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Supreme Court No. 95436-4 (Consolidated with 95420-8)
Court of Appeals No. 75913-2-I (Consolidated with 75779-2-I)

**SUPREME COURT
OF THE STATE OF WASHINGTON**

FEDERAL HOME LOAN BANK OF SEATTLE,

Appellant,

v.

**BARCLAYS CAPITAL INC.; BCAP LLC;
and BARCLAYS BANK PLC,**

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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INTRODUCTION

The Washington State Securities Act (“WSSA”) protects investors from being misled. If a material misstatement is made in offering a security, and the investor relies on that misrepresentation in purchasing the security, then the investor can rescind its purchase, provided that other elements of the WSSA are met. Conversely, if the investor does not rely on the misrepresentation in making its investment, then the investor has not been misled by the inaccuracy. The Federal Home Loan Bank of Seattle’s (“FHLBS”) request that this Court strip the WSSA of its required element of reliance contravenes the Washington Legislature’s intent and would not help protect investors from being misled. Further, the WSSA, unlike the federal and Uniform Securities Act provisions to which FHLBS points, does not contain an express bar on investors recovering even if they knew of the misrepresentation. Eviscerating the WSSA’s reasonable reliance requirement would thus lead to the nonsensical result that an investor who was aware of the falsity of a misrepresentation and purchased the security anyway could nevertheless sue to get its money back—plus considerable statutory interest. As a result, FHLBS’s position would make Washington the first jurisdiction to provide such investors with the equivalent of insurance against market losses.

The WSSA's substantive liability provision, RCW 21.20.010, tracks almost verbatim the SEC's anti-fraud Rule 10b-5. When it was enacted, and to this day, Rule 10b-5 requires that a plaintiff show that it relied on a defendant's alleged misrepresentations in deciding to purchase the security. Accordingly, Washington courts have consistently and correctly confirmed for nearly 50 years that reliance is also an element of RCW 21.20.010. The Washington Legislature has confirmed that the courts of this State were correct in so doing: the Legislature has amended the WSSA *eight times* but has never changed the reasonable reliance requirement. Faced with this clear record, FHLBS focuses instead on the remedy provision of the WSSA, RCW 21.20.430. But RCW 21.20.430 does not change the elements required to establish liability under the WSSA. Furthermore, when enacted, RCW 21.20.430 expressly incorporated the common law concepts of fraud and misrepresentation, which require a showing of reasonable reliance.

FHLBS's suggestion that the WSSA's reliance requirement harms investors is a red herring. FHLBS introduces no evidence or credible argument to demonstrate harm to investors over the past several decades during which courts required proof of reliance. To the contrary, FHLBS has repeatedly argued that no court had ever held that an investor's reliance on SEC filings was unreasonable as a matter of law.

This case presents extraordinary and unique circumstances that led the trial court to find, and the Court of Appeals to agree, that FHLBS could not show that it reasonably relied on alleged misrepresentations concerning the securities it purchased. FHLBS, a highly sophisticated investor with deep knowledge about the RMBS market, worked directly with a third-party loan originator (IndyMac) to assemble two bespoke RMBS certificates according to FHLBS's specifications. FHLBS did so in the midst of the housing and mortgage crisis, when the rest of its sister Federal Home Loan Banks had stopped purchasing non-prime, private-label RMBS entirely. FHLBS and IndyMac subsequently brought in Barclays to issue the certificates off its shelf solely because FHLBS was no longer allowed to purchase RMBS directly from IndyMac.

Based on the unique record present here, the trial court and the Court of Appeals correctly concluded that FHLBS could not establish reasonable reliance on any alleged misrepresentations. Simply put, FHLBS was never misled. FHLBS does not challenge the Court of Appeals conclusion that there is no genuine issue of material fact that FHLBS did not reasonably rely on any alleged misrepresentations. Instead, as a last resort, FHLBS seeks to change the law, so that it can rescind investments that it not only chose to make with its eyes wide open, but actually helped develop.

Countermanding legislative intent, well-founded policy, and established precedent to permit an investor in FHLBS's circumstances to recover under the WSSA would be a wholly asymmetric response to a nonexistent problem. Further, taking away the WSSA's reasonable reliance requirement would lead to the absurd result that an investor that purchased a security with full knowledge of an alleged material misstatement could subsequently rescind its purchase on the basis of that misrepresentation. This would not be investor protection; it would be unprecedented investor insurance against market losses.

