

No. 13-317

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IN THE  
**Supreme Court of the United States**

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HALLIBURTON CO. AND DAVID LESAR,  
*Petitioners,*

v.

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

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

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**BRIEF AMICI CURIAE OF THE COUNCIL OF  
INSTITUTIONAL INVESTORS ET AL.  
IN SUPPORT OF RESPONDENT**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

The Council of Institutional Investors is a nonprofit association of pension funds, other employee benefit funds, endowments, and foundations with combined assets that exceed \$3 trillion. Its members include major long-term shareowners with duties to protect the retirement assets of millions of American workers. The Council has previously appeared as amicus curiae in cases affecting shareowner rights. See, *e.g.*, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 130 S.Ct. 3138 (2010).

The individual fund *amici* are Amalgamated Bank LongView Funds, the California Public Employees' Retirement System, the California State Teachers' Retirement System, the City of Milwaukee Employees' Retirement System, the Commonwealth of Pennsylvania Public School Employees' Retirement System, the Delaware

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), blanket letters of consent from all parties to the filing of *amicus* briefs have been filed with the Clerk.

Public Employees' Retirement System, the Fire & Police Pension Association of Colorado, the Illinois State Board of Investment, the Municipal Employees' Retirement System of Michigan, the Nathan Cummings Foundation, the New York City Police Pension Fund, the New York State Common Retirement Fund, the Ohio Police & Fire Pension Fund, the Pension Reserves Investment Management Board and the Attorney General of the Commonwealth of Massachusetts, the Public Employees' Retirement Association of Colorado, the Public School Teachers' Pension & Retirement Fund of Chicago, the State Board of Administration of Florida, the State of Wisconsin Investment Board, USS Investment Management Ltd., and the Washington State Investment Board. These *amici* are described more specifically in the appendix to this brief.

The interests of *amici* are directly implicated here. The Council's members commonly employ passive investment management strategies like indexing. These strategies are founded on "faith that share prices reflect publicly available information" and so may often preclude a demonstration of direct reliance on fraudulent misstatements. Cox, *Fraud on the Market After Amgen*, 9 Duke J. Constitutional L. & Pub. Policy 101, 128 (2013) (forthcoming). Yet "[w]ithout trust in the markets in which trades are made, . . . funds could hardly be seen to act consistent with"

fiduciary obligations to their beneficiaries. *Id.*, at 129. At the same time, Congress and the courts have strongly endorsed institutional investors stepping forward to lead securities-fraud actions to recover assets for defrauded investors and deter future frauds. See, e.g., H.R. Conf. Rep. No. 104-369, at 34-35 (1994); 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). *Amici* have thus learned, through direct experience, that the fraud-on-the-market presumption of *Basic Inc. v. Levinson* works, and works well, for investors, markets, and the courts.

#### SUMMARY OF ARGUMENT

Enforcement of the securities laws through private rights of action serves vital purposes, as Congress intended and the Court has long recognized. An efficacious private remedy for securities fraud under Rule 10b-5 powerfully deters wrongdoing and affords the greatest opportunity for defrauded investors to recover some portion of their losses. In this latter respect particularly, governmental enforcement is no substitute for a meaningful Rule 10b-5 remedy, which forms an essential complement to actions by the SEC and Department of Justice.

The fraud-on-the-market presumption of investor reliance on the integrity of securities prices is critical to the beneficial effects that private suits provide. Since *Basic* was decided, passive management of investments, such as

through indexing, has emerged as a common mechanism for investment in U.S. securities markets for institutional and individual investors alike. And the decision to adopt a passive investment management strategy, particularly by sophisticated institutional investors like *amici*, is taken with knowledge of—and hence in reliance on—the continued availability of the Rule 10b-5 cause of action for passively managed assets made possible by the *Basic* presumption.

Without that presumption, investors injured by fraud would have no claim unless they could prove actual, direct reliance on fraudulent misstatements—a burden inconsistent with the common strategies of passive investment management and those investors’ reliance on the integrity of market prices. The ramifications of such a radical alteration of the Rule 10b-5 cause of action would be felt not only in class certification, but in the merits determinations of individual actions as well, narrowly restricting the availability of relief to only a certain kind of investor—one that is not necessarily broadly representative of market participants. Eliminating the fraud-on-the-market presumption would be both unnecessary and unwise.

