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In The
Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., *et al.*,

Petitioners,

v.

HEIDE BETZ

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a securities fraud action brought under section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), whether the running of the statute of limitations specified by 28 U.S.C. § 1658(b)(1), which provides a limitations period of two years "after the discovery of the facts constituting the violation," is triggered when a potential plaintiff is on notice that would reasonably prompt an inquiry into the possibility of fraud, including knowledge of proof that prior representations were false, or whether the period is delayed until the fraud would actually have been uncovered if inquiry had been made?

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BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Organization for International Investment ("OFII") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

OFII is the largest business association in the United States representing the interests of United States subsidiaries of multinational companies before all branches and at all levels of government. OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout the country, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

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[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, and counsel for *amici curiae* timely notified each party's counsel of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Chamber is the world's largest business federation. The Chamber 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 country. 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 *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Amici and their members recognize the importance of the federal securities laws to deter and remedy wrongdoing to investors, but they also know that effective deterrence requires consistent and predictable application of the law. *Amici* and their members are concerned that inconsistent standards as to when a statute of limitations allows a securities fraud action (and the potentially unprecedented expansion of the statute of limitations in some circuits) has, and will, lead to further proliferation of securities fraud actions that will undermine the goals of our federal securities laws and threaten the health and stability of our capital markets.

The court of appeals ruling in this case potentially eliminates an otherwise valid statute of limitations defense in many securities fraud actions filed within the Ninth Circuit. Securities fraud actions are subject to a two-year statute of limitations "after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1). But, as Chief Judge

Kozinski explained in his dissent to the denial of rehearing *en banc* below: "If a securities defendant in a simple case like this cannot use the statute of limitations as a shield against the costs and hazards of trial, then no defendant can, and the statute of limitations Congress passed for 10b-5 cases is pretty much a dead letter in this circuit." Pet. App. 28a-29a.

Accordingly, *amici* and their members have a strong interest in this Court's review and reversal of the decision below to ensure evenhanded application of the two-year statute of limitations in securities fraud cases across the country.

SUMMARY OF ARGUMENT

I.

The courts of appeals are deeply divided over when the two-year statute of limitations for a securities fraud action specified in 28 U.S.C. § 1658 begins to run.

A. It is well-settled that if an investor knows of sufficiently ominous signals that would prompt a reasonable investor to inquire about the possibility of fraud regarding his investment, he is deemed to have "inquiry notice" and must begin a diligent investigation into the possibility of fraud. There is an acknowledged conflict between the circuits, however, on whether the statute of limitations begins to run when the investor is put on such inquiry notice, or

later when a reasonably diligent investigation would have actually uncovered the fraud.

The Ninth Circuit's ruling below deepened this longstanding split. In a significant departure from the preexisting authority from every other court of appeals to have addressed the issue, the Ninth Circuit held that even *actual* notice of the falsity of the defendant's prior representation does not, as a matter of law, obligate the investor to inquire whether the misrepresentation was fraudulent. Accordingly, in the Ninth Circuit, inquiry notice is triggered not by evidence of a misrepresentation, as it is in other circuits, but only by evidence of scienter—*i.e.*, an actual intent to defraud.

This division provides securities fraud plaintiffs in some circuits months or even years longer to bring suit than plaintiffs raising identical claims in other circuits. This entrenched conflict will not be resolved absent this Court's intervention.

B. The court of appeals ruling also is contrary to the well-established objectives of Section 1658 and statutes of limitations generally. The decision below provides investors with little incentive to conduct any investigation to reveal fraud, and it strips defendants, including *amici*'s members, of the ability to predict the latest point when any potential legal action could be brought.

II.

A. The Ninth Circuit's holding will have widespread implications because it cannot be limited to investor-broker securities fraud cases. It will also apply to class actions that are brought under the federal securities laws and that significantly threaten *amici*'s members. Indeed, many more securities class actions will survive a pretrial challenge on statute of limitations grounds under the Ninth Circuit's ruling.