STATEMENT OF THE CASE

The facts are described in detail in Respondents' previous briefing. Br. of Resp't at 7-24; Ans. To Pet. for Review at 2-4.¹

ARGUMENT

I. The Washington Legislature Intended Reliance To Be an Element of a WSSA Claim

A. The WSSA's Liability Provision Is Based on Rule 10b-5, Which Requires Proof of Reasonable Reliance

The WSSA's substantive liability provision, RCW 21.20.010, tracks SEC Rule 10b-5. Rule 10b-5 required plaintiffs to prove reasonable reliance when the WSSA was enacted, and it still does

¹ This Court also granted review of the Court of Appeals' *Credit Suisse* decision, No. 75779-2-I, and consolidated that case with this one. Barclays incorporates the arguments set forth in Credit Suisse's supplemental brief.

today. *See, e.g., Reed v. Riddle Airlines*, 266 F.2d 314, 319 (5th Cir. 1959); *Speed v. Transamerica Corp.*, 5 F.R.D. 56, 60 (D. Del. 1945); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2418 n.1 (2014) (“a private plaintiff must prove . . . reliance upon the misrepresentation or omission”) (internal quotation and citation omitted). This Court has held that when the Legislature enacts a statute that is modeled almost verbatim from a federal statute, the state statute “carries the same construction as the federal law and the same interpretation as federal case law.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (citation omitted).

Washington courts have repeatedly recognized that the Washington Legislature based RCW 21.20.010 on Rule 10b-5. *See, e.g., Clausing v. DeHart*, 83 Wn.2d 70, 72, 515 P.2d 982 (1973) (WSSA “is patterned after and restates in substantial part the language of the federal Securities Exchange Act of 1934,” which Rule 10b-5 implements); *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 109, 86 P.3d 1175 (2004) (“The related federal regulations [to RCW 21.20.010] are Section 10(b) [of the 1934 Act and SEC] Rule 10b-5.”); *Shermer v. Baker*, 2 Wn. App. 845, 849-50, 472 P.2d 589 (1970) (“It seems inconceivable to us that the legislature, in 1959, could have intended that RCW 21.20.010 created for intrastate commerce something different from what rule 10b-5

created for interstate commerce”). Indeed, the language of

RCW 21.20.010 is substantively identical to Rule 10b-5:

SEC Rule 10b-5	RCW 21.20.010
<p>“It shall be unlawful for any person ... in connection with the purchase or sale of any security ...</p> <p>(a) To employ any device, scheme, or artifice to defraud,</p> <p>(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or</p> <p>(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person”</p>	<p>“It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:</p> <p>(1) To employ any device, scheme, or artifice to defraud;</p> <p>(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or</p> <p>(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”</p>

There exists no evidence that when the Legislature enacted RCW 21.20.010, it intended to carve out the reasonable reliance requirement found in its virtually identical federal counterpart. Indeed, this is why the Court of Appeals “conclude[d] that the state legislature enacted RCW 21.20.010(2) with the intent that it be construed in the same way as Rule 10b-5 and have the same interpretation as federal case law of that rule. In short, reasonable reliance is a necessary element of this state claim.” Op. at 8 (internal citation omitted).

B. The Legislature Has Ratified Decades of Holdings by Washington Courts that the WSSA Requires Reasonable Reliance

If the decision to model the WSSA's liability provision after Rule 10b-5 were not enough to confirm the Legislature's intent to require a showing of reasonable reliance, the Legislature's acceptance of nearly 50 years of court decisions confirming that reliance is an element of a WSSA claim should remove any remaining doubt. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (noting that the Legislature is presumed to be "aware of judicial interpretations of its enactments and . . . failure to amend a statute following a judicial decision interpreting that statute [indicates] legislative acquiescence"); *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006) ("If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval.").

