Supreme Court, U.S.
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No. __-____ OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF CERTIORARI

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February 4, 2008

QUESTION PRESENTED

Whether state-law claims alleging misrepresentations and omissions by securities transaction clearing agencies are conflict preempted, even though nothing in federal law requires or permits those entities to engage in misrepresentations or omissions to the public, and federal securities law seeks to ensure full and fair disclosure to the investing public.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners NanoPierce Technologies, Inc. (n/k/a Vyta Corp.), Kathy-Knight McConnell, Helen Kolada, Maureen O'Sullivan, Jane Seitz, Stephen Seitz, and James Stock were the plaintiffs in the Nevada district court proceedings and the appellants in the Nevada Supreme Court proceedings.

Respondents Depository Trust and Clearing Corporation, Depository Trust Company, and National Securities Clearing Corporation were the defendants in the Nevada district court proceedings and the respondents in the Nevada Supreme Court proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner NanoPierce Technologies, Inc. (n/k/a Vyta Corp.) states the following:

In January 2006, NanoPierce Technologies, Inc. changed its name to Vyta Corp., a Nevada corporation. Vyta Corp. has no parent company, and no publicly held company owns 10% or more of Vyta Corp.'s stock.

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NanoPierce Technologies, Inc. (n/k/a Vyta Corp.), Kathy-Knight McConnell, Helen Kolada, Maureen O'Sullivan, Jane Seitz, Stephen Seitz, and James Stock respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-27a) is reported at 168 P.3d 73. The opinion of the Nevada district court (Pet. App. 28a-32a) is not reported.

JURISDICTION

The Supreme Court of Nevada entered its judgment on September 20, 2007. A petition for rehearing was denied on November 5, 2007. *See* Pet. App. 33a-35a. On December 14, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 4, 2008. *See id.* at 57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, are set forth at Pet. App. 36a-56a.[1]

[1] Provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933 are all codified in Title 15 of the United States Code and are cited herein simply as, for example, "§ 78q-1".

INTRODUCTION

Respondents are the major entities that perform the back-office tasks of clearing and settling securities transactions, which occur after the parties and their brokers have agreed on terms. Petitioners are a publicly traded small company and several of its individual investors who lost substantial monies as a result of respondents' misrepresentations and omissions to the public regarding their clearing and settlement activities.

For more than a century, investors have brought claims under state law when a defendant failed properly to uphold its obligation to clear or settle a securities transaction. In 1975, Congress passed legislation permitting the Securities and Exchange Commission ("SEC" or "Commission") to register clearing agencies, and it prohibited unregistered clearing agencies from performing clearing and settlement functions. The SEC-approved rules that are relevant here for the respondent clearing agencies span only three pages, and nowhere in those rules or elsewhere in federal law are respondents required or permitted to mislead the public about their clearing and settlement activities through either affirmative misrepresentations or omissions. Nor did Congress express any intent to preempt such claims; rather, it left unaffected the savings clause enacted in 1934 precisely to preserve such claims and inserted two additional savings clauses to make clear its intention to preserve much of state law affecting clearing agencies.

Yet a majority of the Nevada Supreme Court below – over a powerful dissent – too quickly acceded to respondents' broad-brush claims that federal regulation of clearing agencies is equivalent to a conflict with federal law that somehow preempts state-law claims alleging misrepresentation about respondents' clearing activities. The Nevada Supreme Court's decision conflicts directly with a decision of the Delaware Supreme Court regarding the preemptive effects of the rules of self-regulatory agencies, as well as with other decisions of the federal courts of appeals and state courts of last resort.

Moreover, that decision also conflicts with *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), in which this Court soundly reversed an overwhelming tide of lower court decisions finding preemption of state law by a federal statute governing pesticides, explaining that the lower courts had not been careful enough in their analysis. As the Nevada Supreme Court's dissenters pointed out below, the specific analysis and reasoning in *Bates* should have been controlling here in important respects and compels a finding that there is no conflict preemption. The lower courts' misunderstanding of *Bates* – now three years after this Court's decision – demonstrates the need for this Court's additional guidance on the proper articulation and application of conflict-preemption principles. This case raises important concerns about the federal and state policies of full disclosure that govern securities regulation and is an appropriate vehicle for the Court to clarify the conflict-preemption principles that the lower courts must regularly apply.

In the alternative, if this Court does not grant review at this time, it should hold this case for disposition in light of *Altria Group, Inc. v. Good*, No. 07-562, which presents a similar question about the extent to which alleged federal approval of a regulated activity bars state-law claims for misrepresentations concerning that activity.

STATEMENT OF THE CASE

1. More than 150 years ago, the States initiated the first efforts to ensure the integrity of this country's financial markets. *See* 1 Louis Loss & Joel Seligman, *Securities Regulation* 31-43 (3d ed. 1998) ("*Securities Regulation*"); Gerald D. Nash, *Government and Business: A Case Study of State Regulation of Corporate Securities, 1850-1933*, 38 Bus. Hist. Rev. 144, 144-52 (1964) ("*1850-1933 Case Study*"); Louis Loss & Edward M. Cowett, *Blue Sky Law* 3-17 (1958) ("*Blue Sky Law*"). State supervision of the securities industry began as an aspect of the States' traditional regulation of corporations and other business associations. As the number of corporations increased in the middle of the nineteenth century, States responded by passing targeted legislation directly regulating certain types of issuers of securities. *See 1850-1933 Case Study* at 148-49; 1 *Securities Regulation* at 31-32. In 1911, Kansas passed the first "comprehensive licensing system" for the securities industry, one of many state statutes now referred to as "Blue Sky Laws." *See Blue Sky Laws* at 7-9. By 1933, every State but one had enacted such a statute. *See id.* at 10; 1 *Securities Regulation* at 40; *see also 1850-1933 Case Study* at 150-52.

