No. 07-1006

IN THE

Supreme Court of the United States

NANOPIERCE TECHNOLOGIES, INC. (N/K/A VYTA CORP.), KATHY-KNIGHT MCCONNELL, HELEN KOLADA, MAUREEN O'SULLIVAN, JANE SEITZ, STEPHEN SEITZ, AND JAMES STOCK,

Petitioners,

v.

DEPOSITORY TRUST AND CLEARING CORPORATION, DEPOSITORY TRUST COMPANY, AND NATIONAL SECURITIES CLEARING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF IN OPPOSITION

BRUCE T. LAXALT
DONALD T. NOMURA
DANIEL T. HAYWARD
LAXALT & NOMURA, LTD
9600 Gateway Drive
Reno, Nevada 89521

GREGG M. MASHBERG
Counsel of Record
CHARLES S. SIMS
KAREN D. COOMBS
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
Tel: (212) 969-3000
Fax: (212) 969-2900

Attorneys for Respondents

214926

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Nevada Supreme Court erred in holding that petitioners' challenge to respondents' Stock Borrow Program, a component of the uniform SEC-approved system for clearing and settling the nation's securities transactions – a challenge cast as state law misrepresentation claims but actually rooted in alleged inherent defects in the program itself – would stand as an obstacle to the SEC-approved program and is therefore subject to conflicts preemption.

CORPORATE DISCLOSURE STATEMENT

Respondent, The Depository Trust & Clearing Corporation has no parent corporation and no publicly held company owns 10% or more of its stock. It is the sole owner of all other respondents.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	6
REASONS FOR DENYING THE PETITION	15
I. THERE IS NO CONFLICT BETWEEN THE NEVADA SUPREME COURT'S DECISION AND THE INAPPOSITE AUTHORITIES CITED BY PETITIONERS	15
II. THE DECISION RAISES NO IMPORTANT ISSUE WARRANTING THIS COURT'S REVIEW	20
III. THERE IS NO NEED TO HOLD THE PETITION PENDING THIS COURT'S DECISION IN *ALTRIA*, WHICH RAISES WHOLLY SEPARATE ISSUES	21
CONCLUSION	22
APPENDIX — AMENDED COMPLAINT	1a

TABLE OF CITED AUTHORITIES

Page

Cases

Altria Group, Inc. v. Good,
128 S. Ct. 1119 (2008) (*cert. granted* Jan. 16, 2008) 21, 22

American Agricultural Movement, Inc. v. Board of Trade of Chicago,
977 F.2d 1147 (7th Cir. 1992) ..... *passim*

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 2, 18

Bronco Wine Co. v. Jolly,
95 P.3d 422 (Cal. 2004), *cert. denied*, 546 U.S. 1150 (2006) 18

Capece v. DTCC,
Case No. 05-80498, 2005 U.S. Dist. LEXIS 42039 (S.D. Fla. Oct. 11, 2005) 1

Capece, Jr. v. Depository Trust,
Case No. 04-8043 (S.D. Fla. April 28, 2004) .. 2

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 20

Credit Suisse First Boston Corp v. Grunwald,
400 F.3d 1119 (9th Cir. 2005) 16

Cited Authorities

	Page
Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982)	16
Geier v. American Honda Motor Co., 529 U.S. 861 (2000)	16
Genemax Corporation v. Knight Securities, LP, et al., 3:02-cv-00509-ECR-RAM (D. Nev.)	2
Guice v. Charles Schwab & Co., 674 N.E.2d 282 (N.Y. 1996), *cert. denied*, 520 U.S. 1118 (1997)	17
Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)	16
Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973)	16
Myers v. Merrill Lynch & Co., No. C-98-3532 WHO, 1999 WL 696082 (N.D. Cal. Aug. 23, 1999), *aff'd*, 249 F.3d 1087 (9th Cir. 2001)	5
Nanopierce Technologies, Inc. v. Harvest Court LLC, et al., No. 02-CV-0767, 2008 U.S. Dist. LEXIS 6225 (S.D.N.Y. Jan. 28, 2008)	4

Cited Authorities

Page

Nutek Inc. v. Ameritrade, Inc., et al.,
2:03-cv-00321-PMP-RJJ
(D. Nev. Aug. 3, 2004) 2

O'Malley v. Boris,
742 A.2d 845 (Del. 1999) 16, 17

Pet Quarters, Inc. v. DTCC,
4:04-cv-1528-RSW, 2008 U.S. Dist. LEXIS
15316 (E.D.Ark. Feb. 25, 2008) 1, 14

Riegel v. Medtronic, Inc.,
128 S. Ct. 999 (2008) 20

Sporn v. Elgindy,
2:04-cv-06417-R-PJW
(C.D. Cal. July 26, 2005) 1

Whistler Investments, Inc. v. DTCC,
Case No. CV-S-05-0634-RJC (PAL)
(D. Nev. May 24, 2006) 1, 2

