No. 11-1085

IN THE
Supreme Court of the United States

AMGEN INC., ET AL.,
Petitioners,
v.
CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS,
Respondent.

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

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND BIOTECHNOLOGY INDUSTRY ORGANIZATION SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory.

2. Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are the Chamber of Commerce of the United States of America (the "Chamber"), the Pharmaceutical Research and Manufacturers of America ("PhRMA"), and the Biotechnology Industry Organization ("BIO"). Each has a significant interest in the inter-

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondent have filed blanket consent letters with the Clerk.

pretation and enforcement of the federal securities laws and the rules governing class actions in private securities cases.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber's members transact business throughout the United States and a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber has participated as *amicus curiae* in various class-action appeals, including recently in this Court.

PhRMA is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's members invent and develop medicines that save lives and improve the quality of life for millions of patients around the world. PhRMA's members have invested hundreds of billions of dollars in the last decade to develop new medicines—including over $45 billion in 2010 alone. PhRMA serves as the industry's principal policy advocate, advancing policies that foster continued medical innovation, and has participated as *amicus curiae* in appeals involving issues of significance to the pharmaceutical industry. The issues in this case are especially significant to PhRMA members because many of them have borne the expense and burden of defending against securities-fraud class actions in recent years, which raise the already substantial cost and risks of developing new medicines.

BIO is the world's largest biotechnology organization, representing more than 1,100 members in all 50 states. BIO's members are involved in the most cutting-edge research and development of breakthrough technologies that are helping to heal, fuel, and feed the world. They range from entrepreneurial start-ups developing a first product to Fortune 100 multinationals. These members, the vast majority of which are small companies that have not yet brought a product to market or attained profitability, currently have more than 370 products in clinical trials aimed at curing or treating more than 200 diseases. BIO's industrial biotech members are developing renewable and cleaner sources of energy and alternative industrial processes, and its agriculture members are helping to improve farm yields, incomes, and nutritional outcomes, while reducing environmental damage. BIO also represents academic research centers, state and regional biotechnology associations, and service providers to the industry, including venture capital firms that fund large segments of the industry. The biotechnology industry as a whole invests more than $20 billion annually on research and development activities, and supports the employment of more than 8 million people in the United States alone. BIO's mission is to promote a policy, business, and legal environment in which this massive capital and human investment can achieve fully the promise of biotechnology to heal, fuel, and feed the world.

Given this mission, BIO closely monitors legal issues that affect the industry and often offers its perspectives in cases raising such issues in state and federal courts, including this Court. The issues in this case are especially significant because the court of appeals' unjustified expansion of class actions threatens to strangle the ability of BIO members to innovate by entangling them in

massive lawsuits that never should have been certified in the first place.

SUMMARY OF ARGUMENT

By departing from this Court's decisions, the court of appeals has inadvertently encouraged frivolous lawsuits that produce no discernible benefit in deterring actual, fraudulent behavior. Indeed, this Court has observed that improper class certification perversely pressures defendants to settle even meritless lawsuits. The enormous costs that class actions inflict on economic productivity and innovation counsel in favor of strictly applying Rule 23 in securities cases. Just as our substantive securities laws were not intended to provide investors insurance against market losses, courts must guard against lenient class-certification standards that would have the same forbidden effect.

As petitioners have explained, the decision below conflicts with this Court's opinions in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), and *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), by relieving plaintiff of its burden to show materiality and preventing defendants from rebutting the presumption of reliance at class certification. Under those cases, the "fundamental premise" of the rebuttable presumption of classwide reliance is the impact a misrepresentation has on the market price. Thus, *Basic* holds that a plaintiff seeking class certification under the presumption of reliance must prove that the alleged misrepresentations were material, and a defendant may produce rebuttal evidence that the misstatements were not material. For if an alleged misrepresentation is not material, it will not move the market price of a stock that trades in an efficient market. If the market price is not distorted, there is no basis for presuming that the entire class relied on misrepresentations by relying on the market price. Individual class mem-

bers will need to prove actual reliance on the misrepresentation, rendering class certification impossible.