"In the wake of the 1929 stock market crash and in response to reports of widespread abuses in the securities industry," Congress passed "two landmark pieces of securities legislation": the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act"). *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994). Recognizing that the States, because of jurisdictional impediments and resource deficiencies, lacked the ability to ensure the optimal level of disclosure nationwide, *see* 1 *Securities Regulation* at 146-51, 219, Congress in the 1933 and 1934 Acts instituted a national regime of mandatory corporate disclosure, *see, e.g.*, § 78j(b) (general antifraud provision making it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe"); 17 C.F.R. § 240.10b-5 (SEC implementing Rule 10b-5, adopted in 1942).

When Congress entered the field of securities regulation in 1933 and 1934, it chose not to displace the existing state systems of securities regulation. The 1933 and 1934 Acts each explicitly preserved applicable state law. *See* 1933 Act § 16, 48 Stat. 74, 84; 1934 Act § 28, 48 Stat. 881, 903. The States have continued their traditional role of protecting investors. "Today all 50 states, the District of Columbia, Guam, and Puerto Rico have blue sky laws in force," with most having adopted the Uniform Securities Act of 1956 and several more the Revised Uniform Securities Act of 1985. 1 *Securities Regulation* at 41-42. State statutes and common law provide significant private remedies for investors harmed by misrepresentation and other misconduct. *See* 9 *id.* at 4114-66. "Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996).

2. Clearance and settlement, including the actual transfer of securities certificates from seller to buyer, are so-called "back-office" functions that must be performed for each securities transaction. Clearance is the process of verifying and confirming the terms of the trade, such as the number of shares, price, buyer, and seller. After a trade clears, it settles on the date prescribed by regulation, when the seller delivers the shares and the buyer delivers payment. If the seller does not deliver the shares on the settlement date, the industry deems it a "fail to deliver." State law has long been the primary, if not exclusive, regulator of clearance and settlement functions. *See* 6 *Securities Regulation* at 2912 ("the securities transfer and clearance process [was] a subject previously left to state law").

For example, state-law claims have regularly been adjudicated against fails to deliver, fraud, misrepresentation, or other actionable conduct or omissions in the clearance and settlement of securities.[2] And the

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[2] *See, e.g.*, *Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp.*, 485 F. Supp. 2d 387, 397-98 (S.D.N.Y. 2007) (allowing state-law claim for tortious interference to proceed against clearing corporations DTCC and DTC, which are respondents here); *Goldstein v. Depository Trust Co.*, 717 A.2d 1063, 1064 (Pa. Super. Ct. 1998) (DTC's motion to compel arbitration denied in suit brought under state law for breach of fiduciary duty arising from DTC's failure to segregate and account for interest owed on funds paid for shares), *appeal denied*, 736 A.2d 605 (Pa. 1999); *Smith Barney, Harris Upham & Co. v. Liechtensteinische Landesbank*, 866 F. Supp. 114, 117 (S.D.N.Y. 1994) (where DTC "operating procedures" contained no "precise time within which DTC is required to give notice of cancellations or confiscations of securities deposited with DTC," holding that the applicable standard was a "reasonable time" as provided under state common law); *In re Weiss Sec., Inc.*, 542 F.2d 840 (2d Cir. 1976) (denying DTC predecessor's complaint to reclaim securities it had transferred to insolvent company); *Travis Inv. Co. v. Harwyn Publ'g Corp.*, 288 F. Supp. 519 (S.D.N.Y. 1968) (adjudicating state-law claim against transfer agent for failure to transfer shares); *People v. Ruskay*, 152 N.E. 464 (N.Y. 1926) (under New York law and exchange's clearing and settlement procedures, broker's criminal conviction could not be sustained).

Uniform Commercial Code ("UCC") has long governed clearance and settlement of securities.[3] "The original version of [UCC] Article 8, drafted in the 1940s and 1950s, was based on the assumption that possession and delivery of physical certificates are the key elements in the securities holding system. Ownership of securities was traditionally evidenced by possession of the certificates, and changes were accomplished by delivery of the certificates." Lary Lawrence, *Anderson on the Uniform Commercial Code* 596 (3d rev. ed. 2005) ("*Anderson on the UCC*").

3. In the late 1960s and early 1970s, however, the securities industry suffered a "back office paper crunch" due in part to the need to physically transfer stock certificates, continually increasing trading volumes, and the failure of disparate and largely manual clearance and settlement systems to work together effectively. 6 *Securities Regulation* at 2914; *see* S. Rep. No. 94-75, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 183-84. As a result, "many purchasers never actually received their stock certificates nor sellers their money"; and numerous brokers, "faced with liability for these incomplete transactions, went bankrupt." *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1091 (D.C. Cir. 1978).

In 1975, Congress enacted the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 ("1975 Amendments"), which addressed multiple issues including but not limited to the back-office crisis. To address that crisis, and in recognition of new data processing and communications techniques,

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[3] *See, e.g., Delaware v. New York*, 507 U.S. 490, 504-05 (1993) (UCC and additional state laws governed determination that depositories and other intermediaries holding securities were "debtors" for purposes of interstate escheat claims).

Congress added § 17A to the 1934 Act, codified at 15 U.S.C. § 78q-1. The Senate Subcommittee on Securities had identified two primary causes of the back-office crisis in securities clearance and settlement: the absence of "a nationwide system for the clearance and settlement of securities transactions" and a "lack of uniformity and coordination among the various methods and systems of clearing and settlement." S. Rep. No. 94-75, at 54, *reprinted in* 1975 U.S.C.C.A.N. 232. Another congressional study concluded that "[c]omplete elimination of the stock certificate is the ultimate goal in modernizing the securities processing system." H.R. Rep. No. 92-1519, at 70 (1972); *see generally* 6 *Securities Regulation* at 2919-22.[4]

Accordingly, Congress "directed" the SEC in § 78q-1 "to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities." § 78q-1(a)(2)(A)(i). Congress authorized the SEC to register and regulate clearing agencies, and it prohibited unregistered clearing agencies from doing business in interstate commerce. *See* § 78q-1(b).[5] The statute also directed

[4] Following the 1975 Amendments, state laws incorporating UCC Article 8 were revised to reflect that, in most future cases, "ownership of securities would not be evidenced by physical certificates." *Anderson on the UCC* at 597. In particular, the state-law UCC revision provides that "a person acquires a security entitlement if a securities intermediary . . . [i]ndicates by book entry that a financial asset has been credited to his securities account." Nev. Rev. Stat. § 104.8501.2(a). The UCC further defines a "securities intermediary" to include a "clearing corporation" – that is, a "person that is registered as a 'clearing agency' under the federal securities laws." *Id.* § 104.8102(e)(1), (m).

