No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., ET AL.,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* INSTITUTIONAL INVESTORS SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is filed by more than 40 institutional investors – including many of the largest public pension funds in the world – that collectively manage approximately $2 trillion of assets on behalf of over 15 million individuals.[1] A substantial portion of these assets is invested in securities purchased in public offerings and registered under the Securities Act of 1933. Consequently, *amici* have a vital interest in the proper interpretation of Section 11 of the Securities Act, 15 U.S.C. § 77k, which authorizes private suits when a registration statement contains any "untrue statement of a material fact" or "omit[s] to state a material fact" that is "necessary to make the statements therein not misleading . . . ."

A listing and descriptions of the *amici* joining this brief can be found in the Appendix, *infra*.

SUMMARY OF ARGUMENT

This Court should hold that Section 11 does not require a plaintiff to show that the maker of a statement of opinion subjectively believed it to be false. Deceptive intent is not a necessary condition for a violation of Section 11. This Court should make clear that an opinion can violate Section 11 without

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for a party authored any part of this brief, and no person other than *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters from all parties consenting to the filing of the brief are on file or have been submitted to the Clerk of the Court.

a showing that the maker of the statement did not subjectively believe the opinion.

Such a rule is vital to protect the interests of institutional investors, whose importance both in the effective functioning of this nation's securities markets and in securities litigation has been repeatedly recognized by Congress. Institutional investors contribute a substantial majority of the capital invested in the nation's securities markets. Congress endorsed a leading role for institutional investors in the private enforcement of the federal securities laws in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). Congress recognized that institutional investors have a strong interest in enforcing the securities laws, as well as a long-term perspective that aligns their interests with those of the companies in which they invest.

Petitioner Omnicare asks this Court to create a rule that would immunize statements of opinion in registration statements unless a plaintiff can adequately allege (and then prove) that the maker of the statement did not subjectively hold the opinion. According to Omnicare, liability should turn solely on the "psychological fact" of the speaker's belief. Pet. Br. 16 (quoting heading).

Such a rule would significantly harm investors. In most cases, it would be extremely difficult or even impossible to establish the subjective state of mind of the person making the relevant statement. Institutional investors typically lack any knowledge as to the "psychological fact" of the speaker's belief and instead rely on the objective meaning of information provided in registration statements.

Hence, Omnicare's proposal would change Section 11 from a straightforward remedy, which this Court has held imposes a relatively minimal burden on plaintiff investors, to a complex recipe for costly litigation. In many cases, proving a subjective state of mind would be not only time-consuming, but utterly infeasible.

Omnicare's proposal would also invite gamesmanship. Virtually any statement can be labeled an "opinion" by the simple artifice of adding a phrase such as "we believe" (as the statements at issue in this case illustrate). Such semantic sleights of hand could transform almost any provision of a registration statement (even financial line items) into an "opinion" requiring a plaintiff to show that the author of the statement did not subjectively believe it to be true. This would eviscerate Section 11 and the legislative scheme for liability in public offerings.

Further, Omnicare's change would reduce the usefulness and integrity of registration statements. Rather than being able to take the information in registration statements at face value, institutional investors would confront the danger that issuers and others would have less incentive to ensure the truthfulness of the representations in registration statements, because they could claim immunity for any "opinion" they sincerely held. Rather than placing a premium on accuracy in registration statements, Omnicare's version of Section 11 would reward ignorance on the part of issuers, who could genuinely claim "sincere belief" only if they avoided a thorough investigation of the facts. At a minimum, institutional investors would incur additional costs of independent verification, by probing into

supporting data and evidence to verify as best they could the "opinion"-linked information in registration statements.

These additional burdens on investors – which would seriously disrupt the careful design of the Securities Act's scheme for public-offering responsibilities and liability – could translate into a decreased willingness to invest in public offerings, distorting the securities markets and reducing the availability of capital for entrepreneurs and innovative businesses. The operation of U.S. capital markets would be impaired if investors believed that registration statements could not be trusted or if no feasible remedy were available for misstatements and omissions couched in terms of an opinion.

Further, many institutional investors have large amounts invested in passive strategies, such as index funds. These strategies are enormously popular with investors and account for trillions of dollars in assets under management. Indexed investments rely categorically on the integrity of the financial markets; indeed, they assume market prices are fundamentally fair and the market cannot be beat. Any reduction in the trustworthiness or reliability of registration statements would greatly impair the effectiveness of indexed investments and other passive investment strategies.

Omnicare and its *amici* contend that this Court should impose a subjective-intent requirement in Section 11 because securities litigation has harmful economic effects. Yet this Court recently rejected similar policy arguments in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) ("*Halliburton II*"), holding that they were more

properly addressed to Congress. The same result is warranted here.

Omnicare's *amici* claim that the risk of securities-law liability has depressed the number of public offerings in U.S. capital markets. But far from weakening capital markets, liability exposure for material misstatements in public offering materials strengthens and maintains the integrity of U.S. capital markets. Studies show that, when legal regimes fail to protect investors, robust capital markets fail to develop adequately because investors lack the assurances necessary to entrust their capital to management. Simply put, investors fear fraud much more than they fear securities litigation.

If the number of U.S. initial public offerings has declined (and the experience of 2014 shows otherwise), any such decline would be due to the increasing globalization of financial markets, not the level of U.S. securities regulation. If anything, American legal protections for investors cause U.S. markets to be a more attractive location for IPOs.

Finally, concerns expressed by underwriters and auditors as to their potential Section 11 liability are misplaced and have already been accommodated by Congress. Section 11 imposes a different standard of liability on auditors and underwriters than it does on issuers, and affords auditors and underwriters a "due diligence" defense. It would be inappropriate to award them an additional immunity from liability based on subjective intent. Auditors and underwriters are obligated, and in a far better position, to investigate the information in a registration statement than are investors, who are instead entitled to rely on the information's

accuracy. Further, the imprimatur of underwriters and auditors is often critical to an IPO's success. Because of the vital role played by auditors and underwriters in registered securities offerings, and because the registration process is integral to the statutory scheme, the standard of care imposed by Section 11 on auditors and underwriters is entirely appropriate.

The judgment below should be affirmed.

