No. 11-1085

IN THE

Supreme Court of the United States

AMGEN INC., KEVIN W. SHARER, RICHARD D. NANULA, ROGER M. PERLMUTTER, GEORGE J. MORROW,
Petitioners,

v.

CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, N.Y. 10007
(212) 230-8800

STEVEN O. KRAMER
JOHN P. STIGI III
JOHN M. LANDRY
JONATHAN D. MOSS
SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP
333 South Hope St.
Forty-Third Floor
Los Angeles, CA 90071
(213) 620-1780

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
ANDREW N. VOLLMER
DANIEL S. VOLCHOK
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

There are no changes to the disclosure statement included in the petition for a writ of certiorari in this case.

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ARGUMENT

I. PROOF OF MATERIALITY IS REQUIRED TO CERTIFY A CLASS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(3)

To obtain class certification under Rule 23(b)(3) in a securities-fraud case, the plaintiff must show that reliance can be proved on a classwide basis. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988). One way to satisfy this burden is by "establish[ing] the applicability of the so-called 'fraud on the market' presumption." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011); *see also Erica P. John Fund, Inc.* v. *Hallibur-*

ton Co., 131 S. Ct. 2179, 2185 (2011). As this Court's cases make clear, and as respondent and the government acknowledge, materiality is one of several essential predicates to the fraud-on-the-market theory. *See* Pet. Br. 17-19 (citing cases); Resp. Br. 29 ("If the statement is not materially false, then no one in the class can establish reliance via the integrity of the market."); U.S. Br. 23 ("[I]f a plaintiff cannot ultimately prove materiality, the plaintiff will not be able to establish reliance through the fraud-on-the-market presumption."). And "[i]t is common ground," as respondent and the government also concede, that securities-fraud plaintiffs must establish other predicates to the theory—market efficiency and a public misstatement—at the class-certification stage. *Halliburton*, 131 S. Ct. at 2185 (citing *Basic*, 485 U.S. at 248); *accord Wal-Mart*, 131 S. Ct. at 2552 n.6 (citing *Halliburton*, 131 S. Ct. at 2185); Resp. Br. 49-50; U.S. Br. 14-15, 17-18.

Accordingly, the answer to the first question presented here should be straightforward: A securities-fraud plaintiff seeking class certification under the fraud-on-the-market-theory must prove materiality before class certification because materiality is a predicate to that theory and therefore to the necessary showing that reliance can be established on a classwide basis. The contrary arguments offered by respondent and the government lack merit.

A. Predominance Cannot Be Found Without Proof Of The Materiality Predicate

1. Rule 23(b)(3) permits class certification only if the district court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Respondent and the government argue that a district court may

skip the determination of one of the predicate facts needed to establish that reliance is a common issue: materiality. The reason, they assert, is that the plaintiff must prove materiality *after* class certification, and if that proof fails, and hence reliance turns out to be an individual question, the class will nevertheless be united on its death bed by failure to prove the materiality element. *See* Resp. Br. 29, 41-42; U.S. Br. 8, 9-10, 13-14, 18-19 & n.3.

This response disregards both the text of Rule 23 and its purpose, which is to assure that there is a cohesive class *before* the parties and the court are required to embark on a class proceeding. A would-be class plaintiff has no right to litigate any issue on the merits on behalf of a class—much less lose it—unless the district court first evaluates the putative class members' claims as they exist at the time of the class-certification inquiry and concludes that the common issues presented by those claims predominate over the individual ones. In a securities-fraud case, that means the court must determine—before class certification, not after—whether reliance is a common or individual question. *See Halliburton*, 131 S. Ct. at 2184 ("Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance.").

A major purpose of Rule 23(b)(3) is to ensure that there is sufficient cohesion among class members to override the "individual autonomy [of] those who might prefer to go it alone or in a smaller unit" and to "warrant adjudication by representation." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615, 623 (1997); *see also id.* at 621. Cohesion must be found before certification because it is only "class cohesion that legitimizes representative action in the first place." *Id.* at 623.

