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.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CURRENT AND FORMER MEMBERS OF CONGRESS AND STAFF AS *AMICI CURIAE* SUPPORTING RESPONDENT

Barry A. Weprin
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300
bweprin@milberg.com

David E. Mills
Counsel of Record
THE MILLS LAW OFFICE LLC
1300 West Ninth St., Ste.636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Counsel for Amici Curiae

February 5, 2014

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. When Congress Is Aware of Competing Positions on Settled Law and Votes Not to Change That Settled Law, Congress Preserves the Law as It Stands. 2

II. Congress Has Preserved *Basic* and the Fraud-on-the-Market Theory. 4

A. Congress rejected efforts to abrogate *Basic* when enacting the PSLRA. 4

1. History 6

2. Text 9

B. Congress similarly maintained *Basic* when enacting SLUSA and subsequent legislation. 11

III. The Other Legislators' Arguments That Congress Has Not Preserved *Basic* Are Unsupportable. 12

CONCLUSION 15

APPENDIX: List of Amici Curiae 1a

TABLE OF AUTHORITIES

CASES

Aaron v. SEC,
446 U.S. 680 (1980) 4

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013) 1, 4, 15

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) . . . . *passim*

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 3, 13

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 3, 14

Citibank, N.A. v. K-H Corp.,
968 F.2d 1489 (2d Cir. 1992) 13

Currie v. Cayman Res. Corp.,
835 F.2d 780 (11th Cir. 1988) 13

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 14

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 2

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 4

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 12

Patterson v. McClean Credit Union,
491 U.S. 164 (1989) 4

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 3, 12, 14

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 14

Watson v. United States,
552 U.S. 74 (2007) 4

Wool v. Tandem Computers Inc.,
818 F.2d 1433 (9th Cir. 1987) 13

STATUTES AND LEGISLATIVE MATERIAL

15 U.S.C. § 78u-4(a)(2) 10

15 U.S.C. § 78u-4(a)(3) 10

15 U.S.C. § 78u-4(a)(4) 10

15 U.S.C. § 78u-4(a)(5) 10

15 U.S.C. § 78u-4(a)(6) 10, 11

15 U.S.C. § 78u-4(a)(7) 10

15 U.S.C. § 78u-4(b)(1)(2) 10

15 U.S.C. § 78u-4(b)(3)(B) 10

15 U.S.C. § 78u-4(b)(4) 10

15 U.S.C. § 78u-4(c) 11

15 U.S.C. § 78u-4(e) 10, 11

15 U.S.C. § 78u-4(f) 10

15 U.S.C. § 78u-5 11

Class Action Fairness Act, Pub. L. No. 109-2 (2005) 12

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 12

I.R.C. § 501 3

Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 . . . . *passim*

Pub. L. No. 111-203, 124 Stat. 1376, § 929Y (July 11, 2010) 12

Pub. L. No. 111-203, 124 Stat. 1376, § 929Z 12

Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002) . . 12

Securities and Exchange Commission Rule 10b-5, 17 CFR § 240.10b-5 . . . . 3, 9

Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j 5, 9, 10, 12

Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353 (1998) 1, 2, 11, 15

RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

141 Cong. Rec. S17984 (Daily ed. Dec. 5, 1995) 9

Tim Ferguson, Business World: A Contract to Restore Contract to Securities Law, *Wall Street Journal*, Oct. 25, 1994 6

H.R. Conf. Rep. No. 104-369 (1995) 2

H.R. Rep. No. 104-50 (1995) 7

May 25, 1995 letter from Arthur Levitt to Hon. Alfonse M. D'Amato, 141 Cong. Rec. S9126 8

Private Securities Litigation Reform Act of 1995, Report of the Comm. on Banking, Housing, & Urban Affairs of the U.S. Senate, S. Rep. No. 104-98 (June 19, 1995) 7, 8

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. (1995) 7

S. Rep. No. 104-98 (1995) 8

S. 667, 104th Cong. (1st Sess. 1995) 8

INTEREST OF AMICI CURIAE

Amici are current and former Members of Congress and staff, several of whom were involved in drafting and enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737.[1] Some Amici were in favor of the Act, and some opposed it. Regardless, this Court was correct last Term when it concluded that, in enacting the PSLRA, "Congress rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013) (discussing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)). Some other former legislators and staffers have filed an amici brief claiming that this Court's conclusion is inaccurate in light of the PSLRA's full legislative history. (Brief for Former Members of Congress, Senior SEC Officials, and Congressional Counsel as Amici Curiae ("Br.")). Their view is mistaken. Congress indeed validated *Basic* when enacting the PSLRA and subsequent securities legislation.

