No. 13-317

In the Supreme Court of the United States

HALLIBURTON CO. ET AL., PETITIONERS,

v.

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

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

BRIEF FOR FORMER MEMBERS OF CONGRESS, SENIOR SEC OFFICIALS, AND CONGRESSIONAL COUNSEL AS AMICI CURIAE SUPPORTING NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued:

Statutes, regulation, and rule:

Miscellaneous:

Miscellaneous—Continued:

BRIEF FOR FORMER MEMBERS OF CONGRESS, SENIOR SEC OFFICIALS, AND CONGRESSIONAL COUNSEL AS AMICI CURIAE SUPPORTING NEITHER PARTY

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INTEREST OF AMICI CURIAE

Amici are former Members of Congress, senior officials at the Securities and Exchange Commission (SEC or Commission), and congressional counsel who were intimately involved in the drafting and passage of the Private Securities Litigation Reform Act of 1995 (PSLRA or Act), Pub. L. No. 104-67, 109 Stat. 737.[1] As reflected in its text and legislative history, the PSLRA does not address the element of reliance in private securities-fraud litigation, and this Court therefore should not consider Congress to have acquiesced in the fraud-on-the-market presumption of classwide reliance adopted by this Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988).

In *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), this Court briefly touched on the fact that the PSLRA does not address reliance in a private securities-fraud suit. Based on a small portion of the Act's extensive legislative history, the Court read into the Act a congressional "reject[ion]" of "calls to undo the fraud-on-the-market presumption." *Id.* at 1200. In making that observation, however, the Court did not have before it the

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

PSLRA's full legislative history, which had not been briefed by the *Amgen* parties or their amici. As a complete recounting of that history makes clear, Congress did not codify, modify, or repeal the *Basic* presumption in the PSLRA. Rather, in enacting the PSLRA over President Clinton's veto, a supermajority of the 104th Congress simply left the fate of that judicially-created presumption to a future Congress or this Court. Amici thus take no position here on the merits of this case and the continued viability of the *Basic* presumption. Amici's lone interest is in having the Court decide those issues free from the mistaken notion that Congress endorsed the fraud-on-the-market theory in the PSLRA.

SUMMARY OF ARGUMENT

A. The text of the PSLRA is silent with respect to the element of reliance in a private securities-fraud suit. The House of Representatives initially considered undoing *Basic's* presumption of classwide reliance. It then voted to permit plaintiffs to invoke a presumption of classwide reliance if they could show that the market as a whole considered the fraudulent statement and that reliance on the market price was reasonable. By contrast, the Senate never voted on any aspect of reliance at all; the Senate version of the bill said nothing about *Basic*'s presumption or its fraud-on-the-market theory. A supermajority of both Houses of Congress then passed the Conference Report—which, like the Senate bill, did not address the reliance issue—over President Clinton's veto. As that legislative history demonstrates, Congress did not answer any of the competing calls to overturn, modify, or codify the *Basic* presumption. Congress was simply silent in response to those various requests, and this Court should not take Congress's silence as implicit acceptance or rejection of *Basic's* fraud-on-the-market theory.

B. This Court has repeatedly cautioned against relying on legislative inaction as evidence of acquiescence. That caution is especially warranted here. Because the Conference Report was silent on reliance in the face of many varying proposals, Congress as a whole never considered whether to overturn, modify, or codify the *Basic* presumption. In addition, the PSLRA was passed by a narrow supermajority in the Senate. It was not possible in that situation for Congress to speak to any and all issues related to private securities-fraud litigation. As one prominent example, Congress also did not address certain important aspects of the element of scienter. The 104th Congress left the resolution of those issues to a future Congress or this Court. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-322 (2007) (noting that Congress did not define the "strong inference" standard for scienter). If anything, it was particularly reasonable for Congress not to resolve the debate over the *Basic* presumption, as that doctrine originated with this Court rather than Congress.

ARGUMENT

IN THE PSLRA, THE 104TH CONGRESS DID NOT EXPRESS ANY VIEW ON THE *BASIC* PRESUMPTION OF CLASSWIDE RELIANCE

In the early 1990s, many Members of Congress from both parties became increasingly concerned about abusive practices in private securities-fraud litigation. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81-82 (2006). The PSLRA was Congress's response to those perceived abuses. That Act, like many major bipartisan pieces of legislation, addresses certain issues without purporting to cover the entire waterfront. For instance, the Act imposes heightened pleading requirements for securities-fraud actions, specifies the process for appointing the lead plaintiff and counsel, provides a safe harbor for forward-looking statements, stays discovery pending motions to dismiss, limits recoverable damages and attorney's fees, and mandates the imposition of sanctions for frivolous litigation. See *Dabit*, 547 U.S. at 81-82. At the same time, however, the PSLRA is silent on a number of related issues that were raised by individual Senators or Representatives, the SEC, or other parties during the legislative process—including whether to endorse or reject the *Basic* presumption of classwide reliance.

