No. 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

Brief in Opposition

Eric T. Schneiderman
Attorney General of the State of New York
Barbara D. Underwood*
Solicitor General
Steven C. Wu
Deputy Solicitor General
Andrew W. Amend
Senior Assistant Solicitor General
Judith N. Vale
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov

Counsel of Record

Counsel for Respondent

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the National Securities Markets Improvement Act of 1996—which expressly preserves the States' historic power to police fraud and deceit in the securities markets—leaves intact the States' long-standing authority to protect investors from fraudulent and deceitful acts without requiring proof of scienter?

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION...... 7

A. This Court Lacks Jurisdiction Because the Interlocutory Decision Below Is Not a Final Judgment Under 28 U.S.C. § 1257(a). 8

B. Certiorari Is Not Warranted to Address the Scope of NSMIA's Savings Clause. ... 14

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page(s)**

Aaron v. SEC, 446 U.S. 680 (1980) 21

Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) 11

Arizona v. United States, 132 S. Ct. 2492 (2012) 20

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 9

Capital Research & Mgmt. Co. v. Brown, 147 Cal. App. 4th 58 (2007) 14

Chamberlin v. Advanced Equities, Inc., No. 01-cv-502, 2002 WL 34419450 (W.D. Wash. Jan. 17, 2002) 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1,9,12

Florida v. Thomas, 532 U.S. 774 (2001) 12

Flynt v. Ohio, 451 U.S. 619 (1981) 10,13,14

Foster v. Alex, 213 Ill. App. 3d 1001 (1991) 20

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 11

Hall v. Geiger-Jones Co., 242 U.S. 539 (1917).......... 19

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 21

Husky International Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (2016) 21,22

In re Morgan Stanley Information Fund Secs. Litig., 592 F.3d 347 (2d Cir. 2010)....................... 21

Jefferson v. City of Tarrant, 522 U.S. 75 (1997).... 8,12

Johnson v. California, 541 U.S. 428 (2004)............. 11

TABLE OF AUTHORITIES

Cases **Page(s)**

Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101 (2d Cir. 2001) 15

Leroy v. Great W. United Corp., 443 U.S. 173 (1979) 19

Local No. 438 Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963) 11

Martin v. Hallliburton, 618 F.3d 476 (5th Cir. 2010) 10

O'Dell v. Espinoza, 456 U.S. 430 (1982) 8

Papic v. Burke, 113 Conn. App. 198 (2009) 14

People v. Applied Card Sys., Inc., 11 N.Y.3d 105 (2008) 6

People v. Federated Radio Corp., 244 N.Y. 33 (1921) 5

People v. Greenberg, 2010 N.Y. Slip Op. 33216(U), 2010 WL 4732745 (Sup. Ct. 2010) 2,3,6,10

People v. Greenberg, 21 N.Y.3d 439 (2013) 6

People v. Greenberg, 95 A.D.3d 474 (N.Y. App. Div. 2012)... 2,6,10,13

People v. Landes, 84 N.Y.2d 655 (1994).................... 17

People v. Simon, 9 Cal. 4th 493 (1995) 20

People v. Trump Entrepreneur Initiative LLC, 137 A.D.3d 409 (N.Y. App. Div. 2016)................... 5

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) 21

Sutherland Corp. v. Keating, 465 U.S. 1 (1984) 11

Trivectra v. Ushijima, 112 Haw. 90 (2006) 19

TABLE OF AUTHORITIES

Cases **Page(s)**

United States v. Ferguson, 676 F.3d 260 (2d Cir. 2011) 3

Zuri-Invest AG v. Natwest Finance Inc., 177 F. Supp. 2d 189 (S.D.N.Y. 2001) 18

Laws

15 U.S.C.
§ 77aa 16
§ 77f 16
§ 77g 16
§ 77j 16
§ 77k 21
§ 77*l* 21
§ 77p 19
§ 77q 21
§ 77r 14,16,17,18
§ 78bb 19

28 U.S.C. § 1257(a) 7,8,11

Cal. Gov't Code § 12658 20

815 Ill. Comp. Stat. § 5/11 20

N.Y. C.P.L.R. 5501 12,14

N.Y. Executive Law § 63 4,17

N.Y. General Business Law § 353 17

Miscellaneous Authorities

Alan R. Bromberg, Lewis D. Lowenfels, & Michael J. Sullivan, *Securities Fraud & Commodities Fraud* § 7:45 (2d ed. 2003 Westlaw) 19

