No. 15–278

IN THE

Supreme Court of the United States

AMGEN INC., ET AL.,

Petitioners,

v.

STEVE HARRIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* SUPPORTING PETITIONERS

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Pursuant to Rule 37.2(b), the Chamber of Commerce of the United States of America (the "Chamber") and the Pharmaceutical Research and Manufacturers of America ("PhRMA") respectfully move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari in this case. The Chamber and PhRMA have provided counsel of record to the parties at least ten days' notice of their intent to file this motion and brief. Counsel for petitioners consented to the filing of the proposed brief, but counsel for respondents took no position on it.

The Chamber is the world's largest business federation. It represents 300,000 direct members, and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. The Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community. *See*, *e.g.*, *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

PhRMA is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's members invent and develop medicines that save lives and improve the quality of life for millions of patients around the world. PhRMA has frequently participated as *amicus curiae* in appeals involving issues of significance to the pharmaceutical industry.

This case is of great importance to *amici* and their members because many of their members afford their employees the opportunity to participate in company stock funds like the one at issue in this case. Given their experience and that of their members, *amici* believe that their views will significantly aid the Court in its consideration of the petition for certiorari.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel contributed money to fund its preparation or submission. Counsel of record for the parties received at least ten days' notice of *amici*'s intent to file this brief. Counsel for petitioners consented to the filing of this brief, but counsel for respondents took no position on it.

business federation. It represents 300,000 direct members, and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases under ERISA and the federal securities laws. *See*, *e.g.*, *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537 (2013); *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's members invent and develop medicines that save lives and improve the quality of life for millions of patients around the world. PhRMA's members have invested hundreds of billions of dollars in the last decade to develop new medicines—including $51.1 billion in 2014 alone. PhRMA serves as the industry's principal policy advocate, advancing policies that foster continued medical innovation, and has frequently participated as *amicus curiae* in appeals involving issues of significance to the pharmaceutical industry.

This case is of great importance to *amici* because many of their members afford their employees the opportunity to participate in company stock funds like the one at issue here. Both the companies that design employee stock ownership plans and the fiduciaries who administer them have significant interests in the standards by which their actions are reviewed. In this case, the Ninth Circuit flouted this Court's recent decision in *Fifth Third*, which set forth controlling standards by which this Court sought to ensure that "meritless, economically burdensome lawsuits" would not undermine Congress's policy of "encourag[ing] the creation of ESOPs." 134 S. Ct. at 2470. If the standards set forth in *Fifth Third* are disregarded, as they were by the Ninth Circuit here, then ESOP sponsors would be discouraged from providing employees the option of investing in company stock funds—contrary to Congress's manifest intent. *Amici* accordingly submit this brief to urge the Court to grant certiorari and summarily reverse the Ninth Circuit's judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The dissent from the denial of rehearing en banc rightly observed that the panel's decision utterly "ignor[ed] a grant, vacate and remand (GVR) order," and failed to "seriously confront[] the significance of" *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014). Pet. App. 9a (Kozinski, J., dissenting from denial of rehearing en banc; citation and internal quotation marks omitted). As bad as that may sound, however, what the Ninth Circuit did here was actually *worse*: it not only failed to confront *Fifth Third*, but also applied a standard of liability for ESOP fiduciaries that, in multiple respects, is precisely the *opposite* of what *Fifth Third* prescribes.

Fifth Third addressed a crucial question affecting thousands of American companies, millions of their employees, and hundreds of billions of dollars in retirement investments: the standard for holding ESOP fiduciaries liable for failing to act (by either terminating company stock investments, or by disclosure) on inside information that may adversely affect the value of the company stock in the ESOP. This Court recognized the danger that ESOP fiduciaries may find themselves “between a rock and a hard place,” 134 S. Ct. at 2470, and so it set forth a standard that gives fiduciaries’ judgment calls the benefit of the doubt: the Court held that, to state a claim, a plaintiff “must plausibly allege[] that a prudent fiduciary in the defendant’s position *could not* have concluded that stopping purchases … or publicly disclosing negative information would do more harm than good to the fund,” *id.* at 2473 (emphasis added).

