No. 16-

16-284

IN THE

Supreme Court of the United States

MAURICE R. GREENBERG AND HOWARD I. SMITH,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK BY ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exception to federal preemption contained in the National Securities Markets Improvement Act of 1996 for state enforcement actions alleging "fraud or deceit" applies to the New York Attorney General's prosecution of an action under state statutes that do not satisfy the federal definition of "fraud" because they do not require proof of scienter?

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JURISDICTION

The decision of the New York Court of Appeals was entered on June 2, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Further state law proceedings would occur if the Court does not grant *certiorari*. A bench trial is scheduled to commence on September 12, 2016. Nonetheless, the decision of the New York Court of Appeals is final for purposes of Section 1257(a) under the doctrine of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), because: (i) the federal issue has been finally decided; (ii) Petitioners could still prevail on state law grounds, thereby eliminating the possibility of review of the federal issue by this Court; and (iii) reversal of the Court of Appeals on the federal issue would preclude further litigation. *Cox Broadcasting* applies in cases such as this,

where Petitioners are arguing that federal law preempts state law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 546-52 (1963).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, Clause 2, of the United States Constitution provides, in full:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Relevant excerpts of other statutes, ordinances, and regulations involved in the case are set out in the Appendix:

15 U.S.C. § 77r, at Pet. App. 14a.
15 U.S.C. § 77t, at Pet. App. 25a.
N.Y. Executive Law § 63 at Pet. App. 32a.
N.Y. General Business Law §§ 352, 353, 353-a (the "Martin Act') at Pet. App. 42a.

PRELIMINARY STATEMENT

Congress has made clear its intent to create a uniform body of regulation for securities that are publicly traded on national exchanges. This case represents the latest attempt by a plaintiff, this time the Attorney General of the State of New York ("NYAG"), to violate the statutory command of national uniformity by using state law to supplant federal law. The Court has enforced Congress's preemptive intent in the context of *private* securities litigation brought under state law,[1] but has not ruled on the circumstances under which civil actions brought by a state government warrant preemption.

State enforcement actions, no less than private class actions, may impinge upon Congress's mandate of uniform national regulation of securities markets. In this case, that is exactly what has happened. Yet the New York Court of Appeals remanded the case for trial without any meaningful discussion of the fully briefed question whether federal securities law preempts the NYAG's use of state statutes that do not require proof of scienter to

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[1] *See, e.g.*, *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

assert claims alleging wrongdoing arising from alleged misstatements in public securities filings.[2]

In this case, two facts are clear: (1) the National Securities Improvement Act of 1996 ("NSMIA") broadly and expressly preempts state securities laws[3] with an exception only, as relevant here, for "enforcement actions" for "fraud or deceit"; and (2) the New York statutes at issue do not fit the definition of "fraud" under federal law because they do not require proof of scienter. The Court should grant certiorari to clarify that the exception for state enforcement actions involving "fraud or deceit" should be interpreted, consistent with the Court's guidance in related areas, as applying only to state enforcement actions that meet the federal definition of "fraud or deceit." Otherwise, New York's interpretation of the NSMIA exception will swallow the rule and thwart Congress's express purpose to ensure national uniformity in securities fraud actions.

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[2] For this reason, it may be appropriate for this Court to grant, vacate, and remand this matter to the New York Court of Appeals to address the preemption question in the first instance.

[3] *See* 15 U.S.C. § 77r(a) quoted at p. 6, *infra*.

Congress enacted three statutes in the 1990s—the Private Securities Litigation Reform Act of 1995 ("PSLRA"), NSMIA in 1996, and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")—to address the erosion of uniformity in the national securities markets caused by state laws and proceedings. To that end, NSMIA expressly preempts state securities regulation:

> "Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State . . . (3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security" that is a "covered security."