TABLE OF AUTHORITIES

Miscellaneous Authorities **Page(s)**

American International Group, Inc., Annual Report (Form 10-K) (May 31, 2005) 3,4

H.R. Rep. No. 104-622 (1996)................................... 18

Uniform Securities Act (2002) 16, 20

JURISDICTION

The Court has no jurisdiction to review this interlocutory order of the New York Court of Appeals, which affirmed the denial of petitioners' motions for summary judgment and directed the parties to proceed to trial. That order, as explained below, is not a final judgment of a state court reviewable under 28 U.S.C. § 1257(a), and does not fall within any of the exceptions set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

STATEMENT

1. This petition for a writ of certiorari seeks interlocutory review of a nonfinal decision by the New York Court of Appeals directing that this civil securities-fraud enforcement action by the New York Attorney General finally proceed to trial—after more than a decade of pretrial disputes and multiple interlocutory appeals by petitioners. Petitioners did not seek or obtain a stay of the trial, which began in September and is expected to conclude in January 2017. Petitioners nevertheless ask this Court to take this case now to address a preemption argument that has uniformly failed in state and federal courts to date.

2. The events giving rise to this action involve fraudulent transactions by which senior executives at American International Group, Inc. (AIG) concealed and misrepresented important information about the company and thus gave the investing public a false and misleading picture of its financial health. (*See* Pet. App. 477a-504a.) AIG has acknowledged the impropriety of these transactions and has paid more

than one billion dollars in fines, disgorgement, and other monetary relief to settle both public and private claims arising out of these transactions.

This civil enforcement proceeding seeks to hold accountable two key individuals at AIG who were responsible for these frauds: Maurice R. Greenberg, then the company's Chief Executive Officer, and Howard I. Smith, then the company's Chief Financial Officer. Details of the frauds are set forth in the Attorney General's amended complaint (Pet. App. 477a-504a), as well as the various opinions generated in the course of this proceeding, *see*, *e.g.*, *People v. Greenberg*, 95 A.D.3d 474, 475-78 (N.Y. App. Div. 2012); *People v. Greenberg*, 2010 N.Y. Slip Op. 33216(U), at *3-*25, 2010 WL 4732745 (Sup. Ct. 2010). The following is a brief overview of the two fraudulent transactions at issue in the trial now underway. These two transactions are regularly referred to in this litigation as "Gen Re" and "Capco." The complaint alleges, and the evidence at trial will show, that both transactions were fraudulent schemes in which petitioners played central roles.

Gen Re involved a fictitious reinsurance agreement used by petitioners to mislead the public about an important metric of AIG's financial condition called loss reserves. In late October 2000, AIG's stock price suffered a sharp decline after AIG reported a decrease in its loss reserves, and Greenberg was determined to find a way to increase those reserves. He negotiated the following transaction, which was implemented in important part by Smith. On paper, AIG agreed to reinsure a half-billion-dollar portfolio of policies primarily insured by another company, General Reinsurance Corp. In principle, such a transaction would increase AIG's loss reserves, but only if

AIG actually faced some risk of having to pay claims. In reality, the companies secretly agreed that AIG would not take on any risk at all. The purported reinsurance agreement that petitioners used to boost AIG's loss reserves was thus a fabrication. (Pet. App. 483a-487a.)

The scheme's fraudulent nature was confirmed by a 2005 restatement of AIG's financial statements for 2000-2004, *see* AIG, Annual Report (Form 10-K), at 32-33 (May 31, 2005), and by a federal prosecution of other participants in the scheme.[1]

In Capco, petitioners fraudulently concealed a separate problem at AIG—the abysmal underwriting results of its auto-warranty business. In the early 1990s, AIG began writing auto-warranty insurance policies that, by the end of the decade, had turned into what Greenberg called a "major loser" with "horrendous results." *Greenberg*, 2010 N.Y. Slip Op. 33216(U), at *19, 2010 WL 4732745 (quotation marks omitted).