The decision below also contradicts last Term's decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). *Wal-Mart* established beyond doubt that a plaintiff must prove that the Rule 23 requirements are "in fact" satisfied. In this case, as in most Rule 10b-5 cases, the lead plaintiff cannot satisfy Rule 23(b)(3)'s predominance requirement unless it can trigger and sustain the presumption of classwide reliance. The court of appeals failed to put the plaintiff to its proof. It relieved the plaintiff of the duty to prove the materiality prerequisite to the presumption of reliance. And it prevented the defendants from introducing relevant evidence to rebut the presumption. Thus, the court of appeals improperly allowed class certification without determining whether the plaintiff can "in fact" satisfy Rule 23(b)(3).

In so doing, the court of appeals ignored the nature of the rebuttable presumption created by *Basic*. The *Basic* Court cited Federal Rule of Evidence 301 in creating the presumption of reliance. A rebuttable presumption under that Rule requires the plaintiff to prove the *prima facie* case to invoke the presumption—including materiality—by a preponderance of the evidence. And such a presumption may be rebutted whenever the plaintiff invokes it, including at class certification. Finally, a rebuttable presumption does not shift the ultimate burden of persuasion away from the plaintiff. If, as here, a defendant produces some evidence that severs the link between the misrepresentation and the market price, the plaintiff must carry the ultimate burden of proving its entitlement to the presumption of reliance by the preponderance of evidence. Thus, both *Wal-Mart* and the origins of the presumption in Rule 301 dictate that the plaintiff is responsible for proving materiality in order to

obtain class certification under the fraud-on-the-market presumption.

District courts—including those with the most experience in securities cases—routinely resolve disputes over materiality and related issues at the class-certification stage. Courts regularly address whether a misrepresentation is material by considering expert analysis of public statements and event studies that assess whether the alleged misrepresentations affected the market price. These courts have not encountered any difficulty in putting plaintiffs to the proof required of them under Rule 23 and the presumption of reliance. They certify classes where statements were material and distorted the market price. And they deny certification when they cannot make such findings. Federal district courts should continue the Rule 23-mandated work they are already doing.

ARGUMENT

I. The Court Of Appeals' Decision Is Contrary To Both *Basic* And *Erica P. John Fund*

1. As this Court recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988), "[r]equiring proof of individualized reliance * * * effectively * * * prevented [securities-fraud plaintiffs] from proceeding with a class action, since individual issues * * * overwhelmed the common ones." To remedy that perceived problem, the Court in *Basic* ruled that a putative class-action plaintiff may obtain a rebuttable presumption of classwide reliance by using the "fraud-on-the-market" theory. 485 U.S. at 245. The fraud-on-the-market theory assumes that in an efficient, well-developed market, all public, material information about a company is known to the market and reflected in the company's stock price. *Id.* at 246. The theory further posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Because material

misrepresentations presumably distort the market price, "an investor's reliance on any public, material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Ibid.*[2]

To trigger the fraud-on-the-market presumption of reliance, the plaintiff must "plead and prove" certain "threshold facts": that (1) the defendant "made public, material misrepresentations"; (2) the defendant's shares were traded in an "efficient market"; and (3) "the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed." *Basic*, 485 U.S. at 248 & n.27.

Even if the plaintiff successfully proves these threshold facts, the presumption of reliance remains "subject to rebuttal." *Basic*, 485 U.S. at 245. Thus, where the record shows that "the market price [was] not * * * affected by [the] misrepresentations," the presumption is rebutted—the plaintiff class *cannot* have relied on misrepresentations by relying on a distorted market price where the market price was not affected. *Ibid.*

2. Under the court of appeals' holding, the fraud-on-the-market presumption provides a free pass to class certification for any plaintiff suing a company whose stock trades in a generally efficient market. *Amici* agree with petitioners' persuasive demonstration that the court of appeals departed from this Court's presumption-of-

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[2] As discussed *infra*, at 28, the theories underpinning *Basic*'s presumption of reliance have come under increasing scholarly attack. Yet even accepting the continuing validity of *Basic*, the court of appeals improperly upheld certification of a class that could not show classwide reliance through *Basic*'s presumption. At the least, *Basic*'s questionable economic reasoning counsels against further weakening the requirements of *Basic* and Rule 23 for obtaining class certification under the fraud-on-the-market presumption of reliance.

reliance doctrine by relieving plaintiffs of the burden of showing materiality.