15 U.S.C. § 77r(a). The legislative history supports the plain meaning of the language of this statute: Congress deliberately chose preemption for the express purpose of eliminating the overlapping regulation of national securities markets by the federal government and the attorneys general or other regulators of fifty states. *See* H.R. Rep. No. 104-864, at 39-40 (1996) (Pet. App. 382a-384a) (describing a "dual system of regulation" as frequently "redundant, costly, and ineffective").

The instant proceeding was brought under a New York statute that for decades was used almost exclusively against boiler room stockbrokers and sponsors of cooperative and condominium projects converted from rental apartments. In the early 2000s, however, then-Attorney General Eliot Spitzer began using that "once arcane" and "moribund" statute as "the Swiss army knife of securities regulation" to assert claims for alleged wrongdoing in connection with publicly-traded securities. Phyllis Plitch, *Spitzer's Best Funds Tool Is Broad 1921 Legislation*, DOW JONES NEWSWIRE, Sept. 3, 2003, *available at* http://on.wsj.com/2cgMMP4. The NYAG claims that this action falls within an exception to NSMIA preemption for "enforcement actions" concerning "fraud or deceit." *See* 15 U.S.C. § 77r(c); Br. for Respondent at 91, *People v. Greenberg*, No. APL-2015-00172 (N.Y. Oct. 8, 2015). Petitioners do not here challenge the NYAG's position that this is an "enforcement action."[4] Petitioners raise only the

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[4] Petitioners argued in earlier state court proceedings that this action was not an "enforcement action" under the NSMIA savings clause because it originally sought damages; that issue was the subject of a New York Appellate Division decision. *See People v. Greenberg*, 946 N.Y.S.2d 1, 6 (N.Y. App. Div. 2012). The issue became moot, however, when the damages claim was dropped following Petitioners' settlement of a federal securities law class action before the Court of Appeals ruled on the "enforcement action" question. *See People v. Greenberg*, 994 N.E.2d 838, 840 (N.Y. 2013).

issue whether this action qualifies for the "fraud or deceit" savings clause in NSMIA. The Court has not previously interpreted this statutory provision.

This issue is ripe for resolution on this appeal. In denying summary judgment, the New York courts expressly defined the scope of the state's prohibition on "fraudulent practices" in a manner that sweeps far more broadly than the federal definition of these terms, including because there is no requirement of proof of scienter. *See* pp. 21-22, *infra*. Indeed, New York law has been clear since the Martin Act was enacted in 1921 that the NYAG need not prove scienter to establish a violation. *See People v. Federated Radio Corp.*, 244 N.Y. 33, 41 (1926); *People v. Greenberg*, 946 N.Y.S.2d 1, 7 (N.Y. App. Div. 2012); *State v. Justin*, 779 N.Y.S.2d 717, 739 (N.Y. Sup. Ct. 2003). Under the Martin Act, the prohibited "fraudulent practices" are defined to cover any violation of the NYAG's regulations governing securities registration and sales—including such administrative matters as failure of a securities broker-dealer to provide fingerprints to the NYAG and failure to pay annual registration fees ranging from $10 to $100—without a showing of scienter. *See, e.g.*, N.Y. Gen. Bus. Law §§ 352, 353(1), 359-e(12), 359-e(14)(b), (f), (*l*). This point is not in dispute. As the NYAG acknowledges: "The Attorney General need not prove scienter or intent to defraud in a civil claim under" these statutes. Br. for The

People of the State of N.Y. in Opp'n to Defs.' Appeal of the Denial of Defs.' Mot. for Summ. J. at 30, *People v. Greenberg*, No. 401720/05 (N.Y. App. Div. Apr. 6, 2011).

Congress intended the NSMIA exception for "fraud or deceit" to be limited to the federal definition of fraud, which requires scienter. This is demonstrated, for example, by Congress's choice—in the same sub-section creating the "fraud or deceit" exception—to carve out a broader exception to preemption for "unlawful conduct by a broker, dealer, or funding portal." *See* 15 U.S.C. § 77r(c)(1). The Court must give effect to the distinction that Congress drew between "unlawful conduct" and the narrower "fraud and deceit" language at issue here. The Court also has recognized in other contexts that terms such as "fraud" should be given their federal meaning when used in federal statutes. *See* pp. 18-20, *infra*. The decisions below ignored the distinction and thereby subverted Congressional intent.

