No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESSAR,

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 OF LEGAL SCHOLARS AS *AMICI CURIAE* WITH RESPECT TO *STARE DECISIS* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Amici Michael Gerhardt, Deborah Hellman, Howell E. Jackson, Michael E. Solimine, and Amanda L. Tyler submit this brief as *amici curiae* in support of respondent in this case. The *amici curiae* have studied and written on the topic of *stare decisis*, the issue addressed in this brief. Specifically,

Michael Gerhardt is the Samuel Ashe Distinguished Professor of Constitutional Law and Director of the UNC Center on Law and Government at the University of North Carolina at Chapel Hill. He has written extensively on *stare decisis*, including one of the leading treatises on the subject THE POWER OF PRECEDENT (2d ed. 2011).

Deborah Hellman is a Professor of Law and the F.D.G. Ribble Professor at the University of Virginia School of Law, where she teaches constitutional law, contracts, and legal theory. Her work on *stare decisis* includes a forthcoming book chapter, "An Epistemic Defense of Precedent," which will appear in PRECEDENT AND THE U.S. SUPREME COURT (Christopher J. Peters ed., expected 2014), and *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995). Hellman was a fellow at the Woodrow Wilson International Center for Scholars (2005-06) and was the Eugene P. Beard Faculty Fellow in

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[1] Letters from the parties consenting generally to the filing of briefs of *amici curiae* are on file with the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Ethics at the Edmond J. Safra Center for Ethics at Harvard University (2004-05). She was awarded a National Endowment for the Humanities Fellowship for University Teachers in 1999. Before joining the Virginia faculty, Hellman taught at the University of Maryland School of Law. Hellman has been a visiting professor at the University of Pennsylvania Law School and at the University of Virginia.

Howell E. Jackson is the James S. Reid, Jr., Professor of Law at Harvard Law School. His research interests include financial regulation, international finance, consumer protection, federal budget policy, and entitlement reform. Professor Jackson is a senior editor for Cambridge University Press Series on International Corporate Law and Financial Regulation. He is also co-editor of FISCAL CHALLENGES: AN INTER-DISCIPLINARY APPROACH TO BUDGET POLICY (2008), co-author of ANALYTICAL METHODS FOR LAWYERS (2003) and REGULATION OF FINANCIAL INSTITUTIONS (1999), and author of numerous scholarly articles.

Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, where he has taught since 1986. He teaches and writes in civil procedure, federal courts, complex litigation, appellate procedure, and conflict of laws. His scholarship has addressed various aspects of the legislative process, including an empirical analysis of congressional responses to Supreme Court decisions interpreting federal statutes. *See* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992).

Amanda L. Tyler is a Professor of Law at the University of California Berkeley School of Law. She was previously a member of the faculty at the George Washington University Law School and has also served as a visiting professor at Harvard Law School, New York University School of Law, and the University of Virginia School of Law. Professor Tyler's research and teaching interests include the federal courts, the separation of powers, habeas corpus, and statutory interpretation. She has published works in numerous legal journals, including the Harvard Law Review, Yale Law Journal, and Stanford Law Review. In the field of statutory interpretation, Professor Tyler's article *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. (2005), focuses on statutory *stare decisis.*

SUMMARY OF ARGUMENT

This Court has long applied a particularly rigorous version of *stare decisis* to decisions that construe federal statutes and, therefore, are subject to revision by Congress. Contrary to petitioners' claims, there is no basis for declining to apply that rule in this case. In fact, principles of *stare decisis* call for special reluctance to overrule this Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

I. Statutory *stare decisis* facilitates congressional oversight of judicial elaboration of federal statutes by allowing Congress to assume with confidence that it need intervene in the development of the law only when it comes to believe that a judicial decision is wrong or has become outdated. Any other rule would pose an unnecessary burden on Congress to codify decisions with which it agrees, and would prevent Congress from enacting further legislation that depends for its proper functioning on the continued stability of this Court's decisional law. With respect to the statute at issue in this case, Congress has paid careful attention to the development of the Rule 10b-5 class actions made possible by the *Basic* presumption, enacting laws that assume their existence and address the very practical concerns petitioners identify as a reason to overrule the Court's decision. For example, in the Private Securities Litigation Reform Act, Congress restricted securities class actions in numerous ways, including by limiting damages, delaying discovery, providing new sanctions for frivolous class action suits, and creating new rules for the selection of lead plaintiffs.

