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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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Association of Private Sector Colleges and Universities ("APSCU") is a non-profit national trade association representing over 1,400 accredited private sector colleges and universities throughout the United States. It serves as an advocate for, and a source of research and information on, private sector postsecondary education.

A private sector college or university ("PSCU") is a postsecondary education institution that provides a variety of professional or technical career-focused educational programs that lead to doctoral and master's degrees, bachelor's degrees, associate's degrees, or less-than-two year certificates or diplomas. PSCUs in the United States collectively educate more than 3.2 million students annually according to 2008-2009 Department of Education data.[2] PSCUs provide educational programs in over 200 occupational fields, including accounting, allied healthcare, automotive technology, business administration, commercial art, criminal justice, law enforcement administration, culinary and hos-

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than APSCU, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this amicus curiae brief have been filed with the Court.

[2] Department of Education, National Center for Education Statistics, Institute of Education Services, *Postsecondary Institutions and Price of Attendance in the United States: Fall 2009, Degrees and Other Awards Conferred: 2008-09, and 12-Month Enrollment: 2008-09, First Look*, tbl. 10, p. 18 (Aug. 2010), *available at* http://nces.ed.gov/pubs2010/2010161.pdf.

pitality management, emergency medical technology, information technology, interior design, legal administration, network administration, nursing, digital media, visual and performing arts, and other occupations.

APSCU has a diverse membership of educational institutions that are owned and operated by private individuals or families, private investors, and publicly traded corporations. Within APSCU's membership there are 10 publicly traded companies that educate hundreds of thousands of students at more than 650 campuses in 45 states.

Compared to traditional institutions of higher education, enrollment in the private postsecondary education sector has experienced rapid growth over the past decade.[3] The 10 publicly traded PSCUs within APSCU's membership have been a strong part of that rapid growth, reflecting increased demand in the United States for training for occupations requiring at least one year of postsecondary education and the flexible and innovative educational programs offered by PSCUs to students who are primarily working adults.

Strong growth in private sector postsecondary education has been accompanied recently by increased regulatory activity at the Department of Education ("ED") and heightened scrutiny in Congress regarding recruitment and admissions practices at PSCUs. This heightened attention by policymakers has correlated

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[3] Department of Education, National Center for Education Statistics, Institute of Education Sciences, *The Conditions of Education 2010*, Indicator 7: Undergraduate Enrollment, pp. 36-37 (May 2010), *available at* http://nces.ed.gov/programs/coe/2010/pdf/7_2010.pdf.

with an increase in securities fraud class action lawsuits against postsecondary educational institutions.

In this case, Petitioner Apollo Group, Inc. seeks review of a decision by the Court of Appeals for the Ninth Circuit applying an extremely liberal standard for permitting class action plaintiffs to demonstrate a critical element of a securities fraud claim—"loss causation." This liberal standard permits and encourages frivolous securities fraud cases to be filed and pursued. The threat from such suits is particularly severe in the heavily-regulated private education sector.

Rejecting the Court of Appeals' approach and adopting a more rational loss causation standard would significantly reduce the uncertainty facing publicly traded PSCUs and allow those institutions to focus their resources on their mission of educating students. APSCU and its publicly traded member institutions, therefore, have a strong interest in this Court's resolution of this case and urge the Court to grant Apollo's petition.

SUMMARY OF ARGUMENT

The Court has an opportunity in this case to provide important guidance regarding the standard for proving "loss causation" in private securities fraud class actions. Frivolous securities fraud cases are a significant problem generally and are particularly burdensome for highly regulated PSCUs. The liberal standard for proving loss causation applied by the Court of Appeals in this case not only allows but also encourages the pursuit of highly tenuous securities fraud claims. The Court should grant the petition and reverse the Court of Appeals.

ARGUMENT

I. ADOPTION OF A RATIONAL AND PREDICTABLE STANDARD FOR PROVING LOSS CAUSATION IS CRITICAL FOR PUBLICLY TRADED COMPANIES THAT OPERATE IN A HIGHLY REGULATED ENVIRONMENT

The proliferation of baseless securities fraud suits is a well-recognized problem. In passing the Private Litigation Securities Litigation Reform Act, Congress sought to reduce the "abusive practices committed in private securities litigation" including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer." H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730. The problem of frivolous securities class actions, however, persists. As this Court recently recognized, securities fraud litigation continues to "'present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975)).