The Ninth Circuit's opinion, left unchecked, will exacerbate the pressure already placed on securities class-action defendants, including *amici*'s members, to enter into sizable settlements, regardless of the merits of the claims. The bet-the-company nature of securities class actions and the ability of plaintiffs to demand abusive discovery already create greater incentives to settle than in other types of litigation. And this pressure—which has caused settlement values to increase substantially in recent years—is driven successively higher at each stage of litigation. The Ninth Circuit's opinion makes it more difficult for defendants to cut off stale claims at an early stage.

B. Moreover, the judgment below, by permitting cases to proceed to trial in circumstances where Congress clearly intended them to be barred by the statute of limitations, will increase the number of securities class-action defendants and thus deter capital investment necessary to the growth of the United States economy. Empirical analyses demonstrate that the absence of predictability and

certainty in the legal system drives foreign investment away from United States markets and toward markets with more stable legal rules.

ARGUMENT

I. THE COURTS OF APPEALS ARE HOPELESSLY DIVIDED ON WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IN A SECURITIES FRAUD CASE, AND THE UNIQUE POSITION TAKEN BY THE NINTH CIRCUIT IS PARTICULARLY ANTITHETICAL TO THE CORE PURPOSE OF THE STATUTE

Even before the Ninth Circuit entered the fray, ten other circuits were divided as to whether the limitations period for a securities fraud claim begins to run when the plaintiff knows of facts that would cause a reasonable person to inquire whether he has a fraud claim, or later when a reasonably diligent investigation would have actually uncovered the fraud. The Ninth Circuit now has widened that already-entrenched split by holding that even *actual* proof that prior representations were false is not sufficient to obligate the investor to inquire whether such known misrepresentations give rise to a securities fraud claim.

A. The Ninth Circuit's Ruling Enlarges A Longstanding Division In The Circuits On When The Statute Of Limitations Period Is Triggered In A Securities Fraud Case

1. The circuits have long been split between those that hold the limitations period begins to run when a reasonable inquiry should have begun, those that hold it does not begin until such inquiry would have uncovered fraud, and those that choose between the two based on whether inquiry actually was made

Congress imposed on securities fraud actions a statute of limitations that requires actions to be brought within two years "after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1).[2] Plaintiffs, however, in some circumstances want to intentionally delay such "discovery"—and not immediately bring suit—because they want to see if they might do well on the investment despite the possible fraud. But that would defeat the goal of the securities laws to protect the

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[2] Section 1658(b) also imposes a five-year statute of repose that runs from the date of the violation and automatically cuts off a plaintiff's rights at the end of five years, irrespective of any potential tolling. Because the limitations period is based upon the "earlier" of the two periods, the five-year statute of repose is not at issue in this case.

market and other investors from fraud and is not allowed in any circuit.

Accordingly, a securities fraud plaintiff who possesses knowledge of sufficient ominous facts, termed "storm warnings," that would cause a reasonable investor to inquire further is on "inquiry notice" and has a duty to launch an investigation into whether fraud is afoot. *See, e.g.*, *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351-352 (2d Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994). Plaintiffs are not "free to ignore [signs] which would alert a reasonable investor to the possibility of fraud[ ]," nor is the plaintiff "permitted a 'leisurely discovery of the full details of the alleged scheme.'" *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988) (quoting *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970)). Inquiry notice is triggered "by evidence of the possibility of fraud, not full exposition of the scam itself." *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002); *see also Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993).

Although the circuits all have adopted some sort of "inquiry notice" standard, there is a well-recognized divergence between the circuits as to when the statute of limitations begins to run once a plaintiff is deemed to have inquiry notice. *See New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (acknowledging existence of different approaches), *cert. denied*, 540 U.S. 1183 (2004); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1199-1200 (10th Cir. 1998) (Although all "circuits generally apply an inquiry

notice standard[,] * * * [t]he circuits are not consistent * * * in their determination of exactly when the * * * limitations period accrues.").