Williamson v. Goldman, Sachs & Co. et al.,
3:03-cv-00057-HDM-RAM (D. Nev.) 2

X-Clearing Corporation v.
Depository Trust Corp.,
03 CV 1169 (Dist. Ct., Denver, Col. Oct. 3,
2003) 1

Cited Authorities

Page

Statutes

15 U.S.C. § 78q-1 2

15 U.S.C. § 78q-1(a)(1)(A) 6

15 U.S.C. § 78q-1(a)(1)(C) 8

15 U.S.C. § 78q-1(a)(1)(D) 6, 18

15 U.S.C. § 78q-1(a)(2)(A)(i) 2, 7

15 U.S.C. § 78q-1(a)(2) 10

15 U.S.C. § 78q-1(b) 10

15 U.S.C. § 78q-1(b)(3)(A) 20

15 U.S.C. § 78q-1(b)(3)(F) 13

15 U.S.C. § 1334(b) 21

17 C.F.R. § 240.17a-22 10

17 C.F.R. Part 242.200 ..... 4, 12

17 C.F.R. 242.203 4

Cited Authorities

	Page
UCC § 8-102(a) (14) & (17)	7
UCC § 8-501	7
UCC § 8-111	7

Other Authorities

Amendments to Regulation SHO, SEC Rel. 34-56212, 72 Fed. Reg. 45544 (Aug. 14, 2007)	4, 12
Depository Trust Company et al.: Order, SEC Rel. No. 20221, 48 Fed. Reg. 45167-02, 45171 (Oct. 3, 1983)	10
Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries, SEC Rel. No. 34-50758, 69 Fed. Reg. 70852 (Dec. 7, 2004)	9, 10
"Naked" Short Selling Anti-Fraud Rule, SEC Rel. 34-57511 (March 17, 2008)	4
National Securities Clearing Corporation: Order Granting Registration and Statement of Reasons, 42 Fed. Reg. 3916 (Jan. 13, 1977)	8

Cited Authorities

Page

National Securities Clearing Corporation: Proposed Rule Change, SEC Rel. No. 34-17422, 46 Fed. Reg. 3104 (Jan. 13, 1981) 10, 13

Self-Regulatory Organizations: The Depository Trust Company: Order Granting Approval of a Proposed Rule Change Concerning Requests for Withdrawal of Certificates by Issuers, SEC Rel. No. 34-47978, 68 Fed. Reg. 35037 (June 4, 2003) 7

H.R. Conf. Rep. No. 94-229 (May 19, 1975) 6

Sen. Rep. No. 94-75, 1975 U.S.C.C.A.N. 179 (Apr. 14, 1975) 6

http://www.dtcc.com/downloads/annuals/2006/2006_report.pdf 9

http://www.sec.gov/litigation/briefs/nanopiercesecbrief.pdf 2, 12, 13

INTRODUCTION

The decision of the Supreme Court of Nevada, upholding the dismissal of the amended complaint on grounds of conflicts preemption, is one of several decisions (none of which are cited in the Petition) consistently applying the preemption doctrine to dismiss purported state law attacks on the Stock Borrow Program ("SBP"), which respondents operate under rules approved by the U.S. Securities and Exchange Commission ("SEC").[1]

---

[1] Respondents are The Depository Trust & Clearing Corporation and its subsidiaries (collectively, "DTCC"). Co-counsel for petitioners have unsuccessfully brought several actions asserting state law claims against respondents substantively identical to those presented here. Each has been dismissed on grounds of federal preemption. *See Pet Quarters, Inc. v. DTCC*, 4:04-cv-1528, 2008 U.S. Dist. LEXIS 15316 (E.D.Ark. Feb. 25, 2008) (dismissing challenge to SBP on grounds of federal preemption); *Capece v. DTCC*, Case No. 05-80498, 2005 U.S. Dist. LEXIS 42039 (S.D. Fla. Oct. 11, 2005) (same); *Whistler Investments, Inc. v. DTCC*, Case No. CV-S-05-0634-RJC (PAL) (D. Nev. May 24, 2006) (same), appeal in Docket No. 06-16088 argued March 10, 2008 (9th Cir.).

The SBP was also challenged in *Sporn v. Elgindy*, 2:04-cv-06417-R-PJW (C.D. Cal. July 26, 2005). Respondents moved to dismiss, *inter alia*, on grounds of federal preemption. By order filed July 25, 2005, the third amended complaint was summarily dismissed. *See also X-Clearing Corporation v. Depository Trust Corp.*, 03 CV 1169 (Dist. Ct., Denver, Col. Oct. 3, 2003) (dismissing as preempted claims by a company alleged to be the victim of naked short selling that it should be permitted to "exit" its publicly issued shares from DTCC's depository facility).