SUMMARY OF ARGUMENT

Congress has twice legislated on the specific issue Halliburton raises here: private securities class-action litigation. In both the PSLRA and the Securities Litigation Uniform Standards Act (SLUSA), Pub. L.

---

[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.

No. 105-353 (1998), Congress imposed limits on such class actions to strike a balance between the need to protect investors, on the one hand, and issuers' ability to raise capital without fear of strike suits, on the other. *See* H.R. Conf. Rep. No. 104-369, at 31 (1995). In enacting the PSLRA, Congress was expressly invited to revisit *Basic*. It refused to do so. Thus, Congress did not intend to simply refrain from commenting altogether—but instead sought to preserve the law as it stood. That is clear both from Congress's decision not to reconsider *Basic* and from numerous provisions of the PSLRA that make sense only if class-based fraud-on-the-market suits are permitted. Later, when Congress decided to supplement the PSLRA by enacting SLUSA, Congress again left *Basic* intact. Viewed in light of Congress's policy objectives and the alternatives it considered, the enactment of the PSLRA and SLUSA constitutes legislative validation of *Basic*.

ARGUMENT

I. When Congress Is Aware of Competing Positions on Settled Law and Votes Not to Change That Settled Law, Congress Preserves the Law as It Stands.

When Congress, this Court, or a federal agency takes a position on an important legal issue and that position reflects the settled state of the law, it is understood that further Congressional action occurs against that legal background. Thus, when Congress takes action in that area but does not overturn that settled legal position, it is deliberately preserving that position. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–56 (2000) (Congressional action regarding tobacco regulation "effectively ratified

the FDA's previous position" about its jurisdiction because Congress "enacted this legislation against the background of the FDA repeatedly and consistently asserting" that position); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) (Congressional action regarding Section 501 of the Internal Revenue Code implicitly showed that Congress accepted the IRS's interpretations of that section in light of Congress's "prolonged and acute awareness of so important an issue" and the competing positions it generated).

Indeed, this Court has made this very point (implicit Congressional approval of important, settled legal positions) with respect to other provisions of the PSLRA. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (noting that the PSLRA "ratified the implied right of action" under Rule 10b-5, which had become "a prominent feature of federal securities regulation"); *id.* at 163 (noting that the PSLRA also implicitly adopted this Court's previous decision in *Central Bank* that there is no private liability for aiding and abetting securities violations) (discussing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

By contrast, if the legal landscape is unsettled or if the debated legal provision at hand is not a Congressional action's focus, then the Congressional action does not necessarily endorse an existing interpretation of that provision. *See, e.g.*, *Central Bank*, 511 U.S. at 185–87 (not relying on Congress's inaction to determine whether Rule 10b-5 permits liability for aiders and abettors because the Court had not clearly

expressed an interpretation before (so there was nothing for Congress to react to), and because the legislative signals themselves were unclear); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) (not relying on Congress's inaction regarding a scienter requirement in certain statutes because "the legislative consideration of those statutes was addressed principally to matters other than that at issue here").

These principles show why this Court's decisions interpreting Congressional statutes have "special force" as *stare decisis*: "'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 172–73 (1989)). Thus, when "Congress has long acquiesced in the interpretation [the Court has] given," *id.*, the Court can safely infer that Congress has accepted the Court's interpretation of Congress's policies. *See Watson v. United States*, 552 U.S. 74, 82–83 (2007).

As shown below, that is exactly why this Court correctly observed in *Amgen* that Congress has endorsed *Basic* and its embrace of the fraud-on-the-market theory.

II. Congress Has Preserved *Basic* and the Fraud-on-the-Market Theory.

A. Congress rejected efforts to abrogate *Basic* when enacting the PSLRA.

In its 1988 decision in *Basic*, this Court made clear that Congressional policy supported the fraud-on-the-market theory. 485 U.S. at 245–46 ("The presumption of reliance employed in this case" is consistent with

"congressional policy embodied in the 1934 Act," which was enacted "to facilitate an investor's reliance on the integrity of [the securities] markets."). Similarly, the SEC filed an amicus brief in *Basic* supporting the theory, because it furthered "important policies under the federal securities laws" and "the underlying goal of honest markets." Br. of SEC, *Basic*, *supra*, at 25–26.

The *Basic* Court also emphasized the critical point that, without the fraud-on-the-market theory, Section 10(b) investor suits for misrepresentations effectively could not even exist as class actions: "Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Basic*, 485 U.S. at 242.

