No. 13-317

IN THE SUPREME COURT OF THE
UNITED STATES

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,
v.
ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF
MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

On Writ of Certiorari To The United States Court of
Appeals For The Fifth Circuit

BRIEF AMICI CURIAE OF AARP AND NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people and disrupt their retirement security. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

A significant percentage of the investing public in the United States' markets is comprised of members of the age fifty and older population. Older persons are frequent targets of financial fraud because they often have significant assets and they look for investment opportunities that will supplement Social Security and other sources of retirement income. As a result, AARP has elevated the importance of combating securities fraud and given this issue a high priority by commenting on

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

legislative and regulatory proposals that address investment fraud, filing *amicus* briefs in cases involving the securities laws, and supporting efforts to enhance the remedies of defrauded investors.

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has sixty-seven (67) members, including the securities regulators in all fifty (50) states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's members are responsible for regulating securities transactions under state law, and their principal activities include registering local securities offerings, licensing the brokers and investment advisers who sell securities or provide investment advice, and initiating enforcement actions to address fraud and other misconduct. NASAA's members are intimately familiar with the investment offerings and sales abuses confronting their state residents on a daily basis.

NASAA supports all of its members' activities and it appears as *amicus curiae* in important cases involving securities regulation and investor protection. Recognizing that private actions are an essential complement to governmental enforcement of the securities laws, NASAA and its members also support the rights of investors to seek redress in court for investment-related fraud and abuse. NASAA and its members have an interest in this appeal because it will profoundly affect the ability of

investors to seek redress in cases where unscrupulous companies and individuals seek to cloak their fraudulent acts.

The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets. This is of particular concern at this time, to both AARP and NASAA, given the entry of many first-time investors into the market and the responsibility for retirement investing that retirees and employees have had to assume as a result of the shift in the retirement plan paradigm from defined benefit pension plans (under which employers bear the risk of loss) to defined contribution pension plans (under which plan participants bear the risk of loss).

SUMMARY OF ARGUMENT

Private securities fraud litigation initiated under Rule 10b-5 is essential to protect the integrity of the securities markets for investors, maintain investor confidence in the markets, and compensate investors who have been victims of fraud. Overturning or substantially modifying the Court's holding in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), would contravene Congress' and the Court's continually expressed support for such litigation by significantly undermining innocent investors' ability to recover their losses, resulting in a loss of confidence in the U.S. markets.

Basic serves to aid plaintiffs in securities fraud cases seeking class certification under Rule 23 by providing them the fraud-on-the-market presumption to demonstrate reliance as a class and satisfy Rule 23's predominance requirement. Overturning or substantially modifying *Basic*'s

presumption would abandon more than 25 years of the Court's precedent and erect a substantial hurdle to certification that would essentially foreclose securities fraud plaintiffs' use of the class action vehicle.

Given federal limitations on state law-based securities fraud claims, Rule 10b-5 class actions that utilize *Basic*'s presumption remain one of the few viable means by which victims of securities fraud can hope to gain significant recovery. Moreover, Congress, in its attempts to address perceived abuses in securities fraud litigation with the adoption of the PSLRA and SLUSA, continued to recognize the importance of Rule 10b-5 class actions and determined that the provisions of the PSLRA and the SLUSA struck the proper balance between perceived vexatious litigation and the important role played by securities fraud class actions, leaving *Basic*'s presumption intact. Overruling or significantly modifying *Basic* would disrupt the delicate balance these statutes created and would implement a hurdle that Congress chose not to enact.

Therefore, as a result of the important role played by Rule 10b-5 in protecting investors and ensuring confidence and integrity in the markets, the unavailability of alternative remedies under state law, and Congress's determination to address vexatious litigation without dismantling the fraud-on-the-market presumption, the Court should not abandon its ruling in *Basic*.

ARGUMENT

Overturning the Court's ruling in *Basic* will create an insurmountable hurdle to the private securities actions that Congress and the Court have embraced under Section 10(b), and that the SEC implemented through Rule 10b-5, which have proven to be powerful tools in deterring securities fraud and compensating securities fraud victims.

