No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

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

BRIEF OF *AMICI CURIAE* INSTITUTIONAL INVESTORS SUPPORTING RESPONDENT

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Dated: February 5, 2014

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF *AMICI CURIAE*[1]

This brief *amicus curiae* is filed by institutional investors that collectively manage more than $1.36 trillion of assets in carrying out their obligations to over 18.9 million individuals. Consequently, these investors—whose assets are at risk from securities fraud—have a vital interest in this Court's well-settled precedent allowing plaintiffs to rely on the rebuttable fraud-on-the-market (FOTM) presumption in *Basic Inc. v. Levinson,* 485 U.S. 224 (1988). *Amici* include:

Connecticut State Treasurer as Trustee for the Connecticut Retirement Plans and Trust Funds, with over $27 billion in assets under management and 190,000 pension plan participants and beneficiaries.

APG Algemene Pensioen Groep N.V., the asset manager for Stichting Pensioenfonds ABP (the pension fund for all public employees in the government and education sectors in the Netherlands), with approximately $394 billion in assets under management and 2.8 million participants.

Arbejdsmarkedets Tillaegspension, the Danish national pension fund, with approximately $107 billion in assets under management and 4.8 million beneficiaries.

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

Arkansas Public Employees Retirement System, with approximately $5.7 billion in assets under management and over 100,000 beneficiaries.

Arkansas Teacher Retirement System, with approximately $14 billion in assets under management and 113,000 participants.

City of Atlanta Firefighters' Pension Fund, with approximately $620 million in assets under management.

City of Austin Police Retirement System, with approximately $582.8 million in assets under management and 2,380 beneficiaries.

City of Miami Police Relief and Pension Fund, with approximately $111 million in assets under management and 1,000 beneficiaries.

Clearwater Employees Retirement System, with approximately $842 million in assets under management and 2,500 beneficiaries.

District of Columbia Retirement Board, with approximately $6.1 billion in assets under management and 23,500 participants.

Employee Retirement System of the City of Providence, with approximately $360 million in assets under management and 5,800 participants.

Erie County Employees Retirement System, with approximately $227 million in assets under management and 1,900 participants.

Första AP-fonden, one of the five buffer funds in the Swedish national income pension system, with approximately $51 billion in assets under management.

Houston Municipal Employees Pension System, with approximately $2.3 billion in assets under management and 26,000 participants.

Indiana Public Retirement System, Indiana Public Employees' Retirement Fund, and Indiana State Teachers' Retirement Fund, with assets under management of approximately $27.1 billion and 450,000 members.

Industriens Pension, a Danish pension fund with approximately $21 billion in assets under management and 400,000 beneficiaries.

Jacksonville Police and Fire Pension Fund, with approximately $1.48 billion in assets under management and 5,000 beneficiaries.

Louisiana Sheriffs' Pension & Relief Fund, with approximately $2.5 billion in assets under management and 23,000 beneficiaries.

Mn Services N.V., with approximately $128 billion in assets under management for a wide variety of pension funds in the Netherlands and United Kingdom with 1.5 million participants.

Montana Board of Investments, with approximately $13 billion in assets under management and over 30,000 beneficiaries.

North Carolina Retirement System, with approximately $83 billion in assets under management and 900,000 members.

PFA Pension, a Danish company, with approximately $60 billion in assets under management and 1 million participants.

PGGM Investments, with approximately $205 billion of assets under management for 2.5 million participants in the Netherlands.

Plantation Police Retirement System, with approximately $111 million in assets under management and 114 beneficiaries.

The Regents of the University of California, which manages a portfolio of investments totaling over $82 billion, providing benefits to current and retired employees and supporting the University's mission of education, research, and public service.

Sacramento County Employees' Retirement System, with approximately $7.3 billion in assets under management and 24,000 members.

Sampension, a Danish fund, with approximately $51 billion in assets under management and 732,000 beneficiaries.

San Diego City Employees' Retirement System, with approximately $6.3 billion in assets under management and 20,000 participants.

San Mateo County Employees' Retirement Association, with approximately $2.7 billion in assets under management and over 5,000 beneficiaries.

Sjunde AP-Fonden, the Swedish default pension fund, with approximately $27 billion in assets under management and 3 million beneficiaries.

Utah Retirement Systems, with approximately $29.25 billion in assets under management and 285,000 beneficiaries.

Virginia Retirement System, with approximately $62.2 billion in assets under management and 641,000 total members, retirees and beneficiaries.

SUMMARY OF ARGUMENT

In *Basic Inc. v. Levinson,* 485 U.S. 224 (1988), this Court agreed with numerous Courts of Appeals and with the Securities and Exchange Commission (SEC) that there should be a rebuttable presumption that, in well-developed and open markets, (i) material public information is reflected in the market price of a security and (ii) investors rely on the integrity of this market price in making investment decisions. 485 U.S. at 247.

Both Congress and this Court have recognized the important role played by institutional investors such as *amici*. Such investors contribute a substantial portion of the capital invested in the nation's securities markets. Congress recognized and endorsed a leading role for institutional investors in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). Congress recognized that institutional investors have a long-term perspective that aligns their interests with those of the companies in which they invest. Institutional investors have no interest in meritless securities litigation, which only harms their own investments, but they have a strong interest in policing fraud and enforcing the securities laws. Institutional investors strongly favor the *Basic* presumption.