---

[1] *See United States v. Ferguson*, 676 F.3d 260, 267-73 (2d Cir. 2011). The *Ferguson* defendants were convicted but had their convictions vacated on narrow grounds not relevant to the existence of fraud in the Gen Re transaction. *Id.* at 267. They subsequently entered into deferred-prosecution agreements acknowledging that "aspects of the [Gen Re] transaction were fraudulent" and that they should have "attempted to stop [the transaction] from going forward, but instead continued to participate in it." *See* Consent Mot. for Deferred Prosecution Continuance, *United States v. Ferguson*, No. 06-cr-137 (D. Conn. June 22, 2012) (Dkt. No. 1379 Exs. A-E); Deferred Prosecution Order, *United States v. Ferguson*, No. 06-cr-137 (D. Conn. June 25, 2012) (Dkt. No. 1382).

Petitioners publicly emphasized underwriting profit as the true measure of the performance of AIG's core insurance business, and were thus eager to avoid reporting such a bad outcome. They therefore implemented a fraudulent scheme to disguise the auto-warranty program's underwriting losses as investment losses, which would not invite the same skepticism about AIG's core business. The scheme consisted of a series of dealings in which AIG caused its auto-warranty losses to be absorbed by an offshore shell corporation, Capco Reinsurance Company, Ltd., that was ostensibly a separate entity controlled by outsiders, but was actually controlled and financed by AIG. (Pet. App. 491a-497a.)

AIG confirmed the fraudulent character of the Capco transaction in the same 2005 restatement that dealt with Gen Re. The restatement acknowledged that the Capco transaction wrongly disguised AIG's auto-warranty underwriting losses as investment losses through "an improper structure" that appeared "to have not been properly disclosed to appropriate AIG personnel or its independent auditors." AIG, Annual Report, *supra*, at 36-37.

3. The New York Attorney General commenced this civil enforcement proceeding against Greenberg and Smith in May 2005, soon after these and other transactions came to light. The Attorney General's claims here arise under both New York's "blue-sky" law, known as the Martin Act, N.Y. General Business Law art. 23-A, and New York's more general business-fraud statute, N.Y. Executive Law § 63(12). (Pet. App. 502a-503a.) Each of these laws is enforceable only by the Attorney General, and authorizes a wide range of equitable and legal relief for fraud, broadly defined.

In particular, the New York Court of Appeals has long held that the Martin Act and Executive Law § 63(12) do not require the Attorney General to show scienter or fraudulent intent. As the Court explained in 1921, the goal of the Martin Act was "to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all unsubstantial and visionary schemes in relation thereto whereby the public is fraudulently exploited." *People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1921). Accordingly, the Court held that "[t]he words 'fraud' and 'fraudulent practice,' in this connection," should "be given a wide meaning, so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law." *Id.* Executive Law § 63(12)'s nearly identical definition of fraud has likewise been interpreted not to require proof of scienter. *See People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417 (N.Y. App. Div. 2016).

4. The trial of this action has been delayed by numerous interlocutory appeals, as permitted by New York law. As relevant here, petitioners have twice moved for summary judgment, twice had their motions denied, and twice had the denials of those motions affirmed on appeal by New York's Appellate Division and Court of Appeals. The current petition seeks review of only the denial of petitioners' second motion for summary judgment, but a brief discussion of the first motion provides context.

Petitioners first sought summary judgment in 2009. They argued, *inter alia*, that the Attorney General's claim for damages was preempted by

federal statutes that, petitioners asserted, barred any state law action seeking compensation for investors that did not require a showing of scienter. Among the statutes petitioners invoked was the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (NSMIA). Both the trial court and the Appellate Division rejected petitioners' arguments. *See Greenberg*, 2010 N.Y. Slip Op. 33216(U), at *26-*34, 2010 WL 4732745; *Greenberg*, 95 A.D.3d at 479-82.

While the matter was on appeal to the New York Court of Appeals, the Attorney General withdrew his request for damages due to the settlement of a related federal class action, but continued to seek equitable relief. *See People v. Greenberg*, 21 N.Y.3d 439, 446-47 (2013) (citing *In re Am. Int'l Grp., Inc. Secs. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013)); *see also People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 121-26 (2008) (holding that such class-action settlements preclude certain claims for monetary relief by the Attorney General). In light of the withdrawal of the request for damages, the Court of Appeals observed that "[t]he parties agree" that issue of federal preemption "is out of the case." *Greenberg*, 21 N.Y.3d at 447. The Court of Appeals additionally held that there was sufficient evidence "that both Greenberg and Smith participated in a fraud" to warrant a trial, and that the scope of any equitable relief should be "decided by the lower courts in the first instance." *Id.* at 447-48.