Thus, when considering any significant securities legislation after *Basic*, Members of Congress were aware that the Court and the SEC had interpreted Congress's policies to support the fraud-on-the-market theory. Congress therefore understood that the ball was in its court if it wished a different result.

Indeed, seven years after *Basic* was decided, Congress enacted the PSLRA—the most substantial legislation ever passed to reform securities class actions. The policy concerns prompting the PSLRA—regarding the perception of abusive class-action securities litigation—are the same ones Petitioner Halliburton raises here. And *Basic* was a central focus of Congressional attention for years. Starting in the PSLRA's infancy, "a prime target" of the Republican Party's 1994 Contract With America was

securities actions that "allege 'frauds on the market.'" Tim Ferguson, Business World: A Contract to Restore Contract to Securities Law, *Wall Street Journal*, Oct. 25, 1994, at A17. Naturally, *Basic* became a central part of the PSLRA debate.

Thus, the relevant question here is straightforward: Did Congress keep *Basic* and the fraud-on-the-market theory intact in the PSLRA such that established securities class actions would be preserved? The answer—shown by both the PSLRA's history and text—is a resounding yes.

1. History

Consider the early history first. As the other amici legislators and staff acknowledge in their brief, the initial version of the PSLRA (H.R. 10) would have abrogated *Basic* entirely by requiring plaintiffs' eyeball reliance on misleading statements. (Br. 6.) SEC Chairman Arthur Levitt testified that this requirement would be "antithetical to our entire system of disclosure" and that this would "eliminate the notion of fraud on the market." Serial No. 104-2 at 194. Chairman Levitt further explained in his written statement that the bill would overturn the holding "of the Supreme Court in . . . *Basic*" and "fundamentally alter existing law." Serial No. 104-2 at 203–04.

That version was rejected. Representative Christopher Cox, a champion of securities litigation reform, noted in remarks directed to Chairman Levitt that the bill would be amended "because frankly, we found your arguments persuasive." *Id.* at 209.

Then a bill emerged (H.R. 1058) from the House Committee on Commerce that would have significantly

limited (but not entirely abrogated) the fraud-on-the-market theory endorsed in *Basic*. For example, the bill would have limited the fraud-on-the-market theory to cases involving securities traded on national exchanges, would not have clearly permitted claims based on indirect reliance (e.g., where a broker relied on a misrepresentation and misinformed the plaintiff), and would have made it easier for defendants to rebut the presumption of fraud on the market. *See 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. 252–53, 363, 364 (1995). Again, however, the SEC opposed these efforts to undermine *Basic*. *See, e.g.*, H.R. Rep. No. 104-50 at 44 (1995) ("The Commission recommends that the language [regarding securities not on national exchanges] be amended to clarify that both direct and indirect reliance would suffice."). Other witnesses recognized that this weak version of the fraud-on-the-market theory fell far short of the current state of the law as stated by this Court in *Basic*. *See id*. at 369 (Report by the Committee on Securities Regulation and the Committee on Federal Courts of the Association of the Bar of the City of New York) ("Proposed changes in the law on reliance and fraud on the market are counterproductive and *should be withdrawn in favor of current case law in the area*.") (emphasis added). This bill (H.R. 1058) was also rejected.

The Senate similarly rejected versions of legislation that would have abrogated *Basic*'s fraud-on-the-market theory. For example, the original Committee Print of S. 240 would have required an investor's eyeball reliance on misleading forward-looking statements. *Private*

Securities Litigation Reform Act of 1995, Report of the Comm. on Banking, Housing, & Urban Affairs of the U.S. Senate, S. Rep. No. 104-98, at 42 (June 19, 1995). But on May 25, 1995, Committee Chairman Alfonse M. D'Amato "ordered S. 240 favorably reported," S. Rep. No. 104-98, at 3 (1995), after offering a substitute Committee Print that "deleted the requirement that an investor prove he or she 'had actual knowledge of and actually relied on' a fraudulent statement," *id.* at 42 (Additional Views of Senators Sarbanes, Bryan, and Boxer). As reflected in a letter SEC Chairman Levitt wrote to Senator D'Amato, this change appeared to be a direct response to concerns raised by the SEC:

> The Committee staff appears to be genuinely interested in the Commission's views of the draft legislation and has attempted to be responsive. I was pleased to see the latest drafted *deleted the requirement that a plaintiff must read and actually rely upon the misrepresentation before a claim is actionable*.

