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 FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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January 6, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether, in light of the fact that Section 18(a) of the Securities Exchange Act of 1934, the closest express analogue to the judicially created private right of action under Section 10(b) of that Act, requires a showing of actual reliance for the recovery of damages, the same showing should be required for the recovery of damages under Section 10(b).

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Cohen v. Stevanovich,
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Conn. Ret. Plans & Trust Funds v. Amgen Inc.,
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GAMCO Investors, Inc. v. Vivendi, S.A.,
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Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
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Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
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TABLE OF AUTHORITIES—Continued

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Ross v. A.H. Robins Co.,
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TABLE OF AUTHORITIES—Continued

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Unger v. Amedisys, Inc.,
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United States v. Craft,
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United States v. Price,
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Statutes and Rules

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TABLE OF AUTHORITIES—Continued

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Securities Act of 1933, 15 U.S.C. § 77a *et seq*.:
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Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105–353, 112 Stat. 3227 (1998):
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17 C.F.R.:
§ 240.10b–5 (SEC Rule 10b–5) ....*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

FED. R. CIV. P. 23 .... 3, 5

Other Authorities

Applebaum, Binyamin, *Economists Clash on Theory, but Will Still Share the Nobel*, N.Y. TIMES, Oct. 14, 2013, *available at* http://nyti.ms/1fk0tDA.................................... 6

Bajaj, Mukesh, Mazumdar, Sumon C. & McLaughlin, Daniel A., *Assessing Market Efficiency for Reliance on the Fraud-on-the-Market Doctrine After* Wal-Mart *and* Amgen (Dec. 12, 2013), *available at* http://bit.ly/1kdBQfm....................................... 7

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141 CONG. REC. (1995) 32, 33

Cooper, Roger A., Bunda, Matthew M. & Shults, Anthony M., *Rebutting the Presumption of Reliance in Securities Class Actions*, N.Y.L.J., June 10, 2013, *available at* http://bit.ly/19Cfonj..................... 24

THE FEDERALIST NO. 62 (C. Rossiter ed. 1961)... 32

Ferillo, Paul A., Dunbar, Frederick C. & Tabak, David, *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 ST. JOHN'S L. REV. 81 (2004)... 7

TABLE OF AUTHORITIES—Continued

Page(s)

Grundfest, Joseph A., *Damages and Reliance Under Section 10(b) of the Exchange Act* (Rock Ctr. for Corp. Governance Working Paper No. 150, 2013), 69 BUS. LAW. (forthcoming Feb. 2014), *available at* http://bit.ly/IgUL9U .... *passim*

Hall, Patrick, *The Plight of the Private Securities Litigation Reform Act in the Post-Enron Era: The Ninth Circuit's Interpretation of Materiality in* Employer-Teamster v. America West, 2004 BYU L. REV. 863 (2004) 24

4 HAZEN, THOMAS LEE, TREATISE ON THE LAW OF SECURITIES REGULATION (6th ed. 2013) 20

H. CONF. REP. NO. 104–369 (1995) 33

H.R. 1058, 104th Cong. (Mar. 8, 1995), *available at* http://1.usa.gov/19zAAkR 32, 33

Langevoort, Donald C., Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151 .... 7, 9

Nobelprize.org, Press Release, The Prize in Economic Sciences 2013, http://bit.ly/19Qa7Ka 6

Oldham, Jeffrey L., *Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U. L. REV. 995 (2003) 24, 33, 34

S. 240, 104th Cong. (June 19, 1995) 33

S. 2693, 73d Cong. (1934) 21

S. REP. NO. 792, 73d Cong. (1934) 22

TABLE OF AUTHORITIES—Continued

Page(s)

SCOTT, DAVID L., WALL STREET WORDS (3d ed. 2003) 8

Scudder, Michael Y., Comment, *The Implications of Market-Based Damages Caps in Securities Class Actions*, 92 NW. U. L. REV. 435 (1997) 34

Simmonds, Andrew R., Sagat, Kenneth A. & Ronen, Joshua, *Dealing with Anomalies, Confusion and Contradiction in Fraud on the Market Securities Class Actions*, 81 KY. L.J. 123 (1993) 24

Stock Exchange Regulation, Hearing on H.R. 7852 and 8720, before the H. Comm. on Interstate and Foreign Commerce, 73d Cong. (1934) 21

Weiss, Elliot J. & Beckerman, John S., *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995) 24

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BRIEF FOR FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Commissioners and officials of the United States Securities and Exchange Commission, as well as prominent law professors whose scholarship and teaching focuses on the federal securities laws. This brief reflects the consensus of the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed money to fund its preparation or submission. All parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

amici that this Court should reverse the decision below and hold that plaintiffs seeking damages pursuant to the judicially created private right of action under Section 10(b) of the Securities Exchange Act of 1934 must demonstrate actual reliance, as is required by Section 18(a) of the Act, the most analogous express private right that existed under the securities laws in 1934. Each individual *amicus*, however, may not endorse every argument made in this brief.[2] *Amici* are listed below in alphabetical order:

The Honorable Paul S. Atkins served as a Commissioner of the SEC from 2002 to 2008.

Professor Stephen M. Bainbridge is the William D. Warren Distinguished Professor of Law at the University of California, Los Angeles School of Law.

Brian G. Cartwright served as General Counsel of the SEC from 2006 to 2009.

Elizabeth Cosenza is Associate Professor of Law and Ethics, Fordham University.

Richard A. Epstein is the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution.

Professor Allen Ferrell is the Greenfield Professor of Securities Law at Harvard Law School.

The Honorable Edward H. Fleischman served as a Commissioner of the SEC from 1986 to 1992.

The Honorable Joseph A. Grundfest is the William A. Franke Professor of Law and Business at Stanford

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[2] *Amici* do not here address the public policy concerns raised by any decision that limits or overturns *Basic*, and observe that these issues can be considered by Congress in the wake of any decision reached by this Court.

Law School and served as a Commissioner of the SEC from 1985 to 1990.

Professor M. Todd Henderson is a Professor of Law at the University of Chicago Law School.

Professor Richard W. Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

Professor Kenneth E. Scott is the Ralph M. Parsons Professor of Law and Business, Emeritus, at Stanford Law School.

The Honorable Steven Wallman served as a Commissioner of the SEC from 1994 to 1997.