ARGUMENT

I. OMNICARE'S RULE OVERLOOKS THE SPECIAL ROLE THAT CONGRESS HAS ACCORDED INSTITUTIONAL INVESTORS.

A. Congress Has Recognized The Important Role Of Institutional Investors In Securities Markets And Securities Litigation.

Amici have an important perspective on the proper interpretation of Section 11. In the aggregate, pension funds that invest in U.S. markets cover tens of millions of active and retired members and control trillions of dollars in assets. Each year these funds invest billions of additional dollars in the U.S. capital markets on behalf of their beneficiaries.

Institutional investors have a long-term outlook on the companies in which they hold securities. They have no incentive to support meritless securities litigation, which only harms their own investments, but they do have a strong interest in ensuring accurate disclosures in public offerings of securities, deterring misrepresentations from infecting the capital markets, and holding wrongdoers

accountable. Their overriding responsibility is to invest for the retirement and long-term security of tens of millions of active workers and retirees across the United States and internationally.

Because institutional investors are typically under a fiduciary obligation to protect the investments they make on behalf of their millions of beneficiaries, these *amici* have a particularly significant interest in the requirements for lawsuits to redress violations of the federal securities laws. Indeed, it is doubtful whether any party has a greater stake in the requirements for securities actions than institutional investors.

Further, many state and local governments are constitutionally obligated to guarantee defined-benefit retirement plans. Therefore, in many cases, taxpayers would bear the ultimate costs if investment funds suffered losses due to the malfeasance of public securities issuers and their executives.

Congress has recognized the important perspective of institutional investors and endorsed a leading role for them in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). The PSLRA creates a rebuttable presumption for the appointment as lead plaintiffs of investors with the largest financial interest in the relief sought by the class. In the PSLRA, Congress acted "to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs" in securities class actions. *Tellabs, Inc. v.*

Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007).

This reform was designed to encourage the selection of institutional investors as lead plaintiffs precisely because they are "deemed to have a large enough financial interest in the litigation and sufficient professional expertise in directing litigation to ensure that class members' interests are competently and dutifully served." Mary K. Kane, *et al.*, WRIGHT & MILLER ON FEDERAL PRACTICE & PROCEDURE § 1806 at n.22 (2012). "Institutional investors, [Congress] believed, are less likely to bring abusive or meritless litigation." *Id.* at n.23.

Thus, institutional investors have an important and congressionally recognized interest in ensuring that meritorious securities litigation remains a viable tool.

B. Section 11 Provides An Important Remedy For Institutional Investors.

The Securities Act of 1933 requires the preparation and filing of registration statements in connection with public offerings of securities. *See* 15 U.S.C. § 77e. The 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). Indeed, "[t]he primary innovation of the 1933 Act was the creation of federal duties—for the most part, registration and disclosure obligations—in connection with public offerings." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995).

Registration statements play a critical role in public offerings. They are lengthy documents filed with the SEC and available online, whose function is to disclose important financial and other information that provides a key foundation for millions or billions of dollars' worth of investment decisions. As this Court has noted, "[t]he potential impact on shareholders of false or misleading registration statements needs no elaboration." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1173 (2014).

Section 11 of the 1933 Act creates an express cause of action for persons acquiring securities issued under a registration statement that "contained an untrue statement of a material fact" or "omitted to state a material fact . . . necessary to make the statements therein not misleading . . . ." 15 U.S.C. § 77k(a). Section 11 "was designed to assure compliance with the disclosure provisions of the [Securities] Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & Maclean v. Huddleston*, 459 U.S. 375, 381-82 (1983) (footnote omitted). A plaintiff "need only show a material misstatement or omission" in the registration statement "to establish his *prima facie* case." *Id.* at 382. Section 11 is targeted and "limited in scope" – for example, it pertains only to registration statements and contains a one-year statute of limitations, 15 U.S.C. § 77m – but it "places a relatively minimal burden on a plaintiff." *Herman & Maclean*, 459 U.S. at 382. As this Court has explained, "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements," while other defendants, including

auditors and underwriters, may assert a defense of "due diligence." *Id.*

Decades of industry practice under this legal framework have created the settled expectation among institutional investors that registration statements will be accurate and, if not, that a streamlined and efficient remedy will be available under Section 11. Just as investors typically rely on the integrity of the market price in making their investment decisions, *see Halliburton II*, 134 S. Ct. at 2410, so too they assume the accuracy and integrity of registration statements in connection with public offerings. Indeed, the operation of U.S. capital markets would be substantially impaired if investors believed that registration statements could not be trusted or if no practical remedy were available for misstatements and omissions in public offering materials.

C. Omnicare's Proposal Would Impose A Substantial Burden On Institutional Investors.

Omnicare proposes to immunize statements of opinion in registration statements unless a plaintiff can allege (and then prove) that the maker of the statement did not subjectively hold that opinion. According to Omnicare, liability should turn solely on the "psychological fact" of the speaker's belief. Pet. Br. 16 (quoting heading).

Omnicare's proposed rule should be rejected. It would significantly burden institutional investors, which typically lack knowledge as to the "psychological fact" of the speaker's belief. Institutional investors rely on the objective meaning of representations in registration statements, and it

would usually be infeasible for them to investigate and develop proof regarding the subjective state of mind of the persons in question, particularly at the pleading stage. Given the standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007), securities plaintiffs would likely face the argument that they are required to plead specific evidence making the allegation of subjective disbelief plausible, which might be particularly difficult at the outset of a case, without the benefit of any discovery. *Cf.* Pet. App. 9a (applying heightened pleading standards of Fed. R. Civ. P. 9(b) to the plaintiff's claims in this case).

The House Report accompanying the 1933 Act recognized the danger to investors:

> Every lawyer knows that with all the facts in the control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of the defendant. Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omissions or commission on those who purport to issue statements for the public's reliance.

H.R. Rep. No. 85, 73d Cong., 1st Sess., at 9 (1933).