## ARGUMENT

**I. PRIVATE ENFORCEMENT OF THE SECURITIES LAWS THROUGH A MEANINGFUL RULE 10b-5 CAUSE OF ACTION IS ESSENTIAL TO ACHIEVING CONGRESS'S AIMS.**

“[A] dynamic, free economy presupposes a high degree of integrity in all of its parts, an integrity that must be underwritten by rules enforceable in fair, independent, accessible courts.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 161 (2008); accord S. Rep. No. 104-98, at 8 (1995) (“The success of the U.S. securities markets is largely the result of a high level of investor confidence in the integrity and efficiency of our markets.”). The Court and Congress alike have long and consistently acknowledged that private securities-fraud actions “provide ‘a most effective weapon,’” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)), and “an indispensable tool” in the perpetual struggle “to protect investors and to maintain confidence in the securities markets,” H.R. Conf. Rep. No. 104-369, at 31.

**A. An Effective Private Rule 10b-5 Right of Action Is an “Essential Complement” to Enforcement by Public Agencies.**

It has been a commonplace of the Court’s decisions for half a century that private securities-fraud actions “are ‘a necessary supplement to [SEC] action.’” *Bateman Eichler*, 472 U.S., at 310 (quoting *J.I. Case Co.*, 377 U.S., at 432); accord *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). Congress and the SEC both concur in this assessment. See S. Rep. No. 104-98, at 8 (“[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an *essential complement* to the SEC’s own enforcement program.” (quoting SEC Chairman Arthur Levitt; emphasis added)).

The present importance of private supplementation of SEC enforcement is enhanced by several decades of “phenomenal growth [in] the securities industry” during which funding and staffing levels for the Commission have failed to keep pace. *The Sec. Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. on Sec. of the S. Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (Oct. 29, 1997) (joint statement of Chairman Levitt and SEC

Commissioner Isaac Hunt).<sup>2</sup> The concerns Chairman Levitt aired have only grown with time. “Unless there is a vastly enlarged SEC, private actions inevitably must serve as an enforcement substitute for deterrence purposes, as well as their more traditional role as an avenue for appropriate compensation of victims.” Langevoort, *Managing the “Expectations Gap” in Investor Protection: The SEC and the Post-Enron Reform Agenda*, 48 *Vill. L. Rev.* 1139, 1161 (2003).

Despite those concerns, Congress has chosen against substantially expanding public enforcement. SEC budget authority rose from \$913 million in 2005 to \$1.3 billion in 2013, an increase of only 4.75% annually. *Sec. & Exch. Comm’n, FOIA Document: Budget History* (May 7, 2013).<sup>3</sup> (To compare, in 2010, Goldman Sachs spent \$1.3 billion just on marketing and technology. Elstein, *SEC Budget Puts It in League with Goldman’s Marketing Dept.*, *Crain’s N.Y. Business* (Feb. 14, 2011).<sup>4</sup>) As the SEC’s latest budgetary request frankly acknowledges, its “current level of resources is not sufficient to keep pace with the growing size and complexity of the securities markets and of

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<sup>2</sup> <http://goo.gl/zvwAzr>. All Internet sources cited in this brief are on file with counsel of record.

<sup>3</sup> <http://goo.gl/WhuO3q>.

<sup>4</sup> <http://goo.gl/4US99G>.

the agency's broad responsibilities." Sec. & Exch. Comm'n, FY 2014 Congressional Budget Justification 4 (Apr. 10, 2013).<sup>5</sup>

The true measure of the continuing necessity of private actions, however, lies in the decline of SEC securities-fraud enforcement activity. Over the last ten years, enforcement actions categorized by the SEC as "Financial Fraud/Issuer Disclosure" have fallen dramatically: whereas the SEC averaged 175 such actions annually between 2004 and 2008, it brought 73 in 2013 and averaged only 92 over the last three years. Sec. & Exch. Comm'n, Year-by-Year Enforcement Statistics (Dec. 17, 2013).<sup>6</sup> Over the same period, the proportion of the SEC's docket dedicated to securities-fraud enforcement has fallen roughly by half, from 28% in 2004 to just 13% in 2013. Cornerstone Research, Securities Class Action Filings: 2012 Year in Review 23 (2013).

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<sup>5</sup> <http://goo.gl/es0FWM>.

<sup>6</sup> <http://goo.gl/eUnQ1j>. Because these data include FCPA enforcement, they actually overstate the volume of SEC enforcement in the financial-fraud arena. See *ibid.* For example, in 2013, 5 of the 73 reported cases were FCPA actions. *Ibid.*



**B. Private Litigation Is Critical to Achieving Congress’s Aims of Deterring Fraud and Recouping Investor Losses.**

When it moved to reform private securities litigation nearly twenty years ago, Congress readily noted that the “private securities litigation system” is vitally “important to the integrity of American capital markets” because of its utility in “deter[ring] wrongdoing” and ensuring that “defrauded investors can recover their losses.” H.R. Conf. Rep. No. 104-369, at 31. Overruling *Basic* would sharply undermine these goals and disserve the congressional policy embedded in the federal securities laws.