(Cont'd)

The SBP is a component of the uniform system for clearing and settling the nation's securities transactions, established pursuant to Section 17A of the 1975 Amendments to the Securities Exchange Act of 1934 ("Section 17A"), 15 U.S.C. § 78q-1. As explained by the SEC to the court below in its *amicus curiae* submission, the premise of petitioners' claims is wholly inconsistent with the SEC's approval of the SBP pursuant to Section 17A, and allowance of petitioners' claims would frustrate Congress's express goals in establishing the uniform "National Clearance and Settlement System" under SEC supervision. 15 U.S.C. § 78q-1(a)(2)(A)(i).[2]

The holding that petitioners' claims are preempted poses no conflict with any of the court decisions identified by petitioners, including *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

(Cont'd)

Other cases including challenges to the SBP were withdrawn or abandoned. *See Capece, Jr. v. Depository Trust*, Case No. 04-8043 (S.D. Fla. April 28, 2004) (withdrawn); *Nutek Inc. v. Ameritrade, Inc., et al.*, 2:03-cv-00321-PMP-RJJ (D. Nev. Aug. 3, 2004) (withdrawn against DTCC defendants after filing of motion to dismiss); *Williamson v. Goldman, Sachs & Co. et al.*, 3:03-cv-00057-HDM-RAM (D. Nev.) (filed but never served upon named DTCC defendants); *Genemax Corporation v. Knight Securities, LP., et al.*, 3:02-cv-00509-ECR-RAM (D. Nev.) (same).

[2] The SEC's *amicus* brief, urging affirmance on grounds of conflicts preemption, was filed in the Nevada Supreme Court by Order dated March 30, 2006. That brief is available on the SEC's website at www.sec.gov/litigation/briefs/nanopiercesec brief.pdf. The SEC filed a similar brief with the Ninth Circuit in the pending appeal in *Whistler Investments*.

Although styled as a state law misrepresentation case to try to avoid the preemptive effect of the SEC's approval of the challenged program, any reading of the complaint makes plain that it is a facial attack on the uniform, national system for clearance and settlement of securities transactions, and as such preempted.[3] Petitioners (collectively, "Nanopierce"), claim that the SBP, approved by the SEC in 1981, has certain inherent defects – the creation of "phantom shares" that harm the marketplace – and that respondents failed to disclose the SBP's "real effect" to the investing public. (Pet. 15.) As the Nevada Supreme Court held (Pet. App. 17A-21A), the complained-of "misrepresentations" are simply Nanopierce's characterizations of the SBP, which are wholly contrary to the SEC's own characterizations and assessment in approving the program pursuant to its Congressional mandate.

Nanopierce did not allege that any misrepresentations were made regarding the company. Nor did Nanopierce allege that the SBP operates differently with respect to Nanopierce stock than it does with respect to the stock of any of the thousands of other companies for which transactions are cleared and settled by DTCC. The alleged "misrepresentations" at issue did not arise in connection with any Nanopierce-specific conduct. Rather, petitioners challenge the uniform and automated operations of the SBP under SEC-approved rules and oversight, and in particular the discrepancy

[3] The complaint contained not only claims concerning alleged misrepresentations and omissions but also what the Supreme Court of Nevada termed "non-misrepresentation claims," all of which were found preempted. Petitioners have abandoned the latter. (*See* Pet. 19 n.17.)

between the descriptions of the program contained in those approved rules and the pejorative characterizations contradicting the rules that petitioners insist state law requires respondents to disseminate.

Underlying this case and the several others exactly like it is Nanopierce's challenge to a trading strategy known as "naked short selling." (Pet. 14.) Naked short selling is illegal and subject to regulation by the SEC. *See Amendments to Regulation SHO,* 72 Fed. Reg. 45544 (Aug. 14, 2007) (adopting final rule amending Regulation SHO, 17 C.F.R. Part 242.200, 203; *"Naked" Short Selling Anti-Fraud Rule,* SEC Rel. 34-57511 (March 17, 2008) (proposed new Rule 10b-21, addressing naked short-selling, published for notice and comment). Nonetheless, through a series of facial attacks on the SEC-approved SBP (presented as garden variety misrepresentation claims), Nanopierce and plaintiffs in the companion cases have sought to impose the financial responsibility for damages allegedly caused by such naked short selling in the marketplace on the post-trade national clearance and settlement system.[4]

None of the inapposite cases cited by petitioners in arguing that state-law claims have "regularly been adjudicated" against clearance and settlement activities (Pet. 6 and n.2) addressed a frontal challenge to

[4] The parties responsible for alleged fraudulent transactions in Nanopierce stock have not been sued in this action, but were sued in another action, *Nanopierce Technologies, Inc. v. Harvest Court LLC, et al.*, No. 02-CV-0767 (S.D.N.Y.). The district court in that case recently entered summary judgment dismissing each of Nanopierce's claims. 2008 U.S. Dist. LEXIS 6225 (S.D.N.Y. Jan. 28, 2008).

federally-approved activities, as is the case here, or indeed addressed any preemption defenses at all. Rather, the cases cited by petitioners all dealt with ordinary-course business disputes regarding specific transactions between DTCC and the respective plaintiffs – not claims (such as here) effectively attacking a component of the federally-approved clearance and settlement system.[5] *Compare* cases cited nn. 1 and 5 *supra; cf. American Agricultural Movement, Inc, v. Board of Trade of Chicago*, 977 F.2d 1147 (7th Cir. 1992); *Myers v. Merrill Lynch & Co.*, No. C-98-3532, 1999 WL 696082, at *8-9 (N.D. Cal. Aug. 23, 1999), *aff'd*, 249 F.3d 1087 (9th Cir. 2001).