Petitioner Halliburton asks this Court to overrule *Basic* and discard the fraud-on-the-market presumption, a central element of securities-law doctrine that has policed the securities markets and protected investors from fraud for 25 years. A decision by this Court to overturn *Basic* would not only imperil the efficacy of class actions in redressing securities fraud—it would also jeopardize a host of other doctrines governing the trading of securities upon which both investors and companies have been relying for decades.

First, it would disrupt investment strategies of institutional investors that depend on the integrity of the market price of stock in making investment decisions. Investment practices of institutional investors are built on the cornerstone that securities markets are fundamentally fair and that prices reflect available public information. If this Court were to hold that these assumptions are false or no longer recognized, it would force radical changes in those strategies to protect investors' legal rights, if not outright abandonment of those strategies.

Next, eliminating the *Basic* presumption will not simply foreclose private securities fraud class actions. As a practical matter, it will also doom individual suits by institutional investors (either at the outset of class litigation or later), because such suits also rely on the *Basic* presumption. Investors using passive investment strategies (such as index investors) also rely on the integrity of the market (within the meaning of *Basic*) and the presumption that relevant public information is incorporated into price. Halliburton's position would deprive such investors of a 10b-5 remedy as well.

In addition, overruling *Basic* would call into question other well-settled doctrines that rely on the efficiency and integrity of securities markets. The truth-on-the-market (TOTM) defense, which is a logical corollary to the FOTM doctrine, would be threatened if *Basic* were rejected, precisely because the genesis of the TOTM defense was *Basic* itself. In addition, companies frequently assert, as a defense to charges that they made false or misleading statements, that their SEC filings and conference calls contained adequate risk disclosures. Similarly, the PSLRA establishes a safe harbor for forward-looking statements meeting certain criteria. 15 U.S.C. § 78u–5. But if this Court were to overrule *Basic* and require actual, verifiable, individualized reliance, then defendants wishing to establish a "bespeaks caution" defense would need to prove that plaintiffs were actually and individually aware of the defendants' risk disclosures, investor conference calls, and other cautionary statements. The defense of "negative causation" in cases under § 11 of the Securities Act of 1933 would also be called into question if *Basic* were to be overruled.

Furthermore, the widespread, practical, efficient, and effective practice of allowing companies to engage in conference calls with selected investors or to rely on stock analysts to disseminate material information to investors would no longer be sufficient. If *Basic* were to be overruled, the investment community would have no choice but to demand that they or their investment decision makers receive and individually review all filings, press releases, investor conference calls and other public statements in order to be able to prove reliance in a securities-fraud action. Thus, overruling *Basic* would exact an exorbitant price on institutional investors and public companies alike.

The fundamental flaw in Halliburton's criticism of the *Basic* presumption is that it ignores the practical realities of modern securities litigation. In truth, and directly contrary to the mischaracterizations of Halliburton and its *amici*, that presumption is rigorously litigated and not automatically available to plaintiffs. Plaintiffs typically present expert testimony and event studies to establish the preconditions of the presumption. Courts enforce the requirements of *Basic* and disallow the presumption where its elements are not satisfied. Defendants are able to rebut the presumption. And defendants are afforded ample trial and post-trial procedures to address the reliance issue.

The *Household Finance* and *Vivendi* proceedings (the latter of which is the subject of an *amicus* brief supporting Halliburton) demonstrate that, even under the *Basic* presumption, defendants are able to contest reliance on an individualized basis, post-trial, after a jury verdict is returned. Far from helping Halliburton's argument, the *Vivendi* experience shows the multiple layers of procedures available to protect defendants. Halliburton ignores the practical, nuts-and-bolts aspects of securities litigation that have developed in the decades in which courts have applied the *Basic* presumption.

ARGUMENT

I. OVERTURNING *BASIC* WOULD TAKE AWAY THE SPECIAL ROLE THAT CONGRESS AND THE COURTS HAVE ALWAYS ACCORDED INSTITUTIONAL INVESTORS.

In the aggregate, pension funds that invest in U.S. markets cover tens of millions of active and retired members and control trillions of dollars in assets. Each year these funds invest billions of additional dollars in the U.S. capital markets on behalf of their beneficiaries.

As institutional investors, pension funds have a long-term outlook and an interest in deterring meritless litigation. Their overriding responsibility is to invest for the retirement and long-term security of their millions of active and retired members. Institutional investors – and, we believe, all investors – are vitally concerned that investors not be harmed by the illegal conduct of those who issue and sell publicly traded securities.

Because institutional investors are typically under an obligation to protect the investments they make on behalf of their millions of beneficiaries, these *amici* have a particularly significant interest in the procedural requirements for bringing lawsuits against publicly traded companies and their officers to redress violations of the federal securities laws. Indeed, it is doubtful that any party has a greater stake in the procedural requirements for securities class actions than institutional investors, who are concerned about securities fraud as much as, if not more so than, individual investors—and who have much more at stake. This Court has consistently—

and often unanimously—avowed that "private securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, 81 (2006) (8-0). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 331 n.4 (2007) (8-1).