Halliburton’s self-interested assertions of skepticism notwithstanding, empirical evidence demonstrates the correctness of Congress’s understanding of private litigation’s deterrent effect. See, e.g., Choi & Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, U. Mich. L. & Econ. Research Paper No. 12-022, at 39 (2012) (finding that private actions “provide greater deterrence against more serious securities law violations compared with the SEC”).<sup>7</sup> The “greater institutional commitment of the United States to enforcement” of its securities laws, by both public and private actors, succeeds in

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<sup>7</sup> <http://goo.gl/R9sFVD>.

repelling issuers prone to fraud while simultaneously lowering the cost of capital for honest issuers. Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 245-246 (2007). “[P]rivate lawsuits promote public and global confidence in our capital markets and help . . . to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.” H.R. Conf. Rep. No. 104-369, at 31. Beyond prospective deterrence through the fear of liability, private litigation, particularly by institutional investors, also provides opportunities to prevent future frauds through improved corporate governance. See Council of Institutional Investors, *Securities Litigation* 8 (2012) (noting that litigation often serves “as a tool to achieve governance reforms that add value and reduce risk at portfolio companies”). This Court’s decisions rightly respect the congressionally mandated deterrent purpose, refusing to narrow the ambit of Rule 10b-5 and like provisions when doing so would “insulate those who commit securities frauds from any appreciable liability to defrauded investors” and “seriously impair the deterrent value of private rights of action” by diminishing “the incentives for [securities market actors] to comply with the federal securities laws.” *Randall*, 478 U.S., at 664.

Halliburton likewise dismisses the compensatory function of the private Rule 10b-5

right of action that Congress lauded in 1995. But its cynical suggestion that securities class actions should be curtailed because they do not sufficiently compensate defrauded investors, Pet. Br. 41-43, is belied by the fact it would deny many investors any relief at all.<sup>8</sup> And its reassurances that public enforcement is sufficient to replace private securities-fraud claims, let alone make defrauded investors whole, again miss the mark. In 2013, the SEC “obtained total penalties and disgorgements of \$3.4 billion, an increase from the \$3.1 billion awarded the year before.” Sec. & Exch. Comm’n, 2013 Agency Fin. Report 2 (Dec. 12, 2013).<sup>9</sup> However, of that amount, it appears only \$54 million was disbursed to harmed investors, just one-tenth of the amount of disgorgements and penalties transferred to the U.S. Treasury—and even that paltry total was further reduced by taxes and fees. *Id.*, at 96. In comparison, settlements of private securities class-action

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<sup>8</sup> “It is well understood that aggregation is the key to the viability of many claims routinely brought as class actions, particularly what are termed the negative value claims, in which the transaction costs of prosecuting individual actions make enforcement impossible absent aggregation.” Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 *Colum. L. Rev.* 1839, 1861 (2006).

<sup>9</sup> <http://goo.gl/FwDDII>.

suits yielded \$2.9 billion in 2012, the majority of which went into investors' pockets. Ryan & Simmons, Cornerstone Research, Securities Class Action Settlements: 2012 Review and Analysis 2 (2013). Whatever the demerits of the securities class action as a vehicle for compensating defrauded investors, it still far outstrips public enforcement in vindicating this congressional purpose. See H.R. Conf. Rep. No. 104-369, at 31 (noting the value of an efficacious private remedy that recompenses defrauded investors "without having to rely upon government action").

**II. THE *BASIC* PRESUMPTION IS INDISPENSABLE IF PRIVATE ENFORCEMENT IS TO RETAIN ITS VITALITY FOR INSTITUTIONAL INVESTORS.**

If the private Rule 10b-5 right of action is to remain an important vehicle for achieving these congressional aims, a presumption that market participants rely on public information embedded in market prices is crucial. It is widely, and properly, recognized as forming the keystone of the securities class-action edifice. *E.g.*, Cox, *supra*, at 106 (noting that, absent the *Basic* presumption, "the burden of inquiring whether hundreds, or likely thousands, of investors relied on the alleged misrepresentation would be overwhelming," precluding any possibility of certification); accord *Basic v. Levinson*, 485 U.S. 224, 242

(1988). And without the availability of the class-action device, few investors have sufficient incentive to pursue securities fraud claims at all—because “the recoverable amount is too slight to justify” the cost of an individual suit, a class action “is the only viable option for most aggrieved investors,” and the alternative is to forgo suit entirely. Cox, *supra*, at 106, n.17.