Moreover, petitioners here introduced rebuttal evidence that the alleged misrepresentations were immaterial because the truth was already known to the market. In refusing to consider that evidence, the court of appeals not only violated the principles of *Basic* set forth above; it also ignored *Basic*'s specific endorsement of that precise type of rebuttal evidence.

As this Court held in *Basic* and reaffirmed just last Term, the "materiality requirement is satisfied when there is a substantial likelihood that the disclosure * * * would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc.* v. *Siracusano* 131 S. Ct. 1309, 1318 (2011) (quoting *Basic*, 485 U.S. at 231-232). A statement that does not alter the total mix of information available will not affect the company's stock price in an efficient market. As then-Judge Alito wrote for the Third Circuit, "[i]n the context of an 'efficient' market, the concept of materiality translates into information that alters the price of the firm's stock." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997). Accord *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) ("if a company's disclosure of information has no effect on stock prices, it follows that the information disclosed * * * was immaterial as a matter of law") (quotation omitted).

This Court recognized as much in *Basic*, positing this hypothetical in which the presumption of reliance would be rebutted:

> if petitioners could show that the "market makers" were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their mis-

> representations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone.

Basic, 485 U.S. at 248.

That hypothetical tracks the facts here. A statement that does not alter the reasonable investor's valuation of the stock is immaterial and cannot distort the market price in an efficient market. Therefore, it makes no sense to presume that the entire class of investors relied on the misrepresentations by relying on the market price.

3. The Court's decision last Term in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011), held that a plaintiff need not prove "loss causation" in order to trigger the presumption of reliance and declined to "address any other question about *Basic,* its presumption, or how and when it may be rebutted."

While *Erica P. John Fund* did not answer the question presented here, its powerful reaffirmation of *Basic*'s price-centered rationale strongly suggests that the court of appeals was wrong to certify a class based on immaterial statements. The Court declared that "*Basic*'s fundamental premise" is "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." (emphasis added). *Erica P. John Fund*, 131 S. Ct. at 2186. Indeed, the Court directly contrasted *Basic*'s requirement that "a misrepresentation * * * affected the integrity of the market price" with its rejection of the Fifth Circuit's requirement that the misrepresentation "also caused a subsequent economic loss." *Ibid.*

The opinion in *Erica P. John Fund* also reaffirmed that "the presumption was just that, and could be rebutted by appropriate evidence." 131 S. Ct. at 2185 (citing *Basic*, 485 U.S. at 248). And it cited *Basic*'s recognition that absent a plaintiff's ability to sustain the presumption

of reliance, a class cannot be certified because individualized issues of reliance will predominate. *Ibid.*

In refusing to consider whether the alleged misrepresentations were material, the court of appeals certified a class where *Basic*'s "fundamental premise" of price distortion was missing. Likewise, in refusing to consider rebuttal evidence, the court ignored *Erica P. John Fund*'s reminder that *Basic* created a *rebuttable* presumption, without which classes may not be certified. A rebuttable presumption created to aid class certification must necessarily be rebuttable at the class-certification stage. Otherwise, the presumption would be effectively irrebuttable and classes would be routinely certified in error. Cf. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) ("the word 'rebuttable' means that the presumption is not conclusive"). That is because a defendant's rebuttal of the presumption "defeats certification by defeating the Rule 23(b)(3) predominance requirement." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (2d Cir. 2008).

II. The Court Of Appeals' Decision Conflicts With *Wal-Mart*.

1. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011) establishes two fundamental principles. First, to certify a class, a plaintiff "must affirmatively demonstrate [its] compliance" with Rule 23; it must "prove" that it "*in fact*" satisfies all of the Rule's requirements. *Wal-Mart*, 131 S. Ct. at 2551. Second, in determining whether the plaintiff has carried its burden to satisfy Rule 23, the court must often consider issues that "overlap with the merits of the plaintiff's underlying claim." *Id.* at 2551-2552. The district court must resolve all disputes related to class certification even if such a dispute will have to be resolved again on the merits. *Id.* at 2552 n.6.