Moreover, the structure of NSMIA and the other two securities law enactments in the 1990's manifest Congress's intent that parallel state regulation of nationwide securities trading is the exception, not the rule. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013) (SLUSA "curtailed plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud

litigation by bringing class-action suits under state rather than federal law"); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 114 (2d Cir. 2001) (federal securities laws provide "a national set of standards for litigation involving allegations of fraud in the securities markets").

The question presented here is important because an interpretation of NSMIA preemption that permits so-called "fraudulent practice" claims under state laws that do not satisfy the federal definition of "fraud" (and, in particular, do not require a showing of scienter) would overturn the careful balance that Congress struck in permitting only scienter-based state enforcement actions. The NYAG's expansive interpretation of the NSMIA savings clause threatens to create an exception that would permit state regulators and attorneys general to bring putative "fraud or deceit" enforcement claims that overstep the limits imposed by Congress. The eleven-year history of this case demonstrates the vice of permitting state government action that goes beyond the scope permitted by NSMIA. In this case, New York has expressly allowed the NYAG to seek relief harsher than what the state courts characterized as the "more lenient injunction" imposed on Petitioners by the SEC consent judgments. *See* Pet. App. 7a; note 5, *infra*.

Petitioner Greenberg served as AIG's President and Chief Executive Officer from 1968 to 1989, as its Chairman and Chief Executive Officer from 1989 until his retirement in 2005, and as a member of its Board of Directors from 1967 to 2005. Under his leadership, AIG grew to become the largest and most profitable insurance company in the world. Petitioner Smith served as AIG's Vice President and Comptroller from 1984 to 1996, as AIG's Chief Financial Officer, Executive Vice President, and Comptroller from 1996 to 2005, and as a Director of AIG from 1997 to 2005. *See generally Greenberg*, 994 N.E.2d at 840.

On May 26, 2005, then-New York Attorney General Eliot Spitzer filed the original complaint against AIG and Petitioners. All that remains of that complaint today are claims under the N.Y. General Business Law §§ 352-359 ("Martin Act") and N.Y. Executive Law § 63(12) relating to two reinsurance transactions entered into over fifteen years ago that were not material to AIG's financial statements and had no effect on AIG's shareholders' equity or net income. Am. Int'l Grp., Inc. Form 10-K for the Fiscal Year Ended Dec. 31, 2004, at 117-20, 123; Br. for Respondent at 8-13, *People v. Greenberg*, No. APL-2015-00172 (N.Y. Oct., 8, 2015).

Between the filing of NYAG's original complaint and today, related actions brought against

Petitioners by the SEC,[5] AIG,[6] and a class of AIG shareholders[7] have been resolved. Nevertheless, the NYAG continues to seek injunctive relief and disgorgement from Petitioners based on the same alleged conduct, thus overlapping the relief that had been sought in those now-settled federal actions.

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[5] Petitioner Greenberg settled with the SEC as a "control person" under Section 20(a) of the Securities Exchange Act of 1934. *See* Final Consent Judgment as to Defendant Maurice R. Greenberg (Pet. App. 387a), *SEC v. Greenberg*, No. 09-cv-6939 (S.D.N.Y. Aug. 7, 2009) ("SEC Action"); Compl. ¶¶ 117-121, 148-157 (Pet. App. 464a-465a, 471a-47aa), SEC Action (Aug. 6, 2009). Petitioner Smith also settled the SEC's claims against him. *See* Final Consent Judgment as to Defendant Howard I. Smith (Pet. App. 400a), SEC Action (Aug. 7, 2009). The SEC's allegations against both Petitioners included the two transactions that remain at issue in the NYAG action. *See* Compl. ¶¶ 4-6 (Pet. App. 478a-479a), SEC Action. Both judgments were entered "without" the Petitioners "admitting or denying the allegations of the Complaint (except as to jurisdiction)." *See* Pet. App. 387a, 400a.