Halliburton asserts that the demise of the fraud-on-the-market presumption nonetheless presents no cause for concern, anticipating that institutional investors like the Council’s members will take up the slack created by shutting down class-based litigation through pursuit of individual fraud claims. “Sophisticated investors,” Halliburton argues, “will be able to demonstrate that they reviewed documents containing the alleged misrepresentations or omissions and can demonstrate actual reliance in individual actions.” Pet. Br. 48 (quotation marks and alterations omitted). In reality, overruling *Basic* would erect serious impediments to institutional investors’ ability to pursue securities-fraud actions even on an individual basis, and it is naïve—even irresponsible—to assume that institutional investors will (or can) fill the resulting gap in enforcement.

**A. Institutional Investors Employ Passive Strategies to Manage Securities Portfolios Worth Trillions of Dollars.**

Without the aid of the fraud-on-the-market presumption, only “active” investors—those who “reviewed documents containing the alleged misrepresentations,” Pet. Br. 48, and directly relied on those misrepresentations in making investment decisions—will have a cause of action under Rule 10b-5. There is, however, a wide spectrum of investment strategies of varying levels of passivity from which any given investor, regardless of its degree of sophistication, may rationally select. See Cox, *supra*, at 101-103 (offering a taxonomy of investment strategies ranging from the classical active investor, “studiously poring through complex financial information,” to indexing, to the wholly passive “dart thrower”). Many institutional investors, for example, incorporate indexing to reduce risk and improve returns. See, e.g., Diamond, CalPERS Committee Rethinking Active Management, Pensions & Investments (Mar. 18, 2013).<sup>10</sup> Contrary to

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<sup>10</sup> <http://goo.gl/xI0odc>. Because of those investors’ fiduciary obligations to their beneficiaries, investment-strategy decisions such as the adoption of indexing “necessarily entail considering the types of recovery methods available” in the event of fraud, including the availability of a Rule 10b-5 remedy

petitioner’s argument, then, the ability to bring a securities-fraud claim absent *Basic*’s presumption would turn not on whether investor-plaintiffs are “sophisticated,” which institutional investors certainly are, but on whether they actively manage their portfolios. And that is where Halliburton’s breezy assurances fall apart.

Among the largest and most sophisticated investors—institutional investors like *amici*—as with investors generally, passive investment management strategies, particularly indexing, are common and govern substantial amounts of assets.<sup>11</sup> The Council’s research and the

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and, relatedly, the *Basic* presumption. Council of Institutional Investors, *A Survey of Morrison’s Impact on CII Members* 4 (2013) (noting that, before *Morrison v. National Australia Bank*, “funds typically relied on participating in §10(b) class actions to recover securities fraud losses” and documenting reevaluations of investment strategies in response to *Morrison*’s alteration of longstanding precedent).

<sup>11</sup> The prevalence of indexing as an investment strategy has exploded in the years since *Basic* was decided. See, e.g., Investment Company Institute, *2008 Investment Company Factbook* 47 (2008), at <http://goo.gl/dB8mQQ> (documenting ten-fold rise between 1988 and 2007 in percentage of equity mutual fund assets held in index funds). Unlike index funds, however, indexing by institutional

individual experiences of *amici* confirm the importance of passive management strategies to pension funds like the Council's members. See, e.g., Kozlowski, Northern Trust: 1 in 3 Has 40% of Stocks, Bonds in Passive Strategies, Pensions & Investments (Mar. 5, 2012) (documenting prevalence of passive management for equity and fixed-income asset classes);<sup>12</sup> Olsen, Top 200 Pension Funds Actively Moving to Passive Strategies, Pensions & Investments (Feb. 6, 2012) (noting market-adjusted 25% year-on-year increase in passive developed-markets investments among 200 largest U.S. retirement plans).<sup>13</sup> Particularly for domestic securities, the proportion of assets under passive management can be quite high: Some of the country's largest investors index four-fifths or more of their domestic equity assets. Pensions & Investments, Passive Equity Portfolios of 10 Large Pension Funds (Mar. 25, 2013) (reporting rates of passive management in the equity portfolios of the nation's five largest pension

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investors typically involves direct beneficial ownership of the indexed securities.