[5] Registered clearing agencies, like securities exchanges, are treated in the 1934 Act as self-regulatory organizations. *See* § 78c(a)(26).

the Commission "to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities." § 78q-1(e). In all respects, Congress charged the SEC to exercise its authority under § 78q-1, "having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents." § 78q-1(a)(2)(A).

Section 78q-1 does not address claims concerning clearing or settlement under either state or federal law. The 1975 Amendments, however, left intact both (i) the savings clause of the 1934 Act, which provides that the rights and remedies in the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity," § 78bb(a); and (ii) the implied private right of action long held by the courts to exist under section 10(b) of the 1934 Act and SEC Rule 10b-5. Thus, nothing in the 1975 Amendments altered the long-established dual system of remedies.

Moreover, the 1975 Amendments made clear, in two internal savings clauses, that clearing and settlement activities are not above the States' authority. *First*, Congress provided that "[n]othing in this section [78q-1] shall be construed to impair the authority of any State banking authority or other State or Federal regulatory authority . . . to make and enforce rules governing [clearing agencies] which are not inconsistent with this chapter and the rules and regulations thereunder." § 78q-1(d)(4).[6]

[6] *See* 6 *Securities Regulation* at 2926-27 ("Because so many transfer agents and clearing agencies are banks, a political compromise (reminiscent of the 1964 adoption of § 12(i) with

Second, Congress made clear that States are not limited to regulating in ways "not inconsistent" with federal law (*id.*), but may even adopt certain inconsistent rules that *override* the SEC's own rules. In a 1990 amendment, Congress first authorized the SEC, "[n]otwithstanding any provision of State law," to adopt rules concerning both "(A) the transfer of . . . securities" and "(B) rights and obligations of purchasers, sellers," and others "involved in or affected by such transfers," provided that the SEC first makes three findings justifying displacement of state law. § 78q-1(f)(1); *see* § 78q-1(f)(2) (setting out required findings). Nevertheless, Congress then provided what might be called a reverse preemption or clawback power to the States, enabling them to promulgate "a provision that differs from that applicable under the Commission's rule." § 78q-1(f)(3); *see* 6 *Securities Regulation* at 2928 ("[t]hose who drafted this part of the 1990 Act clearly realized that they were walking on eggs" in venturing into this "traditionally state law area").

4. Pursuant to § 78q-1, the SEC registered a number of clearing agencies, including respondents here. In particular, the SEC authorized respondents Depository Trust Company ("DTC") and National Securities Clearing Corporation ("NSCC") to provide automated clearance and settlement of virtually all broker-to-broker securities transactions. DTC

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respect to the registration of bank securities) split jurisdiction between the SEC and the federal bank regulators . . . with respect to transfer agents and clearing agencies that are banks.") (footnote omitted). Although Professor Loss's treatise statement focuses on federal banks and banking authorities, the savings clause itself is not so limited. *See* § 78q-1(d)(4) ("any State banking authority *or other State or Federal regulatory authority*") (emphasis added).

and NSCC, in turn, are wholly owned subsidiaries of respondent Depository Trust and Clearing Corporation ("DTCC").[7] DTCC "is owned by its principal users," which include some 600 "international broker/dealers, correspondent and clearing banks, mutual fund companies and investment banks," as well as its "preferred shareholders," the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE").[8] The profits made by DTCC, including its subsidiaries, inure to the benefit of the industry participants that own and use it.[9] In addition, the more transactions processed by DTCC, the more commissions are earned by its industry participant owners and operators.[10]

Respondent DTC's role is to eliminate the movement of paper stock certificates. It acts as a securities depository; changes in stock ownership are electronically recorded in brokers' respective DTC accounts, and there is no physical transfer of security certificates held by DTC. Share owners may in theory demand possession of their certificates – though they must go through their brokers to do so, which is not a quick process. As a practical matter,

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[7] *See* http://www.dtcc.com/about/subs/.

[8] *See* http://www.dtcc.com/about/business/customers.php; DTCC, *Annual Report 2006*, at 50 (2007), *available at* http://www.dtcc.com/downloads/annuals/2006/2006_report.pdf; *Anderson on the UCC* at 598.

[9] *See* http://www.dtcc.com/about/business/customers.php ("As an industry-owned corporation, DTCC and its subsidiaries operate on an 'at-cost basis,' charging transaction fees for services and then returning excess revenue to its members.").

[10] *See, e.g.*, Merrill Lynch & Co., Inc., Quarterly Report (Form 10-Q), at 5, 70 (Nov. 7, 2007) (commissions constituted largest single source of revenues for reported period), *available at* http://ir.ml.com/sec.cfm?DocType=&Year=2007.

therefore, DTC holds the vast bulk of certificates issued by publicly traded companies.

Although the use of a common depository eliminates the need for physical deliveries, an enormous number of entries would still have to be made on DTC's books if each transaction between its participants were recorded one by one. Respondent NSCC (which acts as an intermediary between DTC and brokers) streamlines the necessary accounting functions with its "Continuous Net Settlement" system by recording only the net changes in the positions of each participant at the end of each day. For example, if Broker A in a given day effects numerous individual transactions, purchasing 20,000 shares and selling 10,000 shares of company XYZ, then NSCC will instruct DTC to show that Broker A's DTC account reflects a net gain of 10,000 shares of XYZ for that trading day.