On remand, petitioners again moved for summary judgment, arguing, *inter alia*, that all of the equitable relief sought by the Attorney General was preempted because NSMIA banned *all* antifraud enforcement actions by state securities regulators that did not

require a showing of scienter. The state courts uniformly rejected petitioners' arguments.

In the decision challenged by this petition, the Court of Appeals noted that its earlier decision had already rejected many of petitioners' arguments, including the argument that equitable relief was unavailable because the Securities and Exchange Commission (SEC) had supposedly obtained "'all such relief that could possibly be awarded'" against petitioners. (Pet. App. 1a-2a (quoting *Greenberg*, 21 N.Y.3d at 447-48).) The Court noted that petitioners "may not relitigate the issues that were resolved in our [prior] decision." (Pet. App. 3a.) The Court went on to reject the balance of petitioners' arguments, including their claim that disgorgement, if awarded by the trial court, would be "barred under the Supremacy Clause." (Pet. App. 5a.) The Court reiterated that issues of fact about petitioners' culpability prevented a conclusion that equitable relief was unavailable as matter of law, and it directed that the matter "should proceed to trial." (Pet. App. 1a.)

That trial is currently underway and is expected to conclude in January. By the time this Court considers this petition, both petitioners will have concluded their live testimony.

REASONS FOR DENYING THE PETITION

The petition should be denied for two independent reasons. First, under 28 U.S.C. § 1257(a), this Court has no jurisdiction to review an interlocutory order of the New York Court of Appeals that merely affirmed the denial of summary judgment. Second, petitioners' arguments about NSMIA preemption—and more specifically the scope of that statute's

savings clause—implicate no split of authority or important federal question warranting this Court's review, and in any event the decision below was correct.

A. This Court Lacks Jurisdiction Because the Interlocutory Decision Below Is Not a Final Judgment Under 28 U.S.C. § 1257(a).

1. This Court's jurisdiction to review state court decisions is limited to the review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The decision below does not satisfy that jurisdictional requirement.

The petition asks this Court to review a decision of the New York Court of Appeals that affirmed the denial of petitioners' motions for summary judgment and directed the parties to "proceed to trial" (Pet. App. 1a). That trial is currently ongoing and scheduled to be completed within months. The decision below is thus plainly not "an effective determination of the litigation" that satisfies § 1257(a)'s "firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Market St. Ry. v. R.R. Comm'n*, 324 U.S. 548, 551 (1945)); *see O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam) (Court lacked jurisdiction where state court had remanded "case for trial").

2. This case does not present any of the "limited set of situations" where review of a federal issue may be obtained despite the absence of a final state judgment, *Jefferson*, 522 U.S. at 82 (quotation marks omitted), commonly called the four *Cox* exceptions.

See generally Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

a. Petitioners appear to rely solely on the fourth *Cox* exception as a purported basis for jurisdiction. Pet. 1. That exception applies only when (i) a reversal on the federal issue "would be preclusive of" further state proceedings, "rather than merely controlling the nature and character of . . . the state proceedings still to come"; and (ii) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broad.*, 420 U.S. at 482-83. Neither prong of that exception is satisfied here.

First, reversal on the federal preemption issue here would not preclude further state proceedings. Even if this Court were to hold that NSMIA has the preemptive effect that petitioners claim—and it does not (see *infra* at 14-22)—the sole consequence of such a holding would be to require the Attorney General to establish at trial that petitioners committed fraud with scienter. Such a holding would "merely control[] the nature and character of . . . the state proceedings still to come," *Cox Broad.*, 420 U.S. at 483, by requiring proof of an additional element not mandated by New York law; it would not "terminate the state action" altogether, as required for the fourth *Cox* exception to apply, *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983).

There is no prospect that this litigation would terminate if this Court were to hold that the Attorney General must establish petitioners' scienter in order to avoid federal preemption. Although New York law does not require proof of scienter to hold petitioners liable for securities and business fraud, the Attorney General has repeatedly argued that the evidence

here supports a finding that petitioners acted with scienter. *See, e.g.*, Br. for Respondent at 97-98, 105-123, *Greenberg*, 21 N.Y.3d 439, 2012 WL 9502920. The trial and intermediate appellate courts have agreed that the evidence at summary judgment strongly suggests that petitioners acted knowingly or recklessly, although both courts recognized that a trial would be necessary to definitively resolve the question. *See Greenberg*, 95 A.D.3d at 485 (evidence demonstrates that petitioners acted "with knowledge of the deceptive purpose" that their accounting frauds were "intended to achieve"); *Greenberg*, 2010 N.Y. Slip Op. 33216(U), at *71, 2010 WL 4732745 (evidence "strongly suggest[s] knowledgeable conduct" by petitioners). And in the ongoing trial, the Attorney General has presented—and intends to continue presenting—evidence that petitioners knowingly or recklessly committed the two accounting frauds at issue here. The ability of the trial court to determine that petitioners in fact acted with scienter thus defeats any suggestion that petitioners' preemption argument, even if accepted by this Court, would be fatal to further state-court proceedings.

