SEC suit seeking an injunction as an “enforcement

action.” *Id.* at 682; *see also, e.g., SEC v. First Fin. Group*, 645 F.2d 429, 432 (5th Cir. Unit A 1981) (describing an SEC suit seeking injunctive relief as an “enforcement action”).

In drafting SLUSA, Congress was well aware of this precise meaning of the term “enforcement action” in the context of the federal securities laws, and its use of the term in the savings clause was intended to incorporate that settled meaning. If Congress had intended to permit *all* state actions, it could have drafted SLUSA to say so: it could have provided, for example, that the statute’s preemption provision does not apply to any State’s efforts “to investigate and bring *actions*.” But that is not how Congress drafted the savings clause; instead, it provided that only a subset of state lawsuits were exempt: those efforts “to investigate and bring *enforcement actions*” are exempted from SLUSA’s preemptive force. 15 U.S.C. § 78bb(f)(4) (emphasis added).

Indeed, the State’s interpretation of the statute would render the word “enforcement” surplusage, in plain contravention of “one of the most basic interpretive canons that a statute should be construed * * * so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 129 S. Ct. 1558, 1560 (2009) (quotation and alterations omitted). The limited reach of SLUSA’s enforcement action carve-out thus is clear: the defining characteristic of an “en-

forcement action” is not that it is merely *brought* by a sovereign, but that the suit asserts an interest *uniquely possessed* by the sovereign

When, pursuant to the Martin Act, the Attorney General seeks injunctive relief or civil fines, the State acts in an enforcement capacity. In such circumstances, the enforcement exception to SLUSA applies. But where, as here, the gravamen of the action is recovering damages for private parties, and not any uniquely sovereign interest, the action does not qualify as an “enforcement action” within the meaning of SLUSA; instead, the suit is treated as a private action for purposes of federal law. This action therefore is expressly precluded by SLUSA.

B. Federal Law Impliedly Preempts This Lawsuit.

Even supposing the present lawsuit were not expressly precluded by SLUSA, the action still would be preempted by implication. That is so because “the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). And it is well settled that the presence of “an express pre-emption provision” in a federal statute does not “bar the ordinary working of conflict pre-emption principles” with respect to that statute. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (alteration omitted) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)); *see also Island Park*,

559 F.3d at 101 (“the presence of an express pre-emption clause in a federal statute ‘does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains’”) (quoting *Altria Group*, 129 S. Ct. at 543).⁴ Here, those principles require dismissal of this suit.

When the enforcement of state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the “state law is nullified” under the implied preemption doctrine. *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). In applying this doctrine, “the purpose of Congress is the ultimate touchstone.” *Caprotti v. Town of Woodstock*, 94 N.Y.2d 73, 82 (1999) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996)). “To discern the existence and the scope of any congressional intention to preempt State law,” courts must consult the “statutory language, * * * the legislative framework, [and] the structure and purpose of the statute as a whole.” *Id.* Here, each of these sources plainly demonstrate that, in enacting the PSLRA and SLUSA, Congress intended to create a single, federal scheme to govern class action suits claiming fraud related to nationally-traded securities. Just as plainly,

⁴ The lower court’s contrary suggestion is incorrect. *See* Slip Op. 30-31. In fact, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995)—the case cited by the lower court—the Supreme Court explained in plain terms that the presence of an express preemption clause “does not establish a rule” “foreclos[ing] any possibility of implied pre-emption,” and “[a]t best * * * supports” a rebuttable “inference” against “implied pre-emption.” *Id.* 288-89. Any such inference is plainly rebutted here.

permitting the Attorney General to bring claims under the Martin Act and Executive Law seeking to recover damages on behalf of a massive class of private shareholders would directly undermine Congress's purpose.

1. *Congress's clear purpose in enacting the PSLRA and SLUSA was to create a uniform federal scheme to govern the recovery of private damages for securities fraud.*

“The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.” *Dabit*, 547 U.S. at 78. For that reason, and recognizing the special “danger of vexatiousness” that attends litigation under the federal securities laws, Congress enacted the PSLRA in 1995 to combat the “perceived abuses of the class-action vehicle in litigation involving nationally traded securities.” *Id.* at 80-81. “While acknowledging that private securities litigation was ‘an indispensable tool with which defrauded investors can recover their losses,’” Congress determined that permissive rules governing securities litigation were “being used to injure ‘the entire U.S. economy.’” *Id.* at 81 (quoting H.R. Conf. Rep. No. 104-369 at 31 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 730). As part of Congress’s effort to eliminate such “rampant” litigation “abuses,” the PSLRA imposed, among other measures, “heightened pleading requirements” and scienter and reliance standards to govern all private actions under the federal securities laws. *Id.* at 81-82.