In four circuits—the Fourth, Fifth, Eighth, and Eleventh—the statute of limitations begins to run when the plaintiff has inquiry notice and is obligated to investigate further. *See Franze*, 296 F.3d at 1255 (Once a plaintiff has "notice of the possibility of fraud, * * * the statute of limitations [is] triggered for their claims at that time."); *Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 898-899 (8th Cir. 1997) (statute of limitations began to run when plaintiff read article that triggered duty to investigate); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1303 (4th Cir. 1993) ("limitation period [commences] when the plaintiff * * * has such knowledge as would put a reasonably prudent [investor] on notice to inquire"); *Jensen*, 841 F.2d at 608 ("'[S]torm warnings' * * * trigger the duty to inquire further and the running of the statute of limitations."). In those courts of appeals, once the potential plaintiff knows of facts that would alert a reasonable investor to conduct an inquiry, the plaintiff has two years under 28 U.S.C. § 1658(b)(1) to *both* diligently investigate and bring suit.

By contrast, four other circuits—the First, Sixth, Seventh, and Tenth—hold that inquiry notice merely obligates the investor to begin an investigation and does not immediately commence the running of the statute of limitations. In those circuits, the clock for bringing suit does not start ticking until a person conducting an investigation with reasonable diligence

would uncover the fraud. *See New England Health Care Employees Pension Fund*, 336 F.3d at 501 ("[L]imitations period begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the facts underlying the alleged fraud."); *Young v. Lepone*, 305 F.3d 1, 9 (1st Cir. 2002) (same); *Sterlin*, 154 F.3d at 1201 (same); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 (7th Cir. 1997) (same).[3]

Finally, two circuits—the Second and Third—have adopted a hybrid approach. When the limitations period begins depends on whether the plaintiff actually begins an investigation. If, and only if, the plaintiff actually begins an inquiry, then the statute of limitations period is not triggered until a reasonable person exercising due diligence would have uncovered the fraud. *See LC Capital Partners, LP v. Frontier Ins. Group*, 318 F.3d 148, 154 (2d Cir.

[3] Certain language in cases from the Fourth and Eighth Circuits, at first glance, might appear to indicate that the statute of limitations begins to run in those circuits only after the period for a reasonable investigation has concluded. *See Great Rivers*, 120 F.3d at 896 (limitations period begins if upon investigation, "reasonable person would have acquired actual notice of the defendant's misrepresentations"); *Caviness*, 983 F.2d at 1303 (same). But it is clear from the facts of those cases that the limitations period began when the plaintiff initially had inquiry notice rather than later when the investigation should have been completed. In any event, even if the Fourth and Eighth Circuits were shifted to another side of the split, the conflict amongst the courts of appeals would still require this Court's resolution.

2003); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (applying same test in burden-shifting approach). If, however, the plaintiff does not conduct any inquiry despite the storm warnings putting him on inquiry notice, then the limitations period is triggered on the date that the duty to inquire arose. *See LC Capital Partners*, 318 F.3d at 154; *Mathews*, 260 F.3d at 252.

2. The Ninth Circuit's ruling deepens the circuit split and finds no support in any other court of appeals decision

When presented with these three different approaches to application of Section 1658's provision that the statute of limitations begins upon "discovery of the facts constituting the violation," 28 U.S.C. § 1658(b)(1), the Ninth Circuit "part[ed] company with ten other circuits," Pet. App. 39a, to find itself, according to Chief Judge Kozinski's dissent, once "again," "out in left field," *id.* at 28a.

Although the Ninth Circuit purported to adopt the "inquiry-plus-reasonable-diligence test used by the Tenth Circuit," Pet. App. 15a (citing *Sterlin*, 154 F.3d at 1201), the court actually announced a new standard that finds no support in any other decision from the courts of appeals. Under the Ninth Circuit's standard, not even objective proof, known to the plaintiff, of the falsity of the defendant's prior representation triggers inquiry notice as a matter of

law unless, and until, the plaintiff has adequate indication that the prior representation was made with scienter. *See id.* at 16a, 20a-21a.