Further, many state and local governments are constitutionally obligated to guarantee defined-benefit retirement plans. Therefore, in many cases, taxpayers would be on the hook if investment funds suffered losses due to the chicanery and malfeasance of the issuers of publicly traded securities.

Congress recognized and endorsed this leading role for institutional investors in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). The PSLRA was born of congressional frustration with what it perceived as "nuisance filings." *Merrill Lynch v. Dabit,* 547 U.S. at 81. *See also Tellabs,* 551 U.S. at 320. Accordingly, Congress acted "to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs" in securities class actions. *Tellabs*, 551 U.S. at 331. Congress founded this policy on its conviction that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Rep. No. 104-369, at 34 (1995) (Conf. Rep.).

The PSLRA enacted new methods for judicial selection of lead plaintiffs and lead counsel in securities class actions. *See id.* These reforms were designed to encourage the selection of institutional investors as lead plaintiffs precisely because such entities are "deemed to have a large enough financial interest in the litigation and sufficient professional expertise in directing litigation to ensure that class members' interests are competently and dutifully served." Mary K. Kane, *et al.*, WRIGHT & MILLER ON FEDERAL PRACTICE & PROCEDURE § 1808 at n.22 (2012). "Institutional investors, [Congress] believed, are less likely to bring abusive or meritless litigation." *Id.* at n.23.

Congress deliberately favored institutional investors in the PSLRA. The PSLRA creates a rebuttable presumption for the appointment as lead plaintiffs investors who have the "largest financial interest" in the relief sought by the class. *See In re Cendant Corp. Sec. Litig.,* 264 F.3d 201 (3d Cir. 2001); *In re Cavanaugh,* 306 F.3d 702 (9th Cir. 2002). "Congress prescribed new procedures for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs." *Tellabs,* 551 U.S. at 320-21. *See also* Mary K. Kane, *et al.*, WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE § 1806 (2012); Charles M. Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve As Lead Plaintiffs in Securities Fraud Class Actions*, 57 DEPAUL L. REV. 471 (2008).

Thus, at the same time that Congress *discouraged* meritless securities class actions, *see* 15

U.S.C. §78u-4(a)(3)(B)(vi), Congress *encouraged* class actions brought by institutional investors such as the *amici* here because they "do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Rep. No. 104-369, at 35 (1995).

II. OVERTURNING *BASIC*'S REBUTTABLE PRESUMPTION OF RELIANCE WOULD WREAK HAVOC WITH DECADES OF SECURITIES REGULATION AND HAVE DEVASTATING PRACTICAL CONSEQUENCES.

A. Halliburton's Position Would Disrupt Investment Strategies Of Institutional Investors.

The FOTM presumption established in *Basic Inc. v. Levinson,* 485 U.S. 224 (1988), endorses as a formal holding the "common-sense" notion, *id*. at 245, that investors rely on the integrity of the market price of stock in making investment decisions. *Id*. at 246 ("An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."). This has been the rule for nearly three decades. If the Court were now to announce to the investing public that this presumption will no longer be recognized, the consequences could be dire. The investment strategies of institutional investors are built on the cornerstone that United States securities markets are fundamentally fair and that prices reflect available public information. If this Court were to hold that these assumptions are false, it would topple the central pillar of institutional investors' investment strategies and raise a serious question as to whether, consistent with their fiduciary duties, they can continue to rely on them.

Such a result could trigger significant market disruption. If this Court accepts Halliburton's invitation to declare that securities markets exhibit "fundamental inefficiency" and that "irrationality . . . is on the rise," Pet. Br. 16, 19 (quoting headings), then institutional investors will be forced to alter their settled investment practices and adapt to new and unpredictable guidelines.

At the very least, if the *Basic* presumption were eliminated, institutional investors would face a host of additional burdens and expenses:

(i) Institutions would incur greater costs because they would be forced to create the capacity to collect and review the disclosures of thousands of companies if they seek to retain any possibility of asserting a claim in the event of fraud.

(ii) The prospect of increased monitoring of corporate disclosures could create an incentive to reduce the number of holdings in their portfolios, thereby reducing diversity and increasing risk within the institutions' portfolios and likely withdrawing funding from smaller companies.

(iii) The additional burdens could create less willingness to invest in companies or sectors with an unproven track record, distorting the securities markets and potentially reducing the funds available for innovative companies and sectors.

(iv) Institutions would be faced with the Hobson's choice of either abandoning the advantage of low-cost passive investment strategies or absorbing the losses occasioned by corporate fraud.

Under Halliburton's view, an investor that uses indexing or a similar strategy cannot demonstrate the reliance necessary to bring a Rule 10b-5 claim for securities fraud.

All of these burdens are inconsistent with Congress' decision to favor institutional investors in the PSLRA. Congress specifically provided the mechanism for institutional investors to lead the prosecution of securities-fraud class actions, but that vital congressional policy would be directly and completely undercut if those same institutional investors were denied the right to a remedy themselves without the *Basic* presumption of reliance that this Court adopted seven years before passage of the PSLRA.