STATEMENT

At issue in this case is the most powerful engine of civil liability ever established in American law: the fraud-on-the-market presumption of reliance under Section 10(b) of the Securities Exchange Act of 1934. That presumption serves as the foundation of a massive, multibillion-dollar litigation industry, and its impact, along with the controversy it has created, has been remarkable.

But just as remarkable was how the presumption came about. Not by an act of Congress. The fraud-on-the-market presumption was instead created by a bare majority of a bare quorum of this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). A judicially created presumption, tacked on to a judicially created right of action, the majority's holding lacked any foundation in the statute's text, and defied its legislative history. The decision rested instead upon two judicial policy preferences. First, treating Rule 23's certification prerequisites as a "problem," *id.* at 242, the four-Justice majority constructed *Basic*'s presumption to

advance its preference for securities class actions. Second, the majority endorsed a then-novel economic theory, the efficient capital markets hypothesis, and adopted it as the foundation for *Basic*'s new rule.

These judicial policy choices have produced a litigation leviathan of which the Congress that passed the 1933 and 1934 Acts, and even the Court in *Basic*, could not possibly have conceived. Even though every Justice ever to have addressed the question has agreed that reliance is essential to a Section 10(b) claim, *Basic*'s fraud-on-the-market presumption has effectively eliminated that element from Section 10(b) class-action litigation. The presumption was ostensibly intended to be rebuttable, but the experience of the past twenty-five years teaches that it is, as a practical matter, *ir*rebuttable, particularly in class actions.

Basic produced this outcome even though the text and structure of the Exchange Act, along with its legislative history, make clear that private plaintiffs in Section 10(b) actions should be required to demonstrate actual reliance. That policy judgment, made explicitly by Congress, should control here.

1. The private right of action under Section 10(b) is, of course, vestigial. "Although the existence of the private right is now settled," *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011), this Court has "made no pretense that it was Congress' design to provide the remedy afforded," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991). Federal judges created the Section 10(b) private right under an "*ancien regime*" of law "that held sway [over] 40 years ago," a regime under which they indulged "the habit of venturing beyond Congress's intent" to better

effectuate, in their own policy calculations, "'the congressional purpose' expressed by a statute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). The Court has long since "sworn off [that] habit," and has "abandoned … [the] method for discerning and defining causes of action" that gave rise to the inferred Section 10(b) right. *Ibid.* Today, "[p]olicy considerations cannot override [this Court's] interpretation of the text and structure of the [Securities Exchange] Act." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

The Court's 4-2 decision in *Basic* sprang from that earlier, policy-driven mode of statutory interpretation. *Basic* relied not on the text or structure of the federal securities laws, but instead embodied two judicial policy judgments. The first was that compliance with "Federal Rules of Civil Procedure 23(a)(2) and (b)(3)" posed a "'problem'" because "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Basic*, 485 U.S. at 242. The fraud-on-the-market presumption "provided 'a practical resolution to the problem'" created by Rule 23. *Ibid.*

The second judicial policy judgment in *Basic* was a belief in the utility and correctness, as a substitute for the traditional element of reliance in fraud actions, of what was then "a mere babe" of an economic theory, *id.* at 250 (White, J., dissenting)—the efficient capital markets hypothesis. "Recent empirical studies have tended to confirm … that the market price of shares traded on well-developed markets reflects all publicly

available information, and, hence, any material misrepresentations." *Id.* at 246. In dissent, Justice White presciently warned that the Court, "with no staff economists, no experts schooled in the 'efficient-capital-market-hypothesis,' no ability to test the validity of empirical market studies, [was] not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory." *Id.* at 253 (White, J., dissenting).

2. As foresightful as he was, even Justice White could not have anticipated how contested the efficient markets hypothesis would become twenty-five years later. In October 2013, the Royal Swedish Academy of Sciences awarded the Nobel Memorial Prize in Economic Sciences to the "leading proponents of *opposing* views" of that theory—one, the theory's "author," the other, its "most influential critic."[3] A vigorous "debate over market efficiency" today "splits leading scholars," and it is not one that this Court, or any court, could competently referee: the controversy "is nuanced and complex, and it implicates fine points of econometrics and finance theory."[4]

Whatever its merits as an economic theory, however, the efficient markets hypothesis was never designed to prove causation or reliance in securities cases, or to be applied by judges and juries. Forcing

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[3] Binyamin Applebaum, *Economists Clash on Theory, but Will Still Share the Nobel*, N.Y. TIMES, Oct. 14, 2013 (emphasis added), *available at* http://nyti.ms/1fk0tDA; *see* Nobelprize.org, Press Release, The Prize in Economic Sciences 2013 (Oct. 14, 2013), http://bit.ly/19Qa7Ka.

[4] Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, at 60 (Rock Ctr. for Corp. Governance Working Paper No. 150, 2013), 69 BUS. LAW. (forthcoming Feb. 2014), *available at* http://bit.ly/IgUL9U.

courts to wrestle with the hypothesis's implications, moreover, has yielded exactly what Justice White foretold: the "[c]onfusion and contradiction in court rulings" that is "inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic*, 485 U.S. at 252 (White, J., dissenting).

For example, under *Basic*, plaintiffs must prove "that the stock traded in an efficient market." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011). But just what does that mean? Lower courts have produced varying multi-factor tests—with five or eight factors, depending on the venue.[5] "The jumble is evident."[6] "Courts have varied in their application of these factors,"[7] resulting in a "massive hodgepodge of cases and outcomes" that has left "plaintiffs and defendants … at a loss when it comes to establishing or rebutting the fraud on the market theory's presumption of reliance."[8] "The law is confused, and in flux."[9]

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[5] *See*, *e.g.*, *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (eight); *Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989) (five).

[6] Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 167.

[7] Mukesh Bajaj, Sumon C. Mazumdar & Daniel A. McLaughlin, *Assessing Market Efficiency for Reliance on the Fraud-on-the-Market Doctrine After* Wal-Mart *and* Amgen, at 16 (Dec. 12, 2013), *available at* http://bit.ly/1kdBQfm.

[8] Paul A. Ferillo, Frederick C. Dunbar & David Tabak, *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 ST. JOHN'S L. REV. 81, 102 (2004).

[9] Langevoort, 2009 WIS. L. REV. at 154.