Indeed, the ruling below demonstrates that the respondent had *actual* notice of the alleged misrepresentation that is the basis of her fraud suit. Respondent's allegation is based on her contention that petitioner guaranteed that her money would be invested "in such a fashion that [she] would receive $15,000 a month from the profit of the investment and that [the defendants] would not touch the principal," *id.* at 4a (second alteration in original), but the documents that respondent signed, on the same day that she was given that guarantee, directly contradict the guarantee. The documents "explicitly stat[ed] that [her] account was subject to market risk and that 'no person has represented to [her] that any particular result can or will be achieved.'" *Ibid.*

In most circuits, this, alone, would be sufficient to place the investor on inquiry notice of the fraud and to start the running of the statute of limitations. *See Topalian v. Ehrman*, 954 F.2d 1125, 1134-1135 (5th Cir.) (plaintiff's signing of subscription agreement disclosing investment's speculative nature and contradicting prior promises of low risk triggered limitations period), *cert. denied*, 506 U.S. 825 (1992); *see also DeBenedictis v. Merrill Lynch & Co., Inc.*, 492 F.3d 209, 216 (3d Cir. 2007) (same); *Franze*, 296 F.3d at 1254-1255 (same in Eleventh Circuit); *Dodds*, 12 F.3d at 351 (same in Second Circuit).

Moreover, even if such documentation were not, alone, adequate to put the investor on notice to inquire further, every other circuit besides the Ninth would have concluded that respondent's knowledge of the precipitous decline in the value of the principal, *see* Pet. App. 5a, was sufficient to place her on inquiry notice. Respondent does not dispute that, within a year of her initial investment, she began receiving account statements showing that her principal certainly had been "touched"—there were ultimately 30 such statements in total—despite the guarantee allegedly made to her. *Ibid.* And within two years, respondent had lost more than 60 percent of her original investment. *See ibid.* That decline in value is directly contrary to the no-risk investment she claims she was promised. *See Mathews*, 260 F.3d at 254. Every other circuit would "have [had] no problem concluding that" respondent's losses constituted "ominous storm warnings" that put her on notice to inquire. *Ibid.*; *see also DeBenedictis*, 492 F.3d at 216 ("accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased" triggers inquiry notice (quoting *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1326-1327 n.5 (3d Cir. 2002))). And, moreover, every other circuit would have concluded that the statute of limitations began to run then, or shortly thereafter, when respondent had proof that the representations allegedly made to her were false.

Chief Judge Kozinski described the ruling below as having "effectively writ[ten] the statute of limitations off the books." Pet. App. 39a. Under the ruling, even actual proof, known to the investor, that the defendant's representations were false does not obligate the investor to conduct any further inquiry because, according to the Ninth Circuit, such falsity somehow does not raise the possibility that the defendant made the false representations with scienter. *Compare* Pet. App. 20-21a (despite promise that principal would not be depleted, "we cannot say that a declining account balance, in and of itself, would have spurred a reasonable investor to further inquire whether he or she had been *defrauded*."), *with Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001) (stating that "[i]nquiry notice is triggered by evidence of the *possibility* of fraud, not full exposition of the scam itself" (citation omitted)); *see also Sterlin*, 154 F.3d at 1202 n.19 (Tenth Circuit explaining that "inquiry notice, which is triggered by evidence of the *possibility* of fraud, may exist before a reasonable investor is able to discover the facts underlying the alleged fraud." (emphasis added)); *Dodds*, 12 F.3d at 352 (Second Circuit applying same standard); *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (applying same standard).

The decision below cannot be justified by the fact that the ruling was at the summary judgment stage either, where inferences are drawn in the plaintiff's favor. Other circuits have consistently held that, "[w]here the underlying facts are undisputed, the

issue of whether the plaintiff has been put on inquiry notice can be decided as a matter of law." *Brumbaugh*, 985 F.2d at 162; *see also LC Capital Partners*, 318 F.3d at 156 (where facts pleaded were sufficient to place plaintiff on inquiry notice, dismissal under Rule 12(b)(6) is appropriate). Indeed, the Ninth Circuit's weakening of the summary judgment standard may be the most troubling aspect of its decision. Left unchecked, the holding, as applied in class-action securities fraud cases, will make it easier for such cases to survive summary judgment and for the plaintiffs to extract large settlements, even where the claim is clearly barred on limitations grounds. *See infra* at pages 17-21.