As importantly, statutory *stare decisis* leaves the task of modifying decisions like *Basic* to the branch of government that is best suited to evaluate the often-complicated factual claims underlying the call for its repeal and the unavoidable political judgments those requests entail. It might, of course, be argued that because the Court waded into these debates when it first decided *Basic*, it is therefore appropriate to consider them afresh now. That is a palpable *non sequitur*. Rightly or wrongly, the *Basic* Court invoked usual tools of statutory interpretation in 1988. *Stare decisis*, a primary such tool, was not relevant to the original analysis in *Basic*. *Stare decisis* should, however, dominate the reconsideration of that holding now. This Court has since curtailed recognition of implied rights of action precisely to avoid such entanglements without significant legislative guidance. But that does not justify taking a second dip in the pond. Strict adherence to statutory *stare decisis* avoids both unnecessary additional entanglements with issues best decided by legislators and the appearance that the decision whether to reconsider a statutory precedent is driven by changes in the Court's composition or policy perspective. In short, judicial interpretation of acts of Congress does operate on a ratchet, which in the usual case such as this it is for Congress to loosen.

Stare decisis also protects reliance interests, and in this case Congress, the Executive, and investors have all come to rely substantially on the Court's decision in *Basic*. Congress, for example, has enacted statutes that rely for their intended operation on the continued existence of the Rule 10b-5 class actions made possible by the fraud-on-the-market

presumption. Thus, the Securities Litigation Uniform Standards Act (SLUSA) was enacted to channel most securities class actions into federal court by pre-empting state laws that permit parallel state law securities claims in state court. Were this Court to overrule *Basic*, and thereby effectively eliminate most federal securities class actions in federal court, SLUSA would have a dramatically different effect, eliminating state law class actions without providing any federal replacement. That is something Congress surely did not intend.

Likewise, requiring investors personally to review and understand the disclosures of every company in which they invest, or face the prospect of having no remedy for market-moving frauds, would require a radical transformation of the way in which the industry has operated for decades. And it could make some kinds of investing (for example, passive investments through index funds) materially less attractive, thereby distorting capital markets.

II. Petitioners' additional arguments against applying statutory *stare decisis* in this case are unfounded. Although *Basic* elaborates a judicially implied private right of action, this is not one of the rare areas of law (like antitrust or maritime law) in which Congress has effectively delegated common law powers to the courts. As discussed, Congress has carefully superintended the details of the Rule 10b-5 private right of action, particularly with respect to class actions. Accordingly, all the reasons for applying a strong presumption of statutory *stare decisis* in deference to that congressional oversight apply to decisions elaborating the details of an implied right of action.

Petitioners are likewise wrong in comparing *Basic*'s presumption to the kind of procedural or evidentiary rules the Court has said warrant less *stare decisis* protection because they do not engender reliance interests. *Basic* established a substantive rule of securities law, declaring what a plaintiff must establish to prove a claim, rather than the procedures and evidence through which that claim must be proven. And as discussed, *Basic* has generated substantial reliance interests, and congressional oversight, that preclude any argument that this is the kind of rule Congress would leave to the courts.

ARGUMENT

I. *Stare Decisis* Considerations Apply With Full Force To Petitioners' Request That This Court Overrule *Basic*.

This Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), interprets a statute enacted by Congress and, as a consequence, is subject to revision by the legislative branch if, and in the manner, our elected representatives see fit. Congress has, in fact, paid detailed attention to the issue of Rule 10b-5 class actions in the wake of *Basic*. The doctrine of *stare decisis* accordingly applies to *Basic* with particular force, triggering a strong presumption that it is for Congress, rather than the courts, to change statutory rules. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 251 (1998) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") (citation omitted); *Rasul v. Bush*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (describing the Court's "almost categorical rule of *stare decisis* in statutory cases"). Despite petitioners' claims to the contrary, those considerations apply with full force in this case.

A. *Stare Decisis* Applies With Particular Force In This Case Because *Basic* Implements A Statute And Is Therefore Subject To Congressional Supervision And Revision.

The strong statutory *stare decisis* presumption arises from the respect owed the legislative branch and the reality that Congress is often better suited to evaluate whether an existing statutory rule or interpretation should be abandoned in light of changed circumstances or policy judgments. That is nowhere more true than in a case like this one. Congress has repeatedly considered the statute's scope. And the arguments for overruling *Basic* are rooted in questions that Congress regularly considers, such as the manner in which the securities markets function and whether existing law produces litigation that imposes an excessive burden on commerce.