Confusion and contradiction reign, most critically, over how *Basic*'s presumption can, if at all, be rebutted. The majority in *Basic* intended the presumption to be "rebuttable," 485 U.S. at 250; *see id.* at 248–49, but that promise has failed, and *Basic* has effectively dispensed with the requirement of reliance, *see* pp. 22–26, below. "A nonrebuttable presumption of reliance" has "effectively convert[ed] Rule 10b–5 into 'a scheme of investor's insurance'"—a result for which "[t]here is no support in the Securities Exchange Act, the Rule, or our cases …." *Basic*, 485 U.S. at 252 (White, J., dissenting; citations omitted).

Basic's effective elimination of reliance under Section 10(b) has produced an explosion of liability. As defined by the courts, the Section 10(b) right imposes no requirement of contractual privity between plaintiff and defendant, and no requirement that the defendant have sold securities.[10] It thus embraces claims involving "secondary," or "aftermarket," trading—the trading of existing securities among investors in the open marketplace, as distinct from purchases from a corporate issuer in an initial offering.[11]

Given this feature of the judge-made Section 10(b) right, *Basic*'s reliance-eliminating, class-action-facilitating presumption "substantially expands, if not creates, what is often staggering dollar exposure for

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[10] *See*, *e.g.*, *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 506 (3d Cir. 1988); *Baretge v. Barnett*, 553 F.2d 290, 291 (2d Cir. 1977); *cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 745 (1975). *But see Basic*, 485 U.S. at 261 (White, J., dissenting; "'[i]mposition of damages liability under Rule 10b–5 makes little sense … where a defendant is neither a purchaser nor a seller of securities'"; citation omitted).

[11] *See* DAVID L. SCOTT, WALL STREET WORDS 8, 330 (3d ed. 2003).

the issuer and its shareholders."[12] It subjects a corporate issuer and its executives to damages in favor of everyone who purchased a company's securities during extended periods of time. The dollar amounts are breathtaking: more than 3,050 private class-action securities-fraud lawsuits were filed between 1997 and 2012, generating settlements amounting to more than $73.1 billion, including six of the ten largest settlements in class-action history, and yielding tens of billions in fees for plaintiffs' and defense counsel. Litigation under Section 10(b), and *Basic*'s reliance-eliminating presumption, accounts for the lion's share of these amounts.[13]

And it all came about not from an act of Congress, but from a judicially invented rule, engrafted onto a judicially invented right of action.

SUMMARY OF ARGUMENT

This Court need not wade into the complex and highly technical debate over the efficient markets hypothesis to answer the question presented here. Instead, the Court can, and should, decide this case by applying well-established principles of statutory construction.

The Court has repeatedly explained that divining the elements of the judicially created private right requires "historical reconstruction." *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 294 (1993). The Court tries "'to infer how the 1934 Congress would have addressed the issue[s] had the 10b–5 action been included as an express provision in the 1934 Act.'" *Cent. Bank of Denver, N.A. v. First*

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[12] Langevoort, 2009 WIS. L. REV. at 155–56.

[13] Grundfest, *Damages and Reliance*, at 1–2 & nn.1–5, 10.

Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994) (citation omitted). To do that, the Court consults "the express causes of action" in the securities laws, *id*. at 178, and borrows from the "most analogous" one, *Musick, Peeler*, 508 U.S. at 294.

Here, that "most analogous" provision is Section 18(a) of the Securities Exchange Act of 1934. Section 18(a) is the only express right of action in existence in 1934 that authorizes damages actions for misrepresentations or omissions that affect secondary, aftermarket trading. It is the only express right that provides a cause of action for damages in favor of open-market purchasers and sellers against those (such as issuers or their executives) who allegedly made false or misleading statements, but did not transact with the plaintiffs—the quintessential Section 10(b) class claim today.

Section 18(a) explicitly states that plaintiffs must demonstrate that they transacted "in reliance upon such [false or misleading] statement[s]." 15 U.S.C. § 78r(a). They must, in other words, demonstrate actual, "eyeball" reliance.[14] Section 18(a)'s legislative history, moreover, underscores the need for plaintiffs to demonstrate actual reliance for aftermarket fraud. As originally drafted, Section 18(a) contained *no* reliance requirement, but Congress rejected that no-reliance version in the face of a torrent of criticism. As enacted, Section 18(a) thus prohibits recovery "unless the buyer bought the security with knowledge of the [false or misleading] statement and relied upon the

[14] *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 479 (S.D.N.Y. 2005); *see, e.g.*, *Ross v. A.H. Robins Co.*, 607 F.2d 545, 552 (2d Cir. 1979); *Heit v. Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

statement." 78 CONG. REC. 7701 (1934) (statement of Rep. Sam Rayburn), *cited in Basic*, 485 U.S. at 258 (White, J., dissenting). The Court should construe the Section 10(b) right accordingly.

Neither *stare decisis* nor congressional inaction precludes this Court from adhering to Congress's expressed intent. *Stare decisis* does not bar an actual reliance requirement: the Court in *Basic* expressly reserved the question of "the proper measure of damages in litigation of this kind." 485 U.S. at 248 n.28. If that open question is answered, it also must be answered by looking to Section 18(a). And Section 18(a) gives the answer: only "damages *caused by … reliance*" on a false or misleading statement may be recovered. 15 U.S.C. § 78r(a) (emphasis added). Accordingly, *Basic* does not preclude a holding that actual reliance must be required here.

But *Basic*'s holding should not be given *stare decisis* effect in any event. "'*[S]tare decisis* is not an inexorable command,'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citation omitted), and "'this Court has never felt constrained to follow precedent,'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted), with a decision so deeply flawed. The four-Justice opinion in *Basic* meets any number of classic criteria for overruling: among other things, it was badly reasoned, its underpinnings have been undermined by later cases, it was based upon perceptions about economic theory that are no longer beyond dispute, its shortcomings have been confirmed by experience, it has defied consistent application by lower courts, and, indeed, is unworkable. Any of these considerations make *Basic* eligible for abandonment; together, they all but require it.

Finally, the Court should not be deterred from following the Seventy-Third Congress's expressed intent by the suggestion that later Congresses, as reflected by their inaction, supposedly desired otherwise. This Court has repeatedly recognized that "congressional inaction … 'deserve[s] little weight in the interpretive process,'" *Alexander v. Sandoval*, 532 US. 275, 292 (2001) (quoting *Cent. Bank*, 511 U.S. at 187), and that "'Congress' failure to overturn a statutory precedent'" ordinarily does not provide a "'reason for this Court to adhere to it,'" *Cent. Bank*, 511 U.S. at 186 (citation omitted). In particular, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute,'" because "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation." *Id.* at 187, 186 (citations omitted). That is exactly the case here. Instead of "reading the tea leaves of congressional inaction," *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality opinion), the Court should apply what Congress expressly enacted into law: a requirement of actual reliance.