3. Because of the widespread conflict, the jurisdiction in which suit is filed is often outcome determinative

The petition demonstrates that if respondent had brought this action in, for example, Texas or Florida, the statute of limitations would have begun to run on June 7, 1999, when respondent signed account documentation that directly contradicted the alleged promise of a no-risk investment. Had she brought it in Massachusetts or Colorado, the clock would have begun ticking in February 2000, or shortly thereafter, when her knowledge of the declining value of her account made it abundantly obvious that the purported guarantee that her principal would not be touched was false. In each of those States, the district court would have dismissed the case on summary

judgment based on the statute of limitations defense as a matter of law, and precluded the need for the enormous expense of a jury trial. But under the ruling below, the limitations period may not have accrued until July 11, 2001, Pet. App. 20a, giving the plaintiff more than two additional years than she would have had to bring suit in Texas or Florida, and well over a year more than she would have had in Massachusetts or Colorado.

B. The Ninth Circuit's Ruling Undermines The Purposes Of The Inquiry Notice Rule And Statutes Of Limitations Generally

The Ninth Circuit's ruling that rests on the discovery of scienter is contrary to the purposes of the inquiry notice rule that underpins Section 1658. The inquiry notice rule is necessary to discourage investors from waiting until the full fraud reveals itself and to instead "tak[e] the actions necessary to bring the fraud to light." *Brumbaugh*, 985 F.2d at 162. Without such a rule, a potential plaintiff is permitted to wait out the five-year statute-of-repose period, *see* 28 U.S.C. § 1658(b)(2), to see if the investment rebounds despite likely fraud. *See, e.g.*, *Fujisawa*, 115 F.3d at 1337; *see also Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 722 (7th Cir. 1993) ("If the stock rebounded from the cellar [the plaintiffs] would have investment profits, and if it stayed in the cellar they would have legal damages. Heads I win, tails you lose."), *cert. denied*, 511 U.S.

1085 (1994). That is now the situation in the Ninth Circuit, where the ruling below diminishes the incentive for investors to investigate the possibility of fraud after they have been presented with proof of the misrepresentation.

The ruling also undermines the role of statutes of limitations generally because they are supposed to provide a defendant "the security of knowing when legal action against him has been foreclosed." *Brumbaugh*, 985 F.2d at 162. But with the pervasive circuit split on the issue, the limitations period for a securities fraud claim may vary by years, depending on the geographic locale.

II. REVIEW IS NECESSARY IN ORDER TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE TO OUR CAPITAL MARKETS

The ruling below cannot be constrained to the particular facts of this case. Because, as Chief Judge Kozinski noted in dissent, the ruling below does not even provide a statute of limitations defense in a simple investor-broker action where there was *actual* notice, Pet. App. 28a, the Ninth Circuit's decision will have widespread ramifications to major, high-stakes securities actions often filed on a class-wide basis against publicly traded companies, including *amici*'s members, in district courts within the Ninth Circuit.

In the typical securities class action, the alleged misrepresentation is made in a registration statement or quarterly or annual report, and a decline in stock value may be less of an indicator of

securities fraud. But in this case, the decline in value of respondent's original investment directly contradicted the representation allegedly made to her, which plainly created a strong suspicion of fraud. Thus, if the statute of limitations is no bar to respondent's case, it would likely not be a bar in many other securities fraud cases, including class actions, under the Ninth Circuit rule.

A. Significant Securities Fraud Suits That Survive Dismissal Efforts Or Summary Judgment Impose Enormous Litigation Costs And Exert Tremendous Pressure To Settle On Defendants, Regardless Of The Merits

This Court has repeatedly recognized that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975)). "Even weak cases * * * may have substantial settlement value * * * because '[t]he very pendency of the lawsuit may frustrate or delay normal business activity.'" *Ibid.* (quoting *Blue Chip Stamps*, 421 U.S. at 740). And the pressure to settle increases at each successive stage of litigation at which the action is permitted to proceed. For this reason, it is vital that the standard for the accrual of the statute of limitations in securities actions be sufficiently rigorous to cut off at

an early stage of litigation those actions that are clearly barred.

