

No. 04-1371

IN THE
Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

PETITIONER,

v.

SHADI DABIT, on behalf of himself and all other similarly
situated,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL
FOUNDATION IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide.¹ WLF engages in litigation and participates in administrative proceedings to defend free enterprise, individual rights, and a balanced civil justice system. To that end, WLF has frequently appeared as *amicus* in this Court and lower courts to address the proper scope of federal preemption. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999); *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir. 1999); *Taylor v. SmithKline Beecham Corp.*, 658 N.W.2d 127 (Mich. 2003); *Etcheverry v. Tri-Ag Servs., Inc.*, 993 P.2d 366 (Cal. 2000).

WLF frequently publishes policy papers and takes part in litigation and agency proceedings to promote and defend legal rules that protect employees, pensioners, and investors from stock losses caused by abusive securities litigation. Among WLF's recent papers on this topic are James Maloney, *Strict Standing Requirement For Securities Fraud Suits Upheld* (2005); Lyle Roberts & Paul Chalmers, *Lower Courts Will Determine Impact Of Supreme Court's Securities Fraud Suit Ruling* (2005); and Neil M. Gorsuch & Paul B.

¹ Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of all *amicus* briefs; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been lodged with the Clerk.

Matey, *Settlements In Securities Fraud Class Actions: Improving Investor Protection* (2005).

WLF is concerned that if the decision below is not reversed, the appeals court's interpretation of the Securities Litigation Uniform Standards Act of 1998 would undermine the express preemption provision of that legislation and thereby re-open the door to vexatious securities lawsuits that Congress intended to close.

WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

This case presents the question whether the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, 3229-30 (1998), (codified as amended in part at 15 U.S.C. §§ 77p & 78bb(f)), preempts state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not to purchase or sell) securities.

SLUSA expressly preempts any class action based upon state law concerning a material misrepresentation or omission "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). As petitioner Merrill Lynch cogently explains, the Second Circuit erred in concluding that this provision allows suits to proceed in state court on behalf of persons who merely hold, rather than purchase or sell, securities. The identical "in connection with" statutory language in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), has long been understood to authorize the Securities and Exchange Commission (SEC) to enforce Section 10(b)'s antifraud requirements even absent a purchase or sale of securities. To be sure, *private* actions to enforce Section 10(b) and Rule

10b-5, are limited to situations involving an actual purchase or sale of securities. As this Court has explained in *United States v. O'Hagan*, however, private actions are “so confined . . . because of ‘policy considerations’” related to the potential for baseless and wasteful private litigation, not because the “in connection with” language of Section 10(b) requires any such limitation. 521 U.S. 642, 664 (1997); *see also Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 284 (1992) (O'Connor, J., concurring in part and concurring in the judgment) (“[t]he purchaser/seller standing limitation in Rule 10b-5 damages actions . . . does not stem from a construction of the phrase ‘in connection with the purchase or sale of any security’”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975). Thus, by preempting state class actions alleging misrepresentation “in connection with the purchase or sale” of securities in SLUSA, Congress must be understood to have preempted “holder” claims as well as purchaser/seller claims. In other words, the preemptive scope of SLUSA is coextensive with the scope of the SEC’s enforcement authority under Section 10(b) and Rule 10b-5, not with the more limited scope of permissible private actions to enforce those provisions.

That is also the only reading of SLUSA consistent with sound policy and common sense. As Judge Easterbrook explained, “[i]t would be more than a little strange if the Supreme Court’s decision to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all.” *Kircher v. Putman Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005), *petition for cert. filed*, ___ U.S.L.W. ___, (U.S. Sept. 29, 2005) (No. 05-409).

As *amicus* WLF will make clear in this brief, the Second Circuit’s counterintuitive reading of SLUSA cannot be justified by an appeal to federalism. Principles of federalism, and limitations on the power of the federal government, are of course the bedrock of our Constitution and of the protection of individual freedom. It is equally clear, however, that the framers intended to grant Congress power to prescribe uniform national rules when necessary to promote the flourishing of interstate commerce in our free enterprise system. This is precisely such a situation. The flow of capital manifested in the trading of securities on national exchanges is inherently interstate (indeed international) in character. Long and bitter experience teaches that the efficient operation of capital markets is placed at great risk if the law of the various States can be freely invoked to impose a multitude of different and potentially conflicting obligations.