I. THE FRAUD-ON-THE-MARKET PRESUMPTION MAKES 10b-5 PRIVATE SECURITIES FRAUD CLASS ACTIONS A VIABLE REMEDY FOR DEFRAUDED INVESTORS.

Basic's fraud-on-the-market presumption makes private enforcement of the securities laws possible by making class action litigation feasible. Rule 10b-5 prohibits issuers from making material misrepresentations in connection with the sale or purchase of securities. *See* 17 C.F.R. § 240.10b-5(b) (2013). To enforce this rule, an individual defrauded investor first must establish that he or she relied on the issuer's misrepresentation. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). To enforce this rule as a class, however, a putative class of defrauded investors must first meet the requirements of Federal Rule of Civil Procedure 23(b)(3) by establishing that common questions of law or fact predominate over any questions affecting only individuals. *See* Fed. R. Civ. P. 23(b)(3). Unlike any of the other factors in a Rule 10b-5 claim, reliance is usually specific to each member of the class, and requiring an individual showing of reliance for each plaintiff makes class certification impossible. Recognizing the importance of the class action vehicle in private enforcement of Rule 10b-5, the Court in *Basic* established the fraud-on-the-

market presumption. The presumption relieves plaintiffs from the necessity of proving reliance individually and permits plaintiffs to establish reliance as a group, provided they establish certain predicate facts, thereby establishing that common questions predominate as required by Rule 23(b)(3). *Basic*, 485 U.S. at 241.

Without *Basic*'s fraud-on-the-market presumption, private securities class actions will not be a viable remedy for victims of fraud in cases alleging affirmative misrepresentations because individual issues would always predominate over common issues due to the individualized nature of Rule 10b-5's reliance component. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1193 (2013) ("Absent the fraud-on-the-market-theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." (citing *Basic*, 485 U.S. at 242)); *see also* Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on* Amgen *and the Second Coming of* Halliburton 27 (Geo. Pub. L. & Legal Theory Research Paper No. 13-058, 2013), *available at* http://scholarship.law.georgetown.edu/facpub/1226 [hereinafter *Judgment Day*] ("[W]ithout class certification there will be no practicable mechanism to address demonstrable harm from securities fraud."). However, the class action mechanism is essential for most investors to vindicate their rights– without it, recovery for Rule 10b-5 fraud would be impossible as a practical matter. Most investors' individual losses are often minimal compared to the total harm to all investors from one fraud. As a result, defrauded investors face a collective action

problem–although each individual would benefit from litigation to hold the violator accountable for shareholder losses, few have the incentive to investigate and bring an individual claim because the costs would dwarf the expected return to the individual investor. *See* Lisa L. Casey, *Class Action Criminality*, 34 Iowa J. Corp. L. 153, 163 (2008). The class action device solves this problem by permitting groups of investors to share litigation costs on a large scale. The class action device also provides incentive to plaintiffs' attorneys to prosecute cases of fraud, and lends feasibility to the handling of such cases. Attorneys must devote significant time, "financial resources and human capital" to the development of complex securities cases. *Id.* at 164. Class actions permit claims aggregation to the point that the class and potential investor return are "large enough to attract experienced plaintiffs' attorneys willing to represent injured shareholders on a contingent fee basis." *Id.* at 163. Without this incentive, defrauded investors would not be able to afford representation and would not be able to take action to recover losses.

II. PRIVATE SECURITIES LITIGATION SERVES A CRUCIAL ROLE IN ENFORCING SECURITIES LAWS, MAINTAINING INVESTOR CONFIDENCE, AND COMPENSATING VICTIMS OF FRAUD.

Private securities fraud class action lawsuits are an essential means of protecting the integrity of the securities markets for investors, maintaining investor confidence in the markets, and compensating investors that have been victims of fraud. As a federal agency dependent on the annual appropriations cycle, the SEC must fulfill its broad mandate with limited resources that are "not sufficient to permit the SEC to examine regulated

entities and enforce compliance with the securities laws in a way that investors deserve and expect." *Testimony Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 113th Cong. 5 (2013) (statement of Mary Jo White, Chair, U.S. SEC). Most recently, the SEC was allocated $324 million less than it requested in 2014. *See* Bruce Carton, *SEC to Receive 2% Budget Increase in FY 2014, Far Below 26% Requested Increase*, Compliance Week (Jan. 14, 2014), http://www.complianceweek.com/sec-to-receive-2-budget-increase-in-fy-2014-far-below-26-requested-increase/article/329305/. According to the SEC, its budget does not enable it to adequately enforce the federal securities laws:

> This proposed level falls short of what we need to fulfill our responsibilities to investors and our markets . . . It will limit our ability to bolster our enforcement and examinations programs, implement our new duties regarding derivatives, private fund advisers and municipal advisers, and invest in critical technology for market oversight and law enforcement. It is particularly frustrating considering that funding for the SEC does not contribute to the federal deficit.

Paul Davidson, *Budget Deal Puts Squeeze on Financial Regulators*, USA Today, Jan. 15, 2014, http://www.usatoday.com/story/money/business/2014/01/14/spending-bill-financial-regulators/4480599/ (quoting SEC spokesman).

The Commission selectively employs its limited resources by necessity, and does not have the resources to fully meet any of its goals without

private investor vigilance. *See* Elisse B. Walter, Commissioner, U.S. SEC, Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program (Nov. 8, 2011) [hereinafter Walter Remarks]. In fact, private litigation fills an enforcement void created by the SEC's limitations, and there is very little overlap between private and public enforcement actions. James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737, 777 (2003) [hereinafter *Enforcement Heuristics*] (finding only 15% of settled class actions have parallel SEC action). This is particularly true as to restitution because the SEC rarely prioritizes making securities fraud victims whole. Walter Remarks, *supra* (SEC cannot choose targets by magnitude of investor losses); *Enforcement Heuristics*, *supra*, at 778 (statistical analysis shows investors' provable losses unrelated to SEC choice of enforcement targets; instead agency focuses resources on small capitalization firms in financial distress).

The Commission therefore recognizes that private securities litigation is an "essential supplement" to SEC enforcement actions. Brief of the United States as Amicus Curiae Supporting Respondents at 1, *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) (No. 08-905) (recognizing the importance of private securities litigation as a supplement to criminal and civil enforcement actions); *see also* Walter Remarks, *supra* (it is "critical to investors, our securities markets, and our economy overall that these laws remain fully enforceable [by the public]"). The courts have likewise recognized the importance of private litigation, *see infra* Section II.A, and Congress has

relied on private litigation to help ensure robust anti-fraud enforcement, *see infra* Section II.B.

Consequently, the resolution of the issues presented in this case will have immediate and potentially serious repercussions for the civil enforcement of securities law violations in this country, especially as they relate to Rule 10b-5. As financial crimes abound and alternative forums for aggrieved investors remain limited, it is especially important that the federal courts remain open to victims of fraud and serve as a viable forum where fraud victims can seek meaningful remedies. Overturning or substantially modifying the fraud-on-the-market presumption in *Basic* would essentially close the courthouse doors to victims of securities fraud by removing victims' ability to enforce the securities laws through private litigation.

A. Defrauded Investors Have Recovered Their Losses as a Result of This Court's Emphasis on the Importance of Private Securities Litigation in Maintaining the Integrity of the Markets and Deterring and Redressing Securities Fraud.

The Court has long recognized the vital importance of legitimate private securities litigation to the federal enforcement regime for securities fraud. *See, e.g., Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (observing that "implied private actions provide 'a most effective weapon in the enforcement' of the securities laws"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (stating that "private enforcement" of Rule 10b-5 is "a necessary supplement to Commission action"). The Court has described private securities fraud actions as "a prominent

feature of federal securities regulation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). The Court noted the importance of private securities fraud actions in *Basic* itself: "[j]udicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements." *Basic*, 485 U.S. at 230-31. Since the Court's decision to implement the fraud-on-the-market presumption in *Basic*, the Court has been unwavering in its support for and recognition of the important role played by private securities fraud litigation in maintaining the integrity of the markets, deterring securities fraud, and compensating victims of fraud. *See* Barbara Black, *Eliminating Securities Fraud Class Actions Under The Radar*, 2009 Colum. Bus. L. Rev. 802, 808 (2009).