Indeed, for nearly two centuries, this Court has recognized that a drawback of an intent standard is "the extreme difficulty of ascertaining what is, *bona*

fide, the interpretation of the party." *Barlow v. United States*, 32 U.S. 404, 411 (1833).[2]

That other areas of the law may involve inquiries into subjective intent is immaterial. Section 11 reflects Congress's decision to provide an effective enforcement mechanism for investors injured by violations of the requirement of accurate registration statements in public securities offerings. Thus, the whole point of Section 11 is to provide a prompt and efficient remedy for violations that "places a relatively minimal burden on a plaintiff." *Herman & Maclean*, 459 U.S. at 382. Yet Omnicare's

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[2] *See also*, *e.g., McCutcheon v. Fed. Election Comm'n*,134 S. Ct. 1434, 1445 (2014) (noting the "difficult[y]" of applying a standard based on "subjective intent" to political contributions) (internal quotation marks omitted); *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 744 (2013) (agreeing with "the need to eliminate the consideration of evidence of subjective intent" in the definition of "vessel"); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011) ("we have almost uniformly rejected invitations to probe subjective intent" under Fourth Amendment); *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) ("The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective."); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009) ("[I]t is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent."); *Saenz v. Roe*, 526 U.S. 489, 517 (1999) (Rehnquist, C.J., dissenting) ("It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain."); *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (legislative immunity does not turn on "subjective intent"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified-immunity test is objective and seeks to "minimize" "the inquiry into officials' subjective intent").

proposal would fundamentally change the nature of Section 11.

The problem is aggravated by the fact that Omnicare's proposal invites semantic gamesmanship. Virtually any statement of fact can be transformed into an "opinion" by simply adding a phrase such as "we believe" (as the statements at issue in this case illustrate). Omnicare's position would invite issuers and others to use verbal tricks to label almost anything in a registration statement (even a financial line item) an "opinion" requiring a plaintiff to show that the author of the statement did not subjectively believe it to be true.

The investment strategies of institutional investors are built on the cornerstone assumption that United States securities markets are fundamentally fair and public securities filings are truthful. If this Court were to adopt Omnicare's proposal, it would create substantial risk to institutional investors by inventing a potentially sweeping immunity under Section 11 for any person who could assert that he or she sincerely held the opinion in question, even if it lacked any reasonable basis. An institutional investor could well find it quite difficult and very burdensome to overcome such a defense, because it is grounded in the person's subjective belief rather than objective indicia of truth or falsity.

Further, the utility of registration statements would be undermined. Institutional investors would face the risk that issuers and others would have less incentive to ensure the truthfulness of the representations in registration statements, because they could claim immunity for any "opinion" they

sincerely held. Indeed, an issuer that engaged in a full and thorough investigation of the facts would only imperil its ability to assert a defense of "sincere belief" under the new subjective standard. Hence, rather than placing a premium on accuracy and full disclosure in registration statements, Section 11 would reward ignorance on the part of issuers.

At a minimum, institutional investors would incur additional costs to probe further on their own into supporting data and evidence, to verify as best they could the information in registration statements. Section 11's purpose, to encourage investors to take representations in registration statements at face value, would be defeated.

These additional burdens on institutional investors could translate into a reduced willingness to invest in public offerings, distorting the securities markets and reducing the availability of capital for entrepreneurs and innovative businesses.

Moreover, many institutional investors rely on passive strategies, such as index funds, for their investment decisions. Such strategies – which are enormously popular with investors and account for trillions of dollars in assets under management[3] – assume the integrity of the financial markets and

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[3] *See, e.g.*, Investment Company Institute, 2014 Investment Company Fact Book; A Review of Trends and Activities in the U.S. Investment Company Industry (54th ed.) pp. 42, 44, http://www.icifactbook.org/pdf/2014_factbook.pdf (noting that "[a]s of year-end 2013, 372 index funds managed total net assets of $1.7 trillion" and "[d]emand for index domestic equity mutual funds more than tripled in 2013" while "[i]n contrast, actively managed domestic equity mutual funds experienced a net outflow of $575 billion" from 2007 to 2013)).

"the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013). Indeed, indexed investing is a prototypical example of an investment strategy that relies on the integrity of market prices because it assumes market prices are fundamentally fair and the market cannot be beat. Accordingly, any reduction in the trustworthiness or reliability of registration statements would greatly impair passive investment strategies.

This Court has consistently — and often unanimously — opined that "private securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Tellabs,* 551 U.S. at 321 n.4 (8-1); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, 81 (2006) (8-0 vote). In fact, private enforcement has resulted in larger recoveries than SEC action. For example, in the Enron fraud, the SEC recovered $440 million while investors recovered approximately $7.2 billion from private suits.[4] The SEC settlement fund in connection with WorldCom was $750 million – at the time the largest in the agency's history – compared to $6.1 billion recovered in the private action.[5] Notably, the private

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[4] *Compare* Securities and Exchange Comm'n, *Enron*, www.sec.gov/divisions/enforce/claims/enron.htm *with* Kristen Hays, "Enron Settlement: $7.2 Billion to Shareholders," HOUS. CHRON., www.chron.com/business/enron/article/Enron-settlement-7-2-billion-to-shareholders-1643123.php (Sept. 9, 2008).

[5] *Compare* AccountingWeb, "$750 Million MCI/WorldCom Settlement is Largest in SEC History,"

settlement with WorldCom included $24.75 million from individual directors while the SEC fine was paid only by the company.[6] The SEC did not recover anything for investors in the Cendant litigation, but the private action recovered $3.2 billion.[7] Similarly, while the SEC settled with Charter Communications in return for a cease-and-desist promise not to violate the securities laws again, the private lawsuits were settled for a $64 million cash fund and an $80 million equity distribution.[8] Empirical research shows that private class actions are more effective than SEC investigations in policing securities fraud.[9]

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www.accountingweb.com/topic/750-million-mciworldcom-settlement-largest-sec-history (July 7, 2003) *with Settlements*, www.worldcomlitigation.com/html/citisettlement.html. The website www.worldcomlitigation.com is the information site administered by Lead Counsel in the *WorldCom* matter.

[6] AccountingWeb, *supra*; www.worldcomlitigation.com, *supra*.

[7] *See In re Cendant Corp. Litig.*, 264 F.3d 201, 217 (3d Cir. 2001).