In 1970, the Court of Appeals confirmed in *Shermer v. Baker* that in "an action brought under RCW 21.20.010," a plaintiff must establish that it "relied upon the misrepresentation or omission of a material fact." 2 Wn. App. 845, 858, 472 P.2d 589 (1970). Since *Shermer*, this Court has repeatedly confirmed that reasonable reliance is

an element under the WSSA.² Indeed, over the last half century, every Washington court that has considered whether reliance is an element of a WSSA claim has held that a securities plaintiff must establish reliance to recover under the WSSA.³

² This Court held in *Hines v. Data Line Systems, Inc.* that to establish liability under the WSSA, a plaintiff must demonstrate that it “relied on . . . misrepresentations in connection with the sale of the securities.” 114 Wn.2d 127, 134, 787 P.2d 8 (1990) (emphasis added). More recently, in *Go2Net, Inc. v. Freeyellow.com, Inc.*, this Court held that the jury’s findings—which included plaintiff’s reliance on a material misrepresentation or omission—established a violation of the WSSA. 158 Wn.2d 247, 251, 143 P.3d 590 (2006).

³ As noted by the Court of Appeals below, “in no case has any Washington court departed from this interpretation of the statute,” which “has been consistently stated by the state [S]upreme [C]ourt and other appellate courts of this state.” Op. at 9-10; see also *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 867-68, 309 P.3d 555 (2013), *aff’d in part, rev’d in part and remanded*, 180 Wn.2d 954, 331 P.3d 29 (2014) (“To establish a claim under the WSSA, an investor must prove that . . . [it] relied on those misrepresentations or omissions. Such reliance must be reasonable under the surrounding circumstances.”) (internal citation omitted); *Helenius v. Chelius*, 131 Wn. App. 421, 439 n.22, 120 P.3d 954 (2005) (referring to “reasonable reliance on a misrepresentation” as part of plaintiff’s “prima facie claim” under the WSSA); *Guarino*, 122 Wn. App. at 109 (“The WSSA also requires reliance upon the alleged misrepresentations or omissions.”); *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 264, 93 P.3d 919 (2004) (describing reasonable reliance as an “essential element to prove a claim under the WSSA”); *Shermer v. Baker*, 2 Wn. App. 845, 858, 472 P.2d 589 (1970) (holding that to establish liability under the WSSA, the plaintiff must show that it “relied upon the misrepresentation or omission of a material fact”); see also *Graham-Bingham Irrevocable Trust v. John Hancock Life Ins. Co. USA*, 827 F. Supp. 2d 1275, 1284 (W.D. Wash. 2011) (“To establish a claim under the WSSA, an investor must prove . . . [it] relied on those misrepresentations or omissions.”); *Moore v. Thornwater Co. LP*, No. C01-1944C, 2006 WL 1423535, at *6 (W.D. Wash. May 23, 2006) (noting that “reliance must be reasonable to prove a WSSA violation”). Courts from other states also recognize that the reliance requirement is a fundamental part of Washington’s blue sky law. See, e.g., *Eagle Fund, Ltd. v. Sarkans*, 63 Mass. App. Ct. 79, 84, 823 N.E.2d 783 (2005) (“In contrast . . . reasonable reliance is a requirement under § 21.20.010(2) of the Securities Act of Washington.”) (citing *Hines*).

The Legislature has amended the WSSA on eight separate occasions⁴ during that span, but has never excluded reliance as an element. The Legislature's inaction in the face of those decisions demonstrates that the Legislature has not needed to clarify its intent because courts have understood it perfectly. *See McKinney v. State*, 134 Wn.2d 388, 403, 950 P.2d 461 (1998) (holding that when the legislature passes an "amendment to a statute without alteration of a section previously interpreted by the courts," such action may "evidence[] legislative acquiescence in the interpretation") (citation omitted); *Buchanan v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (noting that the interpretation of a statute was supported by the fact that the Washington Legislature had not acted in 17 years since this Court's decision, evidencing the Legislature's concurrence in the result); *see also Wade v. Skipper's, Inc.*, 915 F.2d 1324, 1332 (9th Cir. 1990) (observing that the WSSA's amendments "demonstrate [the Washington Legislature's] willingness and ability to correct its own omissions").

⁴ Laws of 1998, ch. 15, § 20; Laws of 1986, ch. 304, § 1; Laws of 1985, ch. 171, § 1; Laws of 1981, ch. 272, § 9; Laws of 1979, Ex. Sess., ch. 68, § 30; Laws of 1977, Ex. Sess., ch. 172, § 4; Laws of 1975, 1st Ex. Sess., ch. 84, § 24; Laws of 1974, Ex. Sess., ch. 77, § 11.