The Court specifically recognized that "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006). Investor confidence in the integrity of the securities markets is crucial to the capital formation system of our economy. *See Basic*, 485 U.S. at 235 n.12. Investor confidence requires both "confidence that the laws will be obeyed and that, when they're not, that the fraudsters will be made to pay." Luis A. Aguilar, Commissioner, U.S. SEC, Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation (Apr. 4, 2011) [hereinafter Aguilar Remarks]. Private securities litigation performs a significant role in maintaining investor confidence in

the integrity of our markets by enforcing the mandatory disclosure required by the securities laws, a role that is particularly important in light of the recent financial crisis. *See Dabit*, 547 U.S. at 78 (noting the importance of Rule 10b-5). If the Court stymies investors' efforts to hold corporate actors accountable for their frauds, investor confidence in the integrity of our markets will suffer, and investors will likely be far less willing to participate in our securities markets. *See* Aguilar Remarks, *supra* (discussing empirical evidence that disclosure benefits companies and the "economy as a whole").

The Court has also recognized the important role of private securities fraud actions in deterring fraud, another fundamental goal of the securities laws, by supplementing criminal and civil actions brought by the various government entities. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."). Many instances of securities fraud go unpunished because "the volume of violations is too great for the SEC to detect and investigate all possible wrongdoing." *Enforcement Heuristics*, *supra*, at 762. As former Commissioner Elisse B. Walter has remarked, "even with ideal resource availability, the Commission cannot bring every case." Walter Remarks, *supra*. However, the "frequency and magnitude of sanctions are important in the deterrence of deceptive financial reporting." James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the*

Enforcement of the U.S. Securities Law, 6 European Company & Fin. L. Rev. 164, 173 (2010).

Private securities actions are therefore essential deterrents to securities law violations because they increase the frequency of sanctions and the financial penalties paid by companies that break the law. Additionally, government agencies are generally strangers to the transactions that give rise to allegations of private securities fraud. Private participants in allegedly fraudulent transactions thus have an informational advantage over government agencies and are significantly more likely to detect and blow the whistle on fraud than the Commission. *Id.* at 198 (SEC is first to detect only 6% of revealed corporate frauds). Private investors, of course, also have stronger incentives to prosecute certain alleged frauds because they stand to profit from any recovery.

Finally, private securities class actions are the defrauded investor's primary mechanism for compensation. Statistics show that "private enforcement . . . dwarf[s] public enforcement," and thus private litigants are much more successful in terms of recovery than the Commission. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1542-43 tbls. 2 & 3 (2006). In fact, "even in major scandals where the [Commission] has brought its own action, the damages paid in securities class actions are usually (but not always) a multiple of those paid to the [Commission]." *Id.* at 1543.

Unfortunately, the SEC is ineffective at making defrauded investors whole because of its institutional shortcomings and because of the nature

of financial fraud. First, the SEC must carefully prioritize enforcement actions because it faces chronic resource constraints, and the Commission typically does not choose enforcement targets based on the magnitude of individual losses. *See supra* Section II; Walter Remarks, *supra*. Furthermore, the Congressional mandate and funding for the Commission allows it to prosecute only the most flagrant abuses of securities laws and limits available monetary remedies. The SEC can order violators of securities laws to disgorge ill-gotten profits and can levy fines, but it cannot seek damages; thus, "while the agency can require wrongdoers to give up the benefits they have received from violations, it cannot necessarily make the victims whole." Walter Remarks, *supra*. In fact, "it is the nature of financial fraud violations that the harm caused as a consequence of misrepresenting the firm's performance or financial position is often greater than any profit violators take home." *Enforcement Heuristics*, *supra*, at 756.

Therefore, although the SEC is authorized to return disgorged funds and some fines to investors, and although these funds may be substantial in some cases, the amounts collected to be returned to investors "can pale when compared to the harm proximately caused by the defendants' violation." *Id.* Thus, while the Commission may seek monetary relief, its remedies are designed primarily to deter violations by making them unprofitable, rather than to make investors whole. And with good reason: the damages in major securities fraud cases can and often do run into the billions of dollars. *See, e.g.*, *Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004); *see also* Coffee,

supra, at 1555 (cataloguing settlement amounts in major securities fraud cases). Accordingly, the primary means of compensating injured investors remains the private cause of action under Rule 10b-5.