[8] *Compare* Business Wire, "Charter Communications Reaches Settlement in Class Action and Derivative Lawsuits," www.businesswire.com/news/home/20040805005892/en/Charter-Communications-Reaches-Settlement-Class-Action-Derivative (Aug. 5, 2004) *with* Stipulation of Settlement, ECF No. 292, *In re Charter Comm'cns, Inc., Sec. Litig.*, No. 02-cv-1186, §1.26 (E.D. Mo. Feb. 17, 2005).

[9] *See* Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, University of Michigan Law School, Law & Econs. Research Paper Series, No. 12-022, Aug. 2014, *available at* ssrn.com/abstract=2109739.

This Court has warned of "plac[ing] an unnecessarily unrealistic evidentiary burden" on securities plaintiffs. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("*Halliburton I*") (citations, quotation marks, and brackets omitted). The securities laws embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry" and should be construed "to effectuate [their] remedial purposes." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 195 (1963). *Accord Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

Congress has consistently legislated against these background principles in enacting the PSLRA and other securities legislation. Omnicare's proposal is inconsistent with this Court's longstanding approach to the interpretation of remedies under the securities laws.

II. OMNICARE'S POLICY ARGUMENTS ARE MISGUIDED.

Omnicare and its *amici* contend that this Court should impose a subjective-intent requirement on Section 11 because securities litigation has harmful economic effects. *See* Pet. Br. 32-38; Sec. Indus. & Fin. Mkts. Ass'n Br. 12-14; Chamber of Commerce Br. 21-26; Center for Audit Quality Br. 8-20. These objections have no merit.

A. Omnicare's Policy Concerns Are Recycled Versions Of Arguments Recently Rejected By This Court In *Halliburton II.*

As an initial matter, the arguments of Omnicare and its *amici* echo the policy concerns raised only a few months ago by Halliburton, which urged this Court to abandon the "fraud on the market presumption" of *Basic Inc. v. Levinson,* 485 U.S. 224 (1988), on the ground that it "produce[d] a number of serious and harmful consequences," including "impos[ing] excessive costs on businesses." *Halliburton II*, 134 S. Ct. at 2413.

This Court rejected those objections: "These concerns are more appropriately addressed to Congress, which has in fact responded, to some extent, to many of the issues raised by Halliburton and its *amici*." *Id.* In *Halliburton II*, this Court noted that Congress has enacted the PSLRA, which sought to combat perceived abuses in securities litigation, and the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227. This Court concluded that "[s]uch legislation demonstrates Congress's willingness to consider policy concerns of the sort" raised by Halliburton. 134 S. Ct. at 2413.

Precisely the same reasoning is applicable here. In fact, *Halliburton II*'s reference to the PSLRA is highly instructive: Instead of restricting Section 11 as Omnicare proposes, Congress in the PSLRA imposed a special subjective-knowledge requirement only with respect to certain "forward-looking" statements of opinion concerning the future. *See* 15 U.S.C. § 77z–2. In that provision, Congress addressed the question when subjective disbelief should be the appropriate standard, and when it should not be. Petitioner seeks to overturn the balance struck by Congress and apply the "subjective intent" standard throughout Section 11.

Moreover, the PSLRA deliberately favored institutional investors, as noted at pp. 7-8, *supra*. Congress *encouraged* institutional investors to take a leadership role in securities litigation because they "do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Rep. No. 104-369, at 35 (1995). "Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs*, 551 U.S. at 321 n.4 (quoting *Merrill Lynch v. Dabit*, 547 U.S. at 81).

B. Omnicare's Proposed Immunity Would Impair The Integrity Of Capital Markets.

Even if this Court were to consider the policy arguments of Omnicare and its *amici*, they lack merit. For example, the *amici* claim that the risk of securities-law liability has reduced the number of public offerings in U.S. capital markets. But they

have failed to identify the relevance of their argument for this case. They cannot demonstrate any plausible link between Section 11 *specifically* and what they claim to have identified as a reduced number of offerings. Certainly, given that Omnicare argues that the Second, Third, and Ninth Circuits have adopted its rule, *see* Pet. for Cert. i, 8-13, it is curious for its own *amici* to maintain that the decline in U.S. public offerings is already occurring. If that decline is happening now, while Omnicare's rule is already in force in the nation's largest financial markets, then the decline has little if anything to do with judicial interpretations of Section 11.

In any event, far from weakening capital markets, legal liability for untrue registration statements strengthens the markets and encourages investment by maintaining market integrity. Omnicare's *amici* focus on only half of the equation: the issuers deciding where to list. *See* Chamber of Commerce Br. at 23 (cost of doing business in the United States was "of real concern to corporate executives" (internal quotation marks omitted)). They ignore the other side of the equation – investors, who must be confident in the integrity of the market to be willing to purchase securities in public offerings, and that confidence requires strong enforcement of the securities laws. "The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (internal citation omitted).

Studies show that, when legal regimes fail to protect investors, capital markets fail to develop

adequately, because investors lack the assurances necessary to entrust their capital to entrepreneurs and management. Simply put, investors fear fraud much more than they fear securities litigation.[10] Robust free markets work well only when investors feel confident enough to take business risks without the added fear of fraud:

> [R]ecent research documents significant adverse consequences of the failure of a legal regime to protect investors. . . . [W]hen investor protection is poor, investment funds are not allocated efficiently across activities . . . , since entrepreneurs with profitable projects need not be the ones with access to funds and investors do not entrust their funds to entrepreneurs. These failures of markets to work well have significant real consequences. . . . [P]oor investor protection policies, through their adverse effects on capital market development, retard economic growth.[11]

Empirical studies of capital formation validate the connection between investor protection and capital formation. A study by Jonathan M. Karpoff of the University of Washington, D. Scott Lee of the University of Nevada, Las Vegas, and Gerald S. Martin of American University examined private

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[10] Joel Seligman, The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority," 108 HARV. L. REV. 438, 439-42 (1994).