The reality is that in SLUSA, as well as in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995), which Congress passed to discourage frivolous class-action litigation, *see* H.R. Conf. Rep. No. 104-369, at 31-32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730-31, Congress worked a significant change in the relationship between federal securities law and state law.² While the PSLRA sought to discourage so-called strike suits by imposing more stringent pleading requirements and mandatory discovery stays, Congress enacted the SLUSA to “prevent certain State private securities class action lawsuits alleging fraud from being

² Additionally, two years before SLUSA, Congress enacted the National Securities Market Improvement Act of 1996 (NSMA), Pub. L. No. 104-290, 110 Stat. 3416 (1996), which preempted some state securities regulation and divided the responsibility for securities registration and investment adviser registration between the SEC and the States.

used to frustrate the objectives of the [PSLRA].” SLUSA, § 2(5). In SLUSA, Congress thus chose to oust state law, and require that securities actions within the federal statute’s coverage be brought in federal court or not at all. In so doing, Congress fundamentally altered the pre-existing relationship between federal and state securities law enforcement.

That exercise of Congressional power was entirely appropriate, and indeed at the core of the concerns that the Constitution directs our national government to address. Congress is the most efficient regulator of national securities markets because it, unlike the states, is able to establish uniform regulations that increase market efficiency and encourage the free flow of capital. That point is true regardless of whether the regulations are related to the registration of securities or the liability standards applicable in class-action suits alleging fraud. As one commentator stated, “[s]ince the problems are national, and in some respects international in scope, an effective national regulator seems more appropriate than piecemeal state regulation.” Roberta S. Karmel, *Reconciling Federal and State Interests in Securities Regulation in the United States and Europe*, 28 *Brook. J. Int’l L.* 496, 546 (2003).

ARGUMENT

I. The Market For Securities Traded On The National Exchanges Is Inherently National And International In Character And Its Efficient Operation Is Essential For Raising And Distributing Capital.

As the Senate noted in considering SLUSA, “[w]e live in an information age in which we have truly national, if not international, securities markets.” S. Rep. No. 105-182 , at 4 (1998). Congress’s recent securities regulation statutes seek to reduce costs and increase efficiency by establishing uniform rules. Banking Committee Chairman Senator

Gramm stressed the trend toward uniform national standards for securities regulation when he introduced SLUSA, stating that “[l]egislatively, we have been moving toward national standards for national securities. The National Securities Markets Improvement Act . . . created national rules for many aspects of our national securities markets. [SLUSA] is an important step continuing in that direction, a step in line with the principles behind the commerce clause of the Constitution.” 143 Cong. Rec. S10475 (daily ed. Oct. 7, 1997). The trend toward uniform national regulation of the securities market is also evident in international markets. See Karmel, *Reconciling Federal and State Interests*, 28 Brook. J. Int’l L. at 547 (surveying changes in securities regulation in the United States and Europe and concluding “[a]s securities markets have become national and even international and significantly affect the national economic welfare in the U.S. and the EU-wide markets in Europe, there has been a trend toward federalizing securities regulation”).

Courts have likewise recognized that the securities market is both national in character and essential for the efficient distribution of capital. As this Court has noted, “[l]arge corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses.” *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90 (1987). State courts likewise recognize that the national character of the securities market. See *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282, 290 (N.Y. 1996) (holding New York law preempted by federal regulations because it “would inevitably defeat the congressional purpose of enabling the SEC to develop and police [a] ‘coherent regulatory structure’

for a national market system.”); *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918, 925 (Minn. 1996) (“There is no denying the fact that the securities industry has a national or, if more broadly considered, an international scope.”).