<sup>12</sup> <http://goo.gl/5zrJuw>.

<sup>13</sup> <http://goo.gl/5XGMUt>. See also Council of Institutional Investors, Asset Allocation Survey 2011, at 1 (2011) (finding that more than 90% of responding funds reported at least partially indexing their asset portfolios).



funds ranging from 72% to 87%).<sup>14</sup> Those passively managed portfolios contain substantial assets. One fund alone, the California Public Employees' Retirement System, or CalPERS, passively manages more than \$125 billion in assets—half of its total \$255 billion portfolio. Kephart, *Passive Investing: If It's Good Enough for CalPERS...*, *Investment News* (Mar. 24, 2013).<sup>15</sup> Across the market as a whole, institutional investors use indexing to manage \$900 billion in fixed-income assets and more than \$3.3 trillion in domestic equities alone—the equivalent of seventy percent of the combined total market capitalization of IBM, Goldman Sachs, Boeing, Chevron, Johnson & Johnson, and the 25 other companies that make up the Dow Jones Industrial Average. Zanon, *Index Assets Up 18.4% for Year*, *Pensions & Investments* (Sept. 16, 2013);<sup>16</sup> see S&P Dow Jones Indices, *Dow Jones Industrial Average Fact Sheet 1* (2013).<sup>17</sup>

The prevalence of indexing in these portfolios is crucial because, after the Court's decision in *Morrison v. National Australia Bank Ltd.*, domestic equities and bonds form the

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<sup>14</sup> <http://goo.gl/xm8uG>.

<sup>15</sup> <http://goo.gl/QL4g4I>.

<sup>16</sup> <http://goo.gl/MAJR0J>.

<sup>17</sup> <http://goo.gl/a1p0ed>.

principal classes of assets for which recovery can be had under Rule 10b-5 and that trade in conditions that could trigger the fraud-on-the-market presumption. See 130 S.Ct. 2869, 2884 (2010) (“And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which §10(b) applies.”). Any reconsideration of *Basic*’s fraud-on-the-market presumption will accordingly fall most heavily on the very portfolios—domestic equities and bonds—in which pension funds have most enthusiastically embraced passive investment strategies like indexing.

**B. Because of the Prevalence of Passive Strategies, Requiring a Demonstration of Actual Reliance Would Thwart Institutional Investors’ Pursuit of Valid Securities-Fraud Claims.**

Halliburton fails even to acknowledge that abolishing the fraud-on-the-market presumption would radically alter securities-fraud plaintiffs’ burden of proof not only at the class certification stage, but also on the merits. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552, n.6 (2011) (emphasizing that reliance, having been proven with respect to a Rule 23(b)(3) predominance inquiry, is “an issue [plaintiffs] will surely have to prove *again* at trial in order to make out their case on the

merits”). Yet a return to the pre-*Basic* status quo ante would herald significant difficulties for proving up even individual actions—and particularly so for any institutional investor who undertook to shoulder the burden of private enforcement of Rule 10b-5. Before *Basic*, such investors’ assertions of reliance faced deep skepticism, with their sophistication regularly invoked against them as a reason to find an absence of “reasonable reliance” or a failure of “due diligence.” See Fletcher, *Sophisticated Investors Under the Federal Securities Laws*, 1988 Duke L.J. 1081, 1086-1094 (documenting these and numerous other problems faced by sophisticated investors in proving actual reliance before *Basic*). Indeed, even senior U.S. Department of Justice officials have emphasized the difficulty of proving actual reliance, particularly for sophisticated investors, to justify the absence of securities-fraud prosecutions in the wake of the 2008 financial crisis. See PBS Frontline, Lanny Breuer: Financial Fraud Has Not Gone Unpunished (Jan. 22, 2013) (“And if I show that sophisticated Bank One is doing a transaction with sophisticated Bank Two, and sophisticated Bank Two knows fully what it’s getting into . . . , then I cannot bring a case.”).<sup>18</sup>

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<sup>18</sup> <http://goo.gl/BX6B20>.

The broader consequence risked by petitioners' plea, then, is not simply that class-based litigation of securities fraud will be effectively curtailed, but that even the rump claims of individual investors will evaporate entirely—not just because the absence of the class device makes such litigation unprofitable, but owing to the difficulty inherent in proving actual reliance on the merits.<sup>19</sup> That result is certainly undesirable, see *Tellabs, Inc.*, 551 U.S., at 313 (describing private Rule 10b-5 claims as “an essential supplement” to public enforcement), but it is unnecessary in equal measure.