[11] Andrei Shleifer, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE, at 1984 (Oxford 2000) (citations omitted).

enforcement actions between 1978 and 2004 and concluded: "Contrary to many criticisms of private lawsuits and regulatory actions, we find that legal penalties are highly systematic, and in particular, are positively related to the size and severity of the harm from the misconduct."[12] Further, the study noted the positive impact on capital markets: "[P]rivate enforcement – in particular, the ability to seek recompense through legal actions – is strongly correlated with financial market development."[13]

Another study focusing on Europe, conducted by scholars at the National Bureau of Economic Research (NBER), the Wharton School (University of Pennsylvania), and the Booth School of Business (University of Chicago), showed a similar strengthening of market liquidity as regulations tightened.[14] The cost of capital decreased as a result of regulation, and the researchers' results "suggest that improving key elements of securities regulation leads to substantial capital-market benefits."[15]

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[12] Jonathan M. Karpoff, *et al.*, *The Legal Penalties for Financial Misrepresentation*, at 1 (May 2, 2007), *available at* http://ssrn.com/abstract=933333. .

[13] *Id.* at 3.

[14] Hans B. Christensen, *et al.*, Capital-Market Effects of Securities Regulation: Hysteresis, Implementation, and Enforcement, at 3 (Nov. 2011). ("[W]e find that market liquidity increases when new market abuse . . . and transparency . . . regulation come into force, using both bid-ask spreads and the percentage of zero-return days. The estimated liquidity improvements are economically significant."), *available at* https://bspace.berkeley.edu/access/content/group/e675b947-6067-425e-adbf-10e8922547b9/CHL%20Enforcement.pdf.

[15] *Id.* at 3.

Importantly, the effects shown in this study "ha[ve] immediate capital-market effects (even before the first enforcement action)."[16] In addition, considering European regulation allowed the researchers to examine the effects at different points in time, due to staggered implementation, rather than the effects of major regulatory events such as the Sarbanes-Oxley Act.[17] The ultimate findings "support *a causal link* between stricter securities regulation and market liquidity."[18]

C. Any Declines In IPO Activity Are Not Caused By Securities Regulation.

Nevertheless, Omnicare's *amici* complain that excessive securities regulation has resulted in a decline in U.S. initial public offerings (IPOs). But in the context of increasingly global financial markets, "[i]t is hardly a surprise . . . that competition has eroded the U.S.' once massive advantage [in IPOs] for reasons unrelated to regulation except for the increasing quality of what other countries are doing."[19] For example, few would be surprised that the rise of Chinese companies has led to an increase in offerings in China. Indeed, the surprising

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[16] *Id.* at 8. The finding complements the conclusions from Karpoff's study, *see* nn. 12-13 *supra* and accompanying text. Both *ex ante* and *ex post* securities regulations strengthen capital markets.

[17] *Id.* at 1.

[18] *Id.* at 35 (emphasis added).

[19] Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 194-95 (2008).

phenomenon has been the number of Chinese companies seeking *to list in the United States.*[20]

Economic research shows that swings in IPO levels are "hypersensitive to changes in market conditions."[21] Worries about the competition between New York and London for public offerings were rendered "largely obsolete" because of the financial crisis of 2008-2009, and at any rate, "focusing on the regulatory advantages of London versus New York misses the big picture. To abuse once more Thomas Friedman's wonderful analogy, the IPO world is clearly becoming flat."[22] Globalization is much more important to IPO markets worldwide than is the effect of United States securities laws.

In fact, studies of the IPO market show that vigorous disclosure and anti-fraud regulations correlate strongly with an increased number of IPOs, even controlling for other factors using multiple

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[20] *E.g.,* "China's Online Goliaths Prepare Public Offerings in U.S.," N.Y. TIMES DEALBOOK, Mar. 14, 2014 ("The Chinese Internet industry is coming of age, as some of its biggest players prepare to start new chapters as publicly traded companies — in the United States. . . . The latest crop of companies has also chosen to file in the United States, which has enjoyed an abundance of I.P.O.s over the last few years.") (*available at* http://dealbook.nytimes.com/2014/03/14/alibaba-aims-for-an-i-p-o-in-new-york/?_php=true&_type=blogs&_r=0).

[21] Jay R. Ritter, "Investment Banking and Security Issuance," 1A HANDBOOK OF THE ECONOMICS OF FINANCE 293 (George M. Constantinides, *et al.*, eds., Elsevier 2003).

[22] Craig Doidge, *et al.*, *The U.S. Left Behind: The Rise of IPO Activity Around the World*, NBER Working Paper No. w16916, at 32 (March 2011), *available at* http://ssrn.com/abstract=1801086.

regressions.[23] U.S. regulation of financial markets actually enhances this country's competitive position against other markets.

"The United States is often viewed as a gold standard for purposes of accurate and complete disclosure, and foreign markets reward companies that meet these standards. As a result, foreign companies often list in the United States not because they want to raise capital but because of the resulting increase in share prices that comes with increased investor confidence."[24] "Many foreign companies have elected to list on U.S. exchanges in part because of the positive signal conveyed to investors by the issuer's willingness to comply with fuller disclosure requirements and greater protection for minority investors."[25]

Studies have found that foreign companies listing their stocks on their home exchanges and in the United States are able to raise capital on better terms, at a lower net cost than companies that list only outside the United States.[26] Economists refer to

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[23] *Id.* at 20-21.

[24] J. Robert Brown, Jr., Criticizing The Critics: Sarbanes-Oxley And Quack Corporate Governance, 90 MARQ. L. REV. 309, 327 (2006).

[25] Onnig H. Dombalagian, Demythologizing The Stock Exchange: Reconciling Self-Regulation And The National Market System, 39 U. RICH. L. REV. 1069, 1129 (2005).

[26] Craig Doidge, *et al.*, *Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listing Choices Over Time*, at 5, 29 (Fisher Coll. of Bus. Working Paper Series, Paper No. 2007-03-012, July 2007), *available at* http://www.ssrn.com/abstract=982193; Luzi Hail and Christian Leuz, *International Differences in the Cost of Equity Capital:*

this as a "cross-listing premium."[27] One study found "an average 30 percent increase in the home market value of trading after listing on the NYSE."[28]

By contrast, companies that cross-list in their home exchanges and London, which is widely recognized to have less rigorous regulations than the United States, do not enjoy the cross-listing premium.[29] This premium exists in the United States because of the superior protections that the regulatory regime in this country provides investors.[30]

The companies that opposing *amici* fear will flee to London (*see* Chamber of Commerce Br. at 23-24) will more likely list in both countries in order to capture the cross-listing premium from the United States.