Though the Court has relied on the deterrence effect of private securities fraud class actions more than it has cited its compensation component, *see* Black, *supra*, at 814-15, the importance of class litigation to investor compensation has not been lost on the lower courts. In fact, without private litigation investors would have recovered little, even in the wake of some of the most significant financial frauds of our time. For instance, when Global Crossing filed for bankruptcy in 2002, the company "wiped out $2.5 trillion in market value." Julie Creswell & Nomi Prins, *The Emperor of Greed*, Fortune, June 24, 2002. Global Crossing chair Gary Winnick treated the company as his personal "cash cow" and "cashed in $735 million of stock over four years–including $135 million Global Crossing issued to his private company–while receiving $10 million in salary and bonuses and other payments to the holding company." *Id.* Investors in Global Crossing claimed to have lost over $35.5 billion as a result of the company's fraud. In the subsequent SEC enforcement action, a handful of company executives were fined $100,000 each, while Global Crossing and Gary Winnick paid absolutely nothing. *3 Ex-Officials of Global Crossing are Fined in SEC Settlement*, N.Y. Times (Apr. 13, 2005), http://www.nytimes.com/2005/04/12/business/worldbusiness/12iht-global.html. As a result of a class action lawsuit, however, investors recovered a $245 million settlement, including $30 million from Winnick personally. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 447. While the recovery

through the private lawsuit was small in comparison to investors' losses, it was vastly more than what the SEC recovered.

More recently, WorldCom shareholders lost an estimated $200 billion as a result of "perhaps the largest accounting fraud in history, with the company's income overstated by an estimated $11 billion [and] its balance sheet overstated by more than $75 billion." *SEC v. WorldCom, Inc.*, 273 F. Supp. 2d 431, 431 (S.D.N.Y. 2003). The SEC recovered $750 million in its enforcement action, some of which was ultimately distributed to defrauded investors. *Id.* at 435. The penalty recovered by the SEC was only a small fraction of investor losses resulting from the fraud: the *WorldCom* district court recognized that compensation of victims is "a 'distinctly secondary goal' of S.E.C. actions" and the SEC could not determine the size of the penalty based on the shareholder losses to be compensated. *Id.* at 434 (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)). However, through class litigation, investors ultimately recovered $6.133 *billion*. *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 322 (S.D.N.Y. 2005). The *WorldCom* settlements represent the second-largest class action settlement of all time. NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review* 30 (Jan. 21, 2014). Investor recoveries varied under the settlement, which went "a long way toward making bondholders whole." *In re WorldCom,* 388 F. Supp. 2d at 339. Stockholders recovered $0.56 per share. *Id.* at 340. Both categories of defrauded WorldCom investors would have recovered little, if anything, without access to investor class actions.

B. Congress Has Also Expressed Its Continued Support for the Important Role Private Securities Litigation Plays in Deterring Fraud, Compensating Victims, and Promoting Market Integrity.

Since the Court's decision in *Basic*, Congress has taken steps to cure what it viewed as abuses in private securities class actions by enacting the PSLRA, 15 U.S.C. § 78u-4 (2012), and the SLUSA, 15 U.S.C. §§ 77p(b), 78bb(f) (2012). Even while restricting private securities class actions to correct perceived abuses, Congress made clear that it recognized the important role played by private securities litigation in deterring fraud and compensating victims: "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. Rep. No. 104-98, at 8 (1995). Congress also recognized the important role such actions play in maintaining investor confidence in our markets and ensuring market integrity:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government actions. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.

H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). The Court itself has also recognized that even in light of the limitations placed on private securities fraud actions in the PSLRA, Congress has continually embraced class actions as an effective tool to ensure a robust regime of securities regulation. *See Tellabs*, 551 U.S. at 321 n.4 ("Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." (*quoting Dabit*, 547 U.S. at 81)).

There is no doubt that the PSLRA and SLUSA greatly limited fraud victims' ability to maintain private class actions. *See infra* Section III. Nevertheless, even during the height of private securities litigation reform when Congress took up the issue of alleged vexatious litigation, Congress did not limit or eradicate *Basic*'s fraud-on-the-market presumption, though some argued doing so would have solved the problems that Congress hoped to address with the adoption of the PSLRA and SLUSA.