But the PSLRA “had an unintended consequence.” *Dabit*, 547 U.S. at 82. By imposing more stringent federal standards, it “prompted” litigants “to avoid the federal forum altogether,” and bring suits covered by the federal securities laws “under state law” instead, and “often in state court.” *Id.* To stop this end-run around the PSLRA and “prevent certain State private securities” actions “from being used to frustrate the objectives of the [Act], Congress enacted SLUSA.” *Id.* (internal quotation and alterations omitted).

As we have discussed, SLUSA provides, for its part, that no “class action based upon the statutory or common law of any State” 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” may “be maintained in any State or Federal court.” 15 U.S.C. § 78bb(f)(1). Instead, such actions must be brought under the federal standards established by the PSLRA.

Congress’s central purpose in enacting the PSLRA and SLUSA is clear: through the former, Congress meant to impose heightened standards for damages actions under the securities laws; and through the latter, to ensure that the PSLRA provided a single, uniform set of “national standards for securities class action lawsuits involving nationally traded securities.” *Dabit*, 547 U.S. at 82, 87 (quoting SLUSA § 2(5), 112 Stat. at 3227). As the Second Circuit put it, taking these two statutes “in concert,” it is clear that “Congress intended to provide national, uni-

form standards for * * * litigation concerning” “nationally marketed securities.”

Lander, 251 F.3d at 111.

2. *This suit conflicts with the uniform federal policy requiring proof of scienter for class recovery of private damages.*

Permitting the Attorney General, on behalf of a massive class of private citizens, to bring securities fraud claims to recover money damages under the Martin Act, Executive Law § 63(12), and New York common law—claims that indisputably would be preempted if brought directly by the class of private citizens themselves—runs directly counter to the PSLRA and SLUSA’s clear purpose of creating a single, federal standard to govern such suits. The federal interests are particularly acute here, insofar as this action will impose liability for the payment of damages to private parties without proof of precisely the heightened standards that Congress meant to impose on such actions.

For example, a central purpose of the PSLRA and SLUSA, taken together, is the requirement that issuers of nationally-traded securities may be held liable to a class of shareholders for private damages *only* upon sufficient allegations and proof of scienter. “Exacting pleading requirements are among the control measures Congress included in the PSLRA.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Private individuals seeking damages, therefore, must first plead with particularity and then prove “facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant’s intention to deceive,

manipulate, or defraud.” *Id.* (quotation omitted). Absent proof of scienter, a class of private individuals simply may not recover damages for securities fraud. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). SLUSA, in turn, precludes a class of private parties from obtaining a damages award in state court based on any lesser standard of liability.

Allowing the Attorney General’s action under the Martin Act squarely conflicts with this explicit federal policy. The court below expressly concluded that the Attorney General was not required to prove scienter to establish liability for private damages in this action. “Under both the Martin Act and the Executive Law § 63,” the court explained, the Attorney General “is not required to demonstrate scienter in order to sustain civil liability for a violation.” Slip Op. 26. There is thus no doubt concerning the implication of the partial grant of summary judgment in this case: it establishes the defendants’ liability for private damages for securities fraud without any regard for, much less proof of, the PSLRA’s scienter element.

Not only is the opinion of the court below crystal clear on this point, but the Attorney General flatly acknowledges it. In its briefing below, the Attorney General forthrightly admitted that the purpose of this suit is “to recover damages” on behalf of investors without concern for satisfying the requirements of “class actions brought under different statutes” such as the PSLRA, “imposing higher standards of proof.” R. 14870. Liability never could have been imposed under such circum-

tances if the action had been brought under the PSLRA itself. Nor could there be liability here if the class brought a state-court action in its own name. This suit, accordingly, cannot be squared with the “national, uniform standards” Congress has established under the PSLRA and SLUSA. *Lander*, 251 F.3d at 111.

The Court of Appeals has not hesitated in the past to declare that the Attorney General may not invoke its special litigation authority to bring claims on behalf of private individuals “as an attempt to circumvent the fault-based claims” that private citizens suing in their own rights would have to bring. *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 69 (2008). That is even more clearly so with respect to the PSLRA and SLUSA, given Congress’s clear purpose of creating a single, federal scheme to govern lawsuits like this one. If permitted to stand, this action—by obviating the need to prove scienter as a prerequisite to class damages for security fraud—“would unavoidably result in serious interference with the accomplishment and execution of the full purposes and objectives of Congress.” *Guice*, 89 N.Y.2d at 45 (quotation omitted). This Court accordingly should hold the Attorney General’s claims implicitly preempted.

CONCLUSION

The order of the court below denying summary judgment to the defendants should be reversed and remanded with instructions to dismiss the action on the ground that it is preempted by federal law.

Respectfully submitted,

Dated: April 6, 2011

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