Amici were intimately involved with the PSLRA's drafting and passage in their capacity as Members of Congress, senior SEC officials, and congressional counsel. Indeed, one of the amici, former Senator Alfonse D'Amato, chaired the Senate Banking Committee, introduced the Senate version of the bill that eventually became the PSLRA, and chaired the Conference Committee. Another of the amici, former Representative Christopher Cox, was the principal author of the House version of the bill. As central figures in the PSLRA's passage, amici are concerned that the Act not be misconstrued as an implicit endorsement of the *Basic* presumption. In fact, from January to December 1995, as both Houses of Congress debated what became the PSLRA, there were multiple competing bills and amendments that ran the gamut from undoing *Basic*, to modifying its presumption, to endorsing that presumption.

In the end, the 104th Congress as a whole did not vote on any of those options. Instead, the PSLRA's managers elected not to address the *Basic* presumption (and many other issues surrounding private securities-fraud litigation) because the Act had to be passed over President Clinton's veto by a bipartisan supermajority. Making any statement on *Basic*—whether endorsing or rejecting it—could have affected the bill's ability to garner the necessary supermajority in both chambers. Thus, the legislation that was reported by the Conference Committee and adopted by the Representatives and Senators of the 104th Congress is silent on the *Basic* presumption, leaving its fate to a future Congress or this Court. Accordingly, there is no basis for treating the PSLRA's silence as tantamount to congressional approval or disapproval. Finding such acquiescence would seriously misread the legislative history and disregard the legislative process.

A. The PSLRA Does Not Address The *Basic* Presumption

Although it speaks directly to certain elements of the implied private right of action for securities fraud, the PSLRA says nothing about the element of reliance. Recently in *Amgen*, this Court briefly discussed a small portion of the PSLRA's legislative history, which it characterized as a "reject[ion]" of "calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." 133 S. Ct. at 1200. But the full legislative history of the PSLRA was not placed before this Court by the parties or their amici in *Amgen*. As a complete recounting of that history confirms, it may be equally said that Congress rejected calls to codify *Basic*. But either interpretation would overstate the extent to which the entire Congress actually addressed the element of reliance.

1. The House of Representatives initially voted to codify a form of the *Basic* presumption

The PSLRA's progress through the House of Representatives demonstrates the varying views of Members with respect to whether to overturn, modify, or codify the *Basic* presumption.

a. *The initial version of H.R. 10.* In January 1995, the Securities Litigation Reform Act, H.R. 10, was introduced in the House of Representatives. Title II of that bill proposed substantial changes to the rules governing private securities-fraud litigation. As relevant here, H.R. 10 would have inserted a new Section 10A into the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, providing that in any private securities-fraud action "based upon a material misstatement or omission concerning a security, the plaintiff must prove that he or she had actual knowledge of and actually relied on such statement in connection with the purchase or sale of a security." H.R. 10, 104th Cong. § 204 (as introduced on Jan. 4, 1995). By its terms, that initial version of Section 10A would have replaced *Basic's* presumption of classwide reliance with a requirement that plaintiffs prove they were in fact aware of a company's misstatement and purchased or sold their securities based on that specific misrepresentation.

b. *The amended version of H.R. 10.* In January and February 1995, H.R. 10's proposed actual-reliance requirement was debated in hearings before the Subcommittee on Telecommunications and Finance. Supporters of such a requirement testified that *Basic* was premised on flawed economic theory; that plaintiffs in securities-fraud actions should be required to prove reliance in the same way as other fraud plaintiffs; and that requiring actual reliance would not put an end to securities class actions. See *Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecomms. and Finance of H. Comm. on Commerce*, 104th Cong., 1st Sess. 236-237, 251-252, 320-321 (1995). By contrast, opponents testified that *Basic* was premised on sound economics; that securities-fraud plaintiffs should be treated differently because they seldom interacted directly with sellers; and that requiring proof of direct reliance would effectively eliminate securities class actions. *Id.* at 56, 203, 211-212, 242-243.

In mid-February 1995, the Telecommunications and Finance Subcommittee met in an open markup session and made several revisions to H.R. 10, including to Section 10A's reliance requirement. As amended, Section 10A would have codified a version of the fraud-on-the-market theory. See Staff of H. Subcomm. on Telecomms. and Finance, 104th Cong., 1st Sess., *Amendment to Title II of H.R. 10*, at 18-19 (Comm. Print Feb. 14, 1995) (Feb. Comm. Print). In fraud-on-the-market cases, a plaintiff could prove reliance "by establishing that the market as a whole considered the fraudulent statement, that the price at which the security was purchased or sold reflected the market's estimation of that fraudulent information, and that the plaintiff relied on that market price." *Id.* at 19.[2] If a plaintiff could adduce "proof that the mar-

[2] A plaintiff could prove that "the market as a whole considered the fraudulent statement" using evidence that the statement "was published in publicly available research reports by analysts of such

ket as a whole considered the fraudulent statement," then he would be "entitled to a rebuttable presumption that the price at which the security was purchased or sold reflected the market's estimation of that fraudulent statement and that the plaintiff relied on such market price." *Id.* at 20.