[6] On November 25, 2009, Petitioners settled all outstanding actions with AIG. In that settlement, AIG agreed to "release and forever discharge" Petitioners from "any and all claims" that "could have been brought by the Parties" as of the date of settlement, including claims relating to the two transactions at issue in the NYAG action. *See* AIG Form 8-K, November 25, 2009, Ex. 10.1 at 1 (Pet. App. 510a).

[7] On April 11, 2013, Petitioners and four other defendants received federal court approval (over the NYAG's objections) for the settlement of a federal securities fraud class action brought on behalf of AIG's shareholders. That settlement, *inter alia*, released Petitioners from liability for damages claims involving the two transactions at issue in the NYAG action. *See In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013).

Because the NYAG is proceeding under state statutes that do not require proof of scienter, *see Greenberg*, 946 N.Y.S.2d at 7, there is a direct conflict between those statutes and the federal statutes under which the overlapping federal actions were brought.

On July 26, 2013, Petitioners moved for summary judgment on state law grounds (primarily that the state statutes at issue do not permit the NYAG to seek the relief sought) and on the basis of federal preemption. The trial court did not address the federal preemption issues. *See* Pet. App. 9a-13a. The Appellate Division affirmed without expressly addressing NSMIA preemption. *See* Pet. App. 7a (stating that the "existence of a federal consent judgment imposing a similar but more lenient injunction, and not providing for any acknowledgement of guilt, does not preclude the injunction sought here by the State" (citation omitted)).

The New York Court of Appeals affirmed the denial of summary judgment, holding that there were disputed issues of fact and that New York law allowed the NYAG to pursue the relief sought. Pet. App. 1a. With respect to preemption, which had been fully briefed by both sides and by amici, the Court of Appeals stated without further explanation: "Nor is there any merit to defendants' arguments

that such relief is barred under the Supremacy Clause . . . ." *Id.* at 5a.

REASONS FOR GRANTING THE PETITION

The Court should grant the Petition under Supreme Court Rule 10(c). Rule 10(c) covers situations in which a state court "has decided an important question of federal law that has not been, but should be, settled by this Court." As noted in *Dabit*, 547 U.S. at 78, "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated," and the NSMIA savings clause at issue has not previously been interpreted by the Court.

I. The NSMIA Exception to Federal Preemption for State Enforcement Actions Applies Only to Actions Alleging Fraud as Defined by Federal Law

NSMIA was enacted, together with PSLRA and SLUSA, to create uniform federal standards for regulation of nationally-traded securities. Here, however, the NYAG seeks to invoke an exception to NSMIA for enforcement actions involving "fraud or deceit" to allow prosecution for "fraudulent practices" that under state law do not require proof of scienter, which is a necessary element of securities fraud under federal law.

First, NSMIA was intended to, and does, broadly preempt state securities regulation. Federal securities statutes such as NSMIA were enacted "to provide national, uniform standards for the securities markets and nationally marketed securities." *Lander*, 251 F.3d at 111; *see also Amgen Inc.*, 133 S. Ct. at 1200; *Dabit*, 547 U.S. at 81-82. The legislative history of the federal securities laws manifests Congress's intent to designate the Federal Government as the "exclusive regulator" of the national securities markets. H.R. Rep. No. 104-622, at 16 (1996) (Pet. App. 158a). Congress thereby sought to eliminate the "dangers of maintaining differing federal and state standards of liability for nationally-traded securities." S. Rep. No. 105-182, at 3 (1998) (Pet. App. 54a). To that end, NSMIA "preempts authority that would allow the States to employ the regulatory authority they retain to reconstruct in a different form the regulatory regime for covered securities that Section 18 has preempted." H.R. Rep. No. 104-622, at 34 (1996) (Pet. App. 197a).

