No. 09-1403

IN THE

Supreme Court of the United States

ERICA P. JOHN FUND, INC.,

Petitioner,

v.

HALLIBURTON CO.; DAVID J. LESAR,

Respondents.

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

AMICUS CURIAE BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (NCPERS) IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit correctly held that plaintiffs in private securities fraud actions must at class certification not only satisfy the requirements set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) to invoke a rebuttable presumption of fraud-on-the-market, but must also establish loss causation by a preponderance of admissible evidence.

2. Whether the Fifth Circuit improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and Federal Rule of Civil Procedure 23, when it held that plaintiffs must establish loss causation at class certification to invoke the fraud-on-the-market presumption.

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Conference on Public Employee Retirement Systems (hereinafter NCPERS) is a national organization focused on the preservation, growth and stability of public pension plans and funds. NCPERS is the largest non-profit public pension advocacy organization, representing over 500 governmental pension funds that manage nearly $3 trillion in pension assets. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.[2]

Public employee pension funds have historically been among the most active institutional investors in the securities markets. More than $1.5 trillion of public pension assets are invested in equities of U.S. and foreign companies, while another $700 billion is invested in bonds issued by the U.S. government, foreign governments, and corporations.[3] Public employee pension funds have also

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1. As required by Supreme Court Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae*, their members or undersigned counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of all amicus briefs.

2. General information concerning NCPERS as well as specific data regarding its activities can be found at its website: www.ncpers.org.

3. "The Economic Effects of Public Pensions," National Association of State Retirement Administrators (www.nasra.org).

taken an active role in private securities fraud litigation.[4] As a result, NCPERS has taken a leadership role on behalf of its member retirement systems with respect to legislative and regulatory actions related to securities fraud through research, published studies and position papers, and the filing of *amicus* briefs.

Because NCPERS' constituents are among the most active investors in the capital markets, they are rightly concerned about the decision of the Fifth Circuit Court of Appeals in *The Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.; David J. Lesar*, 597 F.3d 330 (5th Cir. 2010), which threatens to dramatically alter the landscape of securities fraud litigation, which has functioned effectively following enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and subsequent judicial interpretation of the PSLRA.

As the largest holders of publicly traded capital in the United States, public pension plans are particularly sensitive to any action which undermines the security of those investments. The threat to the pension funds as shareholders and the resulting potential for officer and director misconduct, to the detriment of those funds, threatens the underlying assets which support the state constitutionally guaranteed benefits payable to millions of American public employees and retirees.

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4. Public employee pension funds are among the plaintiffs in many private securities fraud class action lawsuits, and have served as lead or co-lead plaintiffs in a number of such suits.

SUMMARY OF ARGUMENT

In the enforcement of the nation's securities laws by investors, Congress recognized that institutional investors like public employee pension plans would be the plaintiffs most likely to achieve the best result on a just basis for the most investors. See *In re Cendant Corporation Litigation*, 264 F.3d 201 (3rd Cir. 2001); Cox and Thomas, "Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions," 106 Colum. L. Rev., 1587 (2006). Aware of their important and unique role in the ongoing battle against securities fraud, the public pension community is deeply concerned about any changes in the "rules of engagement" in securities litigation.

Like Congress, this Court has noted in a number of cases the critical role of private securities litigation in achieving the goals of the securities laws. See, for example, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (emphasizing the importance of the private right of action in securities cases in maintaining public confidence and deterring fraud); see, also, *Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (stating that "private actions are a most effective weapon in the enforcement of the securities laws.").

In the intervening years following passage of the PSLRA, class action private securities litigation filed on behalf of institutional investors such as public employee pension funds has recovered untold millions of dollars, and has complemented efforts by such regulatory agencies as the Securities and Exchange Commission and the Department of Justice in exposing corporate fraud. In fact, several studies have looked at the relative

effectiveness of private securities fraud litigation versus SEC enforcement of the securities laws, and concluded that plaintiffs in securities fraud lawsuits achieve far greater success with respect to recovery than the SEC. (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).