When the SEC registered DTC and NSCC as clearing agencies pursuant to § 78q-1, it expressly stated that state-law standards of care would continue to apply to their conduct in handling securities. Thus, the SEC provided that DTC and NSCC "are each responsible under state or federal law, or both, to protect participants' securities and funds." Order, *Depository Trust Co., et al.*, SEC Release No. 20,221, 48 Fed. Reg. 45,167, 45,179 (Oct. 3, 1983); *see also id.* (declining to impose a "unique federal standard of care for registered clearing agencies").

5. SEC rules typically require stock trades to clear within three (formerly five) business days; that is, the buyer pays the seller and the seller delivers shares to the buyer by the settlement date prescribed by federal law. *See* 17 C.F.R. § 240.15c6-1. When a broker sells more shares than it has on account at

DTC and fails to deliver within the standard three-day clearance period, the buying broker's two traditional remedies have been either to buy those shares in the open market (with the selling broker being responsible for any price increase) or simply to wait for the shares to become available as other transactions are cleared through NSCC.

In 1981, the SEC authorized a third option known as the stock borrow program. That program permits willing brokers unrelated to a transaction to lend (their customers') shares from the broker's DTC or NSCC account. NSCC then credits the borrowed shares to the buying broker's account through an automated system that matches lenders with buyers. The stock borrow program was designed to cure short-term delivery failures by sellers of securities. Although NSCC's rules currently span more than 300 pages, only three pages concern the stock borrow program.[11]

6. Petitioners are NanoPierce Technologies, Inc. ("NanoPierce"), a small Nevada corporation traded on the NASDAQ Over the Counter Bulletin Board, along with several of its individual shareholders.[12] Petitioners brought suit in Nevada state court, alleging that respondents misrepresented the effects of the stock borrow program and caused market manipulation.

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[11] *See* NSCC Rules & Procedures, Addendum C (NSCC Automated Stock Borrow Program Procedures), *available at* http://www.dtcc.com/legal/rules_proc/nscc_rules.pdf.

[12] NanoPierce was renamed Vyta Corp. in January 2006, but Vyta has not been formally substituted as the named plaintiff in the Nevada state courts. Because the court decisions and pleadings below all refer to NanoPierce, we retain that nomenclature here for the convenience of the Court.

Petitioners' amended complaint alleges that, despite the stock borrow program's purported development in order to cure short-term failures to deliver, respondents have misrepresented and misused the program so as to permit failures to deliver to remain uncured for months and even years. Such omissions and misrepresentations have facilitated the abusive practice of "naked" short selling, whereby unscrupulous short sellers can rapidly drive down the price of a company's shares. In a traditional short sale, the seller sells shares it has first arranged to borrow (typically from a broker) and thus has the shares available to deliver to the buyer on the settlement date. A "naked" short sale is so named because the seller sells the shares *without* borrowing the stock, and thus fails to deliver those shares on the settlement date.[13]

NSCC uses the automated stock borrow program to supply the shares the seller has failed to deliver to the buyer, either because of a naked short sale or for any other reason. The fail to deliver is not thereby cured, however; the seller still owes the shares, but it (via its broker's participation in the stock borrow program) owes them to NSCC rather than the buyer.[14] Both the lending and buying brokers thus effectively "own" the same shares in their DTC accounts; and their customer statements will each reflect owner-

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[13] In selling a stock short, whether in a naked or traditional sale, the seller is betting that the price of the stock will drop before it has to go into the market and buy replacement shares to repay the lender.

[14] *See* http://www.dtcc.com/about/business/tplus3.php ("NSCC steps into the middle of a trade and assumes the role of central counterparty, taking on the buyer's credit risk and the seller's delivery risk.").

ship of the borrowed and delivered shares, but without indicating that the other broker's customer has ownership rights to the very same shares. Moreover, the buyer's broker may make those same shares available for lending in the stock borrow program, with the potential result that not only two investors, but potentially three or more – a potentially unlimited number – are deemed to own the same shares.

The effect of this scheme has been to create millions of unregistered "phantom" shares that artificially increase the electronic supply of the issuers' shares in the marketplace and are not backed by a stock certificate on deposit at DTC. That oversupply of phantom shares drives down the price of the stock and decreases the value of existing shareholders' holdings. For a small capitalization company like NanoPierce, the effect can be devastating because the artificially increased supply of phantom shares in the market materially drives down the price of the stock. Respondents have a strong incentive to continue permitting this practice in order to generate fees, and their industry-participant members likewise benefit from the commissions they receive from their clients for processing naked short sales. *See supra* p. 11 & n.10.

Petitioners allege that respondents have misrepresented these effects of the stock borrow program. Fundamentally, respondents have denied and failed to disclose that the real effect of their operation of the stock borrow program is to create phantom shares that dilute the value of validly issued shares. For example, petitioners allege that respondents have misrepresented that the artificial shares created by the stock borrow program are issued and outstanding shares of NanoPierce. *See* Pet. App. 20a-21a. And respondents have made misrepresentations about the efficacy of the program as a prompt and accurate settlement mechanism, without disclosing the critical fact that it injects phantom shares into the marketplace, creating artificial oversupply that dilutes the value of a company's stock. *See id.* at 19a-20a. At the same time, respondents have failed to disclose the fact that there have long been significant numbers of fails to deliver in their system, thus diluting the share value of NanoPierce and other firms' securities. Nothing in the SEC's rules permits or requires respondents to misrepresent or fail to disclose that the net effect of the stock borrow program is to create phantom shares – a material fact that respondents had long concealed and have continued to deny throughout this litigation.