Nanopierce has cited no case, and DTCC is aware of none, that has ever applied state law to impose damages or injunctive relief against an SEC-approved component of the National Clearance and Settlement System. To the contrary, there is an unbroken line of cases in which

---

[5] The exception is *Goldstein v. Depository Trust Corporation*, January Term, 1989, No. 3300 (Phil. Ct. Common Pleas), in which petitioners cite a long-superseded interim ruling (717 A.2d 1063 (Pa. Super. Ct 1998)) said to reflect an adjudication of state law claims in connection with the clearance of securities. (Pet. 6 n.2.) In fact, apparently unknown to petitioners, *Goldstein* was subsequently dismissed on preemption grounds because, as here, the challenged activity was taken pursuant to The Depository Trust Company's SEC-approved rules. (Unreported decision, December 28, 2001, copy provided to petitioners herewith.) The remaining cases relied upon by petitioners in arguing that relevant "state law claims have regularly been adjudicated" (Pet. 6, n.2) were decided long before Congress enacted the National Clearance and Settlement System in 1975 and long before respondents had even come into existence, and are completely inapposite.

the courts have recognized the primacy of the SEC in regulating the uniform post-trade securities handling process and invoked the preemption doctrine to dismiss state law claims. *See* n.1 *supra.* Those cases make plain that Nanopierce's effort to create the spectre of a state judiciary in disarray and in need of this Court's intervention is baseless. Nothing about this case merits this Court's attention.

STATEMENT OF THE CASE

1. In the late 1960s, Wall Street experienced a "paperwork crisis," as the volume of securities transactions (a tiny percentage of today's volumes) overwhelmed the industry's ability to process transactions. *See* Sen. Rep. No. 94-75, 1975 U.S.C.C.A.N. 179 (Apr. 14, 1975) (hereafter "Sen. Rep.") at 183. Congress recognized that paper indicia of securities ownership was incompatible with the modern securities industry: "A second major purpose of the legislation [Section 17A] is to initiate concrete steps toward the elimination of the negotiable stock certificate as a means of transferring securities." *Id.* at 236-37; *see also* H.R. Conf. Rep. No. 94-229 (May 19, 1975) at 92-93.

Congress's solution to the paperwork crisis and the fractured nature of the post-trade securities handling system (*see* Sen. Rep. at 183-84) was embodied in Section 17A, whose principal goal was "the development of *uniform standards and procedures for clearance and settlement* [of securities transactions] . . . ." 15 U.S.C. § 78q-1(a)(1)(D) (emphasis added); *see also* 15 U.S.C. § 78q-1(a)(1)(A) (Section 17A designed to create a

uniform national system for the prompt and accurate clearance and settlement of securities transactions).[6]

Section 17A vested the SEC with the centralized authority to preside over the National Clearance and Settlement System in order to increase efficiency and reduce risk. 15 U.S.C. § 78q-1(a)(2)(A)(i); *see Self-Regulatory Organizations: The Depository Trust Company: Order Granting Approval of a proposed Rule Change Concerning Requests for Withdrawal of Certificates by Issuers*, SEC Rel. No. 34-47978, 68 Fed. Reg. 35037, at 35041 (June 4, 2003) (hereafter, the "June 4 SEC Order"). The SEC was empowered to regulate, coordinate, and direct the operations of all persons involved in processing securities transactions; it was directed to "regulate[ ] . . . *every facet* of the securities handling process . . . clearing agencies, depositories, corporate issuers, and transfer agents." Sen. Rep. at 233 (emphasis added).

In developing the new National Clearance and Settlement System, Congress was prescient in foreseeing that "advances in data processing" would

---

[6] Petitioners correctly note (Pet. 8 n.4) that following the adoption of Section 17A, the Uniform Commercial Code was revised so that state law of property ownership would recognize that under the new system investors would acquire and transfer "securities entitlements" maintained at "securities intermediaries" rather than paper stock certificates. *See* UCC 8-102(a) (14) & (17), 8-501. The revised UCC also recognized, however, that the SEC-registered clearing agencies (such as respondents) would maintain responsibility for the clearing and settling operations and their rules would be effective even if in conflict with a provision of Article 8. UCC 8-111.

enable the industry to emerge from the ocean of paper in which it was drowning, turning, instead, to electronic systems to evidence ownership and transfer of securities. 15 U.S.C. § 78q-1(a)(1)(C).[7]

2. Pursuant to its delegated authority, the SEC approved the registration of respondents The Depository Trust Company ("DTC") and the National Securities Clearing Corporation ("NSCC") as registered clearing agencies. June 4 SEC Order at 35041; *National Securities Clearing Corp.: Order Granting Registration and Statement of Reasons,* 42 Fed. Reg. 3916 (Jan. 13, 1977).