C. The Remedial Provision of the WSSA Does Not Change the Elements to Establish Liability Under the WSSA

Because the legislative history of RCW 21.20.010 is clear, FHLBS instead focuses on the separate *remedial* provision of the WSSA. That provision, RCW 21.20.430, provides the remedy of rescission and was purportedly based upon Section 12(a)(2) of the 1933 Securities Act and Section 410 of the Uniform Securities Act of 1956 (the “Uniform Act”). But RCW 21.20.430 explicitly references the liability provision of RCW 21.20.010 and does not alter the elements required to prove such liability. *See* Br. of Resp. at 30-31 & n.26; *cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (noting that “generalized references to the ‘remedial purposes’ of the 1934 Act will not justify reading a provision ‘more broadly than its language and the statutory scheme reasonably permit.’”) (quoting *SEC v. Sloan*, 436 U.S. 103, 116 (1978)).

In any event, the legislative history of RCW 21.20.430 belies FHLBS’s contention that the Washington Legislature intended for investors who were not actually misled (*i.e.*, did not rely upon a misrepresentation) to recover under the WSSA. When the WSSA was enacted in 1959, RCW 21.20.430 read as follows: “Any person, who offers or sells a security . . . *by means of fraud or misrepresentation* is liable to the person buying the security from him” Laws of 1959, ch.

282, § 43 (emphasis added).⁵ Reliance has always been an element of causes of action for fraud (*see, e.g., Andrews v. Standard Lumber Co.*, 2 Wn.2d 294, 300, 97 P.2d 1062 (1940)), negligent misrepresentation (*see, e.g., Bryant v. Vern Cole Realty Co.*, 39 Wn.2d 571, 574-75, 237 P.2d 487 (1951)), and even innocent misrepresentation (*see, e.g., Gronlund v. Andersson*, 38 Wn.2d 60, 63, 227 P.2d 741 (1951); *Bradford v. Adams*, 73 Wn. 17, 19-20, 131 P. 449 (1913)).

In 1977, the Washington Legislature amended RCW 21.20.430, replacing the general reference to “fraud or misrepresentation” with an express incorporation of the WSSA’s liability provision, RCW 21.20.010. *See* Laws of 1977, Ex. Sess., ch. 172, § 4. The Legislature adopted this amendment to ensure that investors would have civil remedies for forms of securities fraud that may not have been captured by the common law usages of the words “fraud or misrepresentation.” *See* Bill Report, 1977 HB 618, at 9 (“The present problem is pointed out by the Securities Bar that the use of the words ‘fraud’ or ‘misrepresentation’ may be those used at common law and may not involve all securities frauds, which include schemes and devices, making untrue statements, etc., which are found in RCW 21.20.010.”).

⁵ Neither Section 12 of the 1933 Securities Act nor Section 410 of the Uniform Act contains a reference to “by means of fraud or misrepresentation.”

Accordingly, the remedial provision of the WSSA has at all relevant times expressly referenced either common law fraud or the WSSA’s version of Rule 10b-5—both of which have always required investors to plead and prove reliance.

II. The Reasonable Reliance Requirement Does Not Harm Investors

A. Reliance Is Entirely Consistent with the WSSA’s Purpose of Protecting Investors from Being Misled

Washington courts have repeatedly recognized that there is no tension between the WSSA’s reliance element and its aim of protecting investors.⁶ As this Court has made clear, the WSSA provides relief to investors who are “*wrongfully induced* to purchase a security.” *Hines*, 114 Wn.2d at 135 (emphasis added). Similarly, “[t]he purpose of” Rule 10b-5, on which the WSSA’s liability provision is based, “is to protect persons who are deceived in securities transactions—to make sure that buyers of securities get *what they think they are getting*.” *Chem. Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir. 1984) (emphasis added).

If an investor does not take into consideration an alleged misrepresentation when deciding to purchase a security, the investor is not

⁶ See, e.g., *Stewart*, 122 Wn. App. at 264 (“To establish liability under the WSSA, the purchaser of a security must prove that . . . the purchaser relied on those misrepresentations or omissions. Because the primary purpose of the WSSA is to protect investors, we construe it liberally.”); accord *Guarino*, 122 Wn. App. at 109; *FutureSelect*, 175 Wn. App. at 868; *Go2Net*, 158 Wn.2d at 253; *Hines*, 114 Wn.2d at 145.

misled by that misrepresentation. If an investor knows or has reason to know that a statement of material fact made in offering a security is incorrect or misleading, but decides to purchase the security anyway, the investor does not need to be “protected” from that misrepresentation—much less *enriched* by it.