Once a securities case survives a motion to dismiss, *amici*'s members have found that the potential for the plaintiff to abuse the liberal discovery process is much greater than in other types of litigation. *See Blue Chip Stamps*, 421 U.S. at 741. As a result, it is often more economical for a defendant to settle than to outlay costs associated with discovery, even when it is likely that the defendant will prevail on a limitations defense either at summary judgment or at trial.

But the direct costs (*i.e.*, legal fees) associated with abusive discovery are only one aspect of the wider problem. Depositions and other extensive discovery often draw the attention of key employees of *amici*'s members away from the business's day-to-day operations and also its long-term strategies. *See* H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.). Where a securities action that will ultimately be barred by a limitations defense is permitted to proceed beyond dismissal, "it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," and it exacts "a social cost rather than [provides] a benefit." *Blue Chip Stamps*, 421 U.S. at 741.

And where a court permits a securities case to proceed beyond the summary judgment stage, as the

Ninth Circuit did in the instant case, the settlement value increases significantly. It is often the case that "corporate executives are unwilling to bet their company that they are in the right in [such] big-stakes litigation." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.) (If class is certified, even where statute of limitations for many plaintiffs may have run, defendants "may not wish to roll the[ ] dice. That is putting it mildly. They will be under intense pressure to settle."), *cert. denied*, 516 U.S. 867 (1995). The result, all too often, of permitting securities claims that should have been barred by limitations to proceed beyond summary judgment, is the enablement of "blackmail settlements." *Rhone-Poulenc Rorer*, 51 F.3d at 1298; *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

Indeed, such fears over bet-the-company securities litigation have recently driven settlement values for securities class-action suits to soar. Such settlements totaled $3.5 billion in 2005 alone ($9.7 billion, if WorldCom-related settlements are included). Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 74 (2007) (Bloomberg-Schumer Report), available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf. This figure (excluding the WorldCom settlements) represents a 15-percent

increase over 2004 and an increase of 70 percent over 2003. *Ibid.* What's more, from 1997 to 2004, the average settlement nearly doubled from $14.3 million to $26.5 million, while the number of settlements rose from 14 to 113. *See id.* at 75. The trend has been especially pronounced for foreign issuers, which reached settlements totaling $2.4 billion in 2006, a 78 percent increase over 2005 ($1.35 billion), more than three times the total settlements by foreign issuers in 2004 ($733 million), and nearly five times the 2003 settlements ($495 million). PricewaterhouseCoopers, *2006 Securities Litigation Study* 62, available at http://www.pwc.com/extweb/pwcpublications.nsf/docid/a89d7b2aa156e4f1852572ce005bbd54.

As discussed above, the Ninth Circuit's standard for the statute of limitations in securities fraud cases would likely permit many more otherwise stale cases to survive a limitations challenge in a motion to dismiss or motion for summary judgment. Such a standard would further exacerbate the already hostile litigation environment for publicly traded businesses, including *amici*'s members.

Significantly, this case presents an ideal vehicle for the Court to resolve the circuit split precisely because it is *not* a class-action. Because most securities fraud class actions do not go to trial due to the significant pressure to settle after summary judgment is denied, the instant case provides this Court with a unique opportunity to address a pressing legal question that often evades judicial review.

B. Meritless Securities Class-Action Suits Significantly Hurt The United States Capital Markets

1. It comes as no surprise that meritless securities actions that should not survive a motion to dismiss or summary judgment impose a deleterious effect on the United States economy. On average, securities class actions reduce a defendant company's equity value by 3.5 percent. Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Institute for Legal Reform 2005), available at http://www.heartland.org/pdf/18330.pdf.

Empirical studies have shown that smaller companies, which are "the economy's engine for innovation and growth," suffer a disproportionate loss of equity value, in part because they are less able to achieve economies of scale in litigation costs. *Id.* at 9-10. Abusive securities litigation destroys far more of the defendants' wealth than it creates for plaintiffs. *Id.* at 14. And reduction of equity causes companies to spend less on capital investment, which "has obvious implications for job creation and economic growth," *ibid.*, not to mention the effect on productivity, research and development, and innovation that have sustained America's economic prowess.