Defendants in private securities class actions have argued that the PSLRA has "frozen the outer limits of fraud-on-the-market class actions," *Judgment Day*, *supra*, at 5, which they contend prevents courts from expanding such actions because such expansion is for Congress to decide. This line of reasoning is a two way street, however. *Id.* If the PSLRA prevents the Court from expanding private securities fraud class actions, the PSLRA should also prevent the Court from constricting private securities class actions by overturning doctrines—such as the fraud-on-the-market-presumption—that

were staples of law left unchanged by Congress. *See id.* As the Court has noted, "[i]t is appropriate for us to assume that when § 78u-4 [the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action *as then defined* but chose to extend it no further." *Stoneridge*, 552 U.S. at 166 (emphasis added). In 1995 when Congress adopted the PSLRA, the fraud-on-the-market presumption was an accepted part of the private cause of action under § 10(b). Initial versions of the PSLRA even included provisions that would have abandoned the fraud-on-the-market presumption. Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 204(c) (1995); *see also* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 153 (2009). However, Congress "rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen,* 133 S.Ct. at 1201.

Had Congress wanted to jettison the fraud-on-the-market presumption, it could have acted directly, as the PSLRA was "*about* fraud-on-the-market litigation." *Judgment Day*, *supra*, at 6 n.17. Instead, Congress chose to accept the presumption as part of the § 10(b) and Rule 10b-5 private right of action "as then defined." *Stoneridge*, 552 U.S. at 166. It follows that Congress, not the Court, should determine the presumption's continued viability, as Professor Langevoort convincingly argues:

> Indeed, the structure of the PSLRA makes no sense except when read as a political compromise that preserves the foundation of the fraud-on-the-market class action while making it harder for plaintiffs to bring, plead and prove a successful claim through a variety of reforms. So it occupies

> the field, in a way that disappointed both the most insistent champions and the most strident critics of private securities litigation. When this happens, the natural conservative judicial move is to defer.

Judgment Day, *supra*, at 6; *see also* Black, *supra*, at 805 ("Radical change of an important investor protection mechanism, however, is such an important policy matter affecting our securities markets that the debate should take place in the national spotlight."); *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) (Easterbrook, J.) (indicating that it is up to Congress to further define the limits of private securities actions).

Some former members of Congress argue in this case that the Court should not weigh heavily the fact that Congress rejected a provision that would have overturned the *Basic* presumption. *See* Brief for Former Members of Congress, Senior SEC Officials, and Congressional Counsel as Amici Curiae Supporting Neither Party at 2-3. These *amici* also, however, note that Congress was presented with provisions that would have codified the *Basic* presumption—provisions that were also left on the drafting room floor. Congress left the fraud-on-the-market presumption undisturbed, and this Court should defer to that judgment.

III. RULE 10b-5 REPRESENTS INVESTORS' ONLY SOURCE OF REDRESS BECAUSE OF FEDERAL LIMITATIONS ON SECURITIES FRAUD CLAIMS BASED ON STATE LAW.

Congressional limitations on private securities class actions in the PSLRA and particularly in SLUSA have effectively limited the forums in which aggrieved investors can seek relief. In adopting the PSLRA, Congress sought to prevent the filing of "frivolous 'strike' suits alleging violations of the Federal securities laws in the hope that defendants will quickly settle to avoid the expense of litigation." S. Rep. No. 104-98, at 4 (1995). To address this primary concern, Congress, in the PSLRA, significantly limited private securities litigation by "creat[ing] a carefully tailored safe harbor for forward-looking statements," changing the way in which lead plaintiffs are chosen, and devising stricter pleading standards, among other things. *See id.* at 5-7.