Fundamentally, the WSSA seeks to protect investors from fraud, and reliance is a basic element of a fraud claim. *See Kinney v. Cook*, 159 Wn.2d 837, 844, 154 P.3d 206 (2007) (noting that the WSSA places “special emphasis . . . on protecting investors from fraudulent schemes”); Amicus Br. of Dep’t of Fin. Insts. at 2 (referring to the WSSA’s “antifraud provisions”); *see also Loehr v. Manning*, 44 Wn.2d 908, 911, 272 P.2d 133 (1954) (reliance is an “essential element” of an action for fraud); *cf. ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 832, 959 P.2d 651 (1998) (justifiable reliance is an element of negligent misrepresentation claim).

Protecting investors from being misled does not require creating market insurance for investors. As the U.S. Supreme Court has emphasized, allowing plaintiffs to recover under the analogous Rule 10b-5 without having reasonably relied on the alleged misstatements “would effectively convert Rule 10b-5 into a scheme of investor’s insurance” – a result for which “[t]here is no support in the Securities Exchange Act, the

Rule, or our cases.” *Basic Inc. v. Levinson*, 485 U.S. 224, 252 (1988) (White, J., joined by O’Connor, J., *concurring in part and dissenting in part*) (internal quotation and citation omitted), quoted in *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005)). Similarly, there is no support in the WSSA, its legislative history, or this Court’s jurisprudence to support FHLBS’s contention that the WSSA was intended to serve as insurance for investors who lost money (or in the case of FHLBS—which earned millions of dollars from the securities at issue—from making less money than it had hoped).

B. The WSSA’s Long-Standing Reliance Requirement Has Not Limited the Ability of Aggrieved Investors to Obtain Relief

The WSSA’s reliance requirement has not prevented defrauded Washington investors from obtaining relief or otherwise frustrated the WSSA’s purpose of protecting investors from being misled. The complete absence of any evidence to the contrary despite five decades of Washington jurisprudence requiring proof of reliance is plain in FHLBS’s briefs below and before this Court.

Indeed, FHLBS has argued that no prior case has ever held that an investor’s reliance on SEC filings was unreasonable as a matter of law. *See* Br. of Appellant at 27. This underscores that cases like this one,

where an investor is unable to demonstrate reasonable reliance, are extraordinarily rare.

The reasonable reliance requirement should not be discarded merely because FHLBS is one of the only known investors for whom the evidence established that it was not plausibly misled by the alleged misrepresentations. Rather, FHLBS's unique circumstances demonstrate exactly why reasonable reliance is an element of a claim under the WSSA and should remain as such. The record below confirmed—and the Court of Appeals agreed—that FHLBS, a highly sophisticated RMBS investor: (i) purchased securities from Barclays in 2008 in the midst of a historic collapse in the real estate and mortgage markets when its sister Federal Home Loan Banks had stopped purchasing securities backed by the same types of loans; (ii) “was deeply involved in selecting the loans originated by IndyMac that ultimately constituted the two securities the bank purchased . . . without involvement of Barclays”; and (iii) was acutely aware of the very issues as to which it later claimed, in litigation, to have been misled. Op. at 16-18, 23-24.⁷

As FHLBS personnel acknowledged before it commenced this lawsuit: “It is not a failure of risk management when: Bank knows

⁷ FHLBS has not appealed the Court of Appeals' conclusion that FHLBS failed to meet the reasonable reliance requirement of the WSSA. Rather, FHLBS seeks to overturn settled law that the WSSA requires proof of reliance.

risks, Decides to take them, Outcomes are not favorable.” (SCP 24455 (emphasis in original).) “The securities laws were not enacted to protect sophisticated businessmen from their own errors in judgment.” *Hirsch v. du Pont*, 553 F.2d 750, 763 (2d Cir. 1977). This Court should thus decline FHLBS’s invitation to change firmly-established law because FHLBS wants its money back (plus hundreds of millions of dollars in statutory prejudgment interest that vastly exceeded what FHLBS would have earned on the securities even if they had performed perfectly) after having knowingly invested in securities with full knowledge of the risks.