1. While courts inevitably must develop rules to implement, or fill interstices within, a statutory regime, the ultimate authority and responsibility for enacting and revising legislation lie with Congress. Indeed, particularly when judges must develop rules with little specific statutory guidance – as they must, for example, in elaborating the details of an implied private right of action – the legitimacy of that judicial decision making is premised in substantial part on Congress's ability to revise rules with which it disagrees.

Statutory *stare decisis* facilitates that important congressional oversight. On a practical level, it permits Congress to presume that it need not enact legislation expressly adopting every judicial

construction of a statute with which it agrees. Instead, Congress may rely on the understanding that it need only respond to interpretations it thinks wrong or outdated. That predictability is particularly important when Congress enacts other measures that depend for their effectiveness or fairness on the continued application of prior judicial decisions.[2]

Accordingly, when a statutory precedent has come under fire, the question for the Court is not simply whether ordinary *stare decisis* considerations would warrant revisiting the precedent, for Congress is perfectly capable of making the same calculus – *e.g.*, whether the rule has proven unworkable, whether overturning it would unfairly impose hardships upon those who have relied on it, or whether the rule has been overtaken by changes in the world or our understanding of it. *See, e.g.*, *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 362-63 (2010). The Court must also ask whether there is a sufficient reason to depart from the ordinary understanding that revising statutory precedents is the job of the politically accountable branches, not the courts.

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[2] Congressional revision of statutory decisions is not a mere theoretical possibility; it is a regular occurrence. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992); Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340 (2007).

2. This case presents a particularly compelling candidate for strict adherence to the Court's strong presumption of statutory *stare decisis*.

a. Congress has shown that it is carefully attending to this cause of action.

As this Court has recognized, Congress has repeatedly enacted legislation to govern aspects of private Rule 10b-5 litigation, including class action suits, often in response to this Court's decisions. *See, e.g.*, *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 293-94 (1993) (explaining that after the Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), adopted a short statute of limitations for Rule 10b-5 actions, "Congress intervened by limiting the retroactive effect of our decision") (citing 15 U.S.C. § 78aa-1);[3] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157-58 (2008) (explaining that after the Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), held "that § 10(b) liability did not extend to aiders and abettors," Congress enacted legislation "direct[ing] prosecution of aiders and abettors by the SEC"); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b)(2), 124 Stat. 1376, 1864 (2010) (revising Court's ruling in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), that

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[3] In the Sarbanes-Oxley Act of 2002, Congress went a step further, amending 28 U.S.C. § 1658 to provide a longer statute of limitations than adopted in *Lampf*. Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801.

Securities Exchange Act did not apply extraterritorially, to permit suits by the SEC for some extraterritorial conduct); *id.* § 929Y (requiring the SEC to conduct study on whether Congress should likewise authorize private suits for extraterritorial conduct).

Of particular relevance are the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227. In *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 113 S. Ct. 1184 (2013), the Court explained that the PSLRA enacted a series of special provisions for securities class actions, including heightened pleading requirements, limitations on recoveries, new rules for selecting lead plaintiffs, sanctions for frivolous litigation, and authorization for a stay of discovery pending any motion to dismiss.[4] *Id*. at 1200. SLUSA was then enacted to "curtail[] plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law." *Id.* (citing 15 U.S.C. § 78bb(f)(1) (prohibiting most state law securities fraud class actions)).

Both the PSLRA and SLUSA are premised on Congress's understanding that the Rule 10b-5 class

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[4] While the PSLRA applies to the Securities Exchange Act's express causes of action as well, this Court has recognized that the statute was plainly directed at the far more common class litigation under the Rule 10b-5 implied private right of action. *See Stoneridge*, 552 U.S. at 165.

actions made possible by the *Basic* presumption[5] would remain a "prominent feature of federal securities regulation," *Stoneridge*, 552 U.S. at 165. Indeed, in enacting the PSLRA, Congress "homed in on the precise policy concerns raised" by petitioners in this case. *Amgen*, 133 S. Ct. at 1200 (explaining that in the PSLRA, Congress "addressed the settlement pressures associated with securities-fraud class actions"); Petr. Br. 34-49. Rather than legislatively overrule the *Basic* presumption, Congress instead opted to carefully and specifically modify the rules under which 10b-5 classes can be certified and prosecuted. *See Amgen*, 133 S. Ct. at 1200-01 (describing measures and noting that Congress "rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*").[6]

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[5] As this Court has recognized, "[a]bsent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." *Amgen*, 133 S. Ct. at 1193; *see also Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (same).