ARGUMENT

I. PRIVATE PLAINTIFFS SEEKING DAMAGES UNDER SECTION 10(b) SHOULD BE REQUIRED TO PROVE ACTUAL RELIANCE.

A. To define elements of the judicially created right under Section 10(b), the Court looks to the most analogous express right.

"The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). The statute's text accordingly fails to address "the additional 'elements of the 10b–5 private liability scheme'" later fashioned by the courts. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 2881 n.5 (2010) (quoting *Cent. Bank*, 511 U.S. at 173). And because it never enacted a "private cause of action under § 10(b), Congress had no occasion to address how to … compute … liability arising from it." *Musick, Peeler*, 508 U.S. at 295.

Because the Section 10(b) right is thus one that "'Congress did not authorize when it first enacted the statute and did not expand when it revisited the law,'" this Court has become ever "mindful that we must give 'narrow dimensions'" to that right. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge*, 552 U.S. at 167). Given the "'concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes,'" the Court has made clear that any doubt about the scope of the Section 10(b) right must be resolved "against its

expansion," and that any "decision to extend the cause of action is for Congress, not for us." *Stoneridge*, 552 U.S. at 165 (citation omitted). In particular, "any extension of these laws, to approach something closer to an investor insurance scheme, should come from Congress, and not from the courts." *Basic*, 485 U.S. at 256–57 (White, J., dissenting).

To define the elements of the judicially created Section 10(b) right in a manner that best approximates Congress's intent, the Court engages in "historical reconstruction." *Musick, Peeler*, 508 U.S. at 294. The Court is "faced with the awkward task," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991), of answering a hypothetical question—of "attempt[ing] to infer 'how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act,'" *Cent. Bank*, 511 U.S. at 178 (quoting *Musick, Peeler*, 508 U.S. at 294).[15]

"For that inquiry," the Court "use[s] the express causes of action in the securities Acts as the primary model for the § 10(b) action," *ibid.*—"in particular, … those portions of the 1934 Act most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294. "The reason is evident: Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts." *Cent. Bank*, 511 U.S. at 178. Indeed, there can be "no clearer indication of how Congress would have balanced the policy

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[15] For a more complete treatment of the history of this interpretive technique and its application to Section 10(b), see Grundfest, *Damages and Reliance*, at 19–33.

considerations" involved "than the balance struck by the same Congress in limiting similar and related protections" in "the statute of origin." *Lampf, Pleva*, 501 U.S. at 359.

Drawing from an analogous express provision in this fashion promotes "a fundamental canon of statutory construction": that courts should construe a statute "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). As for the securities laws in particular, looking to comparable provisions "ensure[s] that the rules established to govern the 10b–5 action are symmetrical and consistent with the overall structure of the 1934 Act." *Musick, Peeler*, 508 U.S. at 294.

Most significantly here, the Court has found it "'anomalous to impute to Congress an intention to expand … a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.'" *Cent. Bank*, 511 U.S. at 180 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975)). Indeed, "in establishing limits for the 10b–5 action," one of the Court's "goals" has been "to ensure the action does not conflict with Congress' own express rights of action." *Musick, Peeler*, 508 U.S. at 295.

B. Section 18(a) of the 1934 Act is the express right most analogous to the judicially created Section 10(b) right.

The provision "most analogous to the private 10b–5 right of action that is of judicial creation," *id*. at 294, is the express right contained in Section 18(a) of the

Exchange Act. As this Court has observed, Section 18(a) "impose[s] liability upon defendants who stand in a position most similar to 10b–5 defendants." *Id*. at 296. In fact, Section 18(a) is the *only* express private right of action in the 1933 and 1934 Acts that provides an aftermarket damages remedy analogous to the judicially invented right under Section 10(b).

There are "eight express liability provisions contained in the 1933 and 1934 Acts," seven of which existed when those acts were originally enacted. *Id*. at 296.[16] Three of those seven—Sections 11, 12, and 15—reside in the 1933 Act, 15 U.S.C. §§ 77k, 77*l*, 77*o*, and plainly do not resemble the inferred Section 10(b) right. Section 11 is "limited in scope." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). "In contrast" to the "'catchall'" Section 10(b) right, which authorizes actions "by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security," Section 11 only addresses registered securities offerings: it permits actions only "by a purchaser of a registered security … based on misstatements or omissions in a registration statement, and can only be brought against certain parties" involved in making a securities offering. *Ibid.* (emphasis in original; quoting 15 U.S.C. § 78j(b)); *see* 15 U.S.C. § 77k(a).

Section 12 is likewise limited in scope. Section 12(a)(1) imposes liability only upon sellers of unregistered securities in violation of Section 5 of the Securities Act, and requires no misrepresentation or omission. *See* 15 U.S.C. § 77*l*(a)(1) ("Any person who

[16] For a more extensive analysis of these provisions, see Grundfest, *Damages and Reliance*, at 22–32.

… offers or sells a security in violation of section 77e of this title … shall be liable ….”). Section 12(a)(2), which authorizes rescission or damages for sales made “by means of a prospectus or oral communication” that is materially false or misleading, 15 U.S.C. § 77*l*(a)(2), contains “an express privity requirement,”[17] as it only imposes liability on those who “offer[] or sell[] a security,” 15 U.S.C. § 77*l*(a)(2). It thus does not cover aftermarket trading. That sharply contrasts with Section 10(b), which applies to aftermarket trading, has no privity requirement, and does not limit liability to offerors or sellers of securities. Finally, Section 15(a) is the most limited right of all: it “impose[s] derivative liability only,” *Musick, Peeler*, 508 U.S. at 296, on “person[s] who … control[] any person liable” under Section 11 or Section 12, 15 U.S.C. § 77*o*(a).