Subsequent federal legislation such as the Sarbanes-Oxley Act of 2002, as well as a growing body of judicial decisions, have resulted in well-established procedural, evidentiary, and substantive rules governing private securities fraud litigation. The particular rule at issue in this case – that the element of reliance in private securities litigation brought under a fraud-on the market theory is presumed when the information at issue becomes public – was first articulated by this Court in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), and reiterated in *Stonebridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). The Fifth Circuit's holding in this case (which is based on its holding on its prior decision in *Oscar Private Equity Investments v Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), a decision that has not been adopted by any other circuit, and that has been roundly criticized) marks a significant departure from this rule, and sets a dangerous precedent if permitted to stand. At a time when private and institutional investors alike are still reeling from staggering economic losses in the financial markets over the past five years, it is more critical than ever to preserve the viability of private securities litigation in maintaining the integrity of the marketplace.

Public employee pension funds occupy a unique position among institutional investors. Unlike other

institutional investors such as insurance companies or mutual funds, the assets of public employee pension funds are not derived from policyholder premiums or private investments, but from public employee and taxpayer contributions. When the security of public pension fund assets is threatened – whether from economic downturns, legislation, or corporate misconduct – it is often the public employees and taxpayers who eventually bear the burden of making up the shortfall.

ARGUMENT

1. THE FIFTH CIRCUIT DECISION WILL SIGNIFICANTLY IMPAIR THE ABILITY OF PUBLIC EMPLOYEE RETIREMENT FUND TRUSTEES TO FULFILL ONE OF THEIR FUNDAMENTAL FIDUCIARY RESPONSIBILITIES – PROTECTION OF THEIR FUNDS' ASSETS -- TO THE DETRIMENT OF THE MEMBERS AND BENEFICIARIES OF THOSE FUNDS AND THE GOVERNMENTAL ENTITIES WHICH SPONSOR THEM.

As of 2006, state and local government retirement plans served close to 26 million Americans, including 14.5 million active participants, 4 million inactive members and 7.3 million retirees and other beneficiaries receiving regular payments. Total benefit payments in 2006 were $151.7 billion, for an average benefit payment of $1,739.00 per month of $20,867.00 per year. (Boivie and Almeida, "Pensionomics - Measuring the Economic Impact of State and Local Government Retirement Plans," National Institute on Retirement Security, February 2009; http://www.nirsonline.org/index.)

In 2006, the total state and local government pension receipts were $392.8 billion, with government contributions totaling $64.5 billion, employee contributions of $32.7 billion, and earnings on investments accounting for $295.6 billion. Put differently, of the total state and local government pension fund receipts in 2006, 16.4% came from employer contributions, 8.3% from employee contributions, and 75.3% from investment earnings. *Id*., (See also, U.S. Census Bureau. 2007. State and Local Government Employee-Retirement Systems, Washington, D.C.: U.S. Census Bureau - http://www.census.gov/govs/www/retire.html.)

The pattern of investments constituting the overwhelming source of pension assets has proven to be true over time. Between 1993 and 2006, 19.6% of pension receipts came from employer contributions, 10.8% from employee contributions and 69.6% from investment earnings. Earnings on investments have, therefore, historically made up the bulk of public pension fund receipts. (Boivie and Almeida, *supra* at 2.)

The decline in the capital markets in recent years, including losses attributable to officer and director misconduct, has significantly eroded the funding status of public plans. (Park, "Public Plan Asset Allocations," Employee Benefit Research Institute, Volume 30, No. 4, April 2009 - http://www.ebri.org/publications.)

The impact of resulting underfunding has been estimated over a 15-year horizon to be almost $2 trillion in 2005 dollars. (See, Marx and Rauh, NBER Working Paper Series, "The Intergenerational Transfer of Public Pension Promises," National Bureau of Economic Research, September 2008 - www.nber.org/paper/w14343.pdf.)