Defying *Fifth Third*, the Ninth Circuit applied a diametrically different standard here, one that gives *challenges* to fiduciaries’ judgment calls the benefit of the doubt: the court held that a claim must be sustained whenever “[i]t is … plausible … that [the fiduciary] *could* remove the [company stock] Fund from the list of investment options without causing undue harm to plan participants.” Pet. App. 41a (emphasis added); *accord id.* at 42a; *see also id*. at 5a (Fletcher, J., concurring in denial of rehearing en banc). The Ninth Circuit’s use of its “could” formulation instead of this Court’s “could *not*” flips *Fifth Third* on its head. The result is that, under the decision below, “a fiduciary now can *never* be safe from a lawsuit if he fails to withdraw the fund based on the reasonable belief that it will ‘do more harm than good to the fund by causing a drop in the stock price.’” Pet. App. 16a (Kozinski, J., dissenting; quoting 134 S. Ct. at 2473).

That inversion of *Fifth Third* by itself warrants summary reversal, but the court of appeals dispensed with *Fifth Third* in other critical ways as well. This Court in *Fifth Third* prescribed "careful, context-sensitive scrutiny of a complaint's allegations" in order to "readily divide the plausible sheep from the meritless goats" and to "weed out meritless lawsuits." 134 S. Ct. at 2470. But instead, the Ninth Circuit categorically stated its judgment that ESOPs "*inevitably*" and "*almost certainly*" will be better off if fiduciaries terminate company-stock investments whenever they learn adverse material inside information, Pet. App. 40a (emphasis added)—with the result that "withdrawing the fund will *always* be the better option" for those fiduciaries, *id.* at 16a (Kozinski, J., dissenting).

So, too, the Ninth Circuit paid no heed to this Court's admonition in *Fifth Third* that lower courts must, again carefully and contextually, "consider the extent to which an ERISA-based obligation" to cease investments or disclose inside information "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." 134 S. Ct. at 2473. The Ninth Circuit again took the polar opposite approach: it concluded that such a conflict could *never* occur—because fiduciaries' disclosure of inside information will "simultaneously satisf[y] their duties under both the securities laws and ERISA," and halting trading would avoid "violat[ion] [of] the prohibition against insider trading." Pet. App. 43a. Thus, the court of appeals again "act[ed] as if the Supreme Court hadn't spoken," *id.* at 18a (Kozinski, J., dissenting), and its decision should be summarily reversed.

Likewise warranting review is the Ninth Circuit's conclusion that the securities-law "fraud on the market presumption" of reliance should apply under ERISA as well. Pet. App. 47a. The panel gave no good reason for this holding, and there is none. Under Section 10(b) and Rule 10b–5, the fraud-on-the-market presumption flows from the fact that investors in a "'free and open public market'" rely "on the integrity of the market price." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 246–47 (1988) (quoting H.R. REP. NO. 1383, 73d Cong., 2d Sess. 11 (1934)). But that rationale does not apply to participants in a private ESOP, and has nothing to do with the text, context, or purposes of ERISA.

Moreover, by applying the *Basic* presumption in this case—where *no* plan participant is alleged to have bought or sold Amgen's stock during the class period—the panel actually established a presumption of even *broader* reach than under Section 10(b) and Rule 10b–5, provisions that do *not* allow claims by those who do not purchase or sell shares. This Court should grant certiorari and reverse the court of appeals' breathtaking importation into ERISA, and expansion there, of the fraud-on-the-market presumption.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE NINTH CIRCUIT'S REFUSAL TO FOLLOW *FIFTH THIRD*.

A. This Court's Decision in *Fifth Third*

This Court in *Fifth Third* held that ERISA "does not create a special presumption of prudence favoring ESOP fiduciaries." 134 S. Ct. at 2467. But the Court did not cast those fiduciaries to the litigation winds. It recognized that "an ESOP fiduciary who fears that continuing to invest in company stock may be imprudent finds himself between a rock and a hard place"—he could be sued "[i]f he keeps investing and the stock goes down," and he could be sued "if he stops investing and the stock goes up." *Id.* at 2470. The Court understood that "meritless, economically burdensome lawsuits" threaten to defeat Congress's desire "to encourage the creation of ESOPs." *Id.* And so the Court in *Fifth Third* undertook the "important task" of articulating a "rule [to] readily divide the plausible sheep from the meritless goats"—one that would "weed out meritless lawsuits." *Id.*

In carrying out that task, the Court expressly adopted a fact-sensitive legal standard, not a categorical one. "Because the content of the duty of prudence turns on 'the circumstances … prevailing' at the time the fiduciary acts," the Court reasoned, "the appropriate inquiry will necessarily be context specific." *Id.* at 2471 (quoting 29 U.S.C. § 1104(a)(1)(B)). The Court thus held that the appropriate inquiry demands "careful, context-sensitive scrutiny of a complaint's allegations," and "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently" by failing to act on information about the value of company stock. *Id.* at 2470–71. Only through such careful consideration of the facts, the Court explained, can "the motion to dismiss for failure to state a claim" fulfill its role as an "important mechanism for weeding out meritless claims" that ESOP fiduciaries have violated their duty of prudence. *Id.*