2. As petitioners have extensively shown, the court of appeals ignored *Wal-Mart*'s logic. *Wal-Mart* makes crystal clear that fraud-on-the-market plaintiffs may not cry "merits" or "classwide issue" as a means of escaping their burden to prove that common issues "in fact" predominate. The Court plainly recognized that market efficiency is both a merits issue and an issue that stands or falls on a classwide basis, yet a plaintiff must prove market efficiency if it is to "establish the applicability" of the presumption of reliance, and by extension, predominance of common issues. *Wal-Mart*, 131 S. Ct. at 2552 n.6. There was no principled basis for the court of appeals to require proof of market efficiency, but not the equally important presumption-of-reliance element of materiality.

The necessity of proving classwide, merits-related facts inheres in a plaintiff's choice to proceed under the presumption of reliance. A plaintiff could of course avoid making these merits-related showings by proving that *actual* reliance is a common issue. But a plaintiff opting to use the presumption of reliance must necessarily make a number of classwide, merits-related showings to establish that a classwide presumption makes sense: the statements must be public, material, and received by a generally efficient market. These are all common issues that plaintiffs will have to prove again at trial in order to establish the merits element of reliance. Materiality, like market efficiency, presents precisely the "overlap" between merits and Rule 23 issues that *Wal-Mart* requires district courts to embrace. Just as a plaintiff who chooses to prove *actual* reliance may not escape Rule 23's stringent requirements, a plaintiff who elects to proceed under the judicially created presumption cannot relieve himself of Rule 23's burdens merely because the option

he chose requires proof that pertains to both class certification and the merits.

Of course, at the class-certification stage, the district court is not considering materiality issues for the sake of determining the substantive merits of plaintiffs' claims, but only to determine whether they may proceed as a class. Proof of materiality for purposes of proving the substantive merits of a 10b-5 claim is properly preserved for summary judgment or trial. And a judge's rulings on materiality for certification purposes do not bind the judge or jury if they later address materiality for merits purposes. *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("[T]he determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge."); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.19 (3d Cir. 2008); accord *Blades* v. *Monsanto Co.*, 400 F.3d 562, 566-567 (8th Cir. 2005). The court of appeals erroneously believed that materiality is a pure "merits" issue that may not be decided at the class certification stage. It is not. It is merely a prerequisite to invoking the presumption of reliance, and it is to be addressed at the class-certification stage solely for the purpose of determining whether classwide reliance may be presumed.

3. The court of appeals mistakenly disallowed materiality evidence because the absence of materiality would cause the claims of *all* class members to fail on the merits. Thus, in its view, the materiality determination is a common question that does not preclude class certification. This misconceives the Rule 23 inquiry. Materiality is directly relevant, under *Basic*, to whether the plaintiffs can avail themselves of the presumption of classwide reliance. If they cannot, individual questions of reliance predominate and the class may not be certified. The fact

that the materiality inquiry may also result in a common answer on the separate materiality element does not somehow vitiate its relevance to whether individual issues of reliance predominate—issues that would overwhelm any common issues in the case. It would be frankly absurd to certify a class because individual reliance issues predominate for a reason that reveals a common failing on another element. Predominance of individualized reliance issues prevents certification in securities fraud cases. *Basic*, 485 U.S. at 242. That firm legal threshold may not be circumvented merely because assessing the applicability of the presumption of reliance necessarily implicates certain classwide issues.

Whether there was a material misstatement upon which presumptive reliance can be premised is the very question that determines whether there is a classwide reliance issue that unites class members or whether there are instead individualized reliance issues that separate them. Purchasers of Amgen stock decided to buy for any number of reasons. "Without some glue holding the alleged *reasons* for all those decisions together," a securities-fraud class cannot be certified. *Wal-Mart*, 131 S. Ct. at 2552. The presumption of reliance is the only "glue" identified by respondent; if that fails, even for a reason common to the class, predominance is lacking and class certification is improper. *Id.* at 2552-2553 (denying certification in absence of corporate-level sex-discrimination policy).[3]

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[3] As mentioned above, the court of appeals' rationale would preclude consideration of market efficiency at the class-certification stage, for that is also a common question that, if answered negatively, would doom plaintiffs' claims on the merits. At least one court has followed the court of appeals' reasoning to its logical conclusion. See, *e.g.*, *Simpson* v. *Specialty Retail Concepts*, 149 F.R.D. 94, 100-101 (M.D.N.C. 1993) ("While the better practice for plaintiffs wishing to

III. The Nature Of Rebuttable Presumptions Teaches That Plaintiffs Must Prove—and Defendants Must Be Allowed To Rebut—Materiality At The Class-Certification Stage.