This is no mere quibble. The class-certification inquiry precedes litigation of putative class members' claims because the inquiry is about how that litigation ought to proceed. Here, if the district court were to determine during the certification inquiry that the fraud-on-the-market theory does not apply, and that any securities-fraud case is thus about individual direct reliance, then putative class members who directly relied on the defendants' statements could litigate their individual claims and control that litigation as they saw fit—advancing their own theories, proving their claims with their own evidence, and relying on their own counsel's skill and expertise. If the court instead deferred examination of any fraud-on-the-market predicate until after certification, and the judge or jury concluded *at that point* that the predicate was absent, it would be too late for those putative class members to litigate their direct-reliance claims. Once a class is certified in a fraud-on-the-market case, a failure of proof on any element, whether at summary judgment or trial, results in a judgment for the defendants that binds all class members who did not opt out of the class proceeding. *See* Fed. R. Civ. P. 23(c)(3)(B). Those with direct-reliance claims would then be precluded by res judicata from further litigation. *See, e.g.*, *San Remo Hotel, L.P.* v. *City & County of S.F.*, 545 U.S. 323, 336 n.16 (2005).

2. Respondent and the government try to sidestep these problems by asserting that the predominance inquiry is entirely about a single practical question: whether the case is likely to break down, after certification, into litigation of individual issues. *See, e.g.*, Resp. Br. 20-21, 41-42; U.S. Br. 7, 18. This argument fails for several reasons.

First, as demonstrated, Rule 23(b)(3) is concerned with more than simply testing whether a class proceed-

ing *could* be conducted. An important purpose of the rule is to determine whether a class proceeding *should* be conducted.

Second, the argument is inconsistent with *Amchem*. If Rule 23(b)(3) required only a practical examination of the contours of the post-certification litigation, then the predominance requirement would not apply to "settlement only" classes, because by definition there will never be any litigation of disputed issues after certification of a "settlement only" class, so it would not matter whether any issue could be settled by class-wide proof. But *Amchem* held that Rule 23(b)(3) does apply in that context. The Court there considered the predominance requirement in addressing a challenge to the certification of a "settlement only" class and rejected the certification order based in part on the failure to satisfy Rule 23(b)(3). *See* 521 U.S. at 622-625.

As the Court explained in *Amchem*, Rule 23(b)(3) is concerned with the cohesion of the class at the time of class certification. The Rule 23(b)(3) inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem*, 521 U.S. at 623. *Amchem* rested on the fact that those questions "preexist any settlement," *id.*—and thus they necessarily preexist any class-based litigation on the merits.[1]

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[1] To wring its preferred reading out of Rule 23(b)(3), under which a district court would focus only on the contours of the future class suit proposed by the plaintiff, the government alters the rule's text, rephrasing Rule 23(b)(3) as asking whether "'questions of law or fact common to class members [*will*] predominate'" U.S. Br. 4 (alteration in original) (emphasis added).

Third, Rule 23(b)(3) focuses not simply on "efficiently adjudicating" a controversy, but also on "*fairly* … adjudicating" it. As explained above, a proper predominance finding ensures fairness to absent class members, particularly those with credible evidence of direct reliance. It also ensures fairness to defendants, who should not have to face the pressures of class litigation while the court defers the inquiry into whether a central issue in the case (here, reliance) is a common or individual one. That unfairness is especially apparent if the reason for the deferral is—as respondent and the government argue here—that the absence of a common reliance question will be remedied in the end by the *defendants'* victory on the materiality element. The defendant should not have to face the rigors and risks of class-action litigation in order to establish that a class action was never warranted.