Prior to the enactment of the Securities Act of 1933, protection against fraudulent securities schemes was largely provided through state Blue Sky laws, such as the Martin Act. Cognizant of the need to protect "the integrity and efficient operation of the market for nationally traded securities," *Dabit*, 547 U.S. at 78, Congress enacted the two statutes

under which Petitioners were enjoined in the August 7, 2009 Consent Judgments obtained by the SEC: the Securities Act of 1933 and the Securities Exchange Act of 1934.

Six decades later, Congress reacted to attempts to use state laws and state court proceedings to weaken the exclusive federal regulation of nationally-traded securities by enacting three further pieces of legislation. Each was motivated by this same overriding purpose. Two of the statutes dealt with private litigation, particularly class action securities litigation. *See* PSLRA, 15 U.S.C. § 78u-4; SLUSA, Pub. L. No. 105-353, 112 Stat. 3227; *Dabit*, 547 U.S. at 81-82, 86 (SLUSA was intended to prevent use of state law and state courts "to frustrate the objectives of the" PSLRA and to avoid "wasteful, duplicative litigation" such as "parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts" (internal quotation marks omitted)); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 335, 345-46 (2005).

For similar reasons, Congress also enacted NSMIA, which expressly preempts Blue Sky laws that redundantly and inefficiently required issuers to register nationally traded securities with a State prior to marketing those securities in that State. *Lander*, 251 F.3d at 108. NSMIA streamlined the

regulatory process to avoid the "dual system of regulation that, in many instances, is redundant, costly and ineffective." H.R. Rep. No. 104-864, at 39 (1996) (Pet. App. 383a).

PSLRA, NSMIA and SLUSA together embody Congress's recognition of "the benefits flowing to investors from a uniform national approach" and the considered judgment of Congress that those benefits outweigh competing federalism interests. S. Rep. No. 105-182, at 3-4 (1998) (Pet. App. 54a-58a). The federal securities laws aim to prevent any single State from "impos[ing] the risks and costs of its peculiar litigation system on all national issuers," *id.* at 5 (Pet. App. 59a), and to eliminate "[d]isparate, and shifting, state litigation procedures," which may create "significant liability that cannot easily be evaluated in advance," *id.* at 3 (Pet App. 54a).

Second, the exception to NSMIA preemption for state "enforcement actions" "with respect to fraud or deceit," 15 U.S.C. § 77r(c)(1), should be interpreted narrowly and consistently with the federal definition of fraud. In striking contrast to this narrowly drafted exception to preemption, when Congress wished to preserve a broader role for state regulation of securities markets, it used correspondingly broader language. In the same statutory sub-section of NSMIA that creates the "fraud or deceit" exception, Congress spelled out a broader exception

to preemption for "unlawful conduct by a broker, dealer, or funding portal." 15 U.S.C. § 77r(c)(1).[8] The Court must give effect to the distinction Congress drew between "unlawful conduct" and the narrower "fraud and deceit" language at issue here. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presumes' that Congress intended a difference in meaning." (brackets omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Determining whether an enforcement action qualifies for the "fraud or deceit" savings clause requires analysis of the meaning of those terms under *federal* law. *See, e.g.*, *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 431 (1986); *Reconstruction Fin. Corp. v. Beaver County, Pa.*, 328 U.S. 204, 208 (1946). As the Court stated earlier this year in the context of interpreting the False Claims Act, "the term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud." *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016) (citing

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[8] No such conduct is at issue here.

Neder v. United States, 527 U.S. 1, 22 (1999) for the proposition that "the term actionable fraud is one with a well-settled meaning at common law" (internal quotation marks omitted)); *see also Mathis v. United States*, 136 S. Ct. 2243, 2247-48 (2016) (declining to find an exception to a rule requiring comparison of "the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—*i.e.*, the offense as commonly understood").