It is therefore abundantly clear that anything which threatens the financial security of the underlying assets of public employee retirement systems threatens the security of 25 million Americans. In addition, losses attributable to pension fund participation in the capital markets, particularly losses attributable to officer and director misconduct, go directly to the constitutionally guaranteed promise applicable in every state. Other specific state constitutional provisions relating to retirement or impairment of contract provisions have, in all fifty states, been interpreted to assure that public pension benefits are ultimately a taxpayer guarantee. (See, for example, Article XII, Section 7, Constitution of Alaska; Article I, Section 10, Florida Constitution; Article X, Section 29, Louisiana Constitution; and Article V, Section 7, New York Constitution.)

The decision of the Fifth Circuit Court of Appeals threatens the security of public pension fund assets invested in the capital markets by imposing an additional burden on lead plaintiffs in securities fraud litigation.

This Court has held that Congress "intended securities legislation ... to be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972). By imposing an additional and substantial burden on plaintiffs to prove loss causation at the class-certification stage of litigation, the Fifth Circuit's holding essentially ignores the Court's holding in the *Utah* case. Further, the Fifth Circuit's approach has been rejected by both the Second and Seventh Circuit Courts of Appeal, as well as numerous federal district courts. See, for example, *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 483 (2d Cir 2008)(rejecting the

requirement that plaintiffs demonstrate loss causation at the certification stage), and *Schleicher v. Wendt*, 618 F.3d 679, 687 ("*Oscar Private Equity* represents a go-it-alone strategy by the fifth circuit. It is not compatible with this circuit's decisional law, and we disapprove its holding"). (internal citations omitted).

Among the fiduciary responsibilities of public employee pension fund trustees, few are as fundamentally important as the duty of stewardship – the duty to vigorously preserve and protect the assets of the fund. This duty informs virtually every decision trustees make with respect to the fund's assets, but it is particularly relevant to investment-related decisions. For this reason, trustees must exercise due-diligence and prudence when investing the funds' assets. Once the funds are invested, trustees must diligently monitor the performance of the assets. If the trustees become aware of possible investment fraud that affects the fund's investments, trustees are obligated to take reasonable and prudent measures to recover assets lost as a result of the fraud. One of these measures is participation in private securities fraud litigation, either as members of the class, or, as noted *supra*, as lead or co-lead plaintiffs. See, *In re California Micro Devices Securities Litigation,* 168 F.R.D. 276 (N.D. Cal. 1996); *Gluck v. Cellstar Corp.,* 976 F. Supp. 542 (N.D. Tex. 1997) (courts found public retirement plans particularly well suited serve as lead plaintiffs in private securities actions).

Forty five states (also including the District of Columbia and the Virgin Islands) have adopted the Uniform Prudent Investor Act which incorporates the modern portfolio management theory embodied by the Restatement 3d of Trusts. See, *Uniform Prudent Investor*

Act, References and Annotations (2011). This heightened standard of care in the management of pension assets requires greater reliance on third parties to invest pension assets. As a result, pubic pension trustees have a greater duty to vigorously protect the assets they have entrusted to the market to ensure that the fiduciary standards applicable to the trustees are also applied to those who manage the assets and run the companies whose issues are purchased. *Uniform Prudent Investor Act, Sections 3, 8-9*.

The Fifth Circuit's decision constitutes what amounts to an insurmountable judicial barrier to public employee fund trustees to ferret out and seek redress for investment fraud on behalf of their members, retirees, and beneficiaries as their respective governing laws require them to do. The Seventh Circuit correctly noted that the Fifth Circuit approach in *Oscar* and in the case below "would do more than just 'tighten' the requirements for class certification. It would make certification impossible in many securities suits." *Schleicher*, 618 F.3d 679, 686. The *Schleicher* court even took the extraordinary step of reprimanding the Fifth Circuit: "We do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification insecurities-fraud suits." *Id.* At 686.

CONCLUSION

For the above and foregoing reasons, *amicus curiae* respectfully urges that the decision of the Fifth Circuit Court of Appeal be reversed.

Respectfully submitted,

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