3. The government seeks to distinguish materiality from the other fraud-on-the-market predicates, which must be proved before certification, on one ground alone. It asserts—as did the Ninth Circuit—that if a fraud-on-the-market class is certified without inquiring into the efficient-market and public-statement predicates, and the class later fails to prove one of those two predicates, then individual class members' claims "'would not be dead on arrival; they could seek to prove reliance individually.'" U.S. Br. 16 (quoting Pet. App. 9a). Because such individual litigation would (assertedly) still be possible, the government reasons, pre-certification proof of these two predicates is required to ensure "that the need for variegated proof of that sort would not arise at a later stage of the suit." *Id.* There is no similar need for pre-certification proof of the materiality predicate, the government says, because the absence of materiality creates "no

likelihood that individual issues will come to predominate in the subsequent course of the litigation." *Id.* at 18.

The government's premise is simply mistaken. As noted, the consequence of a certified class failing to prove *any* predicate in a fraud-on-the-market case is the same: The class loses and the judgment binds all of its members. There is no "risk" that upon a negative finding on the efficient-market or public-statement predicates, "individualized reliance inquiries will prove necessary." U.S. Br. 7. Rather, the class members' claims will be extinguished. Securities-fraud plaintiffs are not entitled to fully litigate their claims on a theory of common reliance and then, if they lose on that theory, take a second bite, starting over with the same claims but on new assertions of direct individual reliance.

The true reason for requiring pre-certification proof of the efficient-market and public-statement predicates is more straightforward: They are predicates to the fraud-on-the-market theory, and absent a showing that the theory is applicable, there can be no finding of predominance. *See Wal-Mart*, 131 S. Ct. at 2552 n.6; *Basic*, 485 U.S. at 242. That reason applies with equal force to the materiality predicate.[2]

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[2] Respondent asserts (Br. 43) that Amgen's position would logically require pre-certification proof of the falsity of any alleged misstatements. But proof of falsity is not required to invoke a presumption of common reliance because both true and false public statements can move the price of a stock traded in an efficient market—if the statements are material. By contrast, there is no basis under the fraud-on-the-market theory for presuming common reliance on immaterial statements because they do not move stock prices.

4. Respondent asserts at some length (Br. 22-26) that materiality is itself a question common to all class members. But as the government acknowledges (Br. 18), the same is true of the public-statement and efficient-market predicates. Determinations of those predicates will likewise apply to "the entire class in the same exact way." Resp. Br. 25. In any event, Amgen has not argued that materiality must be proved before certification in order to show that the *materiality* element presents common questions. Amgen's argument is that absent proof of all of the predicates of the fraud-on-the-market theory, the *reliance* element presents individual questions that will, as the Court said in *Basic*, preclude class certification. *See* 485 U.S. at 242. Respondent's extended discussion of whether materiality is itself a common question therefore misses the point.[3]

B. Requiring Pre-Certification Proof Of Materiality Does Not Prejudice Securities-Fraud Plaintiffs

Respondent contends (Br. 20, 33 & n.19, 35-36) that requiring pre-certification proof of materiality unfairly prejudices plaintiffs because of purported limits on their ability to conduct discovery into materiality. But Rule 23 authorizes courts to allow whatever discovery is needed to make the required findings regarding certification, *see* Pet. Br. 28 (citing authorities); *see also*,

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[3] For the same reason, respondent is wrong in asserting (Br. 24) that *Basic*'s (supposed) holding that materiality is a common question "is itself sufficient to dispose of this case." Any such holding would say nothing about whether pre-certification proof of the materiality predicate is required to enable plaintiffs to invoke *Basic*'s presumption as to reliance and therefore to allow the district court to make the required finding of predominance.

e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 319 n.20 (3d Cir. 2008)—a power that courts have in fact invoked, including in this case, *see, e.g.*, Resp. Br. 14 & n.10. More generally, respondent's assertion that requiring pre-certification proof of materiality would be unworkable is belied by the actual experience in circuits where such proof is currently mandated. As one amicus brief explains, for example, since the Second Circuit held in 2008 that such proof is required, "district judges within the Southern District of New York have, with no apparent problems, enforced" that mandate. Chamber of Commerce et al. Amicus Br. 21.[4]

Respondent also asserts (Br. 38) that "[d]eferring the class-certification decision until after full merits discovery would mean that the parties and the court would not know whether the proceeding was an individual or a class proceeding until a very late stage of the litigation." But this assumes, incorrectly, that "full merits discovery" is required. Again, Rule 23 permits courts to authorize the discovery needed to make the certification decision. *See* Fed. R. Civ. P. 23 advisory committee note (2003 amendments) (referring to "discovery in aid of the certification decision"). There is no reason why such targeted discovery need delay a certification decision "until a very late stage" (whatever that means). In any event, Rule 23 was amended in 2003 specifically to allow a discovery-based delay. *See id.* ("Time may be needed to gather information necessary to make the certification decision.").