Following the adoption of the PSLRA, Congress enacted SLUSA in an attempt to close a perceived loophole in the PSLRA that increased the number of private securities class actions being filed in state court, *see* S. Rep. No. 105-182, at 3-4 (1998)—specifically, to address the concern that "securities class action lawsuits [had] shifted from Federal to state courts" as a means of circumventing the PSLRA. *See* 15 U.S.C. §§ 77p(b), 78bb(f) (findings set forth in Pub. L. 105-353, 112 Stat. 3227, § 2). With certain exceptions, SLUSA provides that no class action based upon state law may be maintained in any state court on behalf of more than fifty class members. *See id.* §§ 77p(b), 78bb(f). With the enactment of SLUSA, Congress effectively closed the state courthouse doors to private securities fraud

class actions. *See* John M. Wunderlich, *"Uniform" Standards for Securities Class Actions*, 80 Tenn. L. Rev. 167, 168-69 (2012).

The need to ensure that investors have meaningful remedies in federal court is all the more important when state law does not provide an alternative remedy. This is especially true for securities fraud cases in light of the fact that "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." *Dabit*, 547 U.S. at 88. Furthermore, the Court has observed that the disadvantages posed by a restrictive interpretation of federal securities law can be "attenuated" where adequate remedies are available under state law. *See Blue Chip Stamps*, 421 U.S. at 738 n.9 (weighing fact that class action in state court was an alternative remedy); *see also Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478 (1977) (state cause of action under corporate law was a factor in determining whether to recognize federal cause of action); *J.I. Case Co. v. Borak*, 377 U.S. 426, 429 (1964) (noting that if federal jurisdiction is limited and state law affords no relief, then the "whole purpose" of the statutory provision might be frustrated). Conversely, where state law does not offer a significant alternative forum for plaintiffs' claims—as is the case after the enactment of SLUSA—there is a correspondingly greater justification and need for the federal courts to afford relief for victims of securities fraud.

In this case, Petitioners contend that state courts have "roundly rejected" the fraud-on-the-market theory. *See* Pet'rs' Br. 11. Petitioners go on: "State courts, of course, are not bound by *Basic*, and thus it is a marked critique that they have overwhelmingly refused to adopt its fraud-on-the-

market approach." *Id.* at 24. While most states have not adopted the fraud-on-the-market presumption, their failure to do so is not a "marked critique" of the theory. Many states have not embraced *Basic*'s presumption because there is no need—reliance is not an element of most state law securities fraud claims. *See* Unif. Sec. Act § 410(a)(2) (1956); Unif. Sec. Act § 509(b) (2002); *see also* Unif. Sec. Act. § 509 cmt. 4 (2002) ("Unlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b)."); *Dunn v. Borta*, 369 F.3d 421, 432 (4th Cir. 2004) ("The 'by means of' clause . . . is not intended as a requirement that the buyer [of a security] prove *reliance* on the untrue statement or the omission." (quoting Louis Loss, *Commentary on the Uniform Securities Act* 148 (1976))). Additionally, private state law securities fraud claims generally require some form of privity between the buyer and seller of the securities at issue. See Unif. Sec. Act § 509 cmt. 3 (2002). The existence of any such privity requirement would negate the need for a state to adopt the fraud-on-the-market-theory as the action would be between the buyer and a direct seller—a transaction in which the market plays no direct role.

In states where the fraud-on-the-market theory could be applicable under state law, some state courts have embraced it. *See State v. Marsh & McLennan Cos., Inc.*, 292 P.3d 525, 532-37 (Or. 2012); *Allyn v. Dually*, 725 So. 2d 94, 101 & n.3 (Miss. 1998). And while some states have declined to extend *Basic* to common-law fraud, they did so in part because *Basic*'s presumption remained available under federal or state law. *See, e.g.*, *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1192 (N.J.

2000) ("plaintiff already had an adequate remedy under federal securities law"); *Mirkin v. Wasserman*, 858 P.2d 568, 572 (Cal. 1993) ("[p]laintiffs already have remedies under the federal and state securities laws").

Petitioners' attempt to undermine *Basic*'s fraud-on-the-market presumption by citing state courts' refusal to accept the doctrine is wholly unpersuasive given that (1) state securities fraud claims generally do not require plaintiffs to prove reliance; (2) a state law privity requirement renders the presumption inapt; and (3) where applicable, some state courts have adopted the fraud-on-the-market theory. The states' experience with *Basic*'s approach thus lends no support to Petitioners' arguments.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully submit that the Court should affirm the decision of the Fifth Circuit and deny Petitioners' call to overturn or substantially modify *Basic*.

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