DTC and NSCC are New York corporations and wholly-owned subsidiaries of respondent The Depository Trust & Clearing Corporation. Each performs separate and critical functions in the federal uniform clearance and settlement system. DTC and NSCC maintain accounts and provide services only for the major financial institutions that constitute their respective participants/ members; they do not maintain accounts for issuers or investors, including petitioners here.

DTC is the nation's principal securities depository. It operates an automated, centralized system for book-entry movement of securities positions in the accounts of its participants, the nation's major brokerage houses

[7] The transfer of securities entitlements by electronic means is key to market liquidity. On a daily basis, DTCC's automated systems clear and settle millions of transactions constituting billions of shares of stock. A tiny fraction of today's volumes completely overwhelmed Wall Street during the paperwork crisis.

and banks (who, in turn, serve as securities intermediaries for their own institutional and retail customers). Securities deposited at DTC are registered in the name of DTC's nominee, "Cede & Co.," and immobilized at the depository. This enables DTC to facilitate the automated movements of securities positions without the need to transfer paper indicia of ownership, serving "a critical function in the National Clearance and Settlement System." June 4 SEC Order at 35041 and n.62. Securities on deposit at DTC have a value of over $35 trillion. *See* http://www.dtcc.com/downloads/annuals/2006/2006_report.pdf at p. 30.

NSCC provides centralized clearance, settlement and information services for virtually all broker-to-broker equity, corporate bond and municipal bond and other securities transactions in the United States. As petitioners acknowledge (Pet. 12), in order to facilitate the enormous volume of daily transactions, NSCC's automated "Continuous Net Settlement" system ("CNS") nets down each member-broker's daily position in each security to a single obligation to deliver or receive that security and a corresponding single obligation for payment or receipt of funds. The member-brokers then deliver the net securities or net funds into NSCC's securities settlement system on the settlement date and the system, acting as the central counter-party, allocates the shares and funds to member brokers with a right to receive. *Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, SEC Rel. No. 34-50758, 69 Fed. Reg. 70852 at 70856 and n.55 (Dec. 7, 2004). Changes in beneficial ownership of securities resulting from transactions cleared and settled at NSCC

are implemented by automated book-entry movements of positions in accounts at DTC. June 4 SEC Order at 35014.

The SEC's registration of DTC and NSCC and approval of their rules was necessarily premised on its finding that those agencies, and their rules, met specified statutory objectives implementing the essential objectives of Section 17A, including removing "impediments to and perfect[ing] the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions." 15 U.S.C. § 78q-1(b); *see also* 15 U.S.C. § 78q-1(b)(3)(A) (requiring the SEC to find that clearing agency rules facilitate the prompt and accurate clearance and settlement of securities transactions, safeguard securities).

Clearing agencies such as DTC and NSCC must operate pursuant to their SEC-approved rules, and they cannot issue or alter their rules absent approval by the SEC pursuant to the statutory standards. *See* 17 C.F.R. 240.17a-22; *Depository Trust Co., et al.: Order*, SEC Rel. No. 20221, 48 Fed. Reg. 45167-02, 45171 (Oct. 3, 1983) (approving NSCC and DTC rules); and 15 U.S.C. § 78q-1(a)(2).

3. The SBP was approved by the SEC in 1981 and has been in operation ever since. *See National Securities Clearing Corporation: Proposed Rule Change*, SEC Rel. No. 34-17422, 46 Fed. Reg. 3104 (Jan. 13, 1981) (notice of filing of proposed rule change making SBP permanent), *see also Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, SEC Rel. No. 34-50758, 69 Fed. Reg. 70852, n.57 (Dec. 7, 2004)

("[T]he Stock Borrow Program was approved by the [Securities and Exchange] Commission.").

The SBP is a uniform, automated program used in certain instances where insufficient shares of a particular security have been delivered to NSCC on the settlement date. In order to fulfill its delivery obligations to buying brokers, the CNS system, utilizing the SBP, will automatically borrow securities from members who have (1) voluntarily made such shares available for loan to the clearing corporation and (2) actually have such securities on deposit in their DTC accounts. NSCC then uses these securities, along with the securities delivered to CNS by selling brokers (without making any distinction) to make deliveries to members with the right to receive delivery, thus satisfying the buyer's side of the transaction.