[6] The Court explained that the first version of the PSLRA included a provision abrogating *Basic*. *See Amgen*, 133 S. Ct. at 1201; *see also* H.R. 10, 104th Cong., 1st Sess. (1995). Witnesses in the House Committee on Commerce likewise testified in favor of overruling *Basic*. *See Common Sense Legal Reform Act: Hearings before the Subcommittee on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess., 92, 236-237, 251-252, 272 (1995). But the provision overruling *Basic* was not included in the final legislation. *See Amgen*, 133 S. Ct. at 1201.

Whether or not such actions amount to congressional ratification of *Basic* is beside the point for purposes of *stare decisis*. The point instead is that Congress is not only perfectly capable of ratifying or rejecting *Basic* in the abstract but has been especially attentive to securities fraud class actions in particular. Respect for that authority counsels strongly against judicial revision of that established precedent. *Cf. Stoneridge*, 552 U.S. at 162-63 (refusing to recognize implied private right of action under Rule 10b-5 against aiders and abettors because Congress had, in the PSLRA, enacted a different solution to the same perceived problem by authorizing the SEC to prosecute aiders and abettors).

b. Considerations of institutional competence reinforce that conclusion. Petitioners' argument for overturning *Basic* depends in substantial part on claims about the actual operation of securities markets. *See* Petr. Br. 15-22. Even with the assistance of *amicus* briefs and citations to law review articles, this Court is less well-suited than Congress to evaluate such complex empirical claims. That this evaluation must inevitably be influenced by political and ideological pressures, wherever it is made, is all the more reason to leave it with the politically responsible branches. Moreover, Congress has available to it fact-finding tools that far outstrip the capacity of any court. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 389 (1983). And in this context, it may rely on the recommendations of the expert agency assigned to administer the nation's securities laws.

In addition, even if the Court were convinced that the present fraud-on-the-market regime

warranted revision, Congress has far greater flexibility in responding to the problems petitioners identify than would this Court. While the Court may decide to overrule *Basic*'s presumption of reliance, Congress could choose to address the underlying policy concerns in a different, perhaps more direct, way – for example, by enacting further restrictions on securities class actions or the remedies available in such litigation. *Cf*. 15 U.S.C. § 78u-4(e) (limiting damages in securities class actions when the market rebounds quickly after a negative disclosure). Or, if Congress chose to require proof of individual reliance, it might also enact measures to counteract the potential for that change to reduce deterrence and enforcement – perhaps by requiring greater dissemination of financial statements directly to shareholders, enlarging the enforcement capacity of the SEC, or increasing criminal penalties. *See, e.g.*, William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PENN. L. REV. 69 (2011) (proposing elimination of fraud-on-the-market theory be counterbalanced by doubling of the SEC's enforcement budget).

Of course, all of those alternative options – like the elimination of *Basic* itself – involve trade-offs between protecting defendants from vexatious litigation, on the one hand, and decreased enforcement and deterrence, on the other. *See Amgen*, 133 S. Ct. at 1199-1202. How to balance those competing interests depends in part on empirical judgments (about, *e.g.*, the relative proportion of meritorious to vexatious securities litigation) and in part on value judgments (about, *e.g.*, the relative importance of protecting innocent defendants from meritless suit and providing truly

injured investors a remedy) that are the typical fare of the political, not the judicial, process.

Indeed, the basis of the parties' disagreement, and the underpinnings of petitioners' broad-based attack on the premise of economic rationality more generally, are not just matters of abstract economic theory. If they were, Congress also would be an unlikely forum to judge their theoretical validity. Instead, the disagreements implicate deep political and even philosophical disputes about whether people en masse or individually are reliable judges of their own welfare and therefore about the extent to which governments should intervene to protect individuals from what some may view as irrational choices. The securities laws intervene in markets primarily by protecting investors from false and misleading information. Correcting and punishing lies and deceit is universally recognized as a proper role of government. *See, e.g.*, Richard A. Epstein, *The Supreme Court 1987 Term, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 59 (1988). But the extent and kind of that protection are principally issues of political philosophy and political value and therefore preeminently questions to be resolved in the political fora. We hope that petitioners and their *amici* would agree that this Court is not such a forum.