The amended version of H.R. 10 thus would have codified a form of the *Basic* presumption. A plaintiff could invoke the presumption, however, only if the security at issue was part of a national securities exchange and if it was "[]reasonable to rely on market price." Feb. Comm. Print 21-22. The factors in determining reasonableness were "[t]he weekly trading volume of any class of securities of the issuer"; "[t]he existence of public reports by securities analysts concerning any class of securities of the issuer"; "[t]he eligibility of the issuer * * * to incorporate by reference [certain registration statements]"; and "[a] history of immediate movement of the price of any class of securities of the issuer caused by the public dissemination of information regarding unexpected corporate events or financial releases." *Ibid.* In addition, the presumption was rebuttable by evidence that "the market as a whole considered other information that corrected the allegedly fraudulent statement" or "the plaintiff possessed such corrective information

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security"; "was the subject of news articles"; "was delivered orally at public meetings by officers of the issuer, or its agents"; "was specifically considered by ratings agencies in their published reports"; or "was otherwise made publicly available to the market in a manner that was likely to bring it to the attention of, and to be considered as credible by, other active participants in the market for such security." Feb. Comm. Print 19-20.

prior to the purchase or sale of the security." *Id.* at 20.

c. *The debate over H.R. 10 as amended.* Three days after the Subcommittee meeting, the full Committee on Commerce met in an open markup session to further consider the bill. One of the proposed amendments, offered by Representative Peter Deutsch (D-FL), would have given the SEC rulemaking authority to define "markets that are not sufficiently active and liquid to justify" reliance on the market price. See Staff of H. Subcomm. on Telecomms. and Finance, 104th Cong., 1st Sess., *Amendment to H.R. 10 Offered By Mr. Deutsch of Florida*, at 1 (Comm. Print Feb. 16, 1995). In exercising that authority, the SEC would have been required to consider the four factors for reasonableness discussed above, as well as "whether the issuer and its securities are regularly reviewed by two or more analysts." *Ibid.* Representative Deutsch's proposal was defeated by a party-line vote of 24-21. See H.R. Rep. No. 50, 104th Cong., 1st Sess. 29 (1995).

A week later on February 24, the Committee on Commerce reported the bill to the House with a Committee Report and a recommendation that the bill pass. In a dissent to that recommendation in the Committee Report, a group of 12 Democratic Representatives, supported by the SEC, expressed their appreciation that the amended reliance provision no longer completely dispensed with the *Basic* presumption but instead preserved it in some form. See H.R. Rep. No. 50, 104th Cong., 1st Sess. 44, 65-66 (1995). Those Democratic Representatives nevertheless objected to the amended provision on various grounds, among them that a plaintiff could only invoke the fraud-on-the-market presumption if his security was part of a national securities exchange. See *id.* at 44, 66. The Representatives suggested that the House delegate rulemaking authority to the SEC to decide "when the fraud on the market theory should be available." *Id.* at 66.

d. *The passage of H.R. 1058.* On February 27, Committee of Commerce Chairman Tom Bliley (R-VA)—on behalf of himself and Representatives Christopher Cox (R-CA), Jack Fields (R-TX), and Billy Tauzin (D-LA)—introduced H.R. 1058 in the House. That bill contained the amended reliance provision codifying a form of the *Basic* presumption.[3] See 141 Cong. Rec. H2760 (daily ed. Mar. 7, 1995) (statement of Chairman Bliley) (noting that the bill would preserve "the principle of 'fraud on the market' by removing the obligation in H.R. 10 to prove reliance in each instance of misrepresentation"). Chairman Bliley observed that H.R. 1058 was the product of "months of intensive negotiations" and that "major changes" had been made "during the committee drafting process," including to the reliance provision. *Ibid.* He also disagreed with minority objections that the reliance provision was insufficient: "Members who seek to apply fraud on the market to all securities and not just those with liquid markets do not understand the legal principle and economic theories that underl[ie] the legislation." *Ibid.*

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[3] H.R. 10 was divided into three separate bills: H.R. 956, H.R. 988, and H.R. 1058. H.R. 1058 contained the portion of H.R. 10 concerning securities litigation reform, and the version that Chairman Bliley introduced in the House was substantively identical to the one that the Committee of Commerce had referred to the House days earlier.