B. Halliburton's Position Would Likely Doom Private Enforcement of the Securities Laws.

Overturning or recasting *Basic*'s FOTM presumption would create insuperable barriers to securities-fraud class actions and would eviscerate the congressional goal—reaffirmed in the PSLRA—to promote vigorous enforcement of the securities laws. In *Basic*, this Court reasoned that denying use in a securities-fraud action of a rebuttable presumption of the plaintiffs' reliance on "any public material misrepresentations," 485 U.S. at 247, and instead requiring actual proof of it for each class member at the class certification stage (as Halliburton urges) "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Id.* at 245. This Court also observed that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[ ] the common ones." *Id.* at 242. This Court reiterated the same concerns in *Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179, 2185 (2011) (*Halliburton I*) ("limiting proof of reliance in such a way would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market. We also observed that requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would prevent such plaintiffs from proceeding with a class action, since individual issues would overwhelm the common ones.") (citations, quotation marks, and brackets omitted), and in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) ("Absent the fraud-on-the-market theory, the requirement that Rule 10b–5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class.").

In this case, there was a 42% drop in Halliburton's stock price on December 7, 2001, when the company announced adverse legal judgments. J.A. 230, 343-44. Yet Halliburton does not merely concede—it actually boasts—that class actions would be impossible in securities-fraud cases without the doctrine formulated in *Basic*. *See* Pet. Br. at 26 ("In any non-securities context, the class in this case could not be certified."); *see also id.* at 26-27. Yet this Court's recent decisions continue to reaffirm the importance of private actions for the enforcement of the securities laws: "Nothing in the PSLRA, . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs*, 551 U.S. at 320 n.4 (quoting *Merrill Lynch v. Dabit*, 547 U.S. at 81).

Halliburton asserts that, even without the *Basic* presumption, institutional investors would still be able to bring suit as opt-out plaintiffs. Pet. Br. 48. But individual investors also rely on the *Basic* presumption. *See*, *e.g.*, *Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 358-59 (S.D.N.Y. 2008); *In re Cendant Corp.*, Nos. 98-CV-1664, 98-CV-0381, 98-CV-0759, 2005 WL 3500037, at *3-4 (D.N.J., Dec. 21, 2005); *Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.*, 315 F. Supp. 2d 666, 676-77 (E.D. Pa. 2004); *Shanahan v. Vallat*, No. 03-civ-3496, 2004 WL 2937805, at *5 (S.D.N.Y. Dec. 19, 2004)

Moreover, when opt out litigants "expressly rely on information developed in the class litigation in support of their claims" they are "like all of the other prospective class members, [] the beneficiaries of the class action litigation which had been filed and was being litigated on their behalf."[2]

It is still the case that opt-out cases in securities class actions are exceedingly rare. *See*

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[2] Kevin LaCroix, Securities Class Action Opt-Outs: Back with a Vengeance?, D&O DIARY, Nov. 19, 2012, http://www.dandodiary.com/articles/optouts/.

Amir Rozen, Joshua B. Schaeffer & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements* (Cornerstone Research 2013) at 1 (presenting the first comprehensive quantitative analysis of opt-out securities lawsuits and settlements); *see id.* at 2 (noting that there were only 38 opt-outs among 1,272 securities class-action settlements). Averages of the opt-out payments when compared to the settlement payments present a data set severely skewed by just a couple of cases; more revealing and more representative, the authors concluded, is the fact that the median opt-out recovery was a paltry "3.8% of the related class action settlement[]." *Id.* at 2. Thus, despite the rather forced enthusiasm of Halliburton's cheer-leading for a securities-fraud victim's opportunity to opt out and pursue its own case, this is not an adequate substitute for the class-action regime that currently exists under the *Basic* presumption. Thus, what Halliburton promotes as a panacea is but a "promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Thus there is no way for Halliburton to avoid the drastic and adverse consequences that would ensue should the Court accept Petitioners' invitation to eliminate the *Basic* presumption that is essential to securities-fraud class actions.

C. Halliburton's Position Would Eliminate Recoveries For Investors With Passive Investment Strategies Such As Index Investing, Even For The Most Egregious Securities Frauds.

Index investors also rely on the *Basic* presumption. As this Court dryly observed in *Basic*, "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. *Who would knowingly roll the dice in a crooked crap game?" Basic*, 485 U.S. at 246-47 (emphasis added). By definition, index investors rely principally—often exclusively—on the integrity of the market price of stock in making their investment decisions. As the Court reconfirmed just a year ago, "it is reasonable to presume that most investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen*, 133 S. Ct. at 1192. Accordingly, eliminating *Basic* will disrupt this common investment strategy, too.