Second, declining to consider petitioners' preemption argument now will not erode any important federal policy. Petitioners' assertion that "federal law preempts state law" (Pet. 2) does not identify a concrete or pressing federal interest that "will suffer if the state [trial] goes forward," *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). As a general rule, the interlocutory "denial of a claim that state law is preempted by federal law is not an order that may be immediately appealed." *Martin v. Hallliburton*, 618 F.3d 476, 486 (5th Cir. 2010); *see id.* n.16 (collecting

authority); *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 219 (4th Cir. 2012) (en banc). This principle of federal appellate jurisdiction extends also to run-of-the-mill denials of federal preemption claims in state actions because a "contrary conclusion would permit" the fourth *Cox* exception "to swallow" the finality rule every time a petitioner invokes preemption. *Johnson v. California*, 541 U.S. 428, 430 (2004) (per curiam) (quotation marks omitted).

The cases cited by petitioners (Pet. 2) do not support their assertion that claims of federal preemption invariably satisfy the fourth *Cox* exception. Rather, each of these cases involved exceptional situations where federal interests were particularly heightened. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179 (1988) (state regulation of federally owned facility, which was "the only nuclear facility producing nuclear fuel for the Navy's nuclear fleet"); *Sutherland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (Federal Arbitration Act); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-49 (1963) (interference with exclusive jurisdiction of National Labor Relations Board).

No similar circumstances are presented here. To the contrary, as explained below (see *infra* at 18-19), Congress has repeatedly expressed its approval of and intent to preserve state-law enforcement actions against securities fraud. This case thus does not present any threat to a federal policy that would warrant disregarding the finality rule of § 1257(a).

b. Petitioners do not rely on any of the other three *Cox* exceptions, and none of them has any application here.

First, this matter is not one where "the case is for all practical purposes concluded" by the resolution of the federal issue. *Cox Broad.*, 420 U.S. at 479. To the contrary, as the ongoing trial has demonstrated, there are substantial factual and state-law disputes between the parties that have yet to be resolved, including the precise nature of petitioners' involvement in the alleged frauds and the appropriateness of any equitable relief. Because petitioners may thus still "prevail at trial on the facts" or on a key "nonfederal ground," the first *Cox* exception is inapplicable. *Id.* at 481; *see also Florida v. Thomas*, 532 U.S. 774, 777-78 (2001).

Second, this case is not one where the federal issue is guaranteed to "survive and require decision regardless of" the trial's outcome. *Cox Broad.*, 420 U.S. at 480. As discussed, a decision by this Court on the federal preemption issue will become unnecessary if petitioners prevail at trial based on factual or state-law grounds. The second exception is thus inapplicable because resolution of the pending "state-law claims could effectively moot the federal-law question." *Jefferson*, 522 U.S. at 82; *see also Cox Broad.*, 420 U.S. at 480 (second exception applicable only if "[n]othing that could happen in the course of" the trial "would foreclose or make unnecessary decision on the federal question").

Third, this case is not one where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broad.*, 420 U.S. at 481. The "governing state law" permits petitioners to present their federal preemption argument for review if they are subject to an adverse final judgment. *Id.*; *see* N.Y. C.P.L.R. 5501(a)(1) (appeal from final judgment "brings up for review" any interlocutory

ruling that "necessarily affects" case's outcome). And petitioners have made clear that they intend to raise preemption again at trial as a defense to any finding of liability or imposition of equitable relief. Because the federal preemption issue remains open for this Court to resolve on any appeal that petitioners take from a final judgment in this proceeding, the third *Cox* exception does not apply.