The problem is particularly acute for publicly traded PSCUs, which are subject to extensive federal and state oversight that often serves as fodder for class action attorneys. Institutions of higher education, including APSCU member institutions, are subject to substantial oversight and regulation on three different levels: (1) federal legislation and regulations promulgated by federal agencies, including extensive regulations governing eligibility for federal student financial aid, *see* 34 C.F.R. §§ 600 *et seq.*;[4] (2) state laws and regulations; and (3) accreditation by national or regional accreditation bodies. Collectively, this three-part system of oversight and regulation is known as the "Triad."

This federal and state oversight takes many forms. Schools are subject to program reviews by ED, investigations by congressional committees, and inquiries by states and state agencies. In the past year, there has been a push for even more regulation and oversight of PSCUs. For example, in August 2010, the United States General Accounting Office ("GAO") released a report citing allegations of recruitment and admissions misconduct by a number of PSCUs.[5] Private sector higher education has also been the subject of a number of congressional oversight hearings and two pending investigations by state attorneys general. Shortly after the August 2010 GAO Report was released, ED also announced plans to request and dedicate considerable additional federal resources to oversight and enforcement of financial aid regulations, including (among other things) adding 60 additional staff, conducting 50

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[4] PSCUs that enroll veterans are also subject to regulations promulgated by the Department of Veterans Affairs. *See, e.g.*, 38 U.S.C. § 3452(f); *id.* § 3490; *id.* § 3492.

[5] GAO, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices* (Aug. 2010), *available at* http://www.gao.gov/new.items/d10948t.pdf.

percent more program reviews, and appointing a Chief Customer Experience Officer.[6]

APSCU fully supports the application and enforcement of all current laws and regulations by the federal government and the states. It has been the sector's experience in the past, however, that when regulators and policymakers focus attention on PSCUs, increased litigation by plaintiffs is sure to follow, often based on dubious merits. This has proven to be the case this year as well. Since the August 2010 release of the GAO report, there have been at least 14 securities fraud actions filed against publicly traded PSCUs in the United States.[7] Although GAO later revised the report to be significantly more favorable to the PSCUs inves-

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[6] Letter from Arne Duncan, Sec'y of Educ., to Senators Tom Harkin and Michael Enzi (Aug. 13, 2010), *available at* http://www2.ed.gov/policy/highered/guid/secletter/100817.html.

[7] *See Police Pension Fund of Peoria* v. *Capella Educ. Co.*, 10-cv-04474 (D. Minn. Nov. 5, 2010); *Operating Eng'rs Constr. Indus. & Misc. Pension Fund* v. *ITT Educ. Servs., Inc.*, 10-cv-08323 (S.D.N.Y. Nov. 3, 2010); *Boca Raton Firefighters' & Police Pension Fund* v. *DeVry Inc.*, 10-cv-07031 (N.D. Ill. Nov. 1, 2010); *Plumbers Local #200 Pension Fund* v. *Washington Post Co.*, 10-cv-01835 (D.D.C. Oct. 28, 2010); *Parikh* v. *Education Mgmt. Corp.*, 10-cv-11723 (D. Mass. Oct. 8, 2010); *Kinnett* v. *Strayer Educ., Inc.*, 10-cv-02317 (M.D. Fla. Oct. 15, 2010); *Roth* v. *Apollo Group, Inc.*, 10-cv-02121 (D. Ariz. Oct. 4, 2010); *Fitch* v. *Apollo Group, Inc.*, 10-cv-02044 (D. Ariz. Sept. 23, 2010); *Lyathaud* v. *Lincoln Educ. Servs. Corp.*, 10-cv-04926 (D.N.J. Sept. 19, 2010); *Karam* v. *Corinthian Colls., Inc.*, 10-cv-06523 (C.D. Cal. Aug. 31, 2010); *Gaer* v. *Apollo Group, Inc.*, 10-cv-01735 (D. Ariz. Aug. 13, 2010); *Moreaux* v. *Lincoln Educ. Servs. Corp.*, 10-cv-04160 (D.N.J. Aug. 13, 2010); *Gaer* v. *American Pub. Educ., Inc.*, 10-cv-00081 (N.D. W. Va. Aug. 12, 2010); *Gaer* v. *Education Mgmt. Corp.*, 10-cv-01061 (W.D. Pa. Aug. 11, 2010).

tigated,[8] the damage—in the form of lawsuits and reputational injury—was already done.[9]