SLUSA protects the federal policy of encouraging efficient securities markets by preventing circumvention of the Private Securities Litigation Reform Act of 1995. In 1997, the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs held oversight hearings on the operation of the PSLRA. The committee, after hearing extensive testimony, concluded that there was a measurable shift of securities class-action litigation from federal to state court after the passage of the PSLRA. S. Rep. No. 105-182, at 3. Studies showed that although there was a reduction in the number of securities class actions filed in federal court, that reduction corresponded with a similar increase filed in state courts.³ See Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 *Stan. L. Rev.* 273, 307-18 (1998). The Senate Committee concluded that the trend toward state class-action litigation “created a ripple-effect that has inhibited small, high-growth companies in their efforts to raise capital, and has damaged the overall efficiency of our capital markets.” S. Rep. No. 105-182, at 4. The Committee expressed specific concerns that the prospect of class actions in state court discouraged corporations from using the “safe-harbor” provision of the PSLRA, which was

³ See also Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *Vand. L. Rev.* 1465, 1498 (2004). Choi’s study confirmed that frivolous securities class-action suits were common in federal court before the PSLRA. He also concluded that post-PSLRA, the number of frivolous suits filed in federal court decreased and there was thus a shift toward meritorious suits. His study reviews only federal filings.

designed to encourage corporations to share valuable forward-looking information with investors. *Id.*

The Committee also stressed that although state regulators play a complementary role in regulating securities markets, SLUSA was necessary because defendants in state-court class actions were denied the protections promised by the PSLRA. *Id.* at 5. The Committee report noted that there was some concern that preempting state securities class actions violated federalism principles, but concluded that “the interest in promoting efficient national markets . . . [is] the more convincing and compelling consideration in this context.” *Id.* at 4. The Senate bill as well as the final version approved by the Conference Committee and enacted by Congress were patterned after the NSMIA in that both acts were intended to create uniform national standards in their respective fields. *See* H.R. Conf. Rep. No. 105-803, at 13 (1998) (“Consistent with the determination that Congress made in the National Securities Markets Improvement Act (NSMIA), [SLUSA] establishes uniform national rules for securities class action litigation involving our national capital markets.” (footnote omitted)).

SLUSA thus implements the Senate Banking Committee’s conclusions that securities class actions had shifted from federal to state court, that the shift prevented the PSLRA from achieving its important objective of reducing frivolous class-action litigation, and that “it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.” SLUSA, § 2(5), 112 Stat. 3227. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001) (SLUSA “mak[es] federal court the exclusive venue for class actions alleging fraud in the sale of certain

covered securities and . . . mandat[es] that such class actions be governed exclusively by federal law.”).

II. The Need For Uniform National Regulations That Promote Efficiency In The Securities Market And The Free Flow of Capital Is An Important National Interest That Justifies Congress’s Preemption Of State Securities Class Actions Alleging Fraud.

A. Although the Primary Purpose of Federalism is to Protect the Role of the States in our Federal System, a Necessary Corollary to that Purpose is Respecting the Essential Role of the National Government to Regulate in Specific Spheres.

The Commerce Clause of the Constitution grants the federal government the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. By virtue of the Supremacy Clause, regulations promulgated under the Commerce Clause supersede state law. *See* U.S. Const. art. VI, cl. 2. James Madison explained the Commerce Clause’s delegation of power by pointing out that uniform national regulation benefited the states: “A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.” *The Federalist* No. 42, at 276 (James Madison) (Isaac Kramnick ed., 1987). Alexander Hamilton justified the delegation on the basis that national regulation created a unified market that made the United States a competitive force in international commerce. The

Federalist No. 11, at 129-32 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

Regulation of national securities markets is at the core of the power allocated to the national government in our federal scheme. *See generally*, Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1502 (1994) (“There are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable.”). At the same time, the considerations that favor protection of state prerogatives, such as protecting individuals by providing a check on national power and encouraging citizen involvement by localizing government, are not implicated here. *See* Perino, *Fraud and Federalism*, 50 Stan. L. Rev. at 320-21. Other federalism principles, such as allowing the states to function as “laboratories” for innovation, *see New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), and allowing state government flexibility in responding to local issues, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), have less force here because experience has shown that giving States a free hand to craft their own standards for securities class actions generates an unacceptably high risk of the kinds of vexatious strike suits (with their coercive pressure to settle unmeritorious claims) that federal law seeks to minimize as a matter of national policy.⁴