1. Nothing in *Basic* suggested that the presumption of reliance should be transformed—during any stage of litigation—into a mandatorily accepted fact. Quite the contrary, *Basic* explained that the presumption is a mere procedural tool. Though the Court cited "[r]ecent empirical studies" tending to confirm the fraud-on-the-market theory, 485 U.S. at 246, it did not task itself with "assess[ing] the general validity" of that theory. *Id.* at 242. Instead, the Court relied on Federal Rule of Evidence 301 for adopting a procedural "device for allocating the burdens of proof between parties." *Id.* at 245.

To implement the fraud-on-the-market presumption, the courts below needed to look no further than this Court's holdings applying Rule 301. Under Rule 301, "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," but a presumption "does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301.[4]

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avail themselves of the fraud on the market theory would be to allege facts showing that the instant market is indeed efficient, the Court is of the opinion that a full scale investigation into the efficiency of the market at the class certification stage delves too much into the merits of the case."). But after *Wal-Mart* and *Erica P. John Fund* reaffirmed the market-efficiency prerequisite for class certification, that line of reasoning is foreclosed.

[4] Though Rule 301 was restyled in 2011, "[t]he Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule." Fed. R. Evid. 301 advisory comm. note, 2011 Amendment.

This Court has explained each of the procedural steps governing the order of proof where a Rule 301 presumption applies. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993). First, to invoke the presumption, either a plaintiff's evidence must establish the *prima facie* case by a preponderance of the evidence, or a judge must determine that any rational person would have to find the existence of facts constituting the *prima facie* case. *Id.* at 509-510 & n.3. Second, once created, the "presumption places upon the defendant the * * * burden of producing" evidence that, if believed by the trier of fact, would support a finding that the presumed fact does not exist. *Id.* at 506-507. Third, if "the defendant has succeeded in carrying its burden of production," the presumption "is no longer relevant," and the plaintiff must persuade the trier of fact of the ultimate fact by a preponderance of the evidence. *Id.* at 510-511.

2. Applying those principles here, *whenever* a plaintiff wishes to invoke the benefits of the presumption—whether to gain class certification or to prevail on the merits—it must prove each of the "threshold facts" identified by *Basic* by a preponderance of the evidence. This includes materiality. A plaintiff cannot avoid the need to prove materiality or any other part of his *prima facie* case for invoking the presumption, merely because it first arises at the class-certification stage. That would allow the plaintiff to enjoy the benefit of the presumption for class certification without proving the very facts that give rise to the presumption.

3. Apart from the plaintiff's initial burden to prove materiality at the class-certification stage, the defendant may produce rebuttal evidence on materiality to defeat the presumption of reliance and, by extension, class certification. Merely completing the *prima facie* stage of the rebuttable presumption does not mean plaintiffs have

"prove[n]" that they "*in fact*" satisfy Rule 23(b)(3)'s predominance requirement. *Wal-Mart*, 131 S. Ct. at 2551. Indeed, the predominance inquiry "*cannot be made* without determining whether defendants can successfully rebut the fraud-on-the-market presumption." *Salomon*, 544 F.3d at 485 (emphasis added). Consequently, the defendant's rebuttal must be considered "prior to class certification." *Id.* at 484.

The defendant retains the right to rebut the presumption whenever it is invoked—at class certification or otherwise. That much is clear from *Basic* itself, its background history, and common sense. *Basic* involved an appeal, *inter alia*, of a class-certification order. Against that backdrop, the Court created a presumption that makes class certification possible in securities cases. But it made that presumption rebuttable. Nothing in *Basic*—and nothing before or since—suggests that this rebuttable presumption may not be rebutted when it is invoked at the class certification stage—the very stage for which it was created. *Basic* created a "nonconclusive" presumption, *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005), and there is no indication that this Court intended this powerful, class-enabling tool to be conclusive at the most critical stage of a securities suit. Nor has anyone identified any other rebuttable presumption that may not be rebutted at the procedural stage in which it is invoked.