III. Stripping Away the WSSA’s Reliance Requirement Would Lead to a Nonsensical Result

Unlike federal securities laws and the Uniform Act (which has served as the model for blue sky laws of many states), the WSSA does not include any requirement that the aggrieved buyer of securities lack actual knowledge of the misstatement or omission. 12A LONG ET AL., BLUE SKY LAW § 9:45 (2017). This is unsurprising, as the WSSA requires reasonable reliance. Removing the WSSA’s reliance requirement would thus create a statute that permits investors with actual knowledge of alleged misstatements to rescind or recover rescissory damages for their investment. Such a system is unheard of under federal law or any other state securities law.

Section 410 of the Uniform Act, on which RCW 21.20.430 is based, provides that a plaintiff may only obtain relief if it did “not know[] of the untruth or omission.” Uniform Securities Act (1956) § 410(a)(2). The Washington Legislature did not include this phrase in RCW 21.20.430. *See* Laws of 1959, ch. 282, § 43. This is not surprising, as reasonable reliance is already a required element under the WSSA, which would render superfluous any separate requirement that a buyer lack actual knowledge of the alleged misstatement or omission. Similarly, Section 12(a)(2) of the 1933 Securities Act, which FHLBS claims was the model for the WSSA, *see* Br. of Appellant at 37-38, provides that an investor with knowledge of an alleged misrepresentation cannot recover. 15 U.S.C. § 77l(a)(2) (requiring that “the purchaser not know[] of such untruth or omission”).

Accordingly, to contravene legislative intent by stripping away the WSSA’s reasonable reliance requirement would allow an investor to rescind its purchase of a security based on an allegedly material misrepresentation about which it had full knowledge. Such an outcome would offend the underlying rationale of the WSSA and the federal statutory scheme on which it is based. *See* Section II.A, *supra*. Moreover, it would position Washington as the sole jurisdiction with an effectively “absolute liability” statute.

IV. There Is No Basis to Overturn Decades of Precedent Holding That Reliance Is an Element Under the WSSA

A party asking the Court to depart from established precedent must first demonstrate that the existing rule is both “incorrect and harmful.” *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 238, 236 P.3d 182 (2010) (citation omitted). FHLBS does not, and cannot, show that Washington courts have gotten it wrong for the last half century by requiring reliance or that in doing so, they have harmed investors.

Washington courts do not “lightly set aside precedent.” *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017) (respect for precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Courts have historically been particularly reluctant to overturn established precedent when it concerns the interpretation of a Washington statute, as any disagreement between the Washington Legislature and the courts can be addressed through the legislative process. *See, e.g., Broom*, 169 Wn.2d at 238 (“[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.”); *State v. Reanier*, 157 Wn. App. 194, 204-05, 237

P.3d 299 (2010).⁸ By electing to not amend the WSSA in the wake of nearly 50 years of precedent, the Legislature has clearly indicated that it intends reliance to be required under the WSSA. Under these circumstances, principles of *stare decisis* counsel in favor of “defer[ence] to the legislative conclusion of inaction” and declining to reexamine what a statute might mean. See *Buchanan v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980).

Overturing established precedent here would be contrary to the Legislature’s intent, and would not further protect investors. The principles underpinning *stare decisis*—the promotion of clarity and predictability in the law—represent yet another reason why this Court should affirm the Court of Appeals’ holding that reasonable reliance is an element of a WSSA claim, consistent with decades of precedent in this State.

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⁸ See also *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (“What is more, *stare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”).

CONCLUSION

The Court of Appeals opinion below follows a nearly half-century of legislative history and judicial opinions about the elements of a WSSA claim. The reliance requirement is an important component of this statutory framework, and writing it out of the WSSA would create an absolute liability statute that the Washington Legislature never intended and would lead to nonsensical results. Accordingly, this Court should affirm.

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Dated: June 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email to the last known address of all counsel of record.

I hereby certify, under penalty of perjury under the laws of the State of Washington and the United States, that the foregoing is true and correct.

DATED this 4th day of June 2018, at Seattle, Washington.

/s/Michele Smith

Michele Smith

HILLIS CLARK MARTIN & PETERSON P.S.

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