Finally, the decision below does not warrant invoking any of the *Cox* exceptions for an additional reason: while the petition brings up one discrete federal issue, there could well be other federal issues to review after the state trial concludes, and the resulting risk of piecemeal review counsels against finding an exception to the final judgment rule. *See Flynt*, 451 U.S. at 621. During this proceeding, petitioners have repeatedly argued to the New York courts that the Attorney General's fraud claims are preempted not only by NSMIA but also by other federal statutes, including the Securities Litigation Uniform Standards Act and the Private Securities Litigation Reform Act. *See Greenberg*, 95 A.D.3d at 479-82; *see also, e.g.*, Joint Br. for Defs.-Appellants at 71 n.34, *People v. Greenberg*, 27 N.Y.3d 490 (2016) (APL-2015-00172).[2] Petitioners do not raise these separate preemption arguments here, but would likely do so in an appeal from the final judgment. *See* N.Y. C.P.L.R. 5501(a)(1). This threat of "piecemeal review with respect to federal issues" further warrants denying certiorari to review an interlocu-

---

[2] The brief is available at www.nycourts.gov/ctapps/courtpass/ (Search; Party Name: Maurice Greenberg).

tory order of the New York Court of Appeals. *Flynt*, 451 U.S. at 621.

B. Certiorari Is Not Warranted to Address the Scope of NSMIA's Savings Clause.

Petitioners ask this Court to address whether NSMIA's express preservation of state authority to "investigate and bring enforcement actions . . . with respect to . . . fraud or deceit," 15 U.S.C. § 77r(c)(1)(A)(i), encompasses all state fraud claims (as the plain language indicates), or only those state fraud claims that require proof of scienter. Even if this Court had jurisdiction here, certiorari would not be warranted to address this question.

1. Petitioners have identified no split of authority that requires this Court's resolution. The decision below does not conflict with any decision from the federal courts of appeals or the state appellate courts. To the contrary, the lower courts have consistently rejected the argument that NSMIA inhibits States' ability "to implement greater protections from fraudulent activity than the federal law provides." *Chamberlin v. Advanced Equities, Inc.*, No. 01-cv-502, 2002 WL 34419450, at *3 (W.D. Wash. Jan. 17, 2002); *see also Papic v. Burke*, 113 Conn. App. 198, 205-10 (2009) (rejecting NSMIA preemption challenge to state civil-enforcement proceeding under antifraud statute lacking scienter requirement); *Capital Research & Mgmt. Co. v. Brown*, 147 Cal. App. 4th 58, 70 & n.8 (2007) ("summarily" rejecting argument that NSMIA "preserved only common law fraud claims (which require an intent to deceive)"). Nor does the decision below conflict with any decision of this Court because, as petitioners acknowledge

(Pet. 8), this Court has not previously interpreted the scope of NSMIA's savings clause.

2. Certiorari is also not warranted because petitioners' preemption argument is meritless, and the New York Court of Appeals properly rejected it.

a. As a threshold matter, petitioners' exclusive focus on the scope of NSMIA's savings clause assumes that, absent the application of that clause, NSMIA would otherwise preempt this enforcement proceeding. That assumption is incorrect. NSMIA expressly preempts only state laws relating to securities registration or review, and not state laws prohibiting fraud. Those preemption provisions have little or no effect in New York because New York law does not have the kind of law they preempt—New York does not impose registration or review requirements for securities offerings, except in narrow circumstances not relevant here. Instead, New York protects the integrity of the marketplace by prohibiting fraud—in securities transactions specifically under the Martin Act, and in business transactions generally under Executive Law § 63(12). NSMIA's preemption provisions simply do not extend to such antifraud statutes.

Congress enacted NSMIA to provide uniformity in registration rules for nationwide securities offerings, *i.e.*, the standards governing the form, content, and review of securities offering documents. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001). Before NSMIA, such securities offerings were subject to overlapping federal and state regimes. Federal securities laws administered by the SEC prescribed the form and content of offering documents, including prospectuses

and periodic subsequent filings. *See*, *e.g.*, 15 U.S.C. § 77f (registration of securities); *id.* § 77g (registration statement); *id.* § 77j (prospectus); *id.* § 77aa (schedule of information required in registration statement). At the same time, most States' blue-sky laws also created parallel regulatory registration and review regimes that (1) prescribed the specific content and format of securities offering documents, as federal law did; and (2) in many cases, also imposed varying systems of "merit review" under which state regulators would approve the terms or fairness of securities offerings before they were made. *See*, *e.g.*, Uniform Securities Act §§ 304, 306(a)(7) & cmt. 8 (2002).