Halliburton ignores the courts that have already rejected its premise that an index-based securities fraud action is outside the presumption of reliance that was essential to the holding in *Basic*. For example, the courts have rejected a defendant's argument that, because index purchasers seek to match a predetermined index of securities, such purchasers do not rely on any misrepresentation. *See In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 602 (C.D. Cal. 2009). On the contrary, because index purchasers seek only to match the index and exclude other considerations (such as, for example, reliance on nonpublic information or other idiosyncratic motivations), index purchasers rely *exclusively* upon the market to incorporate any representations (including misrepresentations) into the price of securities. This is close to perfect reliance on market price-setting. As one trial court recently noted, "the law fully supports the notion that *index purchases and the like are in fact a perfect example of reliance on the market*." *In re Merck & Co. Vytorin/Zetia Sec. Litig.*, 2012 U.S. Dist. LEXIS 138080, at *18-19 (D.N.J. Sept. 25, 2012) (emphasis added). *See also Basic*, 485 U.S. at 242.

Similarly, "the fact that a portion of [an institutional investor's] shares were bought by simply replicating index funds such as the S&P 500 does not perforce preclude [the institutional investor] from invoking the fraud-on-the-market theory, because 'these [index] funds relied on both the efficiency of the market . . . as well as [the institutional investor's] historical and current stock price trends.'" *In re Schering Plough Corp. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26297, at *15 (D.N.J. Oct. 9, 2003).

Another court rejected the argument that the plaintiff, which made some of its trades "based on a computer program that was designed to mirror a stock index," was not typical of the class of investors because there was no evidence suggesting "that the index did not . . . rely on the integrity of the market." *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 578 (N.D. Cal. 2009); *see also In re Nortel Networks Sec. Litig.,* 2003 U.S. Dist. LEXIS 15702, at *10 (S.D.N.Y.

Sept. 5, 2003) ("a jury may conclude that pursuing an index strategy entails reliance").

Thus, by overturning the *Basic* presumption in accord with Halliburton's wishes, this Court would ineluctably likewise toll the death knell for securities-fraud victims who seek redress for their injuries via individual lawsuits or index-based claims. They would simply be left without a meaningful remedy absent changes to their investment strategies.

III. REPUDIATION OF *BASIC* BY THIS COURT WOULD JEOPARDIZE OTHER LONG-SETTLED DOCTRINES OF SECURITIES LAW.

Halliburton's position, if endorsed by the Court, would undermine other well-settled doctrines of securities law. One likely doctrinal casualty would be the truth-on-the-market (TOTM) defense, which has justly been described as a natural "corollary" to the FOTM doctrine. *Ganino v. Citizens Utility Co.*, 228 F.3d 154, 167 (2d Cir. 2000). The TOTM defense could be threatened if *Basic* is rejected precisely because the genesis of the TOTM defense was *Basic* itself, which stated that the FOTM presumption could be rebutted by showing that a corrective disclosure "credibly entered the market and dissipated the effects of the misstatements." *Basic*, 485 U.S. at 249. The TOTM defense has often been invoked in situations where purportedly truthful information has entered the market from sources other than the corporate defendant.

In one of the leading TOTM cases, *In re Apple Computer Sec. Litig.*, 886 F.2d 1109 (9th Cir. 1989), plaintiffs alleged that Apple had failed to disclose material risks associated with the launch of the company's "Lisa" computer. However, Apple's optimistic statements that were proffered as the basis for Apple's liability were issued amid pervasive and persuasive press reports that portrayed Lisa as a gamble and that, furthermore, described in detail the glitches to which the new product was prone. In these circumstances, the Ninth Circuit held that "in a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made available to the market by other sources." *Id.* at 1115.[3] Defendants in securities-fraud lawsuits are only too happy to invoke the efficiency of the market when it can deliver them from liability.[4]

Other well-known defenses are likewise based on the assumption that securities markets are efficient in the sense that all public information is reflected in the market price. They, too, would be

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[3] *See also id.* at 1114-15 ("The Supreme Court approved the trial court's adoption of the fraud on the market theory. However, it stressed that the presumption of reliance could be rebutted by a showing that information sufficient to correct the defendants' alleged misstatements was transmitted through market price in the same fashion as the misstatements themselves.").

[4] *See also Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 515 (7th Cir. 1989) (company did not need to provide assumptions underlying projection because "professional investors and analysts surely deduced what was afoot" and "supplied their own assumptions about the likelihood the firm will encounter trouble or that the rules will change").

imperiled if *Basic* were overruled. For example, companies frequently assert, as a defense to falsity, that their SEC filings and conference calls contain adequate risk disclosures under the "bespeaks caution" doctrine. *See, e.g., In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1425 (9th Cir. 1994); *In re Dot Hill Sys. Corp. Sec. Litig.*, 594 F. Supp. 2d 1150, 1160 (S.D. Cal. 2008); *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1165 (C.D. Cal. 2007).

Similarly, the PSLRA establishes a safe harbor for forward-looking statements meeting certain criteria. 15 U.S.C. § 78u–5. However, if this Court were to overrule *Basic* and require actual, verifiable, individualized, "eyeball" reliance rather than presumed reliance, then defendants wishing to establish a "bespeaks caution" defense would need to prove that plaintiffs were not merely on legally sufficient notice of the defendants' risk disclosures and cautionary statements, but were instead actually and individually aware of the risk disclosures and cautionary statements.