“[T]he overarching tenet of *Basic*, reaffirmed in *Amgen*, is irrefutable: Stock prices in markets generally respond to public information that is financially significant.” Cox, *supra*, at 111. And *Basic* was correct, also, that the “causal connection” in fraud-on-the-market cases “is no less significant than in a case of direct reliance.” 485 U.S., at 242 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-1161 (CA3 1986)). Indeed, “an important part of the indexer’s strategy is the

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<sup>19</sup> Institutional investors opting out of settlements in the current system is far too rare to suggest otherwise. Between 1996 and 2011, opt-outs occurred in only 3% of all securities class-action settlements. Rozen et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements 2* (2013).

belief that markets are sufficiently trustworthy so that such passive investment is consistent with the advisor’s fiduciary obligations.” Cox, *supra*, at 126; see, e.g., *In re Countrywide Financial Corp. Sec. Litigation*, 273 F.R.D. 586, 602 (CD Cal. 2009) (observing that, because “index purchases rely *exclusively*” on information conveyed through prices, indexing displays “close to perfect reliance on market price-setting”). Congress did not intend the securities laws to be interpreted to ignore such reliance by passive investors on the integrity of American markets. See S. Rep. No. 104-98, at 8 (ascribing the “success of the U.S. securities markets” to “a high level of investor confidence in the integrity and efficiency of our markets”); H.R. Conf. Rep. No. 104-369, at 31 (observing that “protect[ing] investors” is the “overriding purpose of our Nation’s securities laws”).

### CONCLUSION

For these reasons, *amici* respectfully submit that the judgment of the court of appeals should be affirmed.

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**LIST OF AMICI CURIAE**

**Amalgamated Bank** has over \$30 billion of assets under management and under custody for hundreds of employee pension and benefit fund clients, including in its LongView Funds. Founded over twenty years ago, the LongView Funds actively engage portfolio companies to promote governance practices that we believe will support long-term shareholder value creation. In order to protect Fund investments, the Funds occasionally participate in securities litigation, including having been the first investor to take legal action against Enron for egregious accounting malfeasance. By participating as a named plaintiff, the Funds helped recover \$7.2 billion for investors.

**The California Public Employees' Retirement System** (CalPERS) is the largest public pension fund in the United States. The fund administers health and retirement benefits on behalf of more than 3,000 public school, local agency and State employers. As of October 31, 2013, CalPERS had a total membership of 1,678,996 (consisting of 574,759 beneficiaries and 1,104,237 members) with total assets of \$277.2 billion under management.

**The California State Teachers' Retirement System** (CalSTRS) is the largest teachers' retirement system in the United States. CalSTRS' primary responsibility is to provide retirement related benefits and services

to teachers in public schools from kindergarten through community college. As of June 30, 2013, CalSTRS had a total membership of 868,493 (consisting of 599,219 members and 269,274 beneficiaries), and as of December 31, 2013, total assets of \$181.1 billion.

**The City of Milwaukee Employees' Retirement System** is an I.R.C. 401(a) tax qualified retirement plan organized pursuant to the City Charter as an independent corporation under state law to provide retirement, disability and death benefits for employees, retirees, survivors and beneficiaries of the City, Milwaukee Public School non-credentialed employees and other City agencies, including police, fire and general employees. Current assets are approximately \$4.8 billion.

**The Commonwealth of Pennsylvania Public School Employees' Retirement System** (PSERS or System) was established on July 18, 1917, to provide retirement benefits to public school employees of the Commonwealth. The System is a governmental cost-sharing multi-employer defined benefit pension plan, to which all members and 797 reporting units contribute. The members eligible to participate in the System include all full-time public school employees, part-time hourly public school employees who render at least 500 hours of service in the school year, and part-time per diem public school employees who render at

least 80 days of service in the school year in any of the reporting entities in Pennsylvania. PSERS was established by law as an independent administrative board directed by a governing board of trustees which exercises control and management of the System, including the investment of its assets. As of June 30, 2013, the System had over 267,000 active members and approximately 209,000 retirees and beneficiaries. The total net assets of the System totaled \$49.3 billion as of June 30, 2013.

**The Delaware Public Employees' Retirement System** (DPERS) is established pursuant to 29 Del. C. Sec. 8308. It administers nine public pension plans, and has investment authority for three additional plans. At the end of Fiscal Year 2013, pensioners numbered 26,180; monies from the nine plans and three pension commingled investment funds totaled \$8.1 billion. The State's contribution rate for the State Employees' Plan for Fiscal Year 2013 was 8.9% of payroll. Employer rates in the other plans that the Board administers range from 6.8% to 27.7% of covered payroll.