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[4] The Chamber brief also answers respondent's complaint (Br. 33) that "Amgen fails to offer any insight regarding how plaintiffs should demonstrate materiality at the class-certification stage." The cases amici cite, and similar cases, provide ample "insight."

There is similarly no merit to respondent's related argument (Br. 36) that pre-certification proof of materiality should not be required because materiality "often requires expert evidence." As many courts have held, the discovery that Rule 23 authorizes may encompass expert evidence. *See, e.g.*, *Marcus* v. *BMW of N. Am., LLC*, 687 F.3d 583, 601 (3d Cir. 2012) ("[T]he court's obligation to consider all relevant evidence and arguments [on a motion for class certification] extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it." (second alteration in original) (internal quotation marks omitted)). Indeed, determining whether the relevant market is efficient often involves expert testimony. *See, e.g.*, Pet. Br. 44 (citing *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 205-206 (2d Cir. 2008)); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512 (1st Cir. 2005) ("[T]he district court received and reviewed hundreds of pages of briefing and exhibits focused on the issue of market efficiency, received multiple affidavits from experts on both sides and heard two days of testimony from those experts and arguments from counsel regarding market efficiency."); *Schleicher* v. *Wendt*, 618 F.3d 679, 682 (7th Cir. 2010) ("A financial economist concluded, in an expert report that the district judge credited, that the market for Conseco's shares was efficient[.]"). Respondent itself introduced expert evidence below in seeking to prove the efficiency of the relevant market. *See* Pet. App. 40a.

Respondent also contends that "[r]esolving materiality at the class-certification stage … would … deprive defendants of a class-wide preclusive determination." Br. 20 (emphasis omitted); *see also id.* at 2, 35. Apart from the fact that the amicus briefs filed by groups representing securities-fraud defendants uniformly sup-

port Amgen (suggesting that they do not share respondent's concern), defendants are not *entitled* to a "class-wide preclusive determination" unless the court has properly determined that a class can be certified. The real threat of unfairness to defendants is that they might have to engage in unwarranted class litigation—and face unwarranted settlement pressure—because the putative class plaintiff was not first required to prove the materiality of the alleged misstatements even though it is a necessary predicate of the fraud-on-the-market-presumption of reliance.[5]

In any event, respondent's argument about the unavailability of preclusion is incorrect. If lead plaintiffs successfully prove materiality and otherwise satisfy the requirements for certification, then a class will be certified. And if the parties subsequently settle the case or it is litigated to judgment, there will be preclusive effect. Preclusion is denied to defendants only in cases in which a fraud-on-the-market predicate cannot be proved—*i.e.*, cases that should not be certified for class treatment in the first place.

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[5] Respondent dismisses (Br. 43-44) the magnitude and importance of the settlement pressure that results from class certification. It does so based principally on two law review articles (*see id.* at 44 n.27), ignoring the phalanx of contrary judicial authority, including decisions from this Court (*see* Pet. Br. 24-25), as well as the acknowledgement in the advisory committee note to the 1998 amendment to Rule 23 that "[a]n order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See also* H. Friendly, *Federal Jurisdiction: A General View* 119-120 (1973) ("While the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are *almost always settled*." (emphasis added)).

C. Respondent's Remaining Arguments Lack Merit

1. Respondent repeatedly claims that Congress already addressed the problems that Amgen has identified, and argues that therefore Amgen is asking the Court to "displace Congress's considered policy judgments" regarding securities-fraud class actions. Br. 2; *see also id.* at 20, 21, 38-41; U.S. Br. 31-32. That is not correct.