May 25, 1995 letter from Arthur Levitt to Hon. Alfonse M. D'Amato, 141 Cong. Rec. S9126 (emphasis added).

The Senate also considered eliminating the presumption of reliance embedded in the fraud-on-the-market theory by delegating to the SEC the authority to determine when a party could invoke the presumption. S. 667, 104th Cong. (1st Sess. 1995). That effort to weaken the theory as established in *Basic* similarly failed.

The legislative history thus shows that both chambers of Congress and various congressional committees considered abolishing or modifying the

fraud-on-the-market presumption. The extended debate over *Basic* was a key part of the congressional debate that culminated in the PSLRA. But in enacting the PSLRA, Congress chose to leave the fraud-on-the-market presumption untouched.

The settled doctrine of fraud on the market underlying securities class actions as stated in *Basic* was preserved in the process of enacting the PSLRA. Senator Carol Moseley Braun (an original co-sponsor of S. 240, which ultimately became the law) confirmed that Congress preserved the doctrine: "The House bill abolished liability for fraud on the market. The Senate bill *left that doctrine unchanged*, and the conference bill adopts the Senate approach." 141 Cong. Rec. S17984 (Daily ed. Dec. 5, 1995) (emphasis added).

2. Text

The PSLRA's provisions show that Congress indeed preserved the fraud-on-the-market theory while simultaneously imposing a number of stricter requirements and limitations on plaintiffs bringing securities suits. As noted in *Basic*, securities class actions for alleged misrepresentations under Section 10(b) and Rule 10b-5 would effectively no longer exist without the fraud-on-the-market theory. *Basic*, 485 U.S. at 242. Congress proved that it understood that such suits would continue by affirmatively regulating them (not eliminating them) through the PSLRA.

Indeed, in the statutory section devoted to "Private class actions," the PSLRA regulates securities class actions in great detail, implementing procedures such as the following:

- certification of the class representative, 15 U.S.C. § 78u-4(a)(2);
- requiring certifications filed with the complaint, *id.*;
- appointment of lead plaintiff for the class, *id.* § 78u-4(a)(3);
- restrictions on class representatives' recovery, *id.* § 78u-4(a)(4);
- restrictions on settlements under seal, *id.* § 78u-4(a)(5);
- restrictions on class counsel's attorney fees, *id.* § 78u-4(a)(6); and
- requirements for detailed disclosure of settlement terms, § 78u-4(a)(7).

These provisions make sense for securities class actions alleging misrepresentations under Section 10(b) only if there is a fraud-on-the-market theory to support those actions. In other words, *Basic* authorized fraud-on-the-market class actions—the PSLRA simply regulates and limits them. And, of course, the various other restrictions the PSLRA imposes generally on plaintiffs in securities suits apply to the class actions as well.[2]

---

[2] As examples of these limitations, Congress established heightened pleading requirements, *id.* § 78u-4(b)(1)(2); imposed a stay on discovery pending adjudication of motions to dismiss, *id.* § 78u-4(b)(3)(B); required plaintiffs to prove loss causation, so that defendants are not liable for price declines unrelated to fraud, *id.* § 78u-4(b)(4); limited damages in cases in which the market rebounds quickly after negative disclosure, *id.* § 78u-4(e); limited defendants' joint and several liability, *id.* § 78u-4(f); authorized

In sum, the PSLRA's enactment shows that Congress deliberately preserved *Basic* and the fraud-on-the-market theory. If this Court were to overrule *Basic*, it would effectively nullify Congress's carefully crafted—and explicit—regulation of securities class actions.

B. Congress similarly maintained *Basic* when enacting SLUSA and subsequent legislation.

Three years after the enactment of the PSLRA, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353 (1998), which sought to curb abuse of state-court class actions by requiring securities-fraud class actions to be filed in federal court, and therefore to comply with the additional requirements of the PSLRA. When it addressed for a second time perceived class-action abuses, and in the face of evidence that the PSLRA alone was not achieving Congress's intended goals, Congress still chose not to take any further action with respect to the fraud-on-the-market theory; instead, it chose to simply move more cases into the PSLRA regime. Moreover, the majority of class actions that created the concerns that motivated SLUSA were fraud-on-the-market cases, but Congress chose to allow plaintiffs to pursue them in federal court rather than abolish or curtail such claims. Thus, SLUSA expressly contemplates preserving such securities class actions and *Basic*'s fraud-on-the-market theory.

