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 FOR AMGEN INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amgen Inc. is the world's largest independent biotechnology company. Amgen discovers, develops, manufactures, and delivers innovative human therapeutics to treat patients suffering from cancer, kidney disease, rheumatoid arthritis, bone disease, and other serious illnesses. To develop these therapies, Amgen spends billions of dollars on research and development.[1]

Amgen has a significant interest in ensuring that rules governing securities class actions are fair and sensible. As a large, publicly traded company, Amgen has been the target of several securities class actions, currently including proceedings on remand from this Court's decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Although these lawsuits almost invariably lack merit, the costs of defending them can be enormous, and those costs impair innovation in new human therapies. This Court's decision in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), has substantially increased these societal costs.

Amgen has a second particular interest in urging the Court to overrule *Basic*: In a case brought against Amgen, the Ninth Circuit sua sponte extended the *Basic* presumption to lawsuits brought under the Employee Retirement Income Security Act (ERISA). *See Harris* v. *Amgen, Inc.*, ___ F.3d ___, 2013 WL 5737307 (9th Cir. Oct. 23, 2013) (op. on reh'g). A failure to overrule *Basic* now will encourage other courts to follow the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amgen and its counsel made any monetary contribution to the preparation or submission of this brief. The parties have filed blanket letters of consent with the Court.

Ninth Circuit's lead in improperly extending *Basic* to other substantive areas of law.

SUMMARY OF ARGUMENT

Amgen endorses petitioners' arguments for overruling *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). In particular, Amgen agrees that experience has shown that the theoretical underpinnings of *Basic* are unsound and that absent the *Basic* presumption there would still be adequate mechanisms (such as individual actions by large institutional investors) to deter and remedy genuine misconduct. Amgen writes to add two points.

First, well over two decades of experience under *Basic* have made clear that the presumption enables meritless class litigation that imposes substantial costs on American business. In the pharmaceutical and biotechnology fields, these costs are particularly significant because they translate into less spending on research and development of important new public-health products. The specter of litigation also tends to dampen the type of inventive risk-taking by companies that often produces the most spectacular and beneficial advances—but that can also produce a sharp stock drop (and inevitably, in the *Basic* regime, a flood of lawsuits) when it fails to meet expectations.

Second, the mischief of the *Basic* presumption is spreading beyond the securities context, underscoring why the overruling of *Basic* cannot wait. Recently, the Ninth Circuit borrowed the *Basic* presumption from federal securities law and applied it to ERISA litigation, relieving plaintiffs of the obligation to show reliance on allegedly false statements. That decision is indefensible in itself, as Amgen will explain in a soon-to-be-filed petition for a writ of certiorari. For example,

studies show that a critical assumption underlying the *Basic* presumption—that investors rely on the market price when making investment decisions—is exceedingly tenuous in the ERISA context. For present purposes, the Ninth Circuit's decision illustrates the potential for *Basic* to spread to and confuse other substantive areas of law.

ARGUMENT

I. THE *BASIC* PRESUMPTION HAMPERS INNOVATION BY IMPOSING LARGE LITIGATION COSTS ON PHARMACEUTICAL AND BIOTECHNOLOGY COMPANIES

This Court's 4-2 decision in *Basic* to relieve plaintiffs of the need to prove individual reliance has enabled securities class actions to become a multi-billion dollar industry. More than 3,050 private securities-fraud class actions were filed between 1997 and 2002, and between 2002 and 2004, such lawsuits made up approximately 47 percent of all class actions in federal court. *See* Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act* 1 & n.1, 6 (Rock Ctr. for Corp. Governance Working Paper, Aug. 28, 2013).[2]

The economic burdens of marginal securities-fraud cases are well documented, but they are particularly damaging to society when brought against pharmaceutical and biotechnology companies. The public depends on these companies to develop innovative remedies for serious illnesses. Amgen, for example, has developed therapies for many hard-to-treat diseases, therapies that have been used to treat over 25 million patients. And more innovative therapies are in the pipeline. *See*

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[2] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317537&download=yes.

Amgen, *Science-Pipeline*, *at* http://www.amgen.com/science/pipe.html (last visited Jan. 6, 2014).

Research and development, however, requires a massive and sustained commitment of economic resources. It takes 10-15 years and approximately one billion dollars to bring a product to market; most products are abandoned at some point during this process, either because the drug under development fails to achieve its goals or because safety concerns outweigh any benefits. The costs of defending and settling meritless securities class actions leave less available for investment in research and development.

