No. 10-649

In The
Supreme Court of the United States

APOLLO GROUP, INC. ET AL.,

Petitioners,

v.

POLICEMEN'S ANNUITY AND
BENEFIT FUND OF CHICAGO,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF THE NATIONAL ASSOCIATION
OF MANUFACTURERS AS *AMICUS CURIAE* IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

GEORGE M. NEWCOMBE
(Counsel of Record)
JAMES G. KREISSMAN
SIMONA G. STRAUSS
SIMPSON THACHER & BARTLETT LLP
2550 Hanover Street
Palo Alto, California 94304
(650) 251-5000
gnewcombe@stblaw.com

Of Counsel:
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004-1790
(202) 637-3000

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OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. In support of this mission, the NAM regularly files briefs *amicus curiae* when a case presents a legal issue that will impact the competitiveness of U.S. industry. This is such a case.

Many members of the NAM are publicly traded companies. The competitiveness of these American companies in the global marketplace is adversely affected by the costs associated with securities class action litigation claims, with which foreign companies are largely unburdened. The principles underlying the Ninth Circuit's holding below unnecessarily increase these costs through an asymmetrical

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[1] This *amicus* brief is filed with all parties' consent. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members and its counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

application of the efficient market theory. Indeed, the court embraced the efficient market theory in order to certify a class, but effectively rejected it on the issue of loss causation. Assessing loss causation with reference to events that occur long after corrective public disclosure of the relevant facts in a theoretically efficient market improperly expands the potential exposure of defendants in securities class action cases and decreases the certainty with which companies and insurers can assess this exposure. The effect is negative for the U.S. economy as a whole.

ARGUMENT

I. For Class Certification Purposes, Plaintiffs Get The Benefit Of A Presumption Of Reliance Based On The Efficient Market Theory

The ability of a plaintiff to bring securities fraud claims on a class action basis is grounded in the presumption of reliance under the fraud on the market theory, without which each plaintiff would have to prove actual reliance on the allegedly false and misleading statement – a result that would preclude class certification because individual issues of reliance would predominate over common issues. *Basic, Inc. v. Levinson*, 485 U.S. 224, 250 (1988).

The presumption of reliance is based on the efficient market theory, which holds that in an efficient securities market, all information available to the market is always rapidly reflected in the price at which securities trade in the market. As the Court stated in *Basic*:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.

Id. at 241-42 (citation omitted). Thus, the fact that an investor was not aware of a particular statement is irrelevant because the stock price, of which the investor was aware, already incorporates the statement. If a market were not efficient, there would be no presumption of reliance through the fraud on the market theory, requiring individualized inquiry of reliance.

The efficient market theory on which the *Basic* Court relied is itself based on the premise that competition among investors and traders forces stock prices to rapidly reflect all publicly available information. *See, e.g.*, Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 569-72 (1984); Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1154-56 (1982); Note, *Fraud on the Market: An Emerging Theory of Recovery Under SEC Rule 10b-5*, 50 GEO. WASH. L. REV. 627, 647-49 (1982). Since *Basic*, virtually all academic commentators on market efficiency agree that in an efficient market, the price of a security reflects new facts rapidly – within (depending on the facts) seconds, minutes or *at most* one trading day. *See, e.g.*, Richard A. Brealey, Stewart C. Myers & Franklin Allen, PRINCIPLES OF CORPORATE FINANCE (8th ed. 2006) (information is impounded in stock price within 5-10 minutes); Jeffrey A. Busse & T. Clifton Green, *Market Efficiency in Real Time*, 65 J. FIN. ECON. 415 (2002) (gathering studies and concluding that markets react quickly to information); James M. Patel & Mark A. Wolfson, *The Intraday Speed of Adjustment of Stock Prices to Earnings and Dividend Announcements*, 13 J. FIN. ECON. 223, 250 (1984) (stock market assimilates information "very quickly," starting to react within minutes).

By beginning class certification periods immediately after the allegedly false and misleading statement is made, courts following *Basic* routinely embrace the concept that efficient markets act quickly in assimilating new facts into the price of securities for purposes of applying the presumption of reliance.

II. Defendants Should Get The Benefit Of The Efficient Market Theory For Purposes Of Loss Causation After Corrective Disclosure

If the U.S. securities markets, such as the New York Stock Exchange and NASDAQ Stock Market, are presumed for purposes of class certification and reliance to be efficient in their ability to rapidly assimilate any false and misleading statements made by a company into the price of securities, they should likewise be presumed for purposes of assessing loss causation to be efficient in their ability to rapidly assimilate any corrective statements made by that company into the price of securities. Indeed, because the market does not know at the outset whether a statement is true or false, this assertion should be self-evident.

There is no rational basis for applying different standards of market efficiency for false statements and true statements. If plaintiffs get the benefit of a reliance presumption based on the efficient market theory, defendants should get the benefit of the same market efficiency reacting to all available corrective disclosures. As the Third Circuit has explained, "An efficient market for good news is an efficient market for bad news." *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 271 (3d Cir. 2005).

III. The Uncertain And Inconsistent Application Of The Efficient Market Theory Is Detrimental To The U.S. Economy

Due to the split in the circuit courts on the issue, U.S. manufacturers whose shares trade on efficient markets run the risk of being whipsawed. On the front end, courts assume that their stock price immediately reflects all available information (and thus investors can be presumed to have relied on that information), while, at least in some jurisdictions, courts do not permit manufacturers to rely on the same presumption to establish that the immediate market reaction to an appropriate corrective disclosure effectively caps their damages. For example, in reversing the district court's judgment as a matter of law, the Ninth Circuit in the instant matter decided that third-party analyst reports may have further deflated Apollo Group's stock price because they were "more authoritative" with respect to "fraud-related information" than the newspaper articles that already had revealed the information five days earlier. Appendix to the Petition at 2a. In contrast, the Third Circuit "has one of the 'clearest commitments' to the efficient market hypothesis," and has decided that a stock price absorbs public information "immediately following disclosure." *In re Merck*, 432 F.3d at 269 (citation omitted). The continued lack of certainty and predictability generated by some courts' one-sided application of the efficient market theory has a significant and negative effect on the U.S. economy.

Uncertainty in the securities litigation arena is expensive for defendants, especially given the heavy costs of defending securities fraud claims. The expense (i) allows plaintiffs to coerce unwarranted or inappropriately large settlements, and (ii) results in American companies paying higher insurance premiums. In addition, the unpredictability in the methodology employed to calculate damages significantly increases American manufacturers' potential exposure in securities cases. The increased litigation costs, and the potentially higher damages awards, undercut the competitiveness of American companies *vis-à-vis* foreign companies that do not face such expansive potential liability. These increased costs in turn result in higher prices for American consumers, to the detriment of the U.S. economy as a whole.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE M. NEWCOMBE
(*Counsel of Record*)
JAMES G. KREISSMAN
SIMONA G. STRAUSS
SIMPSON THACHER & BARTLETT LLP
2550 Hanover Street
Palo Alto, California 94304
(650) 251-5000

Of Counsel:
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004-1790
(202) 637-3000

December 17, 2010