Indeed, after this case was filed, SEC Chairman Christopher Cox noted "the serious problem of abusive naked short sales, which can be used as a tool to drive down a company's stock price," and stated that the SEC is "concerned about persistent failures to deliver in the market for some securities."[15]

7. The Second Judicial District Court of Washoe County, Nevada, held petitioners' claims preempted, without stating whether its decision was based on field preemption, conflict preemption, or both. *See* Pet. App. 30a-32a.

On direct review, the Nevada Supreme Court first rejected respondents' reliance on the doctrine of field preemption. *See id.* at 10a-15a. Relying on the savings clauses in both the 1934 Act and the 1975 addi-

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[15] Christopher Cox, Opening Statements at the Commission Open Meeting (July 12, 2006), *at* http://www.sec.gov/news/speech/2006/spch071206cc2.htm.

tion of § 78q-1, the court concluded that "Congress explicitly left room for state laws to supplement the federal regulatory scheme and thus did not reveal a 'clear and manifest' intent to occupy the field of regulating clearing agencies." *Id.* at 14a-15a.

A majority of the Nevada Supreme Court, however, proceeded to find petitioners' claims barred under principles of conflict preemption. The court initially recognized that Congress's intent to preempt state-law claims "must be 'clear and manifest,'" and that there is a "strong presumption that areas historically regulated by the states generally are not superseded by a subsequent federal law." *Id.* at 8a-9a (quoting *Bates*, 544 U.S. at 449). But the court concluded that petitioners' claims are "inextricably entwined with an assertion that respondents have violated their own Commission-approved rules governing the Stock Borrow Program." *Id.* at 17a.

Two justices dissented in part, concluding with respect to petitioners' misrepresentation-based claims that petitioners "are not directly challenging any NSCC rule's language, but rather that respondents represent that they satisfy buy-in requests by purchasing shares in the open market, while instead using the Stock Borrow Program to satisfy buy-in requests." *Id.* at 26a. The dissenters relied on *Bates*'s holding that state-law claims not inconsistent with federal requirements are not preempted:

> Determining whether respondents are liable on state law grounds for inaccurately representing how they executed buying brokers' notifications to purchase shares on the open market is not inconsistent with the Commission's approval of the Stock Borrow Program or the NSCC's rules, even if it indirectly

> causes respondents to choose whether to change those rules or face potential additional lawsuits.

Id. (citing *Bates*, 544 U.S. at 445).[16]

REASONS FOR GRANTING THE PETITION

This case arises in the context of overlapping state and federal securities laws that serve a common purpose: to protect investors by ensuring appropriate transparency and full disclosure of relevant information, and, by so doing, to safeguard the integrity of the securities market. As this Court has explained, the federal securities laws "'substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus . . . achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute*

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[16] The SEC filed an *amicus* brief with the court below urging conflict preemption, based largely on the assertion that petitioners are simply wrong to suggest that the stock borrow program creates artificial or phantom securities. *See* Brief of the Securities and Exchange Commission, *Amicus Curiae*, on the Issue Addressed at 14-16, 22-27 (Nev. filed Feb. 2, 2006). The SEC did so, however, by claiming only that NSCC's accounting system does not accurately "reflect *ownership positions*," pointing out that the "number of securities issued and outstanding is determined by the security issuer." *Id.* at 14-15. At the same time, however, the SEC conceded the correctness of petitioners' claim that the *electronic universe* of shares available for trading can be much larger:

> While the number of securities outstanding does not change because of the clearance and settlement system, the aggregate number of positions reflected in customer accounts at broker-dealers may in fact be *greater* than the number of securities issued and outstanding.

Id. at 16 n.6 (emphasis added). *Accord* Proposed Rule, *Short Sales*, 68 Fed. Reg. 62,972, 62,975 (Nov. 6, 2003) ("At times, the amount of fails to deliver may be greater than the total public float.").

Citizens of Utah v. United States, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)). Through the savings clause in the 1934 Act, § 78bb(a), Congress has recognized that state law can further these purposes by providing important remedies for investors who have been deceived or misled. In this case, petitioners' state-law claims – which seek only to ensure that respondents accurately inform the market generally, and their customers specifically, of their actual business practices in administering their stock borrow program[17] – further the federal policies of transparency and investor protection and do not impede the proper functioning of any federal regulatory mechanism.

Nevertheless, the Nevada Supreme Court has held that, because the SEC has approved the rules that govern the functioning of respondents' stock borrow program, Nevada law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), to the extent that a state-law claim authorizes recovery for misrepresentations in connection with that program. *See* Pet. App. 20a & n.46. That decision directly conflicts with a decision of the Delaware Supreme Court concerning the extent to which

[17] Petitioners' complaint contained several additional claims based not on misrepresentations or omissions by respondents, but on other violations of state law by respondents. These additional claims were also dismissed by the state courts. *See* Pet. App. 21a-23a. Although the state supreme court's judgment was erroneous in its entirety, petitioners seek review in this Court of that judgment only insofar as it affirmed the dismissal of their claims based on misrepresentations or omissions.

the SEC-authorized regulations of self-regulatory organizations preempt state-law claims for misrepresentation; deepens an existing and broader conflict concerning the appropriate treatment of misrepresentations in connection with federally authorized activities; and conflicts with this Court's decision in *Bates*, among other decisions of this Court. Review is warranted for all of these reasons. It is also warranted because of the national importance of the question whether the federal and state policies of full disclosure in the securities markets will apply to what the court below termed an "exploitable flaw" (*id.* at 20a) in respondents' system. In the alternative, if this Court does not grant review at this time, it should hold this case for disposition in light of *Altria Group, Inc. v. Good*, No. 07-562, which presents a similar question about the extent to which alleged federal approval of a regulated activity bars state-law claims for misrepresentations concerning that activity.