The SBP does not affect the seller's side; a member who has failed to deliver remains obligated to do so. Moreover, sellers who fail to deliver do not and cannot know whether the SBP is being utilized on the settlement date when they failed to deliver. As to the member who has loaned shares through the SBP, those shares are deducted from the member's DTC account (and thus cannot be sold, loaned, pledged, etc. by the lending member until returned to its DTC account).[8]

---

[8] Nanopierce's contentions that NSCC has "permit[ted] failures to deliver to remain uncured" and has "facilitated the practice of naked short selling" by market participants (Pet. 14) entirely misapprehends NSCC's role in the National Clearance and Settlement System. NSCC has neither the power nor the obligation to force sellers to deliver; regulatory authority rests (Cont'd)

4. For all the repeated references to "misrepresentations and omissions," neither Nanopierce's complaint nor its Petition for Certiorari identify any misrepresentations or omissions specific to Nanopierce. The essential claim is that the SBP has undisclosed inherent "defects" (*see* Compl. ¶¶ 89-100) that are alleged to have facilitated the abusive practice of naked short selling and depressed the value of Nanopierce stock (Pet. 14). Reflecting the facial nature of this attack, Nanopierce characterizes the SBP as a "scheme," the "real effect" of which is "to create phantom shares that dilute the value of validly issued shares" (Pet. 15), which respondents fail to disclose to the public.[9]

(Cont'd)
with the SEC and other bodies exercising enforcement powers. *See* www.sec.gov/litigation/briefs/nanopiercesec-brief.pdf at 12-13. To the extent that the gravamen of Nanopierce's claims (as it candidly concedes) is that it and its stockholders have been damaged by "naked short selling" of Nanopierce stock by unscrupulous market participants, its remedies therefore lie either with suits against alleged market manipulators (*see supra* p. 4 and n. 4) or with the SEC and other enforcement authorities. As Nanopierce's own quotation from SEC Chairman Christopher Cox (Pet. 16) suggests, the SEC is exercising its authority to monitor and address the naked short selling issue. *See, e.g.*, Regulation SHO, 17 C.F.R. Part 242.200, and amendments thereto (*Amendments to Regulation SHO*, SEC Rel. 34-56212, 72 Fed. Reg. 45544 (Aug. 14, 2007)).

[9] Nanopierce mischaracterizes its allegations as setting forth a "misuse" of the SBP beyond the purpose for which it is approved (Pet. 14) and as seeking disclosure of DTCC's "actual business practices" (Pet. 19). The complaint, however, is unambiguously premised not on any misuse of the SBP but on the SBP's essential nature (its "real effect") and operation under SEC-approved rules. *See* Pet. App. 31a (no allegation that respondents violate SBP rules).

The affirmative misrepresentation claims are similarly rooted in the SEC-approved rules themselves; petitioners maintain that state law requires DTCC to make disclosures that contradict the rules, despite their federal approval. For example, petitioners allege that the SBP "misrepresents" itself as a borrowing program when it is actually a sale of securities. Compl. ¶ 102 (First Claim for Relief). But the SEC-approved rules explicitly characterize the SBP as a borrowing program. *National Securities Clearing Corporation: Proposed Rule Change,* SEC Rel. No. 34-17422, 46 Fed. Reg. 3104; *see* Pet. App. 19a. Similarly, Nanopierce alleges that the SBP results in the inefficient clearing and settling of trades, and therefore DTCC's public disclosures otherwise (to Congress and the public) are actionable. Compl. ¶ 114 (Second Claim for Relief). But, in approving the SBP rules and continuing to supervise the program, the SEC has already determined that the program meets the Congressional mandate of "remov[ing] impediments to and perfect[ing] the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions." 15 U.S.C. § 78q-1(b)(3)(F); *see also* Pet. App. 20a; www.sec.gov/litigation/briefs/nanopiercesecbrief.pdf at 17-18.[10]

---

[10] The remainder of Nanopierce's purported misrepresentation claims (none of which the Petition addresses individually) similarly attack the fundamental nature of the SBP and its rules and are in actuality facial attacks on the program. *See, e.g.,* Compl. ¶¶ 127-130 (Third Claim) (accounting procedures explicitly set forth in the SBP rules (*see* Pet. App. 21a) alleged to "misrepresent" the number of shares in members' accounts); Compl. ¶¶ 139-142 (Fourth Claim) (defendants misrepresent that buy-ins are executed in the marketplace when, allegedly, they (Cont'd)

The complaint thus challenges the SBP on its face. It seeks to utilize purported state law standards to regulate and ultimately obstruct a federally authorized activity by imposing damage awards on respondents, to the tune of hundreds of millions of dollars, for (1) failing to disclose alleged inherent defects that the SEC did not discern either in approving the program or in its ongoing oversight and (2) making "misrepresentations" that actually constitute the substance of the approved rules.

5. On a motion to dismiss based on federal preemption, lack of personal jurisdiction and failure to state a cause of action, the motion court dismissed Nanopierce's suit under the preemption doctrine, without reaching the other grounds asserted. Pet. App. 28a at 31a-32a. The Nevada Supreme Court affirmed, holding that Nanopierce's claims

> conflict with Congress's regulatory scheme, since imposing the requirements implicated by appellants' state law claims, which they primarily base on allegations that respondents conceal flaws in a Commission-approved national system for clearing and settling securities transaction, frustrates Congress's

---

(Cont'd)

are executed through the SBP, even though the rules (cited in Compl. ¶ 91) explicitly state that buy-ins are executed in the marketplace). *See* Pet App. 17a-21a (finding by the court below that each SBP "misrepresentation" claim asserted here actually constitutes challenge to the program as approved and is preempted); *Pet Quarters*, 2008 U.S. Dist. LEXIS 15316, at * 15-18 (same).