To state such a claim, "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.* at 2472. The Court highlighted "three points" to "inform the requisite analysis" of the facts and circumstances alleged. *Id.*

- *First*, ERISA's "duty of prudence … does not require a fiduciary to break the law" by, for example, trading "on the basis of inside information." *Id.*

- *Second*, courts must consider whether "fault[ing] fiduciaries" for allowing "additional stock purchases," or for "failing to disclose [inside] information to the public," "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.* at 2473.

- *Third*, courts must "also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not* have concluded that stopping purchases [or] publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id*. (emphasis added).

The Court vacated and remanded in *Fifth Third* so that the lower courts in that case could apply these standards, *id.*, and in this case, granted certiorari and likewise vacated and remanded so that the lower courts here could do that as well, *Amgen Inc.* v. *Harris*, 134 S. Ct. 2870 (2014).

B. The Ninth Circuit refused to apply *Fifth Third*.

But on remand in this case, the Ninth Circuit failed to apply this Court's decision in *Fifth Third*. Not only did it "'reinstat[e] [its] judgment without seriously confronting the significance'" of *Fifth Third*, Pet. App. 9a (Kozinski, J., dissenting; quoting *Cavazos* v. *Smith*, 132 S. Ct. 2, 7 (2011)), but the court of appeals actually *inverted* the standard proscribed in that case. The court of appeals did that by effectively imposing a categorical rule in lieu of this Court's "careful, context-sensitive" approach, *Fifth Third*, 134 S. Ct. at 2470—a categorical rule that "creates almost unbounded liability for ERISA fiduciaries," a rule under which "withdrawing the fund" or disclosing inside information "will *always* be the better option" for an ESOP fiduciary, Pet. App. 9a, 16a (Kozinski, J., dissenting).

The Ninth Circuit held that respondents had adequately pleaded their claim merely because "[i]t is … *quite plausible* … that [petitioners] *could* remove the Fund from the list of investment options without causing undue harm to plan participants." Pet. App. 41a (emphasis added); *accord id.* at 42a; *see also id*. at 5a (Fletcher, J., concurring in denial of rehearing en banc). As a result, a claim stands if (in the hindsight view of judges) an ESOP fiduciary *could* reasonably decide to stop further investments in the company's stock based upon the inside information at hand without undue harm. Put another way, if a reasonable fiduciary's assessment of whether the fund would be unduly harmed by such an action could go either way—if some would say no, but some would say yes—then the defendant fiduciary *must* stop company-stock investments; and the defendant must face potentially massive personal liability under ERISA.

But this Court held precisely the *opposite* in *Fifth Third*. It explicitly gave ESOP fiduciaries the benefit of the doubt. Appreciating how easily such fiduciaries may find themselves "between a rock and a hard place," 134 S. Ct. at 2470, the Court allowed for judgment calls. And so *Fifth Third* held that a plaintiff must plead that a fiduciary *could not* reasonably have taken the action he or she did, not that the fiduciary *could* reasonably have chosen to do something else: a complaint must "plausibly allege[] that a prudent fiduciary in the defendant's position *could not* have concluded that stopping purchases … or publicly disclosing negative information would do more harm than good to the fund." 134 S. Ct. at 2473 (emphasis added). As a result, if "*any* 'prudent fiduciary in the defendant's position'" might have *agreed* with what the defendant did, a motion to dismiss must be granted; if the fiduciary's choice could have gone either way, "there is *no* liability" at all. Pet. App. 12a (Kozinski, J., dissenting; quoting 134 S. Ct. at 2473).

And there is more. This Court in *Fifth Third* recognized that "the duty of prudence turns on 'the circumstances … prevailing' at the time the fiduciary acts," and thus held that "the appropriate inquiry" for assessing a fiduciary's conduct and liability "will necessarily be context specific." 134 S. Ct. at 2471 (quoting 29 U.S.C. § 1104(a)(1)(B)). The Ninth Circuit's opinion, however, undercuts that contextual, case-by-case inquiry. As Judge Kozinski observed, "withdrawing the fund will *always* be the better option" under the decision below, as "a fiduciary now can *never* be safe from a lawsuit if he fails to withdraw the fund based on the reasonable belief that it will 'do more harm than good to the fund by causing a drop in the stock price.'" Pet. App. 16a (Kozinski, J., dissenting; quoting 134 S. Ct. at 2473).