NSMIA established uniform federal rules for securities registration and eliminated competing state standards by expressly preempting state statutes or regulations that require "registration or qualification" of covered securities. 15 U.S.C. § 77r(a)(1). The statute also preempts state laws or regulations that "directly or indirectly prohibit, limit, or impose any conditions" on the use of securities offering documents or disclosure documents required to be filed with the SEC. *Id.* § 77r(a)(2). And NSMIA further preempts state "merit review" of covered securities offerings, thus displacing state laws that "directly or indirectly prohibit, limit, or impose conditions" on the offer or sale of a covered security "based on the merits of such offering or issuer." *Id.* § 77r(a)(3).

The triggering condition for all of these preemption provisions is a state registration or review scheme that applies to covered securities. No such scheme exists in New York: in contrast to most other States, New York has never imposed registra-

tion or review requirements for securities, except in circumstances not applicable here. *See People v. Landes*, 84 N.Y.2d 655, 660-61 (1994) (identifying "real estate securities, theatrical syndication offerings, and issues offered solely intrastate" as the only securities subject to New York registration requirements). Because NSMIA's preemption provisions thus do not apply at all to this proceeding, the scope of the statute's savings clause is immaterial.

b. Even if NSMIA had some potential preemptive effect here, its savings clause would apply to this enforcement action under the Martin Act and Executive Law § 63(12).

NSMIA's savings clause provides: "[T]he 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, in connection with securities or securities transactions . . . with respect to . . . fraud or deceit." 15 U.S.C. § 77r(c)(1)(A). There is no question that the New York laws underlying this enforcement action address "fraud or deceit": the Martin Act is expressly directed at "fraudulent practices" in the securities marketplace, N.Y. General Business Law § 353(1); and Executive Law § 63(12) prohibits "repeated" or "persistent fraud . . . in the carrying on, conducting or transaction of business." This enforcement action alleging fraud in connection with securities accordingly satisfies the plain terms of NSMIA's savings clause.

Petitioners' contrary argument (*see* Pet. 17–21) reads language into NSMIA's savings clause that Congress never enacted. Petitioners contend that the

phrase "fraud or deceit" should be read to say "fraud or deceit *with scienter*," thus imputing to Congress an implicit intent to preempt state antifraud laws that, like New York's, do not require a showing of scienter. No court has ever endorsed such a theory, and the courts that have addressed this argument have properly rejected it. See *supra* at 14-15.

The text and history of the saving clause show that Congress was not imposing a uniform federal standard of liability upon the States, but rather preserving preexisting state law on fraud or deceit in the securities marketplace, such as the Martin Act. The title of the savings clause is "*Preservation* of authority." 15 U.S.C. § 77r(c) (emphasis added). And the provision's text says that state authorities "shall *retain* jurisdiction *under the laws of such State* to investigate and bring enforcement actions" with respect to fraud or deceit in securities transactions. *Id.* § 77r(c)(1) (emphasis added). The legislative history, moreover, unequivocally repudiates any intent to change the standards of securities fraud established by preexisting state law. The House Report stresses that the statute did not intend to "*alter, limit, expand, or otherwise affect in any way* any State statutory or common law with respect to fraud or deceit . . . in connection with securities or securities transactions." H.R. Rep. No. 104-622, at 34 (1996) (emphasis added) (Pet. App. 198a). "A more clear cut statement against preemption would be hard to find." *Zuri-Invest AG v. Natwest Finance Inc.*, 177 F. Supp. 2d 189, 194 (S.D.N.Y. 2001).

Congress's intent to preserve existing state authority in NSMIA is consistent with its long-standing recognition of the important role played by state antifraud enforcement. State "blue-sky laws"

have policed securities fraud for at least a century, well before Congress addressed this issue. *See*, *e.g.*, *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). When Congress enacted the first federal securities laws in the 1930s, it expressly recognized and preserved the states' preexisting "leeway to regulate securities transactions" by including broad saving clauses "designed to save state blue-sky laws from preemption." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 182 n.13 (1979). Today, such clauses are contained not only in NSMIA, but also in multiple other provisions of federal securities law. *See, e.g.*, 15 U.S.C. §§ 77p(a), (e), 78bb(a)(2), (f)(4). An interpretation of NSMIA's savings clause that preserves state authority to enforce their antifraud statutes is thus consistent with both the history and current structure of federal securities law.