It is no answer that *Basic* itself necessarily involved the Court in resolving a contested policy question, in part on the basis of its review of contestable empirical evidence. The prospect of being drawn into such decision making may be a reason to hesitate before implying private rights of action in

the first place. *See Stoneridge*, 552 U.S. at 164-65 (explaining that in the years since the Court's recognition of the Rule 10b-5 right, the Court has abandoned the practice of liberally implying rights of action). But as this Court has recognized, it is too late for this Court to disestablish the Rule 10b-5 right of action. *See id*. at 165 (noting that Congress has "ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action"). The Court is thus left with either re-entering the political fray or leaving revisions to the political branches. The rule of statutory *stare decisis* provides the wisest answer, avoiding the appearance that both the substance of the law, and the choice to revise it, depend more on the proclivities of the Court's current membership than on neutral principles. *See Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (*stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact").

B. Overruling *Basic* Would Implicate Important Reliance Interests.

Stare decisis also "has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (quoting *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). In this case, overruling *Basic* would implicate important reliance

interests of Congress, the Executive Branch, the securities industry, and investors.

1. Congress repeatedly has enacted legislation in reliance upon the existence of the *Basic* presumption and the Rule 10b-5 class actions that decision was designed to foster. For example, in enacting SLUSA, Congress broadly pre-empted state laws permitting securities class actions under state law in state courts. *See* 15 U.S.C. § 78bb(f)(1). No doubt, Congress believed that this very significant incursion on state sovereignty was acceptable in large part because Rule 10b-5 class actions in federal court remained as an available substitute. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2(5), 112 Stat. 3227, 3230 (congressional statement that SLUSA was enacted to establish "national standards for securities class action lawsuits involving nationally traded securities"). Overruling *Basic* would pull the rug out from under Congress's feet and turn SLUSA into something very different from what Congress intended: instead of channeling securities class actions into federal court (where they would be governed by the PSLRA regime), SLUSA would have the effect of eliminating securities class actions altogether by preempting state class actions in the absence of any viable alternative in the federal system.

2. The SEC has likewise relied on *Basic* in drafting its disclosure regulations on the assumption that shareholders need not directly review required disclosures in order to seek a remedy for the harms caused by false disclosures through their effect on market prices. During hearings leading up to the

enactment of the PSLRA, for example, the chairman of the SEC explained:

> Much of the Commission's disclosure regulation, however, is premised on the assumption that the market will absorb all available information and incorporate it into a company's stock price. We do not, for example, require that companies mail their periodic SEC reports to every shareholder.

Testimony of Arthur Levitt, Chairman U.S. Securities and Exchange Commission Concerning Litigation Reform Proposals Before the Subcommittee on Telecommunications and Finance, Committee on Commerce, United States House of Representatives (Feb. 10, 1995), *available at* http://www.sec.gov/news/testimony/testarchive/1995/spch025.txt.

3. *Basic* also has affected the way in which the securities industry has structured its operations. Under *Basic*, investors need not read every corporate disclosure that has the potential to cause injury to be assured of an available remedy if the statement proves to be false and, through its effect on market prices, causes the investors a loss. But absent *Basic*, investors would be forced to examine for themselves the information they have previously trusted the market to digest, or forgo any ability to recover for any losses occasioned by fraudulent statements.

Importantly, investors in the market today would not have reviewed individual corporate disclosures over the past several years, in reliance on *Basic*'s holding that they are nonetheless protected by the securities laws. But the ruling petitioner seeks would retrospectively strip investors of that

protection for later-filed securities fraud actions that are based on misrepresentations made prior to this Court's ruling.

Going forward, the so-called "eyeball reliance" that petitioner seeks could force conscientious institutional investors (particularly those with fiduciary obligations) to radically change their operations to maximize the potential for recovery for losses occasioned by securities fraud. That could include incurring new expenses to create the capacity to collect and understand disclosures from possibly thousands of companies in which the institution holds stock. Conversely, it could create an incentive for such investors to reduce the number of their holdings (and thereby the diversity of their portfolios, increasing risk) to make the monitoring of corporate disclosures more manageable. Likewise, aware that the deterrent effect of the prospect of class litigation has been reduced, investors could well become less willing to invest in stocks of companies (or sectors of the economy) with an unproven track record for integrity, thereby further distorting securities markets.