I. PLENARY REVIEW IS WARRANTED BY THE CONFLICTS CREATED BY THE DECISION BELOW AND ITS IMPORTANCE TO THE NATIONAL SYSTEM OF SECURITIES REGULATION

A. The Decision Below Conflicts With Decisions Of Other State Courts Of Last Resort And Federal Courts Of Appeals

1. The decision below directly conflicts with *O'Malley v. Boris*, 742 A.2d 845 (Del. 1999). The Delaware Supreme Court there addressed the preemptive effect of a rule of NASD – a self-regulatory organization that is one of respondent DTCC's preferred shareholders. A "negative response letter" is a notification to a broker's client that a change to the client's account will be made unless the client objects. *Id.* at 847. The defendants in *O'Malley* claimed that an NASD rule authorizing the use of such letters for certain accounts preempted a state-law claim that a broker's notification to its clients was misleading because it failed to disclose the broker's interest in the transaction. *Id.* at 848. The rule "specifie[d] the information . . . [to] be included in such a letter," and the SEC had approved the NASD rule to enhance the "'timely and efficient execution of . . . bulk exchanges without compromising investor protections.'" *Id.* at 848 (quoting SEC Release No. 31,558, 57 Fed. Reg. 58,525, 58,526 (Dec. 10, 1992)) (second ellipsis in original).

The *O'Malley* court found that the NASD rule did not preempt the state-law claim, reasoning that the rule did not "purport to create a 'safe harbor'" for brokers and that "additional disclosure requirements concerning the broker's self-interest would be the same for all customers, [and so] would not be unduly burdensome or otherwise interfere with the purpose of the rule." *Id.* at 849. This reasoning cannot be squared with the Nevada Supreme Court's holding that petitioners' claims are preempted.

The NASD rule in *O'Malley*, like respondents' rules in this case, is a rule of a self-regulatory organization designed to promote the efficient operation of the national securities markets. Like the plaintiffs in *O'Malley*, petitioners claim that respondents have affirmatively misrepresented, and have failed to disclose material facts about, their operation of the stock borrow program. Nothing in the rules on which the court below relied creates a "safe harbor" from such claims. Moreover, respondents could have protected themselves from any such claims with simple, general disclosures about the risks of phantom shares created by the stock borrow program, and doing so would not have interfered with any legitimate operation of that program. Accordingly, the courts of Delaware would have granted relief to petitioners on the basis of a disagreement with the courts of Nevada about a dispositive question of federal law.

A similar case from the California Supreme Court, *Diamond Multimedia Systems, Inc. v. Superior Court*, 968 P.2d 539 (Cal. 1999), strongly suggests that California would agree with Delaware. *See id.* at 545 (stating that, in market manipulation actions, "[s]hareholders' rights under state and federal law are cumulative," and "Congress has confirmed the independent force of state securities law").

By contrast, the highest courts of New York and Pennsylvania have addressed closely related questions and adopted a position that aligns with that of Nevada. In *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. 1996), the New York Court of Appeals held that state-law claims based on a broker-dealer's failure to make timely and detailed disclosure of "order flow payments"[18] were preempted by an SEC regulation that had imposed looser disclosure requirements. *See id.* at 289-90. The court held that the effect of tighter state-by-state disclosure requirements would lead to a "'chaotic regulatory structure'" that Congress could not have intended. *Id.* at 290 (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987)); *see Shulick v. PaineWebber, Inc.*, 722 A.2d 148, 151 (Pa. 1998) (following *Guice*); *see also Dahl v. Charles Schwab &*

[18] These are payments for routing customers' orders to other dealers for execution. *See Guice*, 674 N.E.2d at 284.

Co., 545 N.W.2d 918, 925 (Minn. 1996) (reaching a similar conclusion with regard to consent requirements under Minnesota agency law). These cases demonstrate the well-entrenched conflict among state courts of last resort on how preemption affects state-law securities claims.[19]

2. Review of the Nevada Supreme Court's judgment also is warranted because that decision implicates a broader division of the state and federal courts over when a federal regulatory approval conflicts with (and so preempts) state-law claims for misrepresentations about the action approved.

The better and more widely accepted view is that state-law claims for fraud, or other claims based on false or misleading representations, rarely conflict with the federal purpose for authorizing regulated activity, because federal policy will almost always be furthered by preventing fraud. The California Supreme Court, for example, has held that federal approval of a wine bottler's label does not preempt a state statute that prohibited the label as misleading because the label contained the word "Napa" but the wine was not made from Napa grapes. *See Bronco Wine Co. v. Jolly*, 95 P.3d 422, 424-25 (Cal. 2004). In reaching that conclusion, the court reasoned that "Congress's overall purposes . . . have been to support the states' efforts to protect consumers from

[19] In *O'Malley*, the Delaware court distinguished *Guice* because the New York court had relied on a "regulatory history" in which "the SEC had . . . rejected as unworkable" the "very order flow payment disclosures" that the "*Guice* plaintiffs were claiming that state law required." 742 A.2d at 849. No such history is present in this case. If the distinction drawn in *O'Malley* is correct, it shows merely that New York might agree with Delaware rather than Nevada on the question presented, and does not resolve the conflict between this case and *O'Malley*.

misleading labeling, not to permit [such] labeling." *Id.* at 457. The Second Circuit has likewise held that federal regulations governing the drug testing of airline employees did not preempt state-law claims based on misrepresentations made in relation to the tests because those regulations did not contain any provisions regarding false statements. *See Drake v. Laboratory Corp. of Am. Holdings*, 458 F.3d 48, 65-66 (2d Cir. 2006).[20]

Other courts, however, have taken a more aggressive view of preemption that has substantially restricted the scope of state laws providing remedies for misrepresentation. The decision below is one such example, and a recent decision of the Third Circuit provides another. In *Pennsylvania Employees Benefit Trust Fund v. Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007), *petition for cert. pending*, No. 07-822 (filed Dec. 18, 2007), the Third Circuit held that Food and Drug Administration ("FDA") approval of a label for a prescription drug conflicted with and so preempted state-law claims that a drug manufacturer's advertis-