---

sanctions for abusive litigation, *id*. § 78u-4(c); limited damages and attorney's fees, *id*. § 78u-4(a)(6), (e); and created a safe-harbor for forward-looking statements, *id*. § 78u-5.

Subsequent legislative events, including the Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002), and the Class Action Fairness Act, Pub. L. No. 109-2 (2005), likewise involved no efforts to revisit *Basic*, even as parties, such as Halliburton, continually raised concerns about securities class actions. The same is true of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which directed the SEC to study whether private rights of action under Section 10(b) should be extended to cover extraterritorial securities transactions and conduct (addressing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010)). *See* Pub. L. No. 111-203, 124 Stat. 1376, § 929Y (July 11, 2010). The Dodd-Frank Act also directed the GAO to study the impact of authorizing a private right of action against aiders and abettors of violations of the securities laws (addressing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162–63 (2008)). *See* Pub. L. No. 111-203, 124 Stat. 1376, § 929Z. Congress is actively regulating securities suits, and it is leaving *Basic* and the class actions it underlies in place.

* * *

In light of all of the evidence, Congress's decision to maintain the status quo in such a heavily regulated field is intentional. Congress has kept *Basic* intact.

III. The Other Legislators' Arguments That Congress Has Not Preserved *Basic* Are Unsupportable.

The other legislators essentially make three points in their amici brief in an effort to show that Congress did not approve *Basic*, but the legal and historical

backdrop discussed above reveals these points to be fundamentally flawed.

First (and foremost), the other legislators claim that Congress had no opinion regarding *Basic* and the fraud-on-the-market theory because Congress did not formally codify that theory. (Br. 5.) But that ignores the reality of which Congress was acutely aware that—absent legislative action—*Basic* would remain the law. Just as the other legislators acknowledge regarding Congressional action in the face of other efforts to change settled law, it is "hardly conceivable that Congress * * * was not abundantly aware of what was going on." (Br. 20 (quoting *Bob Jones Univ.,* 461 U.S. at 599).) The reality is that opponents of the fraud-on-the-market theory tried and failed to convince a majority of Congress to abandon or even modify it.

Relatedly, the other legislators argue that Congress's decision not to formally codify *Basic* stands in contrast with its decision to codify the loss-causation requirement. (Br. 21.) But unlike the settled endorsement of the fraud-on-the-market theory in *Basic*, there was no settled position on the loss-causation requirement. *Compare Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir. 1992) (likening loss causation to proximate cause and holding that "[t]o establish loss causation a plaintiff must show that the economic harm that it suffered *occurred as a result of* the alleged misrepresentations"); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir. 1988) (same), *with Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1436–37 (9th Cir. 1987) (holding that plaintiffs need only allege that the market price paid by them exceeded the value of the security at the time of

purchase). Thus, codification of the loss-causation requirement in the PSLRA settled an unclear area of the law, as this Court recognized in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343–44 (2005) (holding that the PSLRA rejected the Ninth Circuit's position and required proximate causation); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (codification of heightened scienter standard in PSLRA "signaled Congress' purpose to promote greater uniformity among the Circuits"). Moreover, the loss-causation requirement is highly relevant to fraud-on-the-market cases, which means that Congress's decision to codify that requirement suggests its agreement with fraud-on-the-market principles as they stood at the time, i.e., as set forth by *Basic*.

Similarly, the other legislators claim that Congress's decision not to codify *Basic* stands in contrast with its response to *Central Bank*. (Br. 21–22.) But Congress's response to *Central Bank* actually supports the conclusion that it approved *Basic*. In *Central Bank*, this Court refused to recognize aiding-and-abetting liability in private securities-fraud actions. Congress responded by permitting the SEC to pursue such liability, but it said nothing about such liability in private claims. This Court drew the inference that Congress's silence indicated its approval of *Central Bank*'s rejection of such liability in private suits. *See Stoneridge*, 552 U.S. at 162–63. The PSLRA's silence regarding *Basic* similarly reveals congressional approval of the settled law concerning fraud on the market.

Second, the other legislators offer a speculative argument that the PSLRA does not show Congressional approval of *Basic* because the statute was purposely narrow, and designed to garner supermajorities in both houses of Congress to override President Clinton's veto. (Br. 19.) But this ignores that the PSLRA is the most substantial legislation ever passed to reform securities class actions—and *Basic* was a principal feature of the existing background. Additionally, there is no evidence that Congress would have overruled *Basic* if it had to muster simple majorities in both chambers. Indeed, the fact that Congress has not taken up the issue again—and the fact that the SEC has never wavered in its support of the fraud-on-the-market theory—suggest a high degree of satisfaction with the law as it stands.