On March 8, 1995, the House of Representatives passed H.R. 1058 by a vote of 325 to 99. See 141 Cong. Rec. H2863-H2864 (daily ed. Mar. 8, 1995). Republican Members voted for the bill 226 to 0; Democratic Members voted for the bill 99 to 98; and the one Independent Member voted against it.

2. The Senate bill did not address the *Basic* presumption at all

a. *The introduction of S. 240 and S. 667.* In January 1995, while the House was considering H.R. 10, Senators Pete Domenici (R-NM) and Chris Dodd (D-CT) introduced S. 240, the Private Securities Litigation Reform Act. Unlike the original House bill, S. 240 did not explicitly address whether plaintiffs in securities fraud actions were required to prove actual reliance. But the bill implicitly suggested that they were not required to do so in provisions focused on loss causation and damages. The bill provided in relevant part that

> [i]n an implied private action arising under this title based on a material misstatement or omission concerning a security, and in which the plaintiff claims to have bought or sold the security *based on a reasonable belief that the market value of the security reflected all publicly available information*, the plaintiff shall have the burden of proving that the misstatement or omission caused any loss incurred by the plaintiff.

S. 240, 104th Cong., 1st Sess. § 104 (as introduced on Jan. 18, 1995) (emphasis added); see *ibid.* (same; damages provision). Thus, although not dealing directly with reliance, the loss-causation and damages provisions in S. 240 alluded to the fact that a plaintiff could claim to have bought or sold the security at issue "based on a reasonable belief that the market value of the security reflected all publicly available information." *Ibid.*

In April 1995, after the House had passed H.R. 1058, Senators Richard Shelby (R-AL) and Richard Bryan (D-NV) introduced S. 667, the Private Securities Enforcement Improvements Act of 1995. Like Representative Deutsch's proposal in the House, S. 667 would have provided the SEC with rulemaking authority to "define the circumstances in which it is and is not appropriate for reliance to be presumed under the fraud on the market theory." S. 667, 104th Cong., 1st Sess. § 103 (1995). In exercising that authority, the SEC would have been required to consider the same factors as under Representative Deutsch's proposal, along with "any other factors determined by the Commission to be appropriate." *Ibid.*

In March and April 1995, the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs held hearings on securities litigation reform. Several witnesses testified in support of limiting or abolishing the fraud-on-the-market theory. See, *e.g.*, *Securities Litigation Reform Proposals: Hearings on S. 240 Before the Subcomm. on Securities of S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 12 (1995) (*S. 240 Hearings*) (opening statement of Marc E. Lackritz, President, Securities Industry Association) ("The fraud-on-the-market theory affords the best vehicle for alleging the sort of astronomical damages most likely to coerce a settlement."); *id.* at 45 (same; prepared statement) ("Another step which deserves consideration is limiting or abolishing the fraud-on-the-market theory."); *id.* at 288 (letter from Michael L. Darland, President and CEO of Digital Systems International, Inc.)

("I would urge that * * * the legislature overrule or significantly limit the court[-]created 'fraud on the market' theory.").

Other witnesses contended that the Senate should preserve or at least not disturb the fraud-on-the-market theory. See, *e.g.*, *S. 240 Hearings* 216 (prepared statement of Mark J. Griffin, Director, Division of Securities, Utah Department of Commerce) (arguing in support of the fraud-on-the-market theory); *id.* at 355 (analysis by National Association of Securities and Commercial Law Attorneys) ("H.R. 1058 purports partially to codify fraud-on-the-market, but it actually sets up a highly burdensome and complex standard that bears little or no resemblance to the principle as applied in the courts."); *ibid.* ("S. 240 also fails sufficiently to provide for the availability of the fraud-on-the-market theory."); *id.* at 365 (report by committees of the Association of the Bar of the City of New York) ("Any codification of the fraud on the market theory should follow the present case law."); see also *id.* at 136, 191, 220, 362-365.

b. *The passage of substitute S. 240.* About six weeks after the Securities Subcommittee hearings, Senate Banking Committee Chairman D'Amato proposed a substitute version of S. 240, and three days later the Committee held a markup session to consider that substitute version. Chairman D'Amato's substitute version made substantial changes to the provisions of S. 240 concerning loss causation and damages. In the new version of the bill, those provisions no longer assumed the validity or availability of the fraud-on-the market theory in securities-fraud cases.[4]

[4] Compare 141 Cong. Rec. S1078 (daily ed. Jan. 18, 1995) (referring to a "private action * * * in which the plaintiff claims to have

As a result, the substitute version of S. 240 did not address in any way the fraud-on-the-market theory, thereby omitting from the draft legislation a point on which various Members of Congress and witnesses had disagreed. See S. Rep. No. 98, 104th Cong., 1st Sess. 26 (as reported by the S. Banking Comm. on June 19, 1995) (discussing the requirements for securities-fraud actions and not addressing reliance). By a vote of 11 to 4, a bipartisan majority of the Committee reported the substitute version of S. 240 to the Senate with a recommendation that the bill pass.