[20] In addition, in a decision that sharply conflicts with the decision below, a New Mexico intermediate court of appeals held that state-law fraud claims could proceed against a health-care provider based on a letter containing false statements, even though the text of the letter had been approved by the Health Care Financing Administration. *See Palmer v. St. Joseph Healthcare P.S.O., Inc.*, 77 P.3d 560, 572-75 (N.M. Ct. App. 2003) (reasoning that "Congress could not have intended to grant a federal agency the prerogative" to authorize false statements while leaving the victims "no recourse in court"), *cert. dismissed*, 101 P.3d 808 (N.M. 2004) (table). *See also True v. American Honda Motor Co.*, 520 F. Supp. 2d 1175, 1180-81 (C.D. Cal. 2007) (finding that Environmental Protection Agency ("EPA") approval of a fuel efficiency label did not preempt state-law fraud claims based on advertising other than the label itself).

ing was fraudulent or misleading because it falsely claimed the drug was superior over a competing product. *See id.* at 250-52. A strong dissent in *Pennsylvania Employees* correctly pointed out that the FDA had "not approved the veracity of the particular advertisements in question, and . . . [the] plaintiffs [were] not attacking, directly or indirectly, the labeling approved by the FDA." *Id.* at 255 (Cowen, J., dissenting). The majority, however, opined that "[t]he high level of specificity in federal law and regulations with respect to prescription drug advertising" alone was sufficient to establish conflict preemption. *Id.* at 252. Indeed, in denying leave to amend, the *Pennsylvania Employees* court further held that it would not matter even if the FDA had explicitly refused to approve the specific advertising claims made or if the drug manufacturer had represented to the FDA that it would not make them. *See id.* at 252-53.

These varied decisions show wide-ranging disagreement about the appropriate treatment of state-law misrepresentation claims, and the decision of the Nevada Supreme Court in this case deepens that existing division of authority. For example, *Bronco Wine* requires a showing, before a state law prohibiting fraud and misleading statements will be found to conflict with a federal regulatory authorization, that the authorization approved the particular statements at issue. *See* 95 P.3d at 454 (rejecting an argument that federal law *"authorize[d]"* the misleading statement on the label and stating instead that federal law merely *"d[id] not prohibit"* it). Applied to this case, that reasoning would require reversal, because the NSCC regulations approved by the SEC did not authorize the false and misleading statements for which petitioners seek relief. By contrast, *Pennsylvania Employees* requires no such showing, as the Nevada Supreme Court did not in this case. Similarly, the Second Circuit's decision in *Drake* requires that the federal authorization from which preemption is to be derived at least have something to do with the regulation of false statements – a requirement that, however basic it may seem, the Nevada Supreme Court did not observe here. The applicable standards are unclear, and a grant of review will enable this Court to bring needed clarity to this area of the law.

B. The Decision Below Conflicts With *Bates*

The decision of the Nevada Supreme Court is, moreover, incorrect and in conflict with several prior decisions of this Court, and that conflict also warrants review. Its clearest error is its failure to follow the reasoning of *Bates*. In that case, this Court interpreted an express preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which provided that the States "'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].'" 544 U.S. at 436 (quoting 7 U.S.C. § 136v(b)). Reading that clause, the Court reasoned that it would not preempt a state law that was "equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Id.* at 447. Although the preemption arguments in *Bates* concerned an express preemption clause, the Court's reasoning replicated the classic conflict preemption inquiry when it concluded that "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA." *Id.* at 451.[21]

Further, the *Bates* Court was unpersuaded by the argument that FIFRA's national purpose of uniformity would be impeded by subjecting pesticide manufacturers to the verdicts of different juries in different States – provided that the juries were applying state-law standards that were "fully consistent with federal requirements." *Id.* at 451-52. The Court emphasized the "basic presumption against pre-emption" of state-law causes of action and the broad role for state regulation under FIFRA. *Id.* at 449. And it reasoned that Congress would have "expressed [its] intent more clearly" than it had in § 136v(b) if it "had intended to deprive injured parties of a long available form of compensation." *Id.* at 449-50 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *see Silkwood*, 464 U.S. at 251 (finding it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

The Nevada Supreme Court's reasoning contravenes *Bates* in several respects. The state supreme court should have considered, as *Bates* did, whether the state-law remedies sought by petitioners would "aid, rather than hinder," 544 U.S. at 451, the purposes of the federal securities laws. To do so, the

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[21] *See Hines*, 312 U.S. at 67 (holding that conflict preemption applies when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *cf. Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1073 (9th Cir. 2005) (interpretation of express preemption clause precluding "inconsistent" state-law claims is "substantially identical to the analysis of implied conflict preemption"), *aff'd*, 127 S. Ct. 1513 (2007).

court would have needed to take account of the "fundamental purpose" of the 1934 Act to implement a "philosophy of full disclosure," *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (internal quotation marks omitted), and to give "due regard" for "the protection of investors," § 78q-1(a)(2)(A). In this respect, the state supreme court's conclusion that petitioners' damages "constitute an exploitable flaw inherent in the federally authorized system" misunderstands the correct interplay between federal and state law. If petitioners have a remedy for respondents' fraudulent statements and omissions, then investors can be protected from the consequences of any flaw with tools that Congress contemplated would be available for such purposes – state-law remedies.[22]

Similarly, the court below erred by failing to give adequate weight to Congress's decision to preserve, when it enacted the 1934 Act, "any and all other rights and remedies that may exist at law or in equity." § 78bb(a); *see Leroy v. Great Western United Corp.*, 443 U.S. 173, 182 n.13 (1979) (recounting a draftsman's statement that the "purpose of [§ 78bb(a)] was to leave the States with as much leeway to regulate securities transactions as the Supremacy Clause would allow them in the absence of such a provision"). This savings clause reflects Congress's

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[22] If correct, the decision below also would imply that petitioners have no remedy available under the SEC's Rule 10b-5 – because their state-law claims include a state statute similar to that rule. *See* Nev. Rev. Stat. § 90.570. But it is absurd to say that the SEC either did, or could, authorize respondents to make false and misleading statements in violation of federal law. The logical implication of this result from the premises adopted by the Nevada Supreme Court is merely another sign of that court's error.