Finally, the other legislators argue that Congress's response to the fraud-on-the-market theory is entitled to less weight because the theory originated in this Court. (Br. 25.) To the contrary, that means Congress knew it had the choice to alter the theory through legislation, and affirmatively chose not to. Moreover, as explained above, in enacting the PSLRA and SLUSA, Congress made major changes to the law governing securities class actions and placed its stamp upon the law in this field, but left the fraud-on-the-market presumption untouched.

CONCLUSION

Just last Term, this Court concluded in *Amgen* that in enacting the PSLRA, Congress rejected calls to revisit *Basic*. *See* 133 S. Ct. at 1201. That conclusion is correct: Congress considers *Basic* to be an essential part of the very fabric of our nation's securities laws.

Respectfully submitted,

David E. Mills
Counsel of Record
THE MILLS LAW OFFICE LLC
1300 West Ninth St., Ste.636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Barry A. Weprin
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300
bweprin@milberg.com

Counsel for Amici Curiae

February 2014

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix List of Amici Curiae 1a

LIST OF AMICI CURIAE

Barbara Boxer has served as United States Senator from California since 1993, and she previously served as United States Representative from California for ten years. She served on the Senate Committee on Banking, Housing, and Urban Affairs and the Subcommittee on Securities in 1995.

Edward J. Markey has served as United States Senator from Massachusetts since 2013, and he previously served as United States Representative from Massachusetts for 37 years. He served as Chairman of the House Commerce Subcommittee on Telecommunications and Finance from 1987 to 1994 and as the Ranking Member of the Subcommittee in 1995.

John D. Dingell has served as United States Representative from Michigan since 1955. He served as Chairman of the U.S. House Committee on Energy and Commerce from 1981 until 1994. He was Ranking Member of the Full Committee from 1995 until 2006 and then again Chairman from 2007 until 2008.

John J. Conyers has served as United States Representative from Michigan since 1965, and he is the Ranking Member of the House Committee on the Judiciary.

Maxine Waters has served as United States Representative from California since 1991, and she is currently the Ranking Member of the House Committee on Financial Services.

Jerrold Nadler has served as United States Representative from New York since 1992, and he has

served as Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties.

Bobby L. Rush has served as United States Representative from Illinois since 1993, and he was a member of the House Commerce Subcommittee on Telecommunications and Finance in 1995. He also served as conferee on the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203).

Carol Moseley Braun served as United States Senator from Illinois from 1993 to 1999. She served on the Senate Committee on Banking, Housing, and Urban Affairs in 1995.

Gary Ackerman served as United States Representative from New York from 1983 to 2013, and he served on the House Committee on Financial Services.

William L. Clay, Sr. served as United States Representative from Missouri from 1969 to 2001, and he was the Ranking Member of the Committee on the Post Office and Civil Service in 1995.

John Wiley Bryant served as United States Representative from Texas from 1983 to 1997, and he served on the House Committee on Commerce in 1995.

Jeffrey S. Duncan served, from 1990 to 1994, as Senior Finance Policy Analyst on the House Energy and Commerce Committee's Subcommittee on Telecommunications and Finance, which was then chaired by Representative Edward J. Markey and had jurisdiction over securities and exchanges, the securities industry, and the Securities and

Exchange Commission. From 1995 to 2007, Mr. Duncan served as Legislative Director for Rep. Markey, who from 1995 to 1997 served as the Ranking Democrat on the Subcommittee. In this capacity, Mr. Duncan was responsible for the Subcommittee's work on securities legislation and its oversight activities involving securities and exchanges.

Consuela M. Washington served as Counsel from 1979 to 1994, Minority Counsel from 1995 to 2001, Senior Minority Counsel from 2001 to 2006, and Chief Counsel for Commerce, Trade, and Consumer Protection from 2007 to 2008, all with the U.S. House Committee on Energy and Commerce, to whom she was principal adviser on legislation regulating the Nation's securities markets, securities industry, and the Securities and Exchange Commission until changes in Committee jurisdiction in 2001.

Timothy J. Forde served as Counsel to the Subcommittee on Telecommunications and Finance in 1992; Senior Counsel to the Subcommittee on Telecommunications & Finance from 1993 to 1994; Minority Counsel to the Committee on Commerce from 1995 to 1997; and Counselor to Chairman Arthur Levitt, Chairman of the U.S. Securities and Exchange Commission from 1997 to 1998.