Abusive securities litigation in the United States has not escaped the attention of the international business community, including *amici*'s members. It has been a driving force behind a growing perception

that the United States legal system is more hostile for business than many of our international competitors, most notably the United Kingdom. *See* Bloomberg-Schumer Report at ii. The result has been a rapid decline in the competitiveness of the United States capital markets, driven in large part by foreign firms' concerns over shareholder litigation in the United States. *See* Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* x (2006). It is clear that "foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." Bloomberg-Schumer Report at 101. The consensus is that "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business—and driven away potential investors." *Id.* at ii.

2. This Court's intervention here is necessary to increase the predictability of the United States legal system, a key factor in driving foreign investment into the Nation's economy.

A survey of more than 350 senior executives in the financial services sector revealed that "a fair and predictable legal environment was the second most important criterion determining a financial center's competitiveness," but the prevalence of securities class-action litigation and settlements contributed to the survey respondents' belief that "the US legal

environment is less fair and less predictable than the UK environment." *Id.* at 16.[4] Indeed, many corporations now choose English law, rather than United States law, to govern their international commercial contracts, precisely because English law is seen as far more predictable. *Id.* at 77.

The existence of at least four different standards within the United States governing the statute of limitations in securities fraud cases is the exact opposite of the fair and predictable legal environment for which foreign investors search when making investments. The unpredictability associated with a stale securities class action surviving summary judgment in California, when it would have been dismissed at an early stage of litigation had it been brought in Texas, frustrates foreign investors. This is especially true given the fact that the average public company in the United States has nearly a 10 percent probability of facing at least one securities class action in any five-year period. *Interim Report* at 74. The uncertainty that now exists over the statute of limitations for securities class actions—uncertainty that only this Court can resolve by granting

[4] Only about 15 percent of survey respondents preferred the United States legal system, while more than 40 percent perceived the U.K. legal system as outperforming the United States in terms of predictability and fairness. *Id.* at 77.

certiorari—creates a cautious environment for foreign companies wishing to invest capital in publicly traded companies in the United States.

Empirical evidence supports the widespread perception, held by *amici*'s members, that the enormous litigation costs of securities actions in the United States and the lack of predictability in the United States legal system are hurting the economy. "A leading indicator of the competitiveness of U.S. public equity markets is the ability of the U.S. market to attract listings of foreign companies engaging in initial public offerings—so-called global IPOs." *Interim Report* at 29. The United States market share of global IPOs has been rapidly declining throughout this decade. In 2000, approximately 50 percent of the funds raised through global IPOs was raised in the United States, but by 2005 that figure had steadily sunk to just 5 percent. *Id.* at 29-30. The trend continued in 2006, in which 9 of the 10 largest IPOs occurred outside the United States, and the United States' share of global IPO funds raised remained less than 10 percent. *Id.* at 30. And the phenomenon is not isolated to foreign companies; domestic companies have begun to "abandon[ ] the U.S. equity markets to list in London," where it is much less expensive to raise capital. *Id.* at 32. This drop in the domestic market share, unfortunately, is not the result of cyclical behavior but a symptom of declining competitiveness, *ibid.*, triggered in no small part by the burden of securities litigation in the United States.

While the public equity markets in the United States are in decline, the *private* equity market—where companies are shielded from most securities liability—has become the "market of choice," for foreign companies wishing to raise capital in the United States, even though the cost of doing so is more expensive. *Id.* at 45-46. The "regulatory and litigation burden is an important factor" driving the companies into the private market. *Id.* at 46. Because, "[g]enerally, only institutions and wealthy individuals can participate directly" in the private equity market, individual investors are losing opportunities to invest in these companies. *Id.* at 34. Consequently, "the average investor [is left] in increasingly less liquid and more expensive markets than those enjoyed by institutions and the wealthy." *Ibid.*

This Court should intervene to establish a degree of predictability in an area of law that substantially affects the United States economy. Unless this Court resolves the deep divide between the circuits, the decline in the nation's competitiveness among public equity markets will surely continue, and foreign investment in the United States will be further deterred.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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