intent to preserve state jurisdiction to an even greater extent than does the language in FIFRA, interpreted by *Bates*. Yet the Nevada Supreme Court's analysis gave far less weight to the purposes of the state law, and to the harmony between the purposes of federal and state law, than this Court did in *Bates*. It also neglected this Court's warning that claims about the "disruptive effects" of state-law remedies may be "exaggerate[d]," and this Court's reliance on the "long history of [state] tort litigation" in the relevant field, *Bates*, 544 U.S. at 449, 451, instead simply assuming that state law would be diverse and so disrupt federal policy.[23] This analytic leap is contrary not only to *Bates*, but also to *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in which a plurality of this Court explained that "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards," but instead "rely only on a

[23] Indeed, the court's reasoning on the disruption it feared is difficult to follow. It states that "[i]mposing any state law requirement for efficiency, which, in the absence of any federal standard, would be necessary before appellants could show that respondents have failed to efficiently clear and settle securities transactions here, would compel respondents to alter their federally approved manner of operating the Stock Borrow Program." Pet. App. 20a. But all that is necessary here is to require respondents to disclose and not conceal the fact that their practices have injected phantom shares into the market that dilute the value of validly issued shares. The lower court's holding flies in the face of the federal securities laws' dedication to investor protection, and also of the long-standing requirement that federal preemptive intent be "clear and manifest." *Bates*, 544 U.S. at 449 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting, in turn, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))) (internal quotation marks omitted)).

single, uniform standard: falsity." *Id.* at 529.[24] The Nevada Supreme Court dissenters likewise found, correctly, that state-law claims based on misrepresentation in no way interfere with the federal regime because they merely hold respondents to the centuries-old prohibition against misrepresentation. *See supra* pp. 17-18.

Finally, the state supreme court neglected *Bates*'s teaching that federal approval of a regulated activity confers no automatic imprimatur on representations made in connection with that activity, especially when those representations themselves are not approved by the federal agency. *See* 544 U.S. at 443-45. Just as the EPA's approval of the pesticide label at issue in *Bates* did not prevent the plaintiffs in that case from arguing that the manufacturers had breached the warranty claims in those labels (or oral representations not on the labels), *see id.* at 444 & n.17, so the SEC's approval of respondents' regulations creating the stock borrow program should not preempt petitioners' state-law claims seeking relief for respondents' misrepresentations about that program.

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[24] The plurality opinion in *Cipollone* was, in its reasoning on this point, the "narrowest ground[]" for the Court's judgment, and should therefore have been treated by the court below as controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted); *see Cipollone*, 505 U.S. at 544 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (adopting the broader theory that the statute at issue preempted no common-law claims whatsoever).

C. The Petition Raises An Important Issue Meriting This Court's Review

The scope of preemption in this context implicates the federal and state policies of full and fair disclosure to investors in the securities markets and the remedies available to investors in all 50 States. The Nevada Supreme Court's decision rests on a theory that, even though petitioners have been damaged by respondents' conduct, federal policy precludes any State from providing a remedy for the damage respondents have caused.

If the state court were correct, federal policy would bar state remedies that serve the primary goal of the federal securities laws themselves. But that perverse reasoning is inconsistent with the express statutory language and decades of precedent. If the state supreme court's judgment is allowed to stand, petitioners, and many other investors in a similar predicament, will be deprived of an important tool for vindicating the protections accorded them under federal and state law. Moreover, the state courts' erroneous overreading of federal preemption law may infect other cases that turn on this important set of questions about the interaction of federal and state authority.

In addition, this case presents a good vehicle for this Court to clarify the law. The holding of the Nevada Supreme Court rested solely on federal law and disposed of all of petitioners' claims, leaving no room for further proceedings. *See* Pet. App. 24a. In addition, that court, while erring fundamentally in its conflict-preemption analysis, correctly held that field preemption does not apply in this case, thus narrowing the issues to the key points in contention. *See id.* at 14a-15a. If this Court grants review, there will be no impediment to it resolving the important question presented.

II. IN THE ALTERNATIVE, THIS CASE SHOULD BE HELD PENDING THIS COURT'S DECISION IN *ALTRIA*

Although this case is fully appropriate for this Court's plenary review, it also is possible that the relevant law may be sufficiently clarified by this Court's forthcoming decision in a recently granted case. On January 18, 2008, this Court granted review in *Altria Group, Inc. v. Good*, No. 07-562. Among the questions presented in *Altria* is whether the FDA's alleged authorization of certain statements by cigarette manufacturers about the nicotine and tar content of their cigarettes conflicts with, and so implicitly preempts, state-law claims that the statements in question are false or misleading. *See Altria* Pet. i.

If this Court reaches the merits of the implied conflict-preemption claim in *Altria*, its decision will likely shed light on the contested questions discussed *supra*, pp. 20-26, especially the appropriate analysis of conflict preemption when state law provides a remedy for misrepresentations made in connection with federally authorized activity. Were that to occur, the Court's normal practice of granting, vacating, and remanding would be appropriate to permit the Nevada Supreme Court to reconsider its holding on implied conflict preemption in light of this Court's most recent pronouncement and application of those principles. This case would nevertheless be a more secure vehicle for resolving and applying implied conflict-preemption principles, because it is possible that the Court will decide *Altria* purely on express preemption grounds and because the implied conflict-preemption claim in *Altria* may be resolved on the ground that, because the FDA did not formalize its authorization in a rule, the authorization had no preemptive effect. *See Altria* Pet. 22-24.

Nevertheless, if this Court chooses not to grant plenary review in this case at this time, there is a significant possibility that its decision in *Altria* will make clear whether the decision below is on a secure footing. Accordingly, as an alternative to a grant of certiorari, this Court should hold this case for appropriate disposition in light of *Altria*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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