To begin with, respondent mischaracterizes Amgen's position. Amgen's argument is simply that (a) class certification generates immense settlement pressure, especially in securities cases, and (b) this dynamic means that once a class has been certified courts will rarely if ever actually examine the materiality predicate to the fraud-on-the-market theory, even though that theory is indispensable to class treatment of securities-fraud claims. *See Basic*, 485 U.S. at 242. Respondent's assertions and authorities confirm, rather than contradict, the first point in Amgen's argument, and respondent simply ignores Amgen's second point.

In any event, as respondent acknowledges (*e.g.*, Br. 8, 38-39), the relevant policy judgment that Congress has made is that the class-action mechanism is often abused in securities-fraud cases. The concern about such abuse, moreover, has been substantial enough to impel Congress to take repeated affirmative steps to curb it. Far from displacing that congressional judgment, Amgen's position is consistent with it. That policy judgment is also properly a factor in resolving this case, just as it was in *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), where the Court expressed the need for "caution" about expanding the judicially created private right of

action under section 10(b) and explained that "restraint" was "appropriate in light of" Congress's steps to curb class-action abuse, *id.* at 165.

2. Respondent also asserts (Br. 34) that requiring pre-certification proof of materiality "would substantially increase the burdens on federal courts," by "splinter[ing] [a putative class claim] into separate claims by individual investors." To begin with, that assertion is in substantial tension with respondent's claim (Br. 37-38) that Amgen's position could "undermine[] the federal securities laws by creating the risk that millions of small investors … will be deprived of the ability to vindicate their claims." The latter fails because Amgen's position leads to the denial of certification only where the plaintiff cannot prove the materiality predicate. In that circumstance, reliance is an individual issue, class certification is legally unwarranted, and it is less likely that there are any meritorious claims to be "vindicate[d]" on behalf of investors unaware of the alleged misrepresentations. *Id.* at 38. The claim of a possible burden on the courts, meanwhile, could be made in any case in which a putative class action fails to comply with the requirements of Rule 23.

3. There is likewise no merit to respondent's contention that Amgen's arguments regarding judicial economy and settlement pressure (*see* Pet. Br. 24-27) "prove[] far too much" (Resp. Br. 46) because they supposedly apply equally to loss causation, which this Court held in *Halliburton* need not be proved before class certification. But Amgen's argument is not that as many issues as possible should be adjudicated prior to class certification. No pre-certification proof is required on issues unconnected to the presumption of reliance (or otherwise to Rule 23's requirements). Amgen's argument instead is that among the reasons to

require pre-certification proof of matters that *are* necessary to the presumption of reliance are (1) to conserve judicial resources and (2) because otherwise the issues will often never be examined because certification will force a settlement despite the absence of a predicate to the very theory that allowed for class certification in the first place. *Halliburton* in no way undercuts that point. It did not rest on a rejection of concerns about judicial economy, meritless lawsuits, and consequent undue settlement pressure. Rather, *Halliburton* was driven by the fact that loss causation is not logically linked to the element of reliance, and therefore to *Basic*'s rebuttable presumption. *See* 131 S. Ct. at 2186; *see also* Pet. Br. 22. Materiality, by contrast, is.

4. Respondent also complains (Br. 32) that Amgen's position would "place[] courts in the difficult position of having to resolve an especially nuanced and fact-intensive issue at an early stage of litigation." The simple answer is that Rule 23 does not include an exception to its requirements for "fact-intensive" (or "difficult") matters. The "rigorous inquiry" and "close look" that must be made before a class can be certified, Pet. Br. 19-20 (citing cases), may indeed require the district court to make "difficult" decisions. *See Wal-Mart*, 131 S. Ct. at 2553 (requiring "significant proof"—before certification—that Wal-Mart had a "general policy of discrimination"). That is not a basis to excuse compliance with the Rule's mandates.