The remaining express rights are found in the Securities Exchange Act of 1934—Sections 9, 16, 18, and 20. 15 U.S.C. §§ 78i, 78p, 78r, 78t. Section 16(b) “regulates short-swing trading by owners, directors, and officers,” *Cent. Bank*, 511 U.S. at 179 (citing 15 U.S.C. § 78p), does not address misstatements and omissions, and thus greatly “differs in focus from § 10(b),” *Lampf, Pleva*, 501 U.S. at 360 n.5. Section 20(a) of the 1934 Act, like Section 15(a) of the 1933 Act, only provides for “controlling person” derivative liability, 15 U.S.C. § 78t(a), and does not create primary liability, as does the judicially augmented Section 10(b). *See Musick, Peeler*, 508 U.S. at 296.

In contrast, as this Court explained when it “historical[ly] reconstruct[ed]” a contribution rule for Section 10(b), Sections 9(f) and 18(a) of the 1934 Act “impose liability upon defendants who stand in a

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[17] *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000).

position most similar to 10b–5 defendants." *Musick, Peeler*, 508 U.S at 294, 296. But as between Section 9(f) and Section 18(a), the latter is clearly the closer analogue to Section 10(b). Section 9(f) is narrowly and specifically targeted at "manipulative practices such as wash sales, matched orders, and the like," *Cent. Bank*, 511 U.S. at 179 (citing 15 U.S.C. § 78i), whereas Section 10(b) far more broadly reaches misrepresentations and omissions of material facts. Put another way, misrepresentations and omissions of fact that are unaccompanied by manipulative acts and practices—the heart and soul of modern class-action litigation under Section 10(b)—are actionable under Section 18(a), but not Section 9(f).

Accordingly, it is Section 18(a) that most closely approximates the reach of Section 10(b) and Rule 10b–5. Section 18(a) provides that "[a]ny person" who "shall make or cause to be made" "any" materially "false or misleading" "statement in any application, report, or document filed" with the SEC "shall be liable to any person … who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance," if the person making the statement cannot show that she acted in "good faith and had no knowledge that such statement was false or misleading." 15 U.S.C. § 78r(a); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 211 n.31 (1976). Section 18(a) thus expressly provides for liability of issuers to aftermarket traders who rely on false statements made by the issuer that affect the price of the issuer's securities.

The parallel to the implied right under Section 10(b) is plain. Section 18(a) is the "[o]nly … express private right of action in existence as of the time of Section

10(b)'s enactment [that] addresses misrepresentations or omissions that affect aftermarket prices."[18]

C. Section 18(a) expressly requires proof of actual reliance.

Because Section 18(a) is the express right of action "most analogous to the private 10b–5 right of action that is of judicial creation," *Musick, Peeler*, 508 U.S. at 294, the Court must use that express right "as the primary model for the § 10(b) action," *Cent. Bank*, 511 U.S. at 178. So "in establishing limits for the 10b–5 action," *Musick, Peeler*, 508 U.S. at 295, the Court must look to the limits established by Congress in Section 18(a).

The most critical limitation that Congress placed on the express Section 18 right is that recovery can be had only by persons who buy or sell "*in reliance upon*" the allegedly false or misleading statement that affects the market price. 15 U.S.C. § 78r(a) (emphasis added). Given this unambiguous text, courts have consistently held that "Section 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the SEC"[19]—in other words, "'eyeball' reliance," that the plaintiff "actually read and relied on the filed document."[20] As a result, "constructive reliance is not sufficient" under Section 18,[21] and the fraud-on-the-

[18] Grundfest, *Damages and Reliance*, at 29.

[19] *Ross*, 607 F.2d at 552.

[20] *In re Alstom*, 406 F. Supp. 2d at 479 (citation omitted).

[21] *Heit*, 402 F.2d at 916.

market "presumption of reliance … is not available for Section 18 claims."[22]

It follows, then, that Section 18(a)'s requirement of actual reliance must also be a prerequisite for the recovery of damages under Section 10(b). That is the only reading of the statute that would "ensure the [Section 10(b)] action does not conflict with Congress' own express right[] of action" for damages in Section 18. *Musick, Peeler*, 508 U.S. at 295. Indeed, to hold otherwise would improperly "'expand … a judicially implied cause of action beyond the bounds [Congress] delineated for [the] comparable express cause[] of action'" in Section 18(a). *Cent. Bank*, 511 U.S. at 180 (citation omitted).

D. The legislative history of the 1934 Act confirms that Congress would have rejected a presumption of reliance.

The 1934 Act's legislative history leaves no doubt that, had the Seventy-Third Congress addressed the question, it would not have created a private Section 10(b) right unless that right required proof of actual reliance. That history further underscores that Congress would not have condoned a presumption of reliance, rebuttable or not.

The "initial draft" of the "predecessor" of Section 18 contained *no* reliance requirement, and Congress *rejected* that draft for that very reason. *Basic,* 485 U.S. at 257 (White, J., dissenting). That proto-Section 18 would have "allowed recovery by any plaintiff 'who shall have purchased or sold a security the price of

[22] *Cohen v. Stevanovich*, 722 F. Supp. 2d 416, 433 (S.D.N.Y. 2010); *see also*, *e.g.*, 4 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.18[2] (6th ed. 2013).

which may have been affected by such [misleading] statement.'" *Ibid*. (White, J., dissenting; quoting S. 2693, 73d Cong. § 17(a) (1934)). It "would have permitted suits by plaintiffs based solely on the fact that the price of the securities they bought or sold was *affected* by a misrepresentation"—"a theory closely akin" to the fraud-on-the-market presumption of reliance. *Ibid*. (White, J., dissenting; emphasis in original).

But "in congressional hearings on the proposed Securities Exchange Act," witnesses "roundly criticized" the provision's failure to require reliance. *Id*. at 257 (White, J., dissenting). "The really objectionable feature of this provision," testified one stock-exchange president, "is that the civil penalties may be recovered by persons who have not relied upon the inaccurate or misleading statement"; "[t]he penalty provision leaves a wide open door for … blackmail," testified another.[23] Congress agreed, and inserted a strict requirement of reliance. As Sam Rayburn, then Chairman of the House Committee on Interstate and Foreign Commerce, explained:

> The first provision of the bill as originally written was very much challenged on the ground that reliance should be required. This objection has been met. In other words, if a man bought a security following a prospectus that carried a false or misleading statement, he could not recover from the man who sold to him … unless the buyer bought the security with knowledge of the

[23] Stock Exchange Regulation, Hearing on H.R. 7852 and 8720, before the H. Comm. on Interstate and Foreign Commerce, 73d Cong. 226, 262 (1934) (statements of Richard Whitney and Eugene Thompson); *see also Basic*, 485 U.S. at 258 n.8 (White, J., dissenting; citing this and other testimony).