⁴ Furthermore, SLUSA is carefully drawn to protect the interests of States by preserving state law in situations where Congress has determined that these risks are not as severe. It applies only to “covered class actions” involving (1) fifty or more named plaintiffs where common questions of law or fact predominate, (2) class actions brought on behalf of unnamed class members, and (3) consolidated suits alleging common questions of law or fact seeking damages for more than fifty plaintiffs. 15 U.S.C. § 77p(f)(2)(A). SLUSA also excludes (1) class actions alleging violations

B. Regulating the National Securities Market is Not a Purely Local Concern.

Regulatory competition among the States is beneficial only where the regulated individuals have real choice. Corporations with securities traded on national exchanges cannot control where their securities are traded. Unlike the market for corporate governance law where a corporation chooses a state of incorporation and opts into its laws, fraud liability is premised on the location of the transaction. Perino, *Fraud and Federalism*, 50 Stan. L. Rev. at 325; UNIFORM SECURITIES ACT § 801 (1985). The absence of real choice in the market for legal standards in securities regulations undercuts the value of the states experimentation. If the corporations are not able to opt out of inefficient liability regimes, the States lack incentives to structure competitive liability rules and “the virtue of innovation disappears and what remain are fifty petty and stultifying tyrannies, rather than fifty laboratories of experimentation.” Charles Fried, *Federalism--Why Should We Care?*, 6 Harv. J.L. & Pub. Pol’y 1, 3 (1982-1983).

The application of state fraud laws to securities traded on national exchanges in the form of class-action lawsuits gives

of the statutory or common law of the state in which the issuer is incorporated, (2) actions brought by a state on its own behalf, as a member of a class comprised of other states, or on behalf of a state pension plan, and (3) actions brought on contractual agreements between issuers and indenture trustees. 15 U.S.C. § 77p(d)(1)-(3). Congress also reserved the authority of state securities regulators to investigate violations and bring enforcement actions based on state law. 15 U.S.C. § 77p(e). Finally, derivative actions based on state corporate law are not preempted. 15 U.S.C. § 77p(f)(2)(B). *See generally*, A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U. L.Q. 435, 491-94 (2000) (discussing the exceptions).

that law extra-territorial effect. Allowing extra-territorial application creates the risk of externalities because a state can shift the costs of complying with its law from its own citizens to the citizens of other states. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1495-96 (1987) (reviewing Raoul Berger, *The Founders' Design* (1987)). A state may have a tangential interest in applying its fraud statutes to protect resident shareholders of resident corporations, resident shareholders of nonresident corporations, and nonresident shareholders of resident corporations; however, as this Court emphasized in *CTS*, a state “has no interest in protecting nonresident shareholders of nonresident corporations.” *CTS Corp.*, 481 U.S. at 93 (emphasis omitted). The lack of alignment between the interests of the state in enforcing its fraud laws on a class-wide basis and the cost of enforcement to the state and its residents enhances the risk of negative externalities.

The Senate Banking Committee report foresaw such a negative externality. To avoid liability in an integrated national economy with multiple jurisdictions, all of which may enforce their fraud statutes on a class-wide basis, corporations must conform their statements and forecasts to the most stringent standard, regardless of whether that standard is beneficial to the corporation’s shareholders or national securities markets. Given the costs of litigation, risk-averse corporations might reasonably fail to take full advantage of federal safe-harbor provisions in contravention of federal policy. The Senate report cited that “chilling effect” on the use of the federal safe-harbor provision as one reason to adopt SLUSA. S. Rep. 105-182 at 4.

C. Differing Liability Rules in Class Actions Impose Significant Costs that Impair Efficiency and Increase the Price of Capital in the National Securities Markets.

1. This Court has Emphasized the Important Role of Clear and Consistent Fraud Rules in Achieving Efficient Markets.

This Court repeatedly has rejected attempts to expand civil fraud liability under the federal securities laws in an ill-defined or unclear way. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Court rejected the argument that individuals who neither purchased nor sold a particular security could bring a civil fraud action because it did “not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions.” *Id.* at 755. The Court subsequently rejected the vague “substantial factor” test to determine liable parties under Section 12 of the Securities Act because that test “introduces an element of uncertainty into an area that demands certainty and predictability” and would result in “decisions . . . made on an ad hoc basis, offering little predictive value to participants in securities transactions.” *Pinter v. Dahl*, 486 U.S. 622, 652 (1988); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994) (rejecting aiding and abetting liability under Rule 10b-5 because of the inherent uncertainty such liability entails for secondary parties).⁵