The importance of strong securities-law enforcement is also apparent in delisting decisions. An analysis of firms that delisted from American stock markets between 2002 (when the Sarbanes-Oxley Act was enacted) and 2008 validates the theory that firms list in the United States because of

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Do Legal Institutions and Securities Regulation Matter?, 44 J. ACCT. RES. 485, 485 (June 2006).

[27] Doidge, n. 26 *supra*, at 3.

[28] Howell E. Jackson & Eric J. Pan, Regulatory Competition in International Securities Markets: Evidence from Europe, 3 VA. L. & BUS. REV. 207, 230 (2008) (citing Katherine Smith & George Sofianos, The Impact of an NYSE Listing on the Global Trading of Non-U.S. Stocks, 2-3 (New York Stock Exchange, Working Paper No. 97-02, 1997)).

[29] *Id.* at 31.

[30] *Id.* at 29.

the "bonding" effect a U.S. listing confers, strengthening the appeal of their marketed securities, and delist when those benefits become less important (*e.g.*, when there is less need to raise outside capital).[31] When firms needed to demonstrate trustworthiness and integrity to potential outside investors, they tended to list in the United States precisely because of this country's stronger regulations; conversely, the decision to delist usually came when those particular advantages were no longer needed. The study also considered an alternate hypothesis, that firms delisted because of the oversight burdens and deadweight loss imposed by the stronger regulations of the Sarbanes-Oxley Act, but did not find data to support that hypothesis.[32] Contrary to the suppositions of the editorialists cited by opposing *amici*, the increased regulation of U.S. capital markets has not chased firms overseas. Sec. Indus. & Fin. Mkts. Ass'n Br. 13-14. Indeed, evidence supports the inverse conclusion: that regulation strengthens the integrity of the U.S. capital markets, promoting listing here, and the firms that delist are predominantly ones that no longer benefit from the enhanced integrity.[33]

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[31] Craig Doidge, *et al.*, *Why Do Foreign Firms Leave U.S. Equity Markets?*, ECGI - Finance Working Paper No. 244/2009, at 35-36 (May 30, 2009), *available at* http://ssrn.com/abstract=1415782 or http://dx.doi.org/10.2139/ssrn.1415782.

[32] *Id.*

[33] *See* Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 195-96 (2008) ("[T]he United States has simply induced a more cleanly defined separation that allows the oranges and other sweeter

Omnicare's *amici* point to a 2014 "study" that lacks sufficient rigor to be reliable. The Committee on Capital Markets Regulation report (cited in Chamber of Commerce Br. 21-23) marshals a list of percentages comparing the period up to 2007 with the period from 2008 to 2014,[34] but provides no indication as to the source of those numbers and no interpretive data to place them in context. The authors offer no further analysis, no tests for robustness or significance, no regressions to eliminate alternate reasons for the declines shown, and no contextualization within established economic literature. Omnicare's *amici* cite data from "the most recent quarter" (Chamber of Commerce Br. 23), yet the information from the summer of 2014 shows that IPO activity in the U.S. is at its highest level since 2000.[35] In any event, focusing on the short term is likely to be misleading. The longer-term empirical research discussed above shows that strong securities laws strengthen U.S. markets, and the shortcomings in Omnicare's data underscore the wisdom of leaving the matter to Congress.

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fruit to distinguish themselves from the lemons, presumably leading to a greater level of investor protection to the extent that the oranges are now more readily available to domestic investors, and the lemons are not.").

[34] Comm. on Capital Mkts. Reg., Continuing Competitive Weakness in U.S. Capital Markets Data Summary Chart (May 1, 2014), available at http://capmktsreg.org/wp-content/uploads/2014/05/Q1.2014.data_.summary.pdf.

[35] "IPO Docket Suggests Busiest Week Since 2000," WALL ST. J. (July 28, 2014) (*available at* http://blogs.wsj.com/moneybeat/2014/07/28/ipo-docket-suggests-busiest-week-since-2000/).

D. Congress Has Already Accommodated The Concerns Of Underwriters And Auditors.

Certain underwriters and auditors, appearing as *amici* in support of Omnicare, express further concerns regarding their potential Section 11 liability. *See* Sec. Indus. & Fin. Mkts. Ass'n Br. 7-12; Center for Audit Quality Br. 8-20. Their arguments, however, do not support Omnicare's construction of Section 11.

The underwriters' and auditors' concerns are misplaced and have already been accommodated by Congress. Section 11 imposes a different standard of liability on auditors and underwriters than it does on issuers, by creating a "due diligence" defense. In particular, Section 11(b)(3) provides that defendants other than issuers are exempt from liability if they can establish that they "had, after reasonable investigation, reasonable ground to believe and did believe, at the time [the relevant] part of the registration statement became effective, that the statements therein were true." 15 U.S.C. § 77k(b)(3). Auditors enjoy an additional protection, because they are not subject to liability under Section 11 in the first place unless they are named with their consent as having "prepared or certified" part of the registration statement, or a report or valuation used in connection with it, that contains the alleged untrue statement. *Id.* at § 77k(a)(4).

The auditor *amici* acknowledge that "these two provisions both play an important role in addressing potential liability under the Act." Center for Audit Quality Br. 15. Indeed, any complaint by the auditors regarding Section 11 is hard to credit, given

that the common law subjected them to negligence liability for their audit opinions. *See* Restatement (Second) Torts § 552 (1979) (giving multiple examples of auditor liability in the comments and illustrations). Yet both the auditor and underwriter *amici* seek an additional immunity not contained in Section 11 – freedom from liability absent a showing of subjective intent – on the ground that their tasks involve the exercise of judgment.

The short answer to this request is that Congress deliberately made Section 11 strong medicine for auditors and underwriters, and this Court should not expand their immunity beyond that already afforded by the statute. The House Report accompanying the 1933 Act confirmed the "heavy" duty on underwriters and auditors to ensure the accuracy of information in registration statements:

> All who sell securities with such a flaw, who cannot prove that they did not know—or who in the exercise of due care could not have known—of such misstatement or omission, are liable under sections 11 and 12. For those whose moral responsibility to the public is particularly heavy, *there is a correspondingly heavier legal liability*—the persons signing the registration statement, the underwriters, the directors of the issuer, the accountants, engineers, appraisers, and other professionals preparing and giving authority to the prospectus—all these are liable to the buyer . . . if they cannot prove [the use of due care]. This throws upon originators of securities a duty of competence as well as innocence . . . .