The defense of "negative causation" in cases under § 11 of the Securities Act would also be called into question if *Basic* were overruled. Just as plaintiffs in § 10b-5 cases commonly use event studies to demonstrate market efficiency in order to benefit from the FOTM presumption at class certification and to prove loss causation at summary judgment or trial, defendants in § 11 cases commonly use event studies (see Part IV-A, *infra*) to demonstrate their negative-causation defense under § 11(e), because "the negative causation defense in Section 11 and the loss causation element in Section 10(b) are mirror images." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 375314, at

*6 (S.D.N.Y. Feb. 17, 2005); *see also In re Metropolitan Sec. Litig.*, No. CV-04-25-FVS, 2010 U.S. Dist. LEXIS 4209, at *13 (E.D. Wash. Jan. 20, 2010) (same); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1170 (C.D. Cal. 2008) (same).

Moreover, Halliburton's position would cause significant costs to be imposed upon issuers of securities. Today, companies consistently rely on the market to disseminate material information on their behalf through earnings calls, public filings, and the like. If institutional investors began to demand individual copies of all filings, press releases, and public statements (in order to be able to prove reliance if *Basic* were overruled), public companies themselves would incur the enormous price of this administrative burden. Some might even seek to be listed on exchanges outside of the United States in less-developed markets with untested regulations and laws, rather than bear the cost of providing the direct, individual notice to myriad investors such as *amici* that overruling *Basic* would inevitably entail.

In short, rejecting the *Basic* presumption would call into question well-settled doctrines and practices of securities law.

IV. HALLIBURTON'S ARGUMENT FOR ELIMINATING *BASIC*'S FRAUD-ON-THE-MARKET PRESUMPTION RELIES ON A MISLEADING PICTURE OF MODERN SECURITIES-FRAUD LITIGATION.

Petitioners suggest that securities plaintiffs can trigger a rebuttable presumption of their reliance on the market merely by strolling into the courtroom. That is not so. The fraud-on-the-market presumption is rigorously litigated and not automatically available to plaintiffs.

A. Plaintiffs Must Provide Rigorous Proof.

The FOTM presumption is available only where plaintiffs can show that the market for the security at issue is sufficiently informationally efficient. In general, plaintiffs must meet the multi-factor test developed in *Cammer v. Bloom*, 711 F. Supp. 1263 (D.N.J. 1989), and *Krogman v. Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001). These factors include: (1) average trading volume, (2) number of securities analysts following the stock, (3) number of market makers, (4) whether the company is entitled to file an S-3 Registration Statement, (5) evidence of a cause-and-effect relationship between unexpected news and stock-price changes, (6) the company's market capitalization, (7) the relative size of the bid-ask spread for the security, and (8) the company's float (that is, the extent to which shares of the security are held by the public, rather than insiders).

Under the fifth *Cammer/Krogman* factor, plaintiffs typically offer expert proof of market efficiency through a rigorous and widely accepted scientific methodology called an event study. For more than 40 years, economists have employed event studies to determine market efficiency. An event study, when utilized in this context, is an expert technique used to measure the effect of new, company-specific information on the market price of a company's publicly traded securities. New information may include, for example, news issued in company press releases or SEC filings or through third-party analysts or other sources. Event studies have appeared in hundreds of academic articles as scientific evidence in evaluating how new information affects securities prices. *See*, *e.g.*, David I. Tabak & Frederick C. Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, Ch. 19, LITIGATION SERVICES HANDBOOK, THE ROLE OF THE FINANCIAL EXPERT (3d ed. 2001); John Binder, *The Event Study Methodology Since 1969*, 11 REV. QUANTITATIVE FIN. & ACCT. 111-37 (1998).

Courts have repeatedly recognized that the event-study methodology is an accepted and reliable way to show both market efficiency and damages. *See*, *e.g.*, *United States v. Schiff*, 602 F.3d 152, 173 n.29 (3d Cir. 2010) (an event study "is the tool 'most often used by experts to isolate the economic losses caused by the alleged fraud'"); *In re Flag Telecom Holdings*, *Ltd. Sec. Litig.*, 245 F.R.D. 147, 170 (S.D.N.Y. 2007) ("numerous courts have held that an event study is a reliable method for determining . . . the market's responsiveness to certain events").

As Halliburton's own *amici* acknowledge, "[e]vent studies are routinely employed to show that a market is efficient at the class certification stage." Br. of Law Professors 27. "Thus, courts are already considering experts' event studies examining the effect of disclosures at the class certification stage to prove that a market generally incorporates information into prices, to trigger the *Basic* presumption of reliance." *Id.*

B. Courts Enforce The Preconditions For Invoking The *Basic* Presumption.

Proving the preconditions necessary to trigger the *Basic* presumption of reliance is difficult. Numerous courts have held that plaintiffs in particular cases have failed to meet the burden of showing the elements necessary to invoke the *Basic* presumption. For example, lower courts have held *Basic's* presumption to be unavailable to investors in newly issued securities,[5] mortgage-backed bonds,[6] and collateralized debt obligations.[7]

Further, this Court's decisions in *Basic*, *Halliburton I*, and *Amgen* all confirm that the FOTM presumption *is rebuttable*, and numerous courts have allowed defendants to rebut it. For example, in *Basic* itself, the Court explained that "*[a]ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added). The Court gave three examples:

- a showing that market-makers are privy to the truth, so the misrepresentation has no impact on price;

[5] *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); Freeman v. Laventhol & Horwath, 915 F.2d 193, 199 (6th Cir. 1990).