About a month later, in June 1995, the Senate passed an amended version of H.R. 1058 by a vote of 69 to 30. The amendment replaced the entirety of the House bill with the text of Chairman D'Amato's substitute version of S. 240, which contained no reference to *Basic's* fraud-on-the-market theory. See 141 Cong. Rec. S9219-S9226 (daily ed. June 28, 1995). Republican Members voted for the bill 49 to 4, and Democratic Members voted for the bill 20 to 26.

3. A bicameral supermajority adopted the Conference Report, which did not refer to the *Basic* presumption, over President Clinton's veto

a. *Adoption of the Senate version.* In October 1995, the House of Representatives voted to send H.R. 1058 to a Conference Committee to reconcile the different House and Senate versions of the proposed legislation. The House appointed six Republican

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bought or sold the security based on a reasonable belief that the market value of the security reflected all publicly available information"), with 141 Cong. Rec. S9222 (daily ed. June 28, 1995) (referring simply to "any private action arising under this title").

Members (Representatives Bliley, Cox, Fields, Hyde, McCollum, and White) and six Democratic Members (Representatives Bryant, Conyers, Dingell, Eshoo, Markey, and Tauzin). See 141 Cong. Rec. H10690 (daily ed. Oct. 24, 1995). The Senate appointed five Republican Members (Senators Bennett, D'Amato, Domenici, Gramm, and Grams) and four Democratic Members (Senators Bryan, Dodd, Kerry, and Sarbanes). See *id*. at S17362 (daily ed. Nov. 17, 1995).

In November, the Committee returned the completed Conference Report to the House and Senate for final approval. See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. (1995). The Conference Report—like the Senate's version of H.R. 1058—was silent on the fraud-on-the-market theory. It did not address whether or under what circumstances plaintiffs could rely on the theory to establish reliance. See *ibid*. Moreover, nothing in the Conference Report assumed the validity of, or in any way depended upon the availability of, the *Basic* presumption.

In early December 1995, the House passed the Conference Report version of H.R. 1058 by a vote of 320 to 102, and the Senate did the same by a vote of 65 to 30. See 141 Cong. Rec. H14055 (daily ed. Dec. 6, 1995); 141 Cong. Rec. S17997 (daily ed. Dec. 5, 1995).

b. *President Clinton's veto.* On December 19, President Clinton vetoed H.R. 1058. In his veto message, he explained that he supported Congress' goals of "end[ing] frivolous lawsuits" and "ensur[ing] that investors receive the best possible information by reducing the litigation risk to companies that make forward-looking statements." H.R. Doc. No. 150, 104th Cong., 1st Sess. 1 (1995). President Clinton believed, however, that H.R. 1058 would "have the effect of closing the courthouse door on investors who have legitimate claims." *Ibid.* In particular, he objected to certain aspects of the bill's pleading requirements and its safe-harbor and sanctions provisions. See *id.* at 1-2. The President's veto message did not address the element of reliance or the fraud-on-the-market theory. President Clinton pledged to sign a bill that addressed his concerns.

c. *Congress's override of the veto.* In the House, both Republican and Democratic Members responded that H.R. 1058 was a balanced and bipartisan measure to curb abusive practices in securities litigation. See, *e.g.*, 141 Cong. Rec. H15216 (daily ed. Dec. 20, 1995) (statement of Rep. Fields, R-TX) ("Congress crafted strong bipartisan legislation designed to curb securities litigation abuse."); *id.* at H15217 (statement of Rep. Eshoo, D-CA) ("On every point that is mentioned in the veto, in a bipartisan effort all of this year we have worked to satisfy the concerns of the [SEC], the administration, and the Senate in the key areas."); *id.* at H15219 (statement of Rep. Fazio, D-CA) ("I supported the conference agreement that passed the House because I believe it was a balanced bill"); 141 Cong. Rec. E2437 (daily ed. Dec. 21, 1995) (statement of Rep. Schumer, D-NY) (terming the legislation a "fair, well-balanced bill"); 141 Cong. Rec. H15217 (daily ed. Dec. 20, 1995) (statement of Rep. Tauzin, D-LA) ("[W]e have huge bipartisan support for this bill, and we ought to, in fact, override the veto.").

On December 20, the House overrode President Clinton's veto by a vote of 319 to 100. All 230 Republican Members, and 89 of the 188 Democratic Members, voted in favor of H.R. 1058. See 141 Cong. Rec. H15223 (daily ed. Dec. 20, 1995).

Likewise in the Senate, a bipartisan group of Senators argued in favor of the bill. See, *e.g.*, 141 Cong.