**The Fire & Police Pension Association of Colorado** was established in 1980 pursuant to the Colorado Revised Statutes of 1973, as amended. FPPA administers two funds: the Fire & Police Members' Benefit Investment Fund (\$4 billion) and the Fire & Police Members' Self-

Directed Investment Fund (\$368 million). The Fire & Police Pension Association administers a statewide multiple employer public employee retirement system providing defined benefit plan coverage as well as death and disability coverage for police officers and firefighters throughout the State of Colorado. FPPA serves over 24,000 active and retired members. The Fire & Police Members' Benefit Investment Fund includes the assets of those plans that fall under the complete investment authority of the FPPA Board of Directors. This fund includes the assets of the Defined Benefit System, the Statewide Death & Disability Plan, and numerous separate Local "Old Hire" police and fire plans, and Volunteer Fire pension plans. The Defined Benefit System comprises the Statewide Defined Benefit Plan, the Statewide Hybrid Plan, and the Colorado Springs New Hire Pension Plans. The Fire & Police Members' Self-Directed Investment Fund consists of the assets in plans where members control their account by choosing from various mutual fund options selected by the Board of Directors.

**The Illinois State Board of Investment** is a non-appropriated state agency that is responsible for managing and investing the pension assets of the Illinois General Assembly Retirement System, the Judges' Retirement System of Illinois and the State Employees' Retirement System of Illinois. ISBI's net assets totaled \$14.3 billion as of December 31, 2013. In

addition, the Board is responsible for overseeing the Illinois Deferred Compensation Plan (the Plan). The Plan's net assets totaled \$3.8 billion as of September 30, 2013, with approximately 51,000 participants.

**The Municipal Employees' Retirement System of Michigan** (MERS) is an independent public nonprofit organization that has partnered with Michigan municipalities for more than 65 years. As an agent multiple-employer plan, MERS establishes a separate trust for each municipality. Each entity is responsible for the employer contributions needed to provide benefits for its employees and former employees under the Michigan Constitution, the MERS Plan Document and MERS' enabling legislation (Public Act 427 of 1984, as amended). The pension plan is a tax-qualified plan under section 401(a) of the Internal Revenue Code (most recent letter of Favorable Determination issued April 26, 2012). In addition to the Defined Benefit Plan, MERS' other programs include: MERS Defined Contribution Plan, MERS Hybrid Plan, MERS 457 Supplemental Retirement Program, MERS Health Care Savings Program, MERS Retiree Health Funding Vehicle, and Investment Services Program. As of December 31, 2013, MERS' total assets were \$8.7 billion, and its total membership was nearly 800 municipal members and 100,000 participants.

**The Nathan Cummings Foundation** is a private grant making foundation with an endowment of approximately \$425 million. The Foundation is rooted in the Jewish tradition and committed to democratic values and social justice. The Foundation is guided by the principle that we must work to close the gap between America's promise and practice and aspires to a society that measures its success by how it treats those who have the least. Specifically, the Foundation seeks to make progress on two pressing and interconnected problems that must be resolved if its vision is to be realized: inequality and climate change.

**The New York City Police Pension Fund**, created pursuant to New York Local Law 2 of 1940, provides benefits for uniformed members of the New York City Police Department. It currently serves over 75,000 active and retired members, and as of October 2013 had \$31.2 billion in assets under management.

**The New York State Common Retirement Fund** (NYSCRF) holds and invests the assets of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. As one of the largest public pension funds in the United States, NYSCRF provides pension, disability, and death benefits

for New York state and local government employees and employees of certain other participating employers. As of September 30, 2013, NYSCRF had more than one million employees, beneficiaries, and retirees, and total assets of approximately \$164 billion. NYSCRF has served as lead plaintiff in numerous securities litigation class actions resulting in some of the largest recoveries for shareholders in history, including *In re Worldcom, Inc. Sec. Litigation*, No. 02-cv-3288 (DLC) (SDNY), with a settlement of more than \$6 billion; *In re Cendant Corp. Sec. Litigation*, No. 98-cv-1664 (WHW) (DNJ), with a settlement over \$3.2 billion; and *In re McKesson Corp. HBOC, Inc., Sec. Litigation*, No. C-99-20743 RMW (ND Cal.), with a settlement over \$1 billion.