The case law on which *Basic* relied in creating its presumption of reliance demonstrates that the Court did not intend to create a rebuttable presumption for use in obtaining class certification, yet—with no explanation—render that presumption *irrebuttable* at the class-certification stage. *Basic* favorably cited the presumption of reliance in *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153-154 (1972), which arises

when an issuer makes material omissions despite a duty to disclose. See *Basic*, 485 U.S. at 243, 245. Courts had always understood that the *Affiliated Ute* presumption was rebuttable at the class-certification stage.

Less than a month before *Basic* was handed down, for instance, the Eleventh Circuit spent considerable energy deciding whether "[t]he presumption, derived from *Ute*" had been rebutted by the defendant. *Ross* v. *Bank South, N.A.*, 837 F.2d 980, 993 (11th Cir. 1988). That discussion, *id.* at 993-998, took place in Part II, "Class Certification"—*not* in Part III, "Merits," where the respondent's theory would place it.[5] While the court concluded that defendants had not successfully rebutted the presumption, *id.* at 997, it went out of its way to emphasize that it did "not, of course, intend to preclude a district court from exercising its discretion in a proper case to *deny certification*" in cases where rebuttal was successful. *Id.* at 996 n.11 (emphasis added).

A similar approach appears in *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir. 1975), a seminal presumption case later cited by *Basic*, see 485 U.S. at 244-245, 247 n.25. *Blackie* arose in the context of a conditional certification, 524 F.2d at 894, and explained that the presumption simply "shift[s] to defendant the burden of disproving a prima facie case of causation." *Id.* at 906. This rebuttal discussion was in the certification, and not the trial, context—the part, section, and sub-section in which it occurs were respectively entitled: (1) "[c]ompliance with the [r]equirements of Fed. R. Civ. P. 23(a) and (b)(3)," (2)

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[5] The Eleventh Circuit subsequently took the case *en banc*, where (as to some issues) it departed from the panel, finding no securities-fraud violation. See *Ross* v. *Bank South, N.A.*, 885 F.2d 723, 732 (11th Cir. 1989) (*en banc*). The panel opinion thus is cited here merely as an illustration of when the presumption could be rebutted (a conclusion unchallenged by the *en banc* court).

"[t]he merits of class certification," and (3) "[p]redominance and reliance." *Id.* at 900, 901, 905.

The late Judge Charles Clark, writing in the much-cited (and hardly anti-class) *Shores* v. *Sklar*, observed that "*[w]hen* the *Ute* presumption attaches, the defendant may rebut it by showing that the plaintiff did not rely on the defendant's duty to disclose." 647 F.2d 462, 468 (5th Cir. 1981) (*en banc*) (emphasis added). Though *Shores* did not involve a certification challenge, this common-sense proposition—that *when* the presumption is invoked, *then* the defendant may rebut—is the common-sense principle that respondent asks the Court now to reject.

4. *Basic* recognizes that a defendant may rebut the presumption by rebutting the elements of the presumption—such as materiality—or by making "*[a]ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff." *Basic*, 485 U.S. at 248 (emphasis added). A showing that the alleged misrepresentation was immaterial or did not impact the market price necessarily rebuts the presumption of reliance. *Ibid.* In the absence of price distortion, "the basis for finding that the fraud had been transmitted through market price would be gone." *Ibid.* And if the misrepresentation was immaterial or did not distort the market price, there is no basis for presuming that the class indirectly relied on the misrepresentation by relying on the market price. Materiality and price-impact rebuttal are thus closely related. As the Second Circuit put it:

> If plaintiffs can show that the alleged misrepresentation was material and publicly transmitted into a well-developed market, then reliance will be presumed, for if a reasonable investor would think that the information would have 'significantly altered

> the total mix of information,' then it may be presumed that, in an efficient market, investors would have taken the omitted information into account, thereby affecting market price.

Salomon, 544 F.3d at 483. By the same token, if the alleged misrepresentation is immaterial, it would not distort the stock price in an efficient market.