Rec. S19150 (daily ed. Dec. 22, 1995) (statement of Sen. Domenici, R-NM) (noting that the bill had "51 cosponsors in the Senate" and was "cosponsored by a bipartisan group of Senators spanning the ideological spectrum—Senator Helms and Senator Mikulski"); *id*. at S19149 (statement of Sen. Bradley, D-NJ) (noting his view that the bill struck "the best available balance between protecting investors from fraud perpetuated by unscrupulous issuers and shielding growing businesses * * * from frivolous and costly lawsuits"); *id*. at S19153 (statement of Sen. Dodd, D-CT) ("I regret deeply that we are in this situation, after 4 years, 12 congressional hearings, over 100 witnesses, 5,000 pages of testimony, and committee reports, and truly a bipartisan effort, going back to 1991.").

On December 22, the Senate overrode the President's veto by a vote of 68 to 30—two votes more than the necessary two-thirds supermajority. See 141 Cong. Rec. S19180 (daily ed. Dec. 22, 1995). Of the 68 Senators voting to override the veto, 48 were Republicans and 20 were Democrats. Among those Democrats who supported overriding the veto were Senators Baucus, Dodd, Feinstein, Harkin, Kennedy, Kerry, Mikulski, Moseley-Braun, Murray, and Reid. Of the 30 Senators voting to sustain the veto, four were Republicans: Senators Cohen, McCain, Shelby, and Specter.

* * * *

In the end, although the House voted to codify a form of the *Basic* presumption, the Senate did not address that presumption at all. Faced with requests from both supporters and detractors to take action with respect to the *Basic* presumption, the Senate did not address the element of reliance or the validity of the fraud-on-the-market theory. The Conference

Committee followed the Senate's course, and accordingly the Conference Report that was passed by a bicameral supermajority over the President's veto says nothing about the *Basic* presumption.

B. The PSLRA Does Not Represent Acquiescence In The *Basic* Presumption

Under settled principles of law, Congress's silence with respect to *Basic* in the PSLRA plainly represents inaction, not acquiescence. Indeed, as explained below, this context is an especially poor candidate for acquiescence for several reasons.

1. This Court has repeatedly cautioned against relying on legislative inaction as evidence that Congress has acquiesced in an existing legal rule or interpretation. See, *e.g., Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 169 (2001) (*SWANCC*) (stressing that the Court has exercised "extreme care" in recognizing congressional acquiescence); *United States* v. *Wells*, 519 U.S. 482, 496 (1997) ("[W]e have frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (internal quotation marks and brackets omitted); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (*Central Bank*) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'") (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)); *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").

The reason for the Court's reluctance in finding acquiescence is that "several equally tenable inferences may be drawn from" legislative inaction. *Central Bank*, 511 U.S. at 187. Bills can be proposed and rejected—or bills can address some issues and not others—for any number of reasons. See *SWANCC*, 531 U.S. at 170 ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) ("We have no idea whether the Members' failure to act * * * was attributable to their belief that the Corps' regulations were correct, or rather to their belief that the courts would eliminate any excesses."). This Court has therefore made clear that, "[a]s a general matter," arguments about legislative acquiescence "deserve little weight in the interpretive process." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Central Bank*, 511 U.S. at 187) (brackets in original; second brackets omitted).

The Court has been even more emphatic that acquiescence arguments deserve no weight at all when Congress makes targeted amendments to a statutory scheme without purporting to comprehensively revise that entire scheme. See *Alexander*, 532 U.S. at 292. As explained below, the PSLRA did not attempt to reform every aspect of private securities-fraud litigation. It addressed certain issues on which there was broad, bipartisan consensus (like the need to heighten pleading standards and limit damages), while leaving the resolution of other issues (like scienter and reliance) for another day and another Congress or this Court. See *infra*, pp. 24-25. In that circumstance, where Congress has amended particular provisions in a statute, "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval" of other unamended statutory provisions. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (internal quotation marks omitted).

To be sure, the Court has occasionally found acquiescence in the face of overwhelming evidence that Congress considered a specific issue and embraced the status quo. In *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), for instance, the Court upheld an Internal Revenue Service interpretation because that interpretation was "correct"; because Congress had held "hearings on th[e] precise issue," making it "hardly conceivable that Congress * * * was not abundantly aware of what was going on"; and because "no fewer than 13 bills introduced to overturn the IRS interpretation" had failed. *Id.* at 599-601; cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-156 (2000) (contrasting "simple inaction" with Congress's development of "a distinct regulatory scheme" in reliance on background legal understanding). But in the absence of "such overwhelming evidence of acquiescence," *SWANCC*, 531 U.S. at 169 n.5, the Court has not rested its interpretation of a federal statutory scheme on legislative inaction.