By contrast, accepting petitioners' argument would paradoxically infer from NSMIA's *preservation* of state authority an intent by Congress to sweepingly override preexisting state antifraud laws. New York's blue-sky law was understood not to require scienter for more than seventy-five years before passage of NSMIA, and most other States likewise do not require scienter in civil securities-fraud enforcement actions.[3] It is implausible to

---

[3] *See*, *e.g.*, 5 Alan R. Bromberg, Lewis D. Lowenfels, & Michael J. Sullivan, *Securities Fraud & Commodities Fraud* § 7:45 (2d ed. 2003 Westlaw) (explaining that "[m]ost states have enacted some version of [the] Uniform Securities Act," under which "[n]o intent to mislead or deceive is required" and "both intentional and negligent misrepresentations and omissions are actionable"); *Trivectra v. Ushijima*, 112 Haw. 90, 104 (2006) (collecting authorities from various states that

(*continues on next page*)

suggest that Congress meant to graft a uniform federal standard onto all such state laws, in the absence of any express statement of such preemptive intent. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) ("the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress" (quotation marks omitted)).

Petitioners argue (Pet. 18–19) that the phrase "fraud or deceit" in NSMIA's savings clause must be read to include a scienter requirement because federal law invariably requires proof of scienter to establish fraud or deceit. Federal law does no such thing. For example, it is settled that Congress did not impose a scienter requirement when it enacted section 17(a)(3) of the Securities Act of 1933, which makes it unlawful for securities sellers "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon

---

"almost unanimous[ly]" reject a scienter requirement under the Uniform Securities Act); Uniform Securities Act §§ 501 cmt. 6, 509, 603(b) (2002) (providing for private damages action and public enforcement for injunctive and monetary relief; "no culpability is required to be pled or proven" in "civil and administrative enforcement actions"); Cal. Gov't Code § 12658 (attorney general may bring enforcement action seeking "restitution or disgorgement or damages" among other remedies); *People v. Simon*, 9 Cal. 4th 493, 515-16 (1995) (for state securities enforcement, it is "irrelevant that the defendant knows that the statements or omissions are false or misleading"); 815 Ill. Comp. Stat. § 5/11(I)(4)(r) (secretary of state may bring enforcement action seeking "restitution, damages or disgorgement," among other remedies); *Foster v. Alex*, 213 Ill. App. 3d 1001, 1002-06 (1991) (no scienter requirement for civil securities fraud claims).

the purchaser," 15 U.S.C. § 77q(a)(3). *See Aaron v. SEC*, 446 U.S. 680, 696-97 (1980); *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963) (reaching same conclusion for similar provision in section 206(2) of Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(2)). Other federal securities laws likewise do not require a plaintiff to prove scienter.[4] Petitioners are thus simply wrong when they assert that "[t]he definition of fraud under federal securities law" is always limited to "fraud with a *mens rea* (or scienter) component." (Pet. 19–20.)

Contrary to petitioners' characterization (Pet. 19), this Court's recent decision in *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016), does not support their argument that the word "fraud" in NSMIA's savings clause implicitly requires proof of scienter. *Husky* held that the use of the phrase "actual fraud" in a provision of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), "denote[d] any fraud that involv[es] moral turpitude or intentional wrong." *Id.* at 1586 (quotation marks omitted). But NSMIA's savings clause does not use the phrase "actual fraud," but instead the broader term "fraud." And *Husky* itself recognized that this

---

[4] For example, scienter is not needed to establish liability under section 11, 15 U.S.C. § 77k (materially false or misleading registration statement), *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983); section 12(a)(2), 15 U.S.C. § 77*l*(a)(2) (materially false or misleading prospectus or oral communication), *see In re Morgan Stanley Information Fund Secs. Litig.*, 592 F.3d 347, 359-60 (2d Cir. 2010); and section 17(a)(2), 15 U.S.C. § 77q(a)(2) (material misstatement or omission to obtain money or property), *see Aaron*, 446 U.S. at 696.

broader term included not just "actual fraud" committed with scienter, but also "implied fraud" committed "without the imputation of bad faith or immorality," *id.* (quotation marks omitted)—a category that would include fraud committed without scienter. *Husky*'s recognition of the broad meaning of the term "fraud" thus supports, rather than undermines, the application of NSMIA's savings clause to this enforcement proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ANDREW W. AMEND
Senior Assistant
Solicitor General
JUDITH N. VALE
Assistant Solicitor General

November 2016 * *Counsel of Record*