> objectives with respect to the clearing and settling regulatory scheme and renders adherence to both that regulatory scheme and state law impossible.

Pet. App. 24a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE NEVADA SUPREME COURT'S DECISION AND THE INAPPOSITE AUTHORITIES CITED BY PETITIONERS

There is no conflict between the decision below and any decision of any court of appeal or state high court, notwithstanding strained contentions to the contrary. The Nevada Supreme Court's holding is in line with all the other decisions addressing conflicts preemption in comparable cases, and presents no issue warranting this Court's review.

Nanopierce seeks to have a state court jury find that the SBP has "defects'" that the SEC has determined do not exist, and award enormous damages against respondents for failing to make disclosures of these inherent "defects" and other matters that conflict with the SEC-approved SBP rules. This application of state law, as erroneously construed by Nanopierce, stands as an obstacle to Congress' determination that the SEC would exercise plenary authority over "every facet" of a uniform system for clearing and settling the nation's securities transactions – here manifested by the approval of the SBP – requiring preemption of those state claims

under longstanding authority. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (where federal agency permitted, but did not mandate, banks to enforce due-on-sale clauses in their mortgages, state law prohibiting such clauses was barred under conflicts preemption); *see also Credit Suisse First Boston Corp v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (SRO rules approved by the SEC preempt conflicting state law), *citing Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973).[11]

1. The Delaware Supreme Court's decision in *O'Malley v. Boris*, 742 A.2d 845 (Del. 1999), the centerpiece of Nanopierce's argument (Pet. 20-22), presents no conflict with the decision below. *O'Malley* was a suit by customers against their broker for its fraudulent misrepresentations concerning their own accounts – wholly unlike the present suit against self-regulatory organizations (that have no interactions with the petitioners) responsible for operating the national clearance and settlement system under SEC-approved

[11] *Geier* found that the plaintiffs' state law claims were barred by conflicts preemption notwithstanding a "savings clause," in the federal statute, as courts have done regularly. *Id.*, 529 U.S. at 870 (citing cases); *see also, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (finding conflicts preemption of state law claims notwithstanding a savings clause in the Clean Water Act); *American Agricultural Movement, Inc, v. Board of Trade of Chicago*, 977 F.2d 1147, 1155 (7th Cir. 1992) (finding conflicts preemption notwithstanding savings clause in Commodity Exchange Act). Petitioners' discussion of various savings clauses (Pet. 9-10) has no bearing on the conflicts preemption analysis.

rules. In *O'Malley*, the brokerage firm utilized a "negative response" letter pursuant to an NASD rule to notify its customers of an intent to transfer their accounts, without disclosing that the brokerage firm would benefit financially by doing so. The defense that the claims were preempted was unavailing because disclosing the broker's financial interest in transferring the accounts "would not interfere with the purpose of effectiveness of the NASD rule. . . ." 742 A.2d at 849. Here, by stark contrast, the requested disclosures flatly contradict the fact of the SEC's approval as well as the actual language of the SBP. Nor is *O'Malley* otherwise analogous to petitioners' claims here. The analogous claim would be a damages action under state law against brokers who failed to disclose that the NASD-approved "negative response" program inherently operated as a fraud against their customers. Nothing in *O'Malley* remotely indicates that the Delaware Supreme Court would have permitted such claim. *Compare O'Malley*, 742 A.2d at 849.

That *O'Malley* poses no conflict whatever is plain from the Delaware Supreme Court's express distinction of its decision from *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. 1996) *cert. denied*, 520 U.S. 1118 (1997), which the Petition acknowledges is consistent with the Nevada Supreme Court's decision here. (Pet. 22.) The New York Court of Appeals in *Guice* held that state law claims based on allegedly inadequate disclosures concerning order flow payments were preempted in light of the SEC's specific requirements regarding what had to be disclosed. *Guice*, 674 N.E.2d at 288. By contrast, the NASD rule at issue in *O'Malley* did not purport to limit the disclosures which may be included in a "negative action" letter. *O'Malley*, 742 A.2d at 849.

2. Nanopierce's attempt to create a decisional conflict with cases involving the Federal Alcohol Administration Act and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") (Pet. 23-30) is bootless. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) and *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004), *cert. denied*, 546 U.S. 1150 (2006), were express preemption cases in which the courts construed Congress's intent in adopting the precise preemption language at issue. The holdings of non-preemption were premised in significant part on the facts that the federal statutes at issue contemplated supplemental state regulation. In fact, FIFRA was held to be a "decentralized" statutory scheme which permitted states to ban pesticides that the EPA had approved. *Bates*, 544 U.S. at 451; *see also Bronco Wine*, 95 P.3d at 447-450. Here, by stark contrast, Congress mandated "*uniform standards and procedures for clearance and settlement*" under SEC-approved rules. 15 U.S.C. 78q-1(a)(1)(D) (emphasis added).