Securities-fraud litigation also tends to repress innovation directly, along with public disclosures about that innovation. Developing new products and technologies involves risk, especially in the time- and cost-intensive biotechnology and pharmaceutical industries. But when a publicly traded company pursues a risky undertaking that fails to meet expectations, a sharp stock drop typically follows. And such a drop almost invariably engenders securities class actions, because plaintiffs can always allege that some earlier statement was misleading or some piece of information should have been disclosed sooner. By relieving plaintiffs of the need to prove a critical element of a securities-fraud claim, *Basic* encourages such lawsuits and thus contributes to this direct stifling of innovation.

Basic reduces companies' voluntary disclosure of information as well, in derogation of Congress's desire to foster openness and transparency. *See*, *e.g.*, 15 U.S.C. § 78m (requiring certain disclosures by securities issuers). Because "plaintiffs' lawyers can base accusations of misconduct on management's own voluntary disclosures," "it is better to say less to avoid an-

other lawsuit." Bratton & Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 114 (2011). This is not a new notion; Justice White's dissent in *Basic* noted that "observers in this field have acknowledged that the fraud-on-the-market theory is at odds with the federal policy favoring disclosure." 485 U.S. at 259 (White, J., dissenting) (citing Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. Rev. 435, 457-459 (1984)).

There is no justification for continuing to impose all of these costs, given the growing understanding that the *Basic* presumption rests on an economic theory that is imprecise and often inapplicable to particular cases, yet as a practical matter not open to refutation. *See Amgen, Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1208 n.4 (2013) (Thomas, J., dissenting). The solution is to overrule *Basic* and require investors alleging securities fraud to satisfy the same reliance requirement that other plaintiffs alleging fraud have always had to prove. *See Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011).

II. *BASIC*'S PERNICIOUS EFFECTS HAVE BEEN EXTENDED BEYOND THE SECURITIES CONTEXT

Overruling *Basic* is especially important now because it is spreading beyond the securities-law context. In *Harris* v. *Amgen, Inc.*, ___ F.3d ___, 2013 WL 5737307 (9th Cir. Oct. 23, 2013) (op. on reh'g), the Ninth Circuit sua sponte applied the *Basic* presumption in a class action brought under ERISA. The plaintiffs alleged that Amgen and others had violated a fiduciary duty of care in connection with the management of employer-sponsored pension plans. *See id.* at *1, *14. Notwithstanding that the named plaintiffs apparently

did not buy or sell Amgen stock during the class period—and thus could not even maintain a securities-fraud claim, *see Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975)—the Ninth Circuit held that the putative plaintiff class did not need to establish that any member of the class "actually relied" on any alleged misrepresentation affecting Amgen's stock, *Harris*, 2013 WL 5737307 at *15. Citing *Basic*, the court saw "no reason why ERISA plan participants … should not be able to rely on the fraud-on-the-market theory in the same manner" as securities-fraud plaintiffs. *Id.*

The Ninth Circuit's decision to apply *Basic* in the ERISA context is unfounded. For one thing, empirical research indicates that investors' reliance on pricing information is reduced when investment options are limited, as is often true with participant-directed ERISA plans. *See* Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. Rev. 71, 87 (2002) ("[P]articipant investment decisions … do appear to be influenced by the investment options offered by plan sponsors."). Thus, instead of relying on price information to make investment decisions—as the fraud-on-the-market theory presumes investors who are trading in an unrestricted market do—plan participants' investment decisions are influenced by the parameters of the plan itself. Likewise, studies show that employees tend to invest in their employer's stock out of a sense of loyalty and confidence in their company, despite pricing indications to the contrary. *See id.* at 90-92; *see also* Benartzi et al., *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 68 (2007) ("[E]mployees do not correctly understand the economic value of [their] company stock."). Moreover, employers often provide incentives for employees to invest in company stock (such as employer matches),

and the tax code does as well, *see* Benartzi et al., *supra*, at 50-51. These incentives further dilute the relevance of price in many employees' retirement-investment decisions. In short, a critical assumption underlying the Court's decision in *Basic*, that investors rely on the market price when making investment decisions, is much more dubious (if not wholly unwarranted) in the ERISA context.

Amgen will address the various errors in the Ninth Circuit's decision in its forthcoming petition for review of that decision. For present purposes, *Harris* underscores the need for this Court to reconsider the *Basic* presumption in order to avoid encouraging other courts to follow the Ninth Circuit's lead and improperly extend the judicially created presumption of reliance into other areas of the law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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