Thus, contrary to *Fifth Third*, the Ninth Circuit took a categorical, as opposed to context-specific, view of when an ESOP would be unduly harmed by stopping company stock investments in the face of adverse nonpublic information—essentially, never. Under the decision below, *whenever* there is a claim that material information was misstated or misleadingly omitted under the federal securities laws, ceasing investments becomes the *only* reasonable choice under ERISA to minimize harm to the fund. The court reasoned that "when the previously concealed material information about the company is eventually revealed as required by the securities laws, the stock price will *inevitably* decline, *almost certainly by more* than the amount it would have declined as a result of merely withdrawing the Fund as an investment option." Pet. App. 40a–41a (emphasis added).

Although the court of appeals said that this was why "removal of the Fund" would not "caus[e] undue harm" "in this situation," *id.* at 41, its opinion made clear that its conclusion would apply in every case of this genre.[2] The court emphasized that "[t]he central problem in this case"—the dispositive allegation—"is that [company] officials, many of whom are defendants here, made material misrepresentations and omissions in violation of the federal securities laws." *Id.* at 42a–43a. But that "underlying legal theory … is functionally identical to that in *Fifth Third*." *Id*. at 12a (Kozinski,

[2] It did not matter in this case, for example, that the complaint completely omits to allege that defendants could have frozen the fund without "do[ing] more harm than good," 134 S. Ct. at 2473, and avers instead that doing that "'would have sent a negative signal'" to the market, and would have "'result[ed] in … a drop in the stock price,'" Pet. App. 15a (Kozinski, J., dissenting (quoting complaint)).

J., dissenting); *see Fifth Third*, 134 S. Ct. at 2464. Simply put, the decision below completely dispenses with "*Fifth Third*['s] call[] for a careful parsing of the particular allegations in a complaint," and instead applies "extra-record speculation" that will henceforth control every case. Pet App. 15a (Kozinski, J., dissenting). By doing that, not only has the Ninth Circuit "render[ed] … crucial language in *Fifth Third* utterly without meaning," *id.* at 16a, it has also made the result in *Fifth Third*—vacatur and remand—pointless.

Finally, the Ninth Circuit's decision dispensed with this Court's instruction that lower "courts should consider the extent to which an ERISA-based obligation" to cease investments or disclose inside information "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." 134 S. Ct. at 2473. Again, the court of appeals' response was categorical, not contextual. The panel reasoned that disclosure "would have simultaneously satisfied their duties under both the securities laws and ERISA," and a halt to trading would have prevented any "violat[ion] [of] the prohibition against insider trading, for there is no violation absent purchase or sale of stock." Pet. App. 43a.

If the answer were really that all-encompassing and conclusive, then this Court in *Fifth Third* could have just said so—and it certainly would not have instructed the lower courts to "consider the extent" of a "conflict" that couldn't exist. But the answer is not that simple, because this Court went *beyond* merely considering whether "fiduciaries would be forced to violate the securities laws to comply with ERISA." *Id.* at 17a (Kozinski, J., dissenting). As petitioners rightly note, this Court was also concerned with a much subtler "interplay between ERISA and the securities laws," Pet. 19—and, in particular, "was also worried that 'ERISA-based obligations' would be *broader* than the disclosure requirements under the securities laws and would therefore interfere with the compromise Congress struck when enacting those laws," Pet. App. 17a (Kozinski, J., dissenting; quoting *Fifth Third*, 134 S. Ct. at 2473). That is why this Court noted the "complex[ity]" of the "requirements imposed by the federal securities laws," referred to "the objectives of those laws," and emphasized that "'the scope of permissible judicial innovation'" in developing "'a federal common law of rights and obligations under ERISA-regulated plans'" "'is narrower in areas where other federal [laws] are engaged.'" *Fifth Third*, 134 S. Ct. at 2473 (quoting *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831 (2003) (citation and internal quotation marks omitted)).