Shareholder actions against private sector institutions are often based on data or requirements mandated by ED regulations. In this case, for example, the suit against Apollo centers on a preliminary agency report concerning an alleged violation of ED's incentive compensation regulations. The potential for suits of this kind is only increasing. On October 29, 2010, ED published a Final Rule enacting major amendments intended to strengthen and improve ED's administration of federal financial aid eligibility rules for institutions of higher education under the Higher Education Act of 1965.[10] One of the changes made by these amendments, for example, was to eliminate certain "safe harbors" providing exceptions to the general prohibition on providing incentive compensation. The agency is also expected to issue a final rule in early 2011 that has the potential to severely restrict financial aid eligibility for postsecondary education programs that do not meet elaborate new student debt limitations that ED believes are necessary to ensure that institu-

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[8] The GAO re-released an amended version of its August 2010 report on November 30, 2010. *See* GAO, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices* (Aug. 2010), *available at* http://www.gao.gov/new.items/d10948t.pdf.

[9] The problem is further exacerbated by inaccurate reports by financial analysts highly critical of the sector—some of whom have a financial stake through short positions on publicly traded PSCUs.

[10] *See* 75 Fed. Reg. 66,832 (Oct. 29, 2010).

tions prepare students for "gainful employment." *See* 75 Fed. Reg. 43,616 (July 26, 2010).

To the extent these regulations take effect as scheduled, it is nearly certain that they will result in increased litigation against private sector institutions based on the enhanced and, in some instances, opaque and confusing new federal financial aid eligibility requirements they impose. In this environment, it is particularly important that the standards governing securities class action lawsuits prevent the filing and pursuit of meritless claims.

II. THE NINTH CIRCUIT'S UNGUIDED APPROACH TO LOSS CAUSATION ENCOURAGES FRIVOLOUS SUITS AND SHOULD BE REJECTED

The extremely liberal "loss causation" standard applied by the Court of Appeals in this case encourages, rather than prevents, meritless securities fraud lawsuits. As Petitioners have explained, the Court of Appeals in this case held that securities fraud class action plaintiffs can prove loss causation (1) even if a significant period of time elapses between the alleged corrective disclosure of the truth withheld by the defendant and the allegedly resulting drop in stock price, and (2) based on financial analyst reports that provide no new factual information. This open-ended and illogical approach invites frivolous suits and should be rejected.

As a matter of logic, an efficient market should process publicly available information immediately after the information's disclosure. *See* Pet. 24. The standard applied by the Court of Appeals, however, inexplicably assumes that an efficient market can take days, weeks, or even months to process such information. *See* Pet. App. 2a (relying on *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057-1058 (9th Cir. 2008) (rejecting a "bright-line rule requiring an immediate market reaction" and finding that a corrective disclosure could have caused a drop in stock price 82 days later (internal quotations marks omitted))).

The Ninth Circuit's approach to the type of information that can constitute a corrective disclosure in an efficient market is similarly flawed. An efficient market should not be swayed by restatements of previously disclosed facts. A material corrective disclosure will cause a stock's price to decline, while an immaterial disclosure will not. The Ninth Circuit appears to be alone in permitting class action plaintiffs to prove causation by pointing to a drop in stock price correlated with the mere restatement of previously known information. *See* Pet. 20-21.

Loss causation is a critical element of a securities fraud claim that limits recovery to "losses that misrepresentations actually cause." *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005). By permitting plaintiffs to prove loss causation without showing a drop in stock price immediately following the alleged corrective disclosure, and by allowing plaintiffs to rely on mere restatements of previously disclosed information, the Court of Appeals would all but jettison this important device for screening legitimate claims from frivolous ones. Allowing the Court of Appeals' approach to stand would thus increase legal uncertainty for publicly traded companies, increase the incentive for forum shopping by plaintiffs, and increase the chance that defendants needlessly will be forced to settle frivolous claims against them.

In the highly regulated and highly scrutinized environment in which PSCUs operate, the loss causation standard applied by the Court of Appeals unduly burdens PSCUs with frivolous suits and significantly erodes the clarity and predictability on which the publicly traded members of APSCU depend to provide postsecondary education to millions of students.

CONCLUSION

For the foregoing reasons and as set forth in Apollo's petition, the Court should grant certiorari and reject the Ninth Circuit's approach to loss causation.

Respectfully submitted,

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