3. The Petition also ignores both the companion SBP cases (*supra*, n.1) and *American Agricultural Movement, Inc, v. Board of Trade of Chicago, supra* (hereafter, "*AAM*"), where the Seventh Circuit held preempted state law claims asserted against the Chicago Board of Trade – notwithstanding a savings clause in the pertinent federal regulation – because permitting the plaintiff to bring its state law claims against the Board of Trade would frustrate Congress' intent to bring the markets under a uniform set of regulations.

In *AAM*, plaintiffs had asserted various Illinois common law claims against a program operated by the

Chicago Board of Trade, pursuant to the authority of the federal Commodities Exchange Act. In holding those claims to be preempted, the Seventh Circuit held that preemption was not mandated where resolution of a dispute would affect only the relationship between broker and investor – both marketplace participants involved in the purchase and sale of securities – but would apply where the proposed application of state law would directly affect the operations of the Board of Trade itself. *Id.* 977 F.2d at 1156-57. As the court explained:

> [A] law of general application, when applied in a manner that would govern or supervise the operation of or trading on a contract market, raises the same unwelcome specter of non-uniformity as does a law that, by its terms, purports to govern or supervise the same. The crucial inquiry, we reiterate, is the context in which a law is applied . . . . Laws of general application of course operate in a variety of arenas, and are preempted only when [Appellants] attempt to use them in a manner that would, in effect, regulate the futures markets.

Id. at 1157. Here, as in *AAM*, Congress has set national uniformity as a central goal in operating the post-trade securities handling process, and claims asserted under state laws of general application are preempted to the extent that litigants seek to apply them so as to interfere with the uniform federal policy.

Nor may Nanopierce escape preemption by arguing (as it did in the Nevada courts) that its Complaint seeks

only damages, and not injunctive relief dismantling the SBP. It is beyond dispute that "a liability award 'can be, indeed is designed to be, a potent, method of governing conduct and controlling policy.'" *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). Since it is the SEC, and not the state courts, that is vested by Congress with determining whether DTCC's programs are accurate and efficient and otherwise meet the standards required by Section 17A, the judgment below is correct and warrants no further review. Once the SEC has so determined with regard to DTCC's necessarily uniform system, it would undermine Congress's expressed goals to permit the courts of the 50 states to revisit and overrule that determination, whether by injunction or by the imposition of damages awards.

II. THE DECISION RAISES NO IMPORTANT ISSUE WARRANTING THIS COURT'S REVIEW

Contrary to the Petition's claims, the decision below has no implications whatever concerning the interplay of federal and state policies of full and fair disclosure to investors and the remedies available to investors. It concerns not misrepresentations or omissions made by brokers to customers, or by anyone in connection with the purchase or sale of securities in the marketplace, but whether the operation of the system mandated by Congress and overseen by the SEC for post-trade clearing and settlement can be subject to purported state law disclosure obligations that contradict, and therefore obstruct, the federally approved system. Petitioners' discussion of state regulation of securities trading (Pet. 4-6) ignores the distinction between regulation of

trading; *i.e.*, disclosures in connection with the purchase and sale of securities, and regulation of the uniform clearance and settlement system. As petitioners concede, respondents' systems only come into play *after* the trading decisions have been made (Pet. 2), and thus petitioners' discussion of state remedies "for investors harmed by misrepresentation" strays far from the mark. *Cf. AAM*, 977 F.2d at 1156-57.

III. THERE IS NO NEED TO HOLD THE PETITION PENDING THIS COURT'S DECISION IN *ALTRIA*, WHICH RAISES WHOLLY SEPARATE ISSUES

Finally, there is no need for this Court to hold the present Petition pending its review of *Altria Group, Inc. v. Good*, 128 S. Ct. 1119 (2008) (*cert. granted* Jan. 16, 2008), an inapposite case involving the preemptive scope of the express federal preemption provision in federal tobacco regulations in the context of false advertising claims. The statute at issue in *Altria*, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), expressly precludes states from imposing requirements with respect to cigarette advertising "based on smoking or health" and the issue to be decided on *certiorari* is whether the express preemption provision precludes the application of state law unfair trade practices claim alleging a cigarette ad to be deceptive. There is no reason to suppose that in *Altria* this Court will address implied preemption in a context pertinent to this case, and *Altria* contains nothing like the statutory provision here directing the establishment

of a system with national uniformity. *Altria* is unlikely to provide additional guidance applicable to Nanopierce's preempted facial attack, and the Petition should be denied forthwith.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGG M. MASHBERG
Counsel of Record
CHARLES S. SIMS
KAREN D. COOMBS
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
Tel: (212) 969-3000
Fax: (212) 969-2900

BRUCE T. LAXALT
DONALD T. NOMURA
DANIEL T. HAYWARD
LAXALT & NOMURA, LTD
9600 Gateway Drive
Reno, Nevada 89521

Attorneys for Respondents