The Ninth Circuit elided this Court's stated concerns—and in doing so, made them a reality. The effect of the decision below is precisely to establish broader disclosure requirements under ERISA, and to disturb the balance struck under the federal securities laws. "Under conditions of uncertainty" created by the decision below, "the only way a fiduciary can avoid the risk of liability is by disclosing any *arguable* violation," Pet. App. 16a (Kozinski, J., dissenting)—particularly given how claims under ERISA are not subject to the "'heightened pleading requirements'" Congress imposed "'in actions brought pursuant to § 10(b) and Rule 10b–5,'" *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006)); *see* 15 U.S.C. § 78u–4(b). Not only that, the decision below imposes these enhanced ERISA-based disclosure obligations on individuals who have *no* such obligations under the federal securities laws—such as the "17 of … 19 defendants here" who are not even *alleged* to have violated those laws. Pet. App. 18a (Kozinski, J., dissenting). In short, "the panel act[ed] as if [this] Court hadn't spoken." *Id*.

Such an extraordinary flouting of a decision of this Court warrants summary reversal of the judgment below.

C. This case is exceptionally important.

The court of appeals' defiance of *Fifth Third* especially deserves immediate correction in light of the extraordinary national significance of the issues that *Fifth Third* and this case address. There are more than 9,000 employer stock funds in the country, with nearly 15 million participants, with $250 billion invested in employer securities, and with total assets of $1.1 trillion. *A Statistical Profile of Employee Ownership*, NATIONAL CENTER FOR EMPLOYEE OWNERSHIP (March 2015), http://bit.ly/1LMHClP. Given this massive and widespread national investment in company stock plans, "the panel's adventurism occurs in a matter of exceptional importance that drastically impacts thousands of companies and millions of employees who participate in stock-ownership plans." Pet. App. 18a (Kozinski, J., dissenting).

And the panel's subversion of *Fifth Third* seriously undermines congressional intent as well. Congress carefully crafted ERISA "in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs." *Fifth Third*, 134 S. Ct. at 2467. Congress actually "has written into law its 'interest in encouraging' their use"—it explicitly praised ESOPs "'as a bold and innovative method of strengthening the free private enterprise system,'" and specifically warned against "'regulations and rulings'" that "'block the establishment and success of these plans.'" *Id.* at 2465–66 (quoting Tax Reform Act of 1976, Pub. L. No. 94–455, § 803(h), 90 Stat. 1590 (1976)). In *Fifth Third*, this Court "agree[d] that Congress sought to encourage the creation of ESOPs," and affirmed the need for "a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." 134 S. Ct. at 2470 (quoting *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (citation and internal quotation marks omitted)).

By disregarding *Fifth Third*, the Ninth Circuit's decision will inhibit the establishment and success of ESOPs, in contravention of Congress's express statutory direction. "The panel's decision creates almost unbounded liability for ERISA fiduciaries, plainly at odds with what [this] Court instructed," and, if followed by other courts, will leave "corporations across America … acutely vulnerable to meritless lawsuits." Pet. App. 9a–10a (Kozinski, J., dissenting). That threat of liability and expense from an inevitable "proliferation of ERISA fiduciary suits" would greatly disrupt the administration of ESOPs. "Every company that offers such a plan now faces the chaotic prospect of its plan fiduciaries releasing a disparate array of half-truths and incomplete data to the market"—"or worse, the incessant withdrawal and reinstatement of its fund as fiduciaries are forced to act upon every tidbit of inside information they fear might make them the target of a lawsuit." *Id.* at 18a, 19a. Many companies will likely decide that the game is not worth the candle—they will "permanently withdraw company stock as an investment option." *Id.* at 19a.

Simply put, even "[l]eaving aside the litany of practical problems the panel opinion creates, its promiscuous liability standard flies in the face of Congress's unmistakable will." *Id*. This Court should grant certiorari and reverse to vindicate Congress's intent and this Court's decision in *Fifth Third*.

II. THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE NINTH CIRCUIT'S ADOPTION OF A *BASIC*-STYLE PRESUMPTION OF RELIANCE UNDER ERISA.

This Court should also grant certiorari to address the court of appeals' unjustified, sua sponte importation of "fraud-on-the-market" presumption of reliance into ERISA. Pet. App. 47a; *see*, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). Other circuits have consistently made clear that *actual* proof of reasonable, detrimental reliance is an essential element of a misrepresentation claim under ERISA. *See*, *e.g.*, *Bell* v. *Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010); *Mello* v. *Sara Lee Corp.*, 431 F.3d 440, 444 (5th Cir. 2005); *James* v. *Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002); *Daniels* v. *Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001). But here, without the respondents even having asked, the Ninth Circuit rejected the argument that respondents "must show that they actually relied on the omissions and misrepresentations." Pet. App. 46a–47a. The court explained its holding in a single sentence: "We see no reason why ERISA plan participants who invested in a company stock fund … should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor in a publicly traded stock." *Id*. at 47a.