Respondent relatedly argues (Br. 33) that Amgen's position is undercut by its recognition (Pet. Br. 26 n.3) that the fact-specific nature of materiality often precludes summary judgment on that issue. But the reason summary judgment is often precluded is, as respondent notes (Br. 32 & n.18), that it cannot be granted when there are genuine disputes about impor-

tant facts. *See* Fed. R. Civ. P. 56(a). That says nothing about whether pre-certification proof of materiality should be required, because there is no prohibition on factfinding needed for class certification. To the contrary, "[b]efore deciding whether to allow a case to proceed as a class action, … a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001); *accord, e.g.*, *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("[A] district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; … such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established."). The fact-sensitive nature of materiality—a characteristic that in any event does not distinguish it from the efficient-market predicate—is not a basis to allow proof of it to be deferred until after certification.

There is similarly no merit to respondent's arguments (Br. 32-33) regarding the standard of proof that governs factual determinations on a class-certification motion. Respondent complains (*id.* at 32) that the preponderance-of-the-evidence standard, which several circuits have held to apply to such determinations, "is far higher than the standard … to defeat a motion for summary judgment." Thus, respondent continues, "Amgen's position would require plaintiffs to satisfy the standard that plaintiffs would face at trial, before discovery is even completed." *Id.* at 32-33 (emphasis omitted).

To begin with, Amgen has not urged this Court to adopt a particular standard of proof, and the Court could certainly reverse the Ninth Circuit without ad-

dressing that issue.[6] In any event, respondent's critique of the preponderance standard is unsound for at least three reasons. First, as discussed, courts can authorize whatever discovery is needed to decide the certification question. Second, the fact that a certification decision commonly precedes a summary-judgment ruling does not mean that the certification standard of proof must be lower than the summary-judgment standard. The two stages of litigation simply address different questions. (The same point refutes various amici's argument that pre-certification proof of materiality is unnecessary because defendants have an opportunity to challenge materiality on a motion to dismiss. Such a motion serves a different purpose from a certification motion.) Third, as respondent's argument reveals, this is not an issue unique to the materiality predicate, but rather is a complaint about having to prove anything at the class-certification stage. *Wal-Mart*, which holds that plaintiffs seeking class certification must prove Rule 23's requirements, including when they overlap with merits issues, *see* 131 S. Ct. at 2551-2552, decisively rejects that complaint.

5. Respondent does not contest the validity of the economic research presented in Amgen's opening brief (at 32-34) demonstrating that markets are often efficient in some respects but not others and that, therefore, courts cannot reliably conclude that invocation of

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[6] That said, this Court's opinion in *Wal-Mart* strongly suggests that the proper standard is indeed a preponderance. *See, e.g.*, 131 S. Ct. at 2551 ("A party seeking class certification must *affirmatively demonstrate* his compliance with the Rule—that is, he must be prepared to *prove* that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." (first two emphases added)).

Basic's presumption is warranted in a particular case based only on a generic showing of market-wide efficiency. Respondent argues, however (Br. 47), that if existing tests for efficiency are flawed, "the solution is to revise the[m]." But that misses the point. Respondent's position, which would allow class certification based on little more than a showing of market efficiency, would lead to class certification in circumstances where no affirmative justification has been made in line with economic reality. Requiring pre-certification proof of materiality may not perfectly resolve this problem, but it would ensure that district courts conducting the class-certification inquiry in a fraud-on-the-market case are focused on (a) the market, (b) the particular statement(s), and (c) the reason for presuming the assimilation of the statement(s) into the market price.