[6] *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 210 (2d Cir. 2008).

[7] *See, e.g., Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 651 (S.D.N.Y. 2012).

- a showing that the truth enters the market credibly, so the misrepresentation's impact on price is diffused; or
- a showing that plaintiffs did not rely on the integrity of the market price.

485 U.S. at 248-49. Lower courts have adhered to these directives.[8]

C. Trial and Post-Trial Procedures Protect Defendants.

In *Basic*, this Court opined that defendants can also respond to the fraud-on-the-market presumption at trial. *See* 485 U.S. at 249 n.29 (noting that objection as to market efficiency "is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate"); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011) (noting need for trial proof).

Indeed, even after a verdict is rendered, defendants in securities class actions typically get another bite at the apple. After a plaintiff class obtains a verdict, class members often must respond

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[8] *See, e.g., Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 364 n.25 (5th Cir. 1987); *Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 291 n.4 (5th Cir. 1981); *GAMCO Investors, Inc. v. Vivendi, S.A.,* 927 F. Supp. 2d 88, 101-02 (S.D.N.Y. 2013); *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 262 (D. Mass. 2005) (citing *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 169 (D. Mass. 1989)); *Cooper v. Pac. Life Ins. Co.*, 458 F. Supp. 2d 1368, 1377 (S.D. Ga. 2006); *Schaffer v. Timberland Co.*, 924 F. Supp. 1298, 1308-09 (D.N.H. 1996).

to post-trial interrogatories and file post-trial claim forms before they receive any payment. Individualized reliance and damages can be tested through this process. Thus, there is no guarantee that a plaintiff class will receive compensation in the amount of the jury verdict, and the post-trial process provides further protections for a defendant. *See* Alba Conte & Herbert B. Newberg, 7 NEWBERG ON CLASS ACTIONS § 22:61, at 284 (4th ed. 2002) ("[R]ebuttal of individual reliance will not defeat class certification and may be resolved after trial on common issues.").

An illustrative example of post-verdict proceedings that present the opportunity for a defendant to challenge individual claimants' reliance is *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, No. 02-C-5893, 2012 U.S. Dist. LEXIS 135135, at *5 (N.D. Ill. Sept. 21, 2012). At trial in *Household*, the defendants unsuccessfully sought to rebut the presumption of reliance:

> At trial, defendants offered, and the jury rejected, two of the three types of evidence that can be used to rebut the presumption of reliance, *i.e.,* that market makers were privy to the truth, and the truth had credibly entered the market and dissipated the effects of the omissions and misstatements.

Id. at *5; *see also Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 756 F. Supp. 2d 928, 931-32 (N.D. Ill. 2010). "Thus, in phase two" post-trial proceedings, "the focus has been on the third kind of rebuttal evidence, that which severs the link between the alleged omissions and misstatements and either the price paid or received by any claimant." *Household*, 2012 U.S. Dist. LEXIS 135135 at *5; *see also Household*, 756 F. Supp. 2d at 930 (establishing phase II protocol).

The *Household* district court allowed the defendants to propound further discovery to both the lead plaintiffs and absent class members post-verdict. Claimants were required to answer, under penalty of perjury, whether they would have purchased Household stock absent the misrepresentation. The court summarily dismissed claims of "a substantial number of claimants" – indeed, of 2,476 claimants – on the ground that they had failed to answer this question on the claim form.[9]

Thus, the *Household* defendants have *so far* successfully rebutted the presumption of reliance for more than two thousand class members, whose claims total over $60 million.[10] Another 9,500 claims, valued at another $60 million, are expected to be rejected on the same ground.[11] As things currently stand, the *Household* defendants soon will have successfully rebutted the reliance of some 12,000 of the more than 45,000 claimants, thereby reducing their total damages exposure by over $120 million.

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[9] *Household*, 2012 U.S. Dist. LEXIS 135135, at *22-*23.

[10] *See Household*, Docket Entry 1886 (ruling that "List 3" claims "will be rejected . . . for failing to answer the claim form question"); *Household*, Docket Entry 1860, at 2 (List 3 comprises "2,476 claims valued at $60,344,054").

[11] *Household*, Docket Entry 1940, at 4 (Oct. 23, 2013 hearing transcript).