H.R. Rep. No. 85, 73d Cong., 1st Sess. at 9 (1933) (emphasis added) (quoted in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581 (1995)).

Quite plainly, auditors and underwriters are in a better position to investigate the information in a registration statement than are institutional investors. The auditors and underwriters have access to an issuer's internal financial information and its officers. They have the ability to insist on full disclosure as a precondition for supplying their services to the issuer. And they can establish immunity under Section 11 simply by performing their due diligence with reasonable care.

As the SEC has opined, in enacting Section 11,

> Congress recognized that underwriters occupied a unique position that enabled them to discover and compel disclosure of essential facts about the offering. Congress believed that subjecting underwriters to the liability provisions would provide the necessary incentive to ensure their careful investigation of the offering.

The Regulation of Securities Offerings, Securities Act Release No. 7606A, 63 Fed. Reg. 67174, 67230 (Dec. 4, 1998), 1998 WL 833389.

Further, the imprimatur of underwriters and auditors is often critical to an IPO's success, as the SEC explained more than four decades ago:

> By associating himself with a proposed offering, an underwriter impliedly represents that he has made such an investigation in accordance with professional standards. Investors properly rely on this added

> protection which has a direct bearing on their appraisal of the reliability of the representations in the prospectus. The underwriter who does not make a reasonable investigation is derelict in his responsibilities to deal fairly with the investing public.

In re Richmond Corp., Exchange Act Release No. 4584, 41 SEC 398 [1961–1964 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 76,904, 1963 WL 63647, at *7 (Feb. 27, 1963); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 818-19 nn.13-15 (1984) (noting importance of audit opinions to investors).

Because of the vital role played by auditors and underwriters in public offerings of securities, and because the registration process is integral to the statutory scheme, the standard of care imposed by Congress is entirely appropriate. It makes little sense to force an institutional investor to bear the losses caused by the failings of an auditor or underwriter, when the investor does not enjoy the same degree of access to information.

Moreover, the immunity sought by the auditor and underwriter *amici* would sow confusion and generate litigation. The underwriter *amici*, for example, contend that "judgment-laden issues" such as legal compliance, valuation questions, and credit risk demand a showing of subjective intent. Sec. Indus. & Fin. Mkts. Ass'n Br. 10. The auditor *amici*, for their part, suggest that any audit opinion involving an "accounting question," such as the adequacy of loan reserves, an estimate of goodwill, or even a description of credit risks, should require a showing of subjective intent. Center for Audit

Quality Br. 15. "The list is endless." *Id.* at 17. By their own admission, these tasks encompass virtually everything auditors and underwriters do in connection with a public offering.

Such an approach threatens to render Section 11 virtually meaningless for auditors and underwriters. It is difficult to imagine what Congress might have meant by an accountant's certification if not an audit affirming the accuracy of the documents in question, and it is hard to see what Congress meant by an underwriter's representation if not its decision to offer securities for sale under a registration statement filed with the SEC.

When combined with certain holdings in lower courts giving an improperly expansive view to the concept of an "opinion," the proposal by the auditors and underwriters would lead to genuinely absurd results. For example, the Second Circuit has opened the door for an argument that a company's reported assets and its reported earnings may qualify as matters of subjective opinion, because valuation of an asset, such as goodwill, involves judgment, as does the determination of how much a company should reserve for uncollectible loans.[36] Under Generally Accepted Accounting Principles, both determinations directly affect a company's reported financial results; and a failure to write down assets and to take appropriate reserves will overstate reported net income, assets, and earnings per share.[37] Thus, when a company reports its financial

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[36] *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110-13 (2d Cir. 2011).

[37] *See*, *e.g.*, Larry D. Wall, Timothy W. Koch, *Bank Loan-Loss Accounting: A Review of Theoretical and Empirical*

results, including in its annual report on Form 10-K (which must be included in any registration statements for public offerings of securities), under the Second Circuit's approach the company's reported earnings may be nothing more than a subjective opinion. As if this weren't enough, under the proposal by the auditors and underwriters, the role of an auditor would be simply to form a subjective opinion about whether the company actually holds its professed subjective opinion as to its reported assets and earnings – rather than actually testing the financial results for accuracy.

Such a result would be intolerable. When investors are told that a company earned a specific amount in the past fiscal year, they understand – and are entitled to understand – that the figure disclosed has an objective reality. And they are entitled to think that auditors have tested that objective reality.

This Court should not accept the invitation to water down fundamental protections of the securities laws. The proposals of the auditor and underwriter *amici* should be addressed to Congress, not to this Court.

Evidence, FED. RESERVE BANK OF ATLANTA ECON. REV. 4 (Second Quarter 2000) ("[T]he ultimate effect of an increase in the loan-loss allowance [or reserve] is [] to increase the allowance . . . while decreasing both reported net income and owners' equity."); United States Securities and Exchange Commission, Staff Accounting Bulletin No. 102, 17 C.F.R. Part 211(B) (July 6, 2001) ("Loan loss estimates developed without a disciplined methodology or adequate documentation (of both a disciplined methodology and the resulting amounts of loan loss provisions and allowances) can undermine the credibility of an institution's financial statements.").

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Dated: September 2, 2014

APPENDIX

APPENDIX TABLE OF CONTENTS

List of Amici Curiae 1a

APPENDIX

List of Amici Curiae

Alameda County Employees' Retirement Association is a California public pension plan that provides retirement, death, and disability benefits to active and retired public employees of Alameda County and other participating employers.

APG Asset Management N.V. ("APG") manages pension assets for approximately 4.5 million beneficiaries on behalf of its pension fund clients. APG manages pension assets for twenty percent of all families in the Netherlands.

Arkansas Public Employees Retirement System provides retirement income to state, county and municipal employees, college and university employees, non-teaching public school employees, and other non-state employees in the State of Arkansas.

Arkansas Teacher Retirement System provides retirement, disability, survivor and death benefits to public school teachers and other educationally related employees in the State of Arkansas.