⁵ Recent scholarship vindicates the Court’s emphasis. *See* Rafael LaPorta, Florencio Lopez-de-Silanes, and Andrei Schliefer, *What Works in Securities Laws*, __ J. Fin. __ (forthcoming Feb. 2006), available at <http://www.afajof.org/jofihome.shtml> (follow “Forthcoming Articles”

2. *The Substantial Costs of Frivolous Class Action Litigation Impede the Efficiency of National Securities Markets.*

Class-action litigation, regardless of its merits, always imposes substantial costs. *See generally* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945 (1993). The costs of frivolous class-action litigation are especially damaging to the markets because they impose a dead-weight loss on investors. The Senate committee report prepared after the hearings on the PSLRA emphasized the cost of class-action litigation, noting that in 1994 corporations and their insurers paid \$1.4 billion to settle various securities lawsuits. S. Rep. No. 104-98, 8-10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 683, 687-89. The average cost of settlement was \$8.6 million. *Id.* More recent surveys report that settlement costs for all securities class-action suits have increased along with the length of the settlement process while the number of cases settling has decreased. *See* Mukesh Bajaj, Sumon C. Mazumdar, & Atulya Sarin, *Securities Class Action Settlements*, 43 Santa Clara L. Rev. 1001 (2003).

This Court has noted that “litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.” *Blue Chip Stamps*, 421 U.S. at 739. The danger is not

hyperlink; then follow February 2006 hyperlink) (last visited Nov. 11, 2005). The authors survey the securities regulations of 49 countries and find, among other things, a positive correlation between judicial efficiency and developed financial markets. They conclude that the benefits of regulation typical in common-law jurisdictions “lie in its emphasis on private contracting and standardized disclosure, and in its reliance on private dispute resolution using market-friendly standards of liability.” *Id.* at 23.

ameliorated when suits resembling suits brought under Rule 10b-5 are brought in state court based on state blue sky laws or common law; rather, it is exacerbated. The PSLRA was a response to vexatious federal litigation, but its strictures do not apply in state court. The lack discovery stay and stringent pleading standards in state court proceedings adjudicating claims based on state fraud statutes increases both the cost of the litigation and the incentive to settle, regardless of the merits, to avoid those costs. Also, as illustrated by the present case, state law may provide expanded bases of liability for both individual and class action suits. This Court held in *Blue Chip Stamps* that sound policy dictated that the same claim asserted in *Dabit* could not proceed under Rule 10b-5. The policy arguments against allowing class-action lawsuits asserting the claim in federal court apply in state court. The costs of defending class actions are no less and the difficulties inherent in the holding claim itself are the same.

3. State Courts Recognize that Differences Between State and Federal Regulations Governing Securities Markets Create Costs and Impede Market Efficiency.

State courts recognize that state law can impede market efficiency and increase costs by imposing liability beyond that imposed by federal securities laws. For example, the SEC adopted a regulation to establish uniform practices regarding the payment for order flow. That rule allowed the payments subject to reasonable disclosure requirements. The SEC's less stringent standard conflicted with regulations in a number of states. Addressing that conflict, the New York Court of Appeals held that uniform national rule preempted New York's regulation because enforcing its more stringent standard would cause firms to cease payment for order flow despite the SEC's judgment the practice was beneficial to the

securities market. *Guice*, 674 N.E.2d at 289-91. At least four other states reached the same conclusion. *See McKey v. Charles Schwab & Co.*, 79 Cal. Rptr. 2d 213 (Cal. App. 1998); *Orman v. Charles Schwab & Co.*, 688 N.E.2d 620 (Ill. 1997); *Dahl*, 545 N.W.2d at 925-26; *Shulick v. PaineWebber, Inc.*, 722 A.2d 148 (Pa. 1998); *see also* Rutheford B. Campbell, Jr., *The Insidious Remnants of State Rules Respecting Capital Formation*, 78 Wash. U. L.Q. 407 (2000) (arguing that non-preempted state securities regulations applicable to small issuers increases their capital costs.).

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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