Household remains on track, moreover, for trials at which still more claims may be rejected: "Defendants have . . . created a triable issue of fact as to the reliance of claimants who: (1) responded 'yes' to the claim form question; (2) submitted duplicate claims with conflicting answers to the claim form question; and (3) submitted multiple claims with different answers to the claim form question. These claims must be resolved at trial."[12]

The *Household* district court has been careful, through this process, to ensure that the defendants have a reasonable opportunity for discovery. Allowed several months "to take discovery of any class member,"[13] and permitted to depose representatives of the largest claimants, the *Household* defendants actually took fewer depositions than the district court had authorized.[14]

Halliburton's *amicus* Vivendi complains of its treatment in the post-trial proceedings in *In re Vivendi Universal, S.A. Securities Litigation*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011), but the record

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[12] *Household*, 2012 U.S. Dist. LEXIS 135135, at *17. Vivendi's *amicus* brief in this action misleadingly asserts that in *Household* "a special master would determine which reliance challenges could be resolved as a matter of law and which ones required a trial." Vivendi Br. at 20 n.8. In truth, the district court tasked the special master only with resolving certain ministerial objections and grouping the thousands of claimants according to how they had answered the claim form questionnaire, so the court might process them more efficiently.

[13] *Household*, 2012 U.S. Dist. LEXIS 135135, at *18 (citing Nov. 22, 2010 Mem. Op. & Order at 9; Jan. 5, 2011 Hr'g Tr. at 20, 25-26).

[14] *Household*, Docket Entry 1766 (June 10, 2011 status report).

undermines Vivendi's objections. In fact, Vivendi won a significant post-verdict victory when this Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), dramatically reduced its exposure for a massive fraud that had been proven at trial. After the plaintiffs obtained a verdict, the district court also permitted Vivendi to "rebut[] the presumption of reliance" of the remaining plaintiffs through "an individualized inquiry into the buying and selling decisions of particular class members." *Id.* at 584. Vivendi had attempted to rebut, on a class-wide basis, the fraud-on-the-market presumption of reliance by asserting a "truth on the market" defense, but the jury rejected this defense.

Nevertheless, after the verdict was rendered, the court held that Vivendi had not waived its right to contest reliance on an individualized basis by failing to pursue the issue at class certification; the court opined that "courts in securities fraud actions have consistently recognized that issues of individual reliance can and should be addressed after a class-wide trial, through separate jury trials if necessary." *Id.* at 584-85. Vivendi itself extolls—in its *amicus* brief to this Court—precisely how these procedures will safeguard the rights of securities-fraud defendants:

> Recognizing that the presumption adopted by *Basic* is supposed to be rebuttable, the district court rejected a motion by the class plaintiffs for immediate entry of final judgment after the verdict, and held that Vivendi must first have the opportunity to rebut the presumption of reliance as to particular

> class members. *In re Vivendi*, 765 F. Supp. 2d at 584-87. This "individualized inquiry," the court explained, could take place only after the trial because when the class action verdict was entered Vivendi did "not yet know the identity of most class members." *Id.* at 584-85. Class members have submitted claim forms and the process of challenging reliance on an individualized basis will soon begin, as *Basic* allowed.

Vivendi Br. 17-18. It is perplexing that Vivendi nonetheless complains that the process it faces in the district court is "fundamentally unfair." *Id.* at 18. But in any event Vivendi's objections really go to case-management decisions by the district court (chiefly regarding the extent of discovery Vivendi will be permitted), rather than to anything inherent in *Basic* and its FOTM presumption. Vivendi faults the district court for confining discovery to a "limited number of investors" (*id.* at 20), but Vivendi fails to mention that it was Vivendi itself that proposed that limitation.[15]

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[15] The district court explained the details of the procedure by which Vivendi can rebut reliance on an individualized basis:

> Vivendi has stated that it "has no intention of contesting the individual reliance of each and every Class member" but instead "only intends to challenge the reliance of sophisticated persons and entities, such as large institutional investors, who may not satisfy the standard of reasonable reliance . . . ." Once the claim forms have been submitted, Vivendi will

The bottom line is that Vivendi will be permitted to rebut the presumption of FOTM reliance before the entry of final judgment and before the payment of any damages. Moreover, Vivendi already has successfully rebutted the presumption in a separate suit by an individual investor. *See GAMCO Investors, Inc. v. Vivendi*, S.A., 927 F. Supp. 2d 88, 101-02 (S.D.N.Y. 2013). Thus, Vivendi's objections are contradicted by the facts of its own case. In any event, such case-management quibbles are no basis for this Court to undo thirty years of doctrine in securities law and to cripple the leading role in private policing of the securities markets that Congress has assigned to institutional investors.

> have the opportunity to screen large investors by analyzing the information included in Section II of the Proof of Claim form . . . .
>
> Second, based on the information provided in the claims forms, interrogatories relating to reliance will be sent to the limited number of "sophisticated persons and entities" whose reliance defendants choose to challenge. . . .
>
> Third, a Special Master will determine which claimants' interrogatory responses raise a triable issue of material fact sufficient to potentially rebut the presumption of reliance.

In re Vivendi Universal S.A. Securities Litig., 284 F.R.D. 144, 155 (S.D.N.Y. 2012).

CONCLUSION

In sum, what Halliburton and its *amici* seek here is not an application of legal *principles* long accepted by this Court, but the implementation of a radical new *policy* that is at odds with the central role that Congress has assigned to institutional investors. The place for Petitioners to pursue that kind of profound policy shift is not before this Court, but in the Legislative Branch of Government.

The judgment below should be affirmed.

Respectfully submitted,

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February 5, 2014