**The Ohio Police and Fire Pension Fund** (OP&F) was created by the Ohio General Assembly in 1965, replacing 454 separate local police and firemen's relief and pension funds in Ohio. The statewide Fund began operating January 1, 1967. On that date, the local pension funds transferred their assets and liabilities to the OP&F. Assets transferred to OP&F in 1967 were approximately \$75 million. As of January 29, 2014, OP&F has approximately \$14 billion in assets and our members include more than 28,000 active police officers and firefighters, more than 18,000 retired members and nearly 8,000 beneficiaries and survivors.

**The Pension Reserves Investment Management Board of the Commonwealth of Massachusetts** (PRIM) is the trustee of the Massachusetts Pension Reserves Investment Trust (PRIT) Fund, a defined benefit public pension fund with 285,000 beneficiaries and \$57,085,493,546 in assets under management as of January 30, 2014. PRIM works diligently on behalf of Massachusetts state employees and teachers, and also local municipal and county retirement systems throughout the Commonwealth of Massachusetts, to invest their pension assets in a manner that maximizes returns while mitigating risk. **The Attorney General of the Commonwealth of Massachusetts** is the chief lawyer and law enforcement officer of the Commonwealth. The Attorney General is an advocate and resource for the Commonwealth and its residents in many areas, including consumer protection, combating fraud and corruption, protecting civil rights, and promoting meaningful economic recovery.

**The Public Employees' Retirement Association of Colorado** provides retirement and other benefits to the employees of more than 500 government agencies and public entities in the state of Colorado, including employees of the Colorado state government, public school teachers, many university and college employees, judges, many employees of cities and towns, State Troopers, and the



employees of a number of other public entities. It is the 21st largest public pension plan in the United States and has over \$40 billion in assets, approximately 200,000 active members, and approximately 100,000 benefit recipients.

Established by the Illinois state legislature in 1895 as **The Public School Teachers' Pension and Retirement Fund of Chicago**, the Chicago Teachers' Pension Fund (CTPF) is the administrator of a multi-employer defined benefit public employee retirement system providing retirement, survivor, and disability benefits to retired teachers and employees of the Chicago Public Schools. CTPF has almost 28,000 retirees and over 29,000 active members. CTPF is administered in accordance with Illinois Compiled Statutes (ILCS) Chapter 40, Articles 1,17,20. CTPF is governed by a 12-member Board of Trustees; six are elected by the teacher contributors, three are elected by the annuitants, one is elected by the principal contributors, and two are appointed by the employer, Board of Education. The CTPF Trustees and investment staff oversee a well-diversified investment portfolio of approximately \$10 billion.

**The State Board of Administration of Florida** (SBA) is a body of Florida state government that provides a variety of investment services to clients and governmental entities. These include managing the assets of

the Florida Retirement System (FRS), the Local Government Surplus Funds Trust Fund (Florida PRIME™), the Florida Hurricane Catastrophe Fund, and over 30 other fund mandates. The FRS presently has approximately 647,000 active (working) members and 992 participating employers. Members are employees of state, county and city governments, school boards, community colleges and universities, and special districts. As of December 31, 2013, the SBA managed assets across all mandates totaling approximately \$174 billion.

**The State of Wisconsin Investment Board** (SWIB) is an independent agency of the state whose purpose is to provide professional investment management of the Wisconsin Retirement System trust funds, as well as other state trust funds. The Wisconsin Retirement System provides benefits to more than 572,000 current or former employees of state agencies, the university system, school districts and most local governments in Wisconsin. The WRS is the 9th largest U.S. public pension fund and the 28th largest public or private pension fund in the world. As of December 31, 2013, the assets under management by SWIB were over \$100 billion.

**USS Investment Management Limited** (USSIM) is a wholly owned subsidiary of Universities Superannuation Scheme Limited

(USS), which acts as USS's investment manager and advisor and which operates from its London office. It is regulated by the Financial Conduct Authority. USS is the sole trustee company of the Universities Superannuation Scheme (Scheme). The Scheme was established in 1974 as the principal final salary pension scheme for universities and higher education institutions in the UK. USS administers the Scheme and runs the pensions administration and group functions from the head office in Liverpool. It is regulated by the Pensions Regulator. The Scheme's membership has grown to include over 400 institutions with approximately 290,000 individual members and is the second largest pension fund in the UK with assets of approximately £40 billion (\$65.9 billion).

**The Washington State Investment Board** manages investments for 17 retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters and judges. In addition, the Board manages investments for 16 other public funds that support or benefit industrial insurance, colleges and universities as well as developmental disability programs. The Board has \$94.6 billion in assets under management.