Abandonment of *Basic* could also render infeasible (or at least considerably less useful) one of the most common forms of securities investing – the use of index funds and other passively managed investments. An index fund simply purchases and holds the stocks of companies listed in a market index, such as the Standard & Poor's 500 index, so that the fund can be expected to mirror the performance of the index. *See* Securities and Exchange Commission, Index Funds, http://www.sec.gov/answers/indexf.htm. These funds

are attractive precisely because their administrative costs are kept low by managers *not* expending the resources required to decide which stocks to buy and sell, and when. *See id*. Thus, almost by definition, those who hold investments in – and, indeed, those who manage – an index fund could never prove individual reliance on corporate misrepresentations, even if the misrepresentation plainly affected market prices, to the injury of the fund. They would be faced with an unenviable choice – abandon the advantages of passive investment in order to ensure availability of a remedy for such frauds, or absorb the losses occasioned by even the most extreme and injurious frauds with no hope of recovery.

II. Petitioners' Argument In Favor Of Relaxing *Stare Decisis* Constraints In This Case Are Meritless.

Petitioners nonetheless claim that *stare decisis* considerations apply with lesser force in this case for two reasons, neither of which bears scrutiny.

A. *Stare Decisis* Applies With Full Force To Decisions Elaborating The Requirements Of An Implied Private Right Of Action.

Petitioners first argue there "is no occasion for applying the heightened form of *stare decisis* that attends statutory construction, for *Basic*'s presumption stems from a judicially implied cause of action." Petr. Br. 32. Where a rule is judge-made, petitioners argue, this Court – not Congress – bears principal responsibility for corrections and revisions. *Id*. Not so.

To be sure, there are a very few areas of statutory law in which Congress has effectively delegated to the courts responsibility for developing, maintaining, and modifying the operative legal rules. The maritime and antitrust cases petitioners rely upon, Petr. Br. 33, are the principal examples. In those contexts, there is no reason for courts to wait for Congress to act to correct misguided decisions or to modify the law in light of changed circumstances.

But this Court has recognized that Congress intends no such delegation under the Securities Exchange Act. This "is not a case," the Court has explained, "in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). To the contrary, as described above, in recent times Congress has closely supervised this area of law, making modifications as it deems appropriate.[7]

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[7] Petitioners note that there was a time in which Congress left elaboration of the 10b-5 cause of action to this Court with little intervention. *See* Petr. Br. 32-33 ("The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right.") (quoting *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 292 (1993)). But that language in *Musick* simply explained why the Court felt free during that period to recognize a new right of contribution. It said nothing to suggest that ordinary principles of statutory *stare decisis* would not apply to that or any other decision elaborating the Rule 10b-5 cause of action. And in *Stoneridge* this Court noted that Congress had since

Thus, this Court has afforded ordinary statutory *stare decisis* effect to its decisions recognizing and defining the Rule 10b-5 implied right of action. For example, even though there is an unusually strong argument that the "judge-made" implied right of action under Rule 10b-5 does not comport with modern standards for finding implied private rights of action, *see Stoneridge*, 552 U.S. at 164, this Court has not overruled it. Instead, the Court has treated "the existence of the private right [as] now settled," *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011),[8] even while declining to recognize similar private rights of action under other provisions of the securities laws.[9] (The Court has applied the same approach with respect to the cause of action implied in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), applying *stare decisis* to preserve previously implied causes of action to enforce certain constitutional rights while declining to extend *Bivens* to new contexts.[10])

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become actively involved in supervising the development of Rule 10b-5 litigation. 552 U.S. at 165.

[8] The Court treated the question as settled even before Congress effectively ratified the implied right of action in various statutory amendments. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy is simply beyond peradventure.").

[9] *See, e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 & n.19 (1979) (no implied right of action under Section 17 of the Securities Exchange Act); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 41-42 (1977) (no implied right of action under Section 14(e) for defeated tender offeror).

[10] *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("[W]e have consistently refused to extend *Bivens*

The Court has likewise afforded *stare decisis* to decisions, like *Basic*, defining the scope and content of the implied cause of action. Particularly in light of statutes like the PSLRA, the Court has explained, it "is appropriate for us to assume that when" that statute was "enacted, Congress accepted the § 10(b) private cause of action *as then defined*." *Stoneridge*, 552 U.S. at 166 (emphasis added). Accordingly, petitioners are unable to identify any occasion on which the Court has overruled one of its Section 10(b) precedents, much less any case disavowing the constraints of statutory *stare decisis*.