In fact, there are good reasons why that peculiar securities-law theory should not apply here—reasons the court of appeals might have considered had the subject been briefed. To begin with, the rationale for the Rule 10b–5 fraud-on-the-market presumption simply doesn't apply to corporate employees' elections to participate in their own company's ESOP. *Basic* v. *Levinson*—and the Securities Exchange Act generally—was concerned with the "'free and open public market,'" in which the "'competing judgments of buyers and sellers as to the fair price of a security'" should cause "'the market price [to] reflect[] as nearly as possible a just price.'" 485 U.S. at 246 (quoting H.R. REP. NO. 1383, 73d Cong., 2d Sess. 11 (1934)). That was why *Basic* presumed that "the typical 'investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price'—the belief that it reflects all public, material information." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014) (quoting *Basic*, 485 U.S. at 247).

But an ESOP participant is *not* "the typical investor," and does not freely and rationally choose among countless investment options in a "free and open public market." Far from it. Defined-contribution retirement plans typically contain a limited number of investment choices from which participants may select. More importantly, "many employees invest heavily in employer stock out of a sense of loyalty to their employers," or because their company's business is the one they know best, and they often insist on investing in their company even if they know they could get better returns somewhere else. Susan J. Stabile, *The Behavior of Defined Contribution Plans*, 77 N.Y.U. L. REV. 71, 91–92 (2002). Price is not their cynosure.

There are also tax incentives, and sometimes employer-created incentives, for employees to invest in their company's stock. *See* Pet. 25; *see*, *e.g.*, 26 U.S.C. §§ 72(t)(2)(A)(vi), 402(e)(4), 404(a)(9), 404(k). In addition, ESOP participants face significant insider-trading prohibitions on when they can trade their company's stock. For the typical *ESOP participant*, as opposed to the typical non-employee open-market investor, all this "'severs the link between the alleged misrepresentation and … [the] decision to trade at a fair market price.'" *Halliburton*, 134 S. Ct. at 2408 (quoting *Basic*, 485 U.S. at 248). And so not only is the presumption of reliance on market price rebutted for ESOP participants; there should be no presumption in the first place.

Finally, even apart from the inaptness of applying an open-market presumption of reliance to ESOP plan participants, the Ninth Circuit's application of that presumption goes far beyond what even *Basic* expansively conceived. And that is because, as petitioners rightly note, the Ninth Circuit conferred the benefit of *Basic*'s potent presumption to plaintiffs who, under Section 10(b) and Rule 10b–5, *would not even have claims*. Pet. 23–24.

Thus, under "the purchaser-seller rule" this Court adopted in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731, 734, 737–38 (1975), "the plaintiff class in a Rule 10b–5 action [is] limited to actual purchasers and sellers," and excludes mere holders of shares—"actual shareholders in the issuer who allege that they decided not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material." That purchaser-seller rule, the

Court explained, serves to forestall the "peculiarly high" "dangers of … abuse" that would arise from allowing suits for "intangible economic injury" from the "loss of a noncontractual opportunity to buy or sell." *Id.* at 734–35, 743.

Yet those dangers are precisely what the Ninth Circuit has prescribed under ERISA here, where *no* named plaintiff is alleged to have bought or sold Amgen stock—and where the case is brought purportedly "on behalf of a Class of *all* current and former Participants in the [Amgen] Plans at any time during the Class Period," whether or not they bought or sold during that time. First Am. Compl. ¶¶ 17–21, 63 (emphasis added). Even worse, the court of appeals has presumed the reliance of such plaintiffs who couldn't be plaintiffs under Section 10(b). Now, not only do ERISA plaintiffs in the Ninth Circuit not have to allege or prove that they purchased or sold company stock, but they also do not even need to allege or prove that they *would* have done so had they known the allegedly concealed truth.

In the realm of securities class action litigation, the *Basic* v. *Levinson* presumption of reliance has been fairly described as "the most powerful engine of civil liability ever established in American law."[3] There is no basis in law or logic for extending it to ERISA, let alone for extending it to plaintiffs who merely *held* their employers' stock. Such an extraordinary ruling, so casually adopted below, should be summarily reversed by this Court as well.

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[3] Brief for Former SEC Commissioners and Officials and Law Professors as *Amici Curiae* Supporting Petitioners at 3, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13–317), 2014 WL 69391.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

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