2. Applying those well-established principles here, Congress's silence with respect to *Basic* constitutes simple inaction, not tacit acquiescence. Moreover, several additional factors counsel strongly against any finding of acquiescence here.

a. In the PSLRA, Congress did not simply fail to act in response to "calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*"—although even that would not be sufficient evidence of legislative acquiescence in the typical case. *Amgen*, 133 S. Ct. at 1201. Congress also failed to codify the use of the *Basic* presumption or to permit the SEC to decide when classwide reliance could be presumed. It is thus "impossible to assert with any degree of assurance" that the legislative silence signified an implicit desire to take any particular side of the debate over *Basic*. *Patterson*, 491 U.S. at 175 n.1. When the Senate decided not to overrule, modify, or codify *Basic* and the House later agreed by passing the Conference Report, the 104th Congress left it for a future Congress or this Court to reconsider *Basic*. It did not in any way indicate that particular Congress's acceptance of the fraud-on-the-market theory in the PSLRA.

A useful contrast is the manner in which Congress addressed loss causation in the PSLRA. As the United States explained to this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), "[b]etween 1974 * * * and 1995, when Congress passed the PSLRA, loss causation was generally recognized as a judicially inferred element of a Rule 10b-5 cause of action. The PSLRA codified the loss-causation requirement, making it a statutory element." Brief for the United States as Amicus Curiae Supporting Petitioners at 10, *Dura*, *supra* (No. 03-932). The loss-causation provision of the PSRLA demonstrates that when Congress wanted to codify preexisting case law, whether from this Court or the lower courts, it did so expressly in the Act. Cf. *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2527 (2010) ("The SSA's express authorization of such payments * * * shows that Congress knows how to make fees awards payable directly to attorneys where it desires to do so.").

Another useful contrast is the manner in which Congress addressed aiding-and-abetting liability in the PSLRA. This Court had previously held in *Central Bank* that the implied private right of action under the securities laws did not extend to such liability. See 511 U.S. at 177-178. In the PSLRA, Congress responded to *Central Bank* by authorizing aiding-and abetting-liability only in actions brought by the SEC, not in private actions brought by investors. See 15 U.S.C. 78t(e). As a result, in *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), this Court held that Congress's decision to provide for one type of liability but not the other was entitled to respect. See *id.* at 162-163. Thus, *Stoneridge* was a case in which, because of what Congress actually said in the PSLRA, its failure to say more on the subject was meaningful. Here, by contrast, Congress simply failed to say anything at all about the *Basic* presumption.

b. It would be particularly unwarranted to interpret the PSLRA's silence as signifying Congress's support for *Basic*'s fraud-on-the-market theory, because that Act was barely passed over President Clinton's veto. Although there were plenty of votes to spare in both the House and the Senate if a majority had been needed, 68 Senators voted to override the President's veto—only two votes more than the necessary two-thirds supermajority. That group included a number of Democratic Senators (for instance, Senators Feinstein, Kennedy, and Kerry), and it did not include some Republican Senators (such as Senators McCain, Shelby, and Specter). As might be expected given its broad bipartisan base of supporters, the legislation was winnowed down in the course of reaching a compromise. See, *e.g.*, 141 Cong. Rec. S19153 (daily ed. Dec. 22, 1995) (statement of Sen. Dodd) (noting that the PSLRA was the result of "4 years, 12 congressional hearings, over 100 witnesses, 5,000 pages of testimony, and committee reports, and truly a bipartisan effort, going back to 1991").

It is not reasonable to suppose that, needing a two-thirds supermajority in both chambers, the bill's sponsors and managers would ask Congress to address any and all issues related to private securities-fraud litigation. A broader bill would have risked losing support at the margins. To be sure, a bicameral supermajority might have agreed on repealing or modifying *Basic* if a provision to that effect had been included in the Conference Report. But the most that can be said from the history is that the 21 conferees from the House and Senate did not seek such agreement from all of their colleagues. Whether that is because the conferees themselves could not agree on changing *Basic*, or because they had other priorities, or because they believed that a future Congress or this Court would reconsider *Basic*, or for some other reason altogether is simply not answerable based on the legislative record. Nor is there any need to select among those "several equally tenable inferences," *Central Bank*, 511 U.S. at 187, because the Court has never suggested that the mere failure of a supermajority of Congress to overturn a judicial interpretation should be viewed as acquiescence in that interpretation.

c. Congress's inaction with respect to reliance is not unique in the PSLRA. The Act was not intended to cover the entire waterfront of securities litigation reform. Rather, the PSLRA plainly leaves certain issues for future legislative or judicial resolution. A prominent example of that is the Act's scienter provision. The original House version of the bill, H.R. 10, would have provided that a defendant could be held liable for money damages for a misrepresentation or omission only if he "knew the statement was misleading at the time it was made, or intentionally omitted to state a fact knowing that such omission would render misleading the statements made at the time they were made." H.R. 10, 104th Cong., 1st Sess. § 204 (as introduced on Jan. 4, 1995). In other words, H.R. 10 would have required that a defendant's misrepresentation or omission be intentional and knowing.