That is hardly surprising. All of the reasons for applying a strong *stare decisis* presumption apply whether a judicial rule arises from an interpretation of statutory language or is developed by the Court in the absence of legislative guidance.[11] In either instance, Congress remains empowered to alter the result; requiring Congress to expressly ratify decisions with which it agrees would impose an unworkable burden on the legislature; and Congress remains better suited to decide whether changes in the world or evolving policy preferences require revising the judicial decision.

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liability to any new context or new category of defendants."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., concurring) (acknowledging that although "the ground supporting it has eroded," nonetheless "*Bivens* stands").

[11] Indeed, the distinction between the two categories is more of a gradient than a bright line; interpretation of vague legislative language often relies on much the same analysis as judicial elaboration of an implied right of action.

Any contrary rule would throw the law into disarray, opening up for re-examination any of the numerous decisions defining the Rule 10b-5 action, including many decisions that *constrain* the action and protect defendants from the harms petitioners cite as justification for departing from *Basic*. For example, it is *Basic* itself that establishes reliance as an element of the implied 10b-5 right of action. *Compare Basic*, 485 U.S. at 243 ("We agree that reliance is an element of a Rule 10b-5 cause of action.") *with Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382-83 & n.5 (1970) (holding that reliance is not an element of the implied right of action under Section 14(a)). And similar "judge-made" rules restrict the types of plaintiffs who may bring Rule 10b-5 actions[12] and the kinds of defendant subject to

[12] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-49 (1975) (only purchasers or sellers may bring suit); *see also Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1088 (1991) (holding that implied right of action under Section 14(a) not available to minority shareholders whose votes are not required to authorize corporate action subject to a fraudulent proxy solicitation).

suit,[13] or define what the plaintiff must prove to prevail.[14]

B. *Basic* Is Not The Kind Of Procedural Or Evidentiary Rule That Warrants Lesser *Stare Decisis* Protection.

Finally, petitioners are wrong to argue that the *Basic* rule is a procedural or evidentiary rule of the kind this Court has sometimes said warrants a lesser standard of *stare decisis*. Petr. Br. 29.

While the Court has said that *stare decisis* concerns are lessened in cases "involving procedural and evidentiary rules," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), that observation has no application here because "fraud on the market is a *substantive* doctrine of federal securities-fraud law." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). While sometimes couched in procedural terms, the rule effectively determines *what* a plaintiff must prove, rather than the procedures and evidence by which it must be proven. The rule thus applies equally to lawsuits by

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[13] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (no cause of action against aiders or abettors); *Stoneridge*, 552 U.S. at 166-67 (no cause of action against vendors or customers of corporation that issued securities); *Janus Capital*, 131 S. Ct. at 2302 (limiting 10b-5 liability to parties that actually make material misstatements).

[14] *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (rejecting plaintiffs' loss-causation theory as insufficiently demanding).

individual plaintiffs (as it often is invoked in cases brought by opt-outs) and also class-actions.

Nor does the reason for lesser *stare decisis* protection for procedural and evidentiary rules – the lack of reliance interests, *Payne*, 501 U.S. at 828 – apply to *Basic*. As discussed above, Congress, the Executive, and investors have come to rely on the legal regime founded upon the availability of the fraud-on-the-market theory. Moreover, there is every reason to believe that Congress is prepared to modify such rules when it deems appropriate. *Cf., e.g*., Civil Rights Act of 1991, Pub. L. No. 102-66, § 107, 105 Stat. 1071, 1075-76 (modifying burden-shifting regime established under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for proving discrimination in mixed-motive cases).

The cases cited by petitioners (Petr. Br. 29-30) are not comparable. *See United States v. Gaudin*, 515 U.S. 506 (1995) (overruling constitutional rule permitting court, rather than jury, to decide questions of materiality); *Payne*, 501 U.S. 808 (overruling constitutional rule precluding victim impact evidence in capital trials); *Pearson v. Callahan*, 555 U.S. 223 (2009) (overruling precedent governing order in which judicial opinions should address elements of qualified immunity analysis). In none of these examples was there any claim of reliance by individuals or Congress, which either had no power to alter the constitutional rule at issue (*Gaudin* and *Payne*) or no reason to think that the rule was any of its business (*Pearson*).

CONCLUSION

For the foregoing reasons, the Court should reject petitioners' invitation to overrule *Basic*.

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