> statement and relied upon the statement. It seemed to us that this is as little as we could do.

78 CONG. REC. 7701 (1934), *quoted in part in Basic*, 485 U.S. at 258 (White, J., dissenting); *see also* 78 CONG. REC. 8040 (1934) (Rep. Rayburn).

Congress deliberately placed "the burden … on the plaintiff to show … the fact that the statement was false or misleading, and that he relied thereon to his damage." S. REP. NO. 792, 73d Cong. 13 (1934). "Congress thus anticipated meaningful proof of 'reliance' before civil recovery can be had under the Securities Exchange Act." *Basic*, 485 U.S. at 258 (White, J., dissenting). As a result, presuming reliance, even rebuttably, "negates congressional intent to the contrary expressed during adoption of the 1934 Act," and disregards the clear text of Section 18 that Congress enacted into law. *Ibid*. (White, J., dissenting).[24]

E. *Basic*'s presumption is *de facto* irrebuttable, and has effectively dispensed with the element of reliance under Section 10(b).

Basic's negation of congressional intent is exacerbated by the fact that its ostensibly rebuttable presumption is *de facto* irrebuttable, particularly in class actions.

An essential premise behind *Basic*'s fraud-on-the-market presumption was that "[t]he presumption … is 'just that'"—a presumption—"'and [can] be rebutted by appropriate evidence.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013)

[24] For a further discussion of the legislative history, see Grundfest, *Damages and Reliance*, at 33–35.

(quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011)); *see Basic*, 485 U.S. at 248–49. The Court intended the presumption to be rebuttable because reliance has always been a critical element of a private Section 10(b) action. "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action" because "[i]t ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge*, 552 U.S. at 159 (quoting *Basic*, 485 U.S. at 243). Indeed, every Justice who has ever considered the question, whether in the majority or in dissent, has agreed that reliance is an essential element of the inferred Section 10(b) right.[25]

But *Basic*'s promise of rebuttability "r[a]ng[] hollow" from the start. *Basic*, 485 U.S. at 256 n.7 (White, J., dissenting). The lower courts that pioneered the presumption recognized that, "given [its] force," "attempt[s] to rebut the presumption … would likely be futile in the vast number of cases." *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 n.4 (N.D. Tex. 1980). The presumption "will undoubtedly be conclusive as to most of the class," these courts understood, and, at most, "a defendant may be able to defeat the showing of causation as to a few individual class members."

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[25] *See*, *e.g.*, *Amgen*, 133 S. Ct. at 1192; *id.* at 1205 (Scalia, J., dissenting); *id.* at 1207–08 (Thomas, J., dissenting); *Janus*, 131 S. Ct. at 2301 n.3; *id.* at 2309 (Breyer, J., dissenting); *Erica P. John Fund*, 131 S. Ct. at 2184–85; *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317 (2011); *Stoneridge*, 552 U.S. at 157, 159; *id.* at 170–71 (Stevens, J., dissenting); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005); *Cent. Bank*, 511 U.S. at 178, 180; *Basic*, 485 U.S. at 243; *id.* at 251 (White, J., dissenting); *Blue Chip Stamps*, 421 U.S. at 770 (Blackmun, J., dissenting).

Blackie v. Barrack, 524 F.2d 891, 906–07 n.22 (9th Cir. 1975). Even in 1988, it was thus clear that, "while, in theory, the Court allows for rebuttal of its 'presumption of reliance' … in practice … such rebuttal is virtually impossible in all but the most extraordinary case." *Basic*, 485 U.S. at 256 n.7 (White, J., dissenting).

A quarter-century of experience has now established the point beyond peradventure. As numerous commentators have observed,[26] the presumption is rarely rebutted. To be sure, defendants have sometimes successfully prevented it from attaching in the first place, by showing that a market for a security is inefficient, or by establishing a "truth-on-the-market" defense, which "is a method of refuting an alleged misrepresentation's materiality" by showing that accurate information in the market negated its

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[26] *See*, *e.g.*, Roger A. Cooper, Matthew M. Bunda & Anthony M. Shults, *Rebutting the Presumption of Reliance in Securities Class Actions*, N.Y.L.J., June 10, 2013, *available at* http://bit.ly/19Cfonj ("defendants have had little luck in rebutting the presumption"); Grundfest, *Damages and Reliance*, at 46–49; Patrick Hall, *The Plight of the Private Securities Litigation Reform Act in the Post-Enron Era: The Ninth Circuit's Interpretation of Materiality in* Employer-Teamster v. America West, 2004 BYU L. REV. 863, 870–71 & n.46 (2004) (rebuttal "nearly impossible"); Jeffrey L. Oldham, *Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U. L. REV. 995, 1013 (2003); Andrew R. Simmonds, Kenneth A. Sagat & Joshua Ronen, *Dealing with Anomalies, Confusion and Contradiction in Fraud on the Market Securities Class Actions*, 81 KY. L.J. 123, 136 (1993) ("virtually impossible"); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2077 (1995) (rebuttal is a "null, or close to null, set[]").

effect.[27] Such proof, however, "does not really 'rebut' the presumption, but rather shows that it does not apply in the first place." *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 (S.D.N.Y. 2013). For the most part, "true rebuttals [have] require[d] an individualized inquiry into the buying and selling decisions of particular class members." *Id.* at 100. And the cases in which such an individualized inquiry has rebutted the presumption after it has attached "are … as rare as hen's teeth."[28]

That the theoretically rebuttable presumption of reliance is *de facto* irrebuttable flows from an internal contradiction central to *Basic*. The four-Justice majority there admittedly created the presumption in order to facilitate class actions. But rebuttal is an individualized inquiry, and, if successful, only bars an individual representative plaintiff from proceeding without proof of reliance.[29] If a proposed class representative happens to be one of the "few individual class members" as to whom "a defendant may be able to defeat the showing of causation," *Blackie*, 524 F.2d at 906–07 n.22, then all that plaintiff's counsel need do is find a new one. And there will virtually always be another class member as to whom the presumption cannot be rebutted—which is why rebuttal is "futile in

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[27] *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011) (emphasis omitted), *aff'd*, 133 S. Ct. 1184 (2013).

[28] Grundfest, *Damages and Reliance*, at 47 (identifying only five such cases).