II. DEFENDANTS MUST HAVE A FULL OPPORTUNITY TO REBUT THE FRAUD-ON-THE-MARKET THEORY BEFORE CERTIFICATION

Respondent concedes (Br. 53) that before certification defendants may present some evidence to rebut the applicability of the fraud-on-the-market theory, including evidence regarding the theory's efficient-market or public-statement predicates. *Accord* U.S. Br. 30-31. It nonetheless contends that defendants cannot offer similar evidence as to the materiality predicate. Such disparate treatment is neither sensible nor required by either Rule 23 or this Court's precedent.[7]

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[7] Respondent does not discuss the trade-timing predicate addressed in *Halliburton*. *See* 131 S. Ct. at 2185 ("It is common ground … that plaintiffs must demonstrate [before certification] …

1. As Amgen has explained (Br. 40-41), a successful rebuttal of materiality has the same effect on the *Basic* presumption as a rebuttal of the public-statement or efficient-market predicates: It eliminates "[t]he basis for finding that the fraud had been transmitted through market price," and therefore eliminates "the causal connection" that is essential to the fraud-on-the-market theory. *Basic*, 485 U.S. at 248. Because such rebuttal prevents proof of classwide reliance—a prerequisite to class certification, *see id.* at 242—courts must consider it at the certification stage.

Respondent asserts (Br. 52, 53) that rebuttal of materiality "does not actually rebut the fraud-on-the-market presumption," but instead "proves that no one in the class was defrauded." No case law is cited for this proposition—and it is flatly contradicted by *Basic*. There this Court described, as its first example of what would suffice "to rebut the presumption of reliance," a showing "that the 'market makers' were privy to the truth." 485 U.S. at 248.

2. Both respondent (Br. 54) and the government (Br. 30) rely on dicta in a *Basic* footnote stating that certain rebuttal proof "is a matter for trial." 485 U.S. at 249 n.29. But neither has any response to Amgen's point (Br. 42) that a literal reading of this language would also bar rebuttal of efficiency, which both respondent and the government concede is appropriate at the certification stage. Respondent also ignores Am-

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that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'" (quoting *Basic*, 485 U.S. at 248 n.27)). For the reasons discussed herein and in our opening brief, it too would be subject to rebuttal at the certification stage.

gen's point (*id.*) that the footnote cited a section of Rule 23 that, at the time, authorized conditional certification orders, allowing deferral of difficult questions until later in the litigation. *See* Fed. R. Civ. P. 23(c)(1)(C) (1998). Rule 23 was amended in 2003 to remove that authority, and the advisory notes to that amendment instruct that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been." The government responds (Br. 30 n.7) that district courts retain the authority to amend certification orders. That does not change the fact that when *Basic* made its "for trial" observation, conditional certification was an option, one that no longer exists. That is the salient point as to why the "for trial" dictum warrants little weight.

Respondent also argues (Br. 54) that the *Basic* Court would not have "affirmed the lower courts' class-certification order" if the Court "thought truth-on-the-market rebuttal evidence … was relevant to class certification." To begin with, however, the *Basic* Court did not "affirm" the certification order. It said that the order was "appropriate when made," 485 U.S. at 250—*i.e.*, appropriate given the law as it existed prior to this Court's decision. And it expressly contemplated that the order would be "subject on remand to such adjustment, if any, as developing circumstances demand." *Id.* In any event, there is no indication that the *Basic* defendants actually sought to present rebuttal evidence.

3. Respondent does not dispute that if full rebuttal is precluded at the certification stage, defendants will often be denied any meaningful opportunity to rebut materiality because of the settlement pressure that certification creates. *See* Pet. Br. 41. And the government responds only (Br. 32-33) that such rebuttal can occur at summary judgment or trial—a response that

ignores the entire point, which is that settlement pressure will often prevent cases from reaching or completing those stages. Respondent and the government also offer no response to Amgen's argument (Br. 44-45) that it is both unfair and antithetical to our adversarial legal system to permit one side to obtain class certification based on the fraud-on-the-market presumption while preventing the other side from offering contrary evidence. That silence is telling.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, N.Y. 10007
(212) 230-8800

STEVEN O. KRAMER
JOHN P. STIGI III
JOHN M. LANDRY
JONATHAN D. MOSS
SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP
333 South Hope Street
Forty-Third Floor
Los Angeles, CA 90071
(213) 620-1780

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
ANDREW N. VOLLMER
DANIEL S. VOLCHOK
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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