Automotive Industries Pension Trust Fund provides retirement benefits to individuals working as machinists or in related crafts involved in the maintenance and repair of consumer vehicles, commercial transport and industrial transport, primarily in the Northern California area.

Blue Sky Group manages pension assets for approximately 85,000 beneficiaries in the Netherlands on behalf of its pension fund clients.

California Public Employees' Retirement System provides retirement, health and related financial programs and benefits to public employees, retirees and their families and to public employers in the State of California. It is the largest public pension system in the United States.

California State Teachers' Retirement System provides retirement, disability and survivor benefits for full-time and part-time public school educators and their families in the State of California. It is the largest teachers' retirement system and second largest public pension fund in the United States.

Cambridge Retirement System provides retirement, disability, and other benefits to employees of the City of Cambridge, Cambridge Housing Authority, Cambridge Public Health Commission and Cambridge Redevelopment Authority in the Commonwealth of Massachusetts.

Carpenters Pension Trust Fund for Northern California and Carpenters Annuity Trust Fund for Northern California provide retirement benefits to members of the United Brotherhood of Carpenters and Joiners of America within forty-six northern California counties.

City of Dania Beach Police & Firefighters' Retirement System provides retirement and other benefits for police officers, firefighters, and their beneficiaries in the City of Dania Beach, Florida.

Colorado Public Employees' Retirement Association provides retirement and other benefits to the employees of government agencies and public entities in the State of Colorado.

Dallas Police and Fire Pension System provides retirement, death, and disability benefits for police officers, firefighters, pensioners, and their beneficiaries in the City of Dallas, Texas.

Employees Retirement System of the City of St. Louis is a governmental plan that provides retirement, death, and disability benefits to employees of: the City of St. Louis, Missouri, the St. Louis Art Museum, the St. Louis Zoo, the St. Louis Public Library, the Metropolitan Taxicab Commission, the Mental Health Board and Tower Grove Park.

Fire & Police Pension Association of Colorado administers a statewide multiple employer public employee retirement system providing defined benefit plan coverage as well as death and disability coverage for police officers and firefighters throughout the State of Colorado.

Florida's State Board of Administration is responsible for investing the assets of the Florida Retirement System Trust Fund, one of the largest public retirement plans in the United States, as well as the assets of a variety of other state funds.

Government of Guam Retirement Fund provides retirement, health, disability, and other benefits to employees and their beneficiaries of the Government of Guam.

Illinois Municipal Retirement Fund provides retirement, disability, and death benefits to employees of local governments and school districts in the State of Illinois.

Jacksonville Police and Fire Pension Fund is a defined benefit pension plan covering all full-time

police officers and firefighters of the Consolidated City of Jacksonville, Florida.

Kern County Employees' Retirement Association provides retirement, disability and death benefits to employees of Kern County, California.

Louisiana Sheriffs' Pension & Relief Fund is a multi-employer, defined benefit, governmental retirement plan providing retirement, disability and death benefits to active and retired employees of the sheriff's offices in all sixty-four Louisiana parishes.

Miami Police Relief and Pension Fund is a defined contribution plan providing retirement benefits to police officers in the City of Miami, Florida.

Mn Services N.V. manages and administers pension assets for approximately two million people in the Netherlands and United Kingdom on behalf of its pension fund clients.

Montana Board of Investments is responsible for investing all state agency funds and local government funds under a unified investment program for the State of Montana.

Municipal Employees' Retirement System of Michigan is a statutory public corporation with nearly eight hundred municipal members that was created by the Michigan Legislature to help municipalities across the State of Michigan offer affordable, sustainable retirement solutions for their employees.

The New York State Common Retirement Fund ("NYSCRF") provides service and disability retirement benefits, as well as death benefits to state and local government employees and employees of

certain other participating employers in the State of New York. As one of the largest public pension funds in the United States, NYSCRF has more than one million members, beneficiaries, and retirees.

New York State Teachers' Retirement System ("NYSTRS") administers a defined benefit plan that provides retirement, disability and death benefits to New York State public school teachers and administrators (outside of New York City). It is the second largest public retirement system in New York State and one of the ten largest public pension funds in the nation.

Operating Engineers Pension Trust provides retirement benefits to public and private construction workers and their survivors, including heavy equipment operators, mechanics, concrete pumpers, soil testers, inspectors, and surveyors.

PGGM Investments manages pension assets for approximately 2.5 million beneficiaries in the Netherlands on behalf of its pension fund clients.

The Regents of the University of California ("the University") manages a portfolio of investments which provides benefits to current and retired employees and their beneficiaries. In addition, the University has a separate investment portfolio, its General Endowment Pool (est. 1933), which consists of over 5,000 individual endowed gift funds which support the University's mission of education, research and public service.

Rockledge Firefighters', Rockledge General Employees' & Rockledge Police Officers' Retirement Plans manage the retirement plans for fire

department, police department, and general employees of the City of Rockledge, Florida.

Royal Mail Pension Plan provides pension benefits to employees of Royal Mail, the United Kingdom's universal postal service. It is one of the United Kingdom's largest pension systems.

Sacramento County Employees' Retirement System provides retirement, disability, and survivors' benefits to employees of the County of Sacramento, California, the Superior Court of the County of Sacramento, and eleven special districts with the County of Sacramento.

San Diego City Employees' Retirement System administers the defined benefit plans for active and retired employees of the City of San Diego, San Diego Unified Port District and San Diego County Regional Airport Authority, in California.

San Mateo County Employees' Retirement Association is responsible for providing retirement, disability and survivor benefits to employees and elected officials of the County of San Mateo, the Superior Court of the County of San Mateo, and the San Mateo County Mosquito and Vector Control District in California.

Santa Barbara County Employees' Retirement System is responsible for providing retirement, disability, death and survivor benefits for employees and contracting districts of the County of Santa Barbara, California.

State of Wisconsin Investment Board is responsible for managing the assets of the Wisconsin Retirement System, the State Investment Fund (SIF) and other trust funds of the State of Wisconsin.

Tulare County Employees' Retirement Association provides retirement, disability and death benefits to employees of the County of Tulare, California, the Tulare County Superior Court, and the Strathmore Public Utility District.

Utah Retirement Systems provide retirement and insurance benefits to Utah public employees.