[29] *See*, *e.g.*, *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 45–46 (S.D.N.Y. 2012); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 281 (S.D.N.Y. 2003); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa. 2003); *Saddle Rock Partners, Ltd. v. Hiatt*, No. 96 Civ. 9474, 2000 WL 1182793, at *5 (S.D.N.Y. Aug. 21, 2000).

the vast number of cases," *In re LTV*, 88 F.R.D. at 143 n.4, why the presumption "will undoubtedly be conclusive as to most of the class," *Blackie*, 524 F.2d at 906–07 n.22, and why "a successful rebuttal … will be exceedingly rare," *GAMCO*, 927 F. Supp. 2d at 100. To put it bluntly, "rebutting the presumption in a class action context is like inviting the defendant to play a game of 'Whack-A-Mole,' in which the moles always win."[30]

In short, *Basic* effectively dispenses with the element of reliance, not only in defiance of the text of the Exchange Act and its legislative history, but also in contravention of the consistent holdings of this Court that reliance *is* required under Section 10(b).

II. *STARE DECISIS* AND CONGRESSIONAL INACTION DO NOT PRECLUDE REQUIRING PROOF OF ACTUAL RELIANCE IN SECTION 10(b) ACTIONS.

A. *Stare Decisis*

1. The Court need not overrule *Basic* in order to require actual reliance under Section 10(b). *Basic* expressly stated that its "decision … is not to be interpreted as addressing the proper measure of damages in litigation of this kind." 485 U.S. at 248 n.28. Indeed, the Court has never addressed that question. To answer it, the Court must again look to Section 18(a), the closest analogue to the Section 10(b) private right. And, once again, Section 18(a) provides the answer. It states that the defendant shall be "liable … for damages *caused by such reliance*." 15 U.S.C. § 78r(a) (emphasis added).

[30] Grundfest, *Damages and Reliance*, at 7.

Accordingly, the "proper measure of damages in litigation of this kind," the issue left open in *Basic*, is limited to losses caused by actual reliance. So even if *Basic*'s presumption of reliance suffices to establish Section 10(b)'s element of "'transaction causation,'" *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 341 (2005), proof of actual reliance is still required to satisfy the entirely separate elements of "economic loss" and "'loss causation," *id.* at 342.[31]

2. But even if requiring actual reliance were deemed incompatible with *Basic*, the doctrine of *stare decisis* would not stand as a bar. "'*[S]tare decisis* is not an inexorable command,'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997)), but "is a principle of policy and not a mechanical formula of adherence to the latest decision," *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). In particular, "[w]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

The Court has jettisoned precedents "'when subsequent cases have undermined their doctrinal underpinnings,'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (citation omitted); "[w]here a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,'" *Pearson*, 555 U.S. at 235 (quoting *Payne*, 501 U.S. at 829–30); when "'economic realities underlying earlier decisions have changed, or … earlier judicial

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[31] *See generally* Grundfest, *Damages and Reliance*, 2–6, 17–32.

perceptions of those realities were in error,'" *State Oil*, 522 U.S. at 21 (citation omitted); or when "'experience has pointed up the precedent's shortcomings,'" *Citizens United*, 558 U.S. at 363 (quoting *Pearson*, 555 U.S. at 233). And although the Court is usually "reluctan[t] to overrule decisions involving statutory interpretation," *State Oil*, 552 U.S. at 20, it has been far less hesitant to do so when "the precedent consists of a judge-made rule," *Pearson*, 555 U.S. at 233, or when it involves a law that "the Court has treated … as a common-law statute," and as to which "'the federal courts [have] act[ed] more as common-law courts,'" *Leegin*, 551 U.S. at 899 (citation omitted).

Basic meets each of these criteria. Its four-Justice majority opinion was badly reasoned: it cast aside the text and structure of the securities laws, in favor of policy decisions that "should [have] come from Congress, and not from the courts." *Basic*, 485 U.S. at 257 (White, J., dissenting). *Basic* reflects a mode of interpretation of Section 10(b) that sharply conflicts with the Court's more recent cases, which hold that "[s]tatutory intent … is determinative," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and stress that, under the "'separation of powers, … Congress rather than the courts controls the availability of remedies for violations of statutes,'" *Stoneridge*, 552 U.S. at 165 (citation omitted).

Basic's principal judicial policy choice, moreover, rested upon an economic theory that the Court assumed was settled, but wasn't—a theory indisputably not designed to determine reliance, and one that non-economist judges have "no ability to test" and are "not well equipped" to apply. *Basic*, 485 U.S. at 253 (White, J., dissenting). Indeed, today not even the Nobel Prize Committee can agree on the status of

the economic theory that was so fundamental to *Basic*'s rationale. *See* p. 6, above.

Experience has shown, moreover, that *Basic* has defied consistent application and is unworkable, *see* p. 7, above, which has led Members of this Court to question it, *see Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., dissenting). And experience has proven false a central premise and promise of *Basic*—that the fraud-on-the-market presumption would be rebuttable. Beyond this, of course, *Basic* is as judge-made, and as common-law, as a statutory precedent can get: "[w]hen we deal with private actions under Rule 10b–5, we deal with a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps*, 421 U.S. at 737.

For any of these reasons, *Basic* is ripe to be overruled.[32]

B. Congressional Inaction

Finally, the fact that Congress has not overturned *Basic*'s presumption does not require adherence to it.

As an initial matter, "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). "'It is the intent of the Congress that enacted [the section] … that controls.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750,

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[32] Nor is the fraud-on-the-market presumption compelled by *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152–54 (1972), which presumed reliance in a Section 10(b) omission case. That unusual case did not involve aftermarket trading of a public company's securities, or any affirmative misstatements, but rather the breach of a fiduciary "duty of disclosure" by a defendant who was "'acting for'" the plaintiffs. *Id.* at 152.

758 (1979) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)). As a result, "'subsequent history is less illuminating than the contemporaneous evidence,'" *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("*SWANCC*") (quoting *Hagen v. Utah*, 510 U.S. 399, 420 (1994)), and is in fact a "'hazardous basis for inferring the intent of an earlier' Congress," *PBGC v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

This Court has repeatedly recognized, moreover, that "congressional inaction … 'deserve[s] little weight in the interpretive process,'" *Alexander*, 532 U.S. at 292 (quoting *Cent. Bank*, 511 U.S. at 187), and that "'Congress' failure to overturn a statutory precedent'" ordinarily provides no "'reason for this Court to adhere to it.'" *Cent. Bank*, 511 U.S. at 186 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation." *Cent. Bank*, 511 U.S. at 186 (quoting *Patterson*, 491 U.S. at 175 n.1 (quoting *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting))). Accordingly, "[w]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering*, 309 U.S. at 121. Numerous decisions thus reflect this Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction." *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (Scalia, J.; plurality opinion).