By the time that the PSLRA was passed, however, that provision had been changed. As enacted, the provision states that

> in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with *a particular state of mind*, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with *the required state of mind*.

15 U.S.C. 78u-4(b)(2)(A) (emphasis added). Congress thus heightened the applicable pleading standard by requiring plaintiffs to allege misrepresentations or omissions with particularity.

At the same time, however, Congress declined to specify "the required state of mind" in private securities-fraud actions. Whether the element of scienter could be satisfied only by actual knowledge or by some lesser showing like recklessness had long been a debated question, see, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976), and Congress did not resolve it one way or the other in the PSLRA. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-322 (2007) (observing that Congress also did not define what would constitute a "strong inference" that the defendant had acted with the required state of mind). Congress likewise did not resolve the similarly contested question of *Basic*'s fraud-on-the-market theory.

d. Finally, it bears noting that the fraud-on-the-market theory—and indeed the implied private cause of action for securities fraud as a whole—originated with this Court rather than Congress. See *Stoneridge Inv. Partners, LLC*, 552 U.S. at 164 ("The [Section] 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes."). Whatever the Court's normal reluctance to infer acquiescence from legislative inaction, it should be especially loath to assume that Congress implicitly ratified a judicially-created evidentiary presumption. Of the various issues not addressed in the PSLRA, it would have been particularly reasonable for Congress to believe that, in light of *Basic*'s origins and continuing controversy, the judiciary was well positioned to reconsider *Basic*'s fraud-on-the-market presumption. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975) (Rehnquist, J.) ("When 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.").

To be clear, amici do not contend that because the PSLRA is silent on reliance, this Court should infer congressional support for overruling its decision in *Basic*. Amici simply contend that the Court should draw no inference either way. That is especially so here, where the bar for legislative acquiescence should be set particularly high because the legal rule at issue is of judicial creation. But wherever the bar is set, the legislative history of the PSLRA does not demonstrate—let alone provide "overwhelming evidence," *SWANCC*, 531 U.S. at 169 n.5—that Congress acquiesced in *Basic*'s presumption of classwide reliance.

CONCLUSION

For the reasons set forth above, in enacting the PSLRA, Congress did not implicitly endorse or reject *Basic*'s fraud-on-the-market presumption of classwide reliance. The Court should therefore decide the merits of this case without reference to the PSLRA and assertions of legislative endorsement or acquiescence.

Respectfully submitted.

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APPENDIX

LIST OF AMICI CURIAE

Alfonse M. D'Amato served as a United States Senator from New York from 1981 to 1999, as Chairman of the Senate Committee on Banking, Housing, and Urban Affairs from 1995 to 1999, and as Chairman of the PSLRA Conference Committee in 1995.

Thomas J. Bliley, Jr. served as a United States Representative from Virginia from 1981 to 2001, and as Chairman of the House Committee on Energy and Commerce from 1995 to 2001.

Christopher C. Cox served as a United States Representative from California from 1989 to 2005, and as Chairman of the Securities and Exchange Commission from 2005 to 2009.

Michael G. Oxley served as a United States Representative from Ohio from 1981 to 2007, and as Chairman of the House Committee on Financial Services from 2001 to 2007.

Billy J. Tauzin II served as a United States Representative from Louisiana from 1980 to 2005, and as Chairman of the House Committee on Energy and Commerce from 2001 to 2004.

Stephen A. Blumenthal served as Counsel of the House Committee on Energy and Commerce from 1989 to 1995.

Dan R. Brouillette served as the Legislative Director for Representative Tauzin from 1989 to 1996.

David L. Cavicke served as Counsel, General Counsel, and Chief of Staff of the House Committee on Energy and Commerce from 1995 to 2010.

Robert J. Giuffra, Jr. served as Chief Counsel of the Senate Committee on Banking, Housing, and Urban Affairs from 1995 to 1996.

Brian J. Lane served as Counsel to Chairman Arthur Levitt, Jr. of the Securities and Exchange Commission from 1995 to 1996, and as Director of the Division of Corporation Finance of the Securities and Exchange Commission from 1996 to 1999.

Simon M. Lorne served under Chairman Arthur Levitt, Jr. as the General Counsel of the Securities and Exchange Commission from 1993 to 1996.

Laura S. Unger served as Counsel of the Senate Committee on Banking, Housing, and Urban Affairs from 1990 to 1997, and as Commissioner and then Acting Chairman of the Securities and Exchange Commission from 1997 to 2002.