Third, the federal definition of fraud requires scienter. As the Court recently recognized in interpreting federal law in this important respect, "actual fraud" ("any fraud that involves moral turpitude or intentional wrong") "stands in contrast" to "implied fraud" ("which describe[s] acts of deception that may exist without the imputation of bad faith and morality"). *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) (internal quotation marks and brackets omitted). This distinction comports with the principle that common law fraud is "actual fraud," requiring at least recklessness, and cannot be proven by evidence of mere negligence. *See* Restatement (Second) of Torts § 526 & cmt. e.

The definition of fraud under federal securities law tracks the common law understanding and prohibits only "actual fraud" under the *Husky* framework—*i.e.*, fraud with a *mens rea* (or scienter)

component. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) ("When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct."). The point is underlined by the dissent's position in *Ernst & Ernst*—which was rejected by the Court—that Rule 10b-5 should "extend beyond common-law fraud, and . . . apply to negligent omission and commission." *Id.* at 216-17 (Blackmun, J., dissenting).

The Court has recognized the crucial importance of scienter under the federal securities laws, finding that the "fact of scienter constitutes an important and necessary element of a § 10(b) violation," and a "plaintiff cannot recover without proving that a defendant made a material misstatement *with an intent to deceive*—not merely innocently or negligently." *Merck & Co. v. Reynolds*, 559 U.S. 633, 648-49 (2010) (emphasis in original) (internal quotation marks and brackets omitted); *see* 15 U.S.C.A. § 78u-4(b)(2) (PSLRA) (requiring "proof that the defendant acted with a particular state of mind"). The Court repeatedly has addressed the proper application of scienter requirements. *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S.

27, 48-50 (2011); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-24 (2007); *Ernst & Ernst*, 425 U.S. at 214-15. The balance struck by Congress and recognized by the Court will be undone if the NSMIA exception is allowed to swallow the preemption rule by permitting state enforcement actions that do not require proof of scienter.

Fourth, the New York statutes at issue, as interpreted in and applied to this case, are far broader than the federal definition of securities fraud—or even common law fraud. Under New York's Martin Act, liability for "fraudulent practices" can be imposed without any proof of scienter, and on the basis of what *Husky* termed "implied fraud." *See Federated Radio Corp.*, 244 N.Y. 33, 40-41.[9] Indeed, and as applied to this case, it cannot reasonably be disputed that the statutes at issue here fall into *Husky*'s "implied fraud" category. The New York Appellate Division, in denying Petitioners' earlier motion for summary judgment, and at the NYAG's

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[9] As discussed at p. 8, *supra*, violations of the NYAG's various regulations governing securities registration and sales are defined to constitute a "fraudulent practice" under the Martin Act. *See, e.g.*, N.Y. Gen. Bus. Law §§ 353(1), 359-e(12), 359-e(14)(b), (f), (*l*).

urging,[10] relied upon an extraordinarily broad interpretation and application of the state statutes. This sweeping interpretation encompasses conduct well outside the federal definition of "fraud," and extends even beyond the dissenters' position in *Ernst & Ernst* (*see* p. 20, *supra*):

> The Martin Act defines fraud as any device, scheme or artifice[,] deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise. Fraud under the Martin Act includes all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public. Executive Law § 63(12) includes virtually identical language to the Martin Act. Both statutes have been liberally construed to defeat all unsubstantial and visionary schemes whereby the public is fraudulently exploited. The Attorney General *need*

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[10] *See* Br. for The People of the State of N.Y. in Opp'n to Defs.' Appeal of the Denial of Defs.' Mot. for Summ. J. at 30, *People v. Greenberg*, No. 401720/05 (N.Y. App. Div. Apr. 6, 2011).

> *not prove scienter or intent to defraud in a civil claim under either statute.*

Greenberg, 946 N.Y.S.2d at 7 (emphasis added; citations, internal quotation marks, brackets, and ellipses omitted).

* * * *

The meaning of "fraud or deceit" in the NSMIA savings clause, and the further application of *Husky* to the context of public enforcement of securities law, is an issue of national importance that the Court should address to preserve the uniform standards established by Congress for nationally-traded securities.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari.

August 30, 2016

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