Indeed, not even Congress's failure to pass a specific bill overriding a precedent precludes this Court from overruling that precedent. "'[F]ailed legislative

proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute."'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002) (quoting *PBGC*, 496 U.S. at 650)); *accord SWANCC*, 531 U.S. at 170; *Cent. Bank*, 511 U.S. at 187. In particular, "'because several equally tenable inferences may be drawn from [congressional] inaction'" on proposed legislation, such "'inaction lacks persuasive significance.'" *Cent. Bank*, 511 U.S. at 187 (quoting *PBGC*, 496 U.S. at 650); *accord Craft*, 535 U.S. at 287. And obviously "'Congressional inaction cannot amend a duly enacted statute,'" as "'Congress may legislate … only through the passage of a bill which is approved by both Houses and signed by the President.'" *Cent. Bank*, 511 U.S. at 186 (quoting *Patterson*, 491 U.S. at 175 n.1).

Accordingly, the fact that Congress, when it enacted the Private Securities Litigation Reform Act of 1995, failed to pass "an unenacted bill that … 'would have undone *Basic*,'" *Amgen*, 133 S. Ct. at 1201 (citation omitted), cannot be treated as an endorsement of *Basic*. "'A bill can be proposed for any number of reasons, and it can be rejected for just as many reasons.'" *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1686 (2012) (quoting *SWANCC*, 531 U.S. at 170). "We have no idea whether the Members' failure to act in [1995] was attributable to their belief that [*Basic* and the fraud-on-the-market presumption] were correct, or rather to their belief that the courts would eliminate any excesses, or indeed to their unwillingness to confront the [securities plaintiffs' bar] lobby." *Rapanos*, 547 U.S. at 750 (plurality opinion).

To these might be added any number of other possibilities: "The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting; quoting THE FEDERALIST NO. 62, at 378 (C. Rossiter ed. 1961)). Members of Congress might have failed to act, moreover, in order to spend their political capital on other measures, or to avoid a filibuster. Or—of particular relevance here—they might have been trying to avoid a presidential veto, or muster enough votes to override one: the PSLRA itself was vetoed, and the veto was overridden—by just *two* votes in the Senate. *See* 109 Stat. 737, 765 (1995); 141 CONG. REC. S19180 (daily ed. Dec. 22, 1995). To extract "a controlling legal principle" from the PSLRA's failure to address *Basic* would thus indeed "walk on quicksand." *Helvering*, 309 U.S. at 121.

But even if "the danger of placing undue reliance on the concept of congressional 'ratification'" were disregarded, *Patterson*, 491 U.S. 175 n.1, what Congress actually did in 1995 refutes such a ratification here. If the PSLRA's legislative history shows anything, it is that Congress *rejected* the *Basic* presumption. The bill that initially passed the House contained a provision that would have explicitly *codified* the presumption. H.R. 1058, 104th Cong. § 4 (Mar. 8, 1995), *available at* http://1.usa.gov/19zAAkR.[33]

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[33] Section 4 of the bill would have added a new Section 10A(d)(3) to the Exchange Act that would have established "a

The version approved by the Senate omitted this provision, *see* S. 240, 104th Cong. (June 19, 1995); 141 CONG. REC. S9219–25 (daily ed. June 28, 1995), as did the conference report that ultimately became law, H. CONF. REP. NO. 104–369, at 1–30 (1995). At the very least, the conflicting inferences that may be drawn from the PSLRA's history suggest that reliance on that history, to use Judge Leventhal's famous metaphor, would be "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Ansikoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

Given what it sought to accomplish through the PSLRA, moreover, it is fanciful to suggest that Congress in 1995 endorsed a presumption that guts the requirement of reliance under Section 10(b).[34] The PSLRA "demonstrate[s] Congress's desire to reduce the amount of meritless securities litigation, an aim that is inconsistent with a sweeping presumption that facilitates more litigation without any relation to the merits of a claim, as found in *Basic*."[35]

Most notably, the PSLRA contains an important damages-limitation provision that is "fundamentally inconsistent with the logic of the efficient market

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rebuttable presumption … that the plaintiff relied on [the] market price" of a security under circumstances specified in a new Section 10A(d)(2). *Ibid.*

[34] Nor did Congress acquiesce in *Basic* when it passed SLUSA, the Securities Litigation Uniform Standards Act of 1998. SLUSA merely addressed the "shift" in "securities class action lawsuits … from Federal to State courts" that occurred in the PSLRA's wake. Pub. L. 105–353, § 2(2), 112 Stat. 3227 (1998); *see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006).

[35] Oldham, 97 NW. U. L. REV. at 998.

theory that serves as the basis for the fraud on the market presumption."[36] That so-called "look-back" provision limits recovery by requiring that damages from a misstatement or omission be calculated not from a security's price when a corrective statement is made, but from "the mean trading price … during the 90-day period" *after* that point.[37] The logic of this rule is that "stock prices will overreact to corporate information," and that "the market takes a significant period of time to accurately reflect" that information—a notion "fundamentally inconsistent with,"[38] and, indeed, "anathema to,"[39] *Basic*.

In short, "the tea leaves of congressional inaction" in 1995, *Rapanos v. United States*, 547 U.S. at 749 (plurality opinion), provide no reason to annul the action that Congress actually *did* take in 1934, when it enacted Sections 10(b) and 18(a) into law.

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[36] Grundfest, *Reliance and Damages*, at 40; *accord*, *e.g.*, Oldham, 97 NW. U. L. REV. at 998, 1028; Michael Y. Scudder, Comment, *The Implications of Market-Based Damages Caps in Securities Class Actions*, 92 NW. U. L. REV. 435, 461 (1997).

[37] 15 U.S.C. § 78u–4(e)(1).

[38] Oldham, 97 NW. U. L. REV. at 1027–28.

[39] Grundfest, *Reliance and Damages*, at 42.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 6, 2014