Amgen's evidence pertaining to materiality falls within this broad right of rebuttal. It both rebuts the materiality element of the presumption and constitutes a showing that severs the link between the misrepresentation and the price paid by the plaintiff. As discussed above, there is no basis for distinguishing a materiality rebuttal from any other sort of rebuttal of the presumption of reliance —such as market efficiency—that is concededly available at the class-certification stage.

The quantum of rebuttal evidence required of a defendant is light, consistent with *Basic*'s "any showing" formulation and its citation of Rule 301. Contrary to respondent's intimations, Amgen does not bear the burden of conclusively proving that the misrepresentations were immaterial or had no impact on the stock price. A rebuttable presumption does not shift the burden of proof away from the plaintiff. Rather, at the rebuttal stage, Amgen need only produce evidence that could support a factfinder's belief that the statements were immaterial or did not move the stock price. Amgen's evidence that the truth was on the market before its alleged misrepresentations amply satisfies this burden.

5. If the defendant satisfies this burden of production, the presumption is "no longer relevant." *Hicks*, 509 U.S. at 510. The plaintiff would then be required to prove by a preponderance of evidence that the alleged fraud had been transmitted through the market price. *Salomon*, 544 F.3d at 486 ("If defendants attempt to make a rebut-

tal, * * * the district judge must receive enough evidence * * * to be satisfied that each Rule 23 requirement has been met."). If the plaintiff could not prove classwide reliance via reliance on a distorted market price, individualized issues of reliance would predominate and the class could not be certified. *Id.* at 485 (holding that a "successful rebuttal defeats certification by defeating the Rule 23(b)(3) predominance requirement").

The rebuttable presumption of reliance therefore offers no escape hatch for plaintiffs seeking to avoid their ultimate burden to prove materiality—and the applicability of the presumption—by the preponderance of the evidence at the class-certification stage. That requirement is dictated by both *Basic*'s invocation of Rule 301 and the plaintiff's Rule 23 burden to show that common issues predominate over individual ones.

IV. District Courts Routinely Consider Materiality At The Class-Certification Stage, Denying Class Certification Where The Presumption Of Classwide Reliance Is Not Warranted.

District courts regularly resolve factual disputes over materiality and related issues, allowing cases to proceed as class actions only when they find the presumption of reliance justified. Practical experience teaches that there is no reason to fear allowing district judges to do precisely what Rule 23 requires of them.

Judges often consider event studies, expert testimony, and analyst reports in determining whether an alleged misrepresentation was material and had an impact on market price. As petitioners have persuasively explained, this individualized analysis of each alleged misrepresentation is much more consistent with the fraud-on-the-market theory of reliance than an inquiry into whether the market for a given stock is efficient as a general matter. Pet. Br. 30-34. Yet even the lower

courts that consider only generalized market efficiency at the class-certification stage receive evidence and resolve disputes in a way that demonstrates courts' ability to address materiality and price-impact issues at the same stage.

1. Since the Second Circuit's holding in *Salomon*, district judges within the Southern District of New York have, with no apparent problems, enforced *Basic*'s materiality requirement and allowed defendants to rebut with respect to materiality and price impact at the class-certification stage.

For example, in *Berks County Employees' Retirement Fund* v. *First American Corp.*, 734 F. Supp. 2d 533 (S.D.N.Y. 2010), the court denied class certification because plaintiff "has not demonstrated that defendants' alleged misstatements and omissions were material. It therefore cannot avail itself of a presumption of reliance under * * * the fraud-on-the-market doctrine." *Id.* at 541. In reaching that conclusion, the court critically analyzed "the event study of [plaintiff's] expert witness." *Id.* at 538. It determined that plaintiff failed to show the alleged misrepresentation "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 539. And it held that the event study's finding of stock-price declines could not show materiality because the alleged information causing the declines was no different than facts "that had been disclosed publicly" several days (or weeks) earlier. *Id.* at 540-541. After finding plaintiff's expert "unconvincing" and "reject[ing] his study as a basis for a finding of materiality," the court, in the alternative, "credit[ed] the opinion of defendants' expert witness" that demonstrated that none of the alleged misrepresentations had an impact on stock price. *Id.* at 541 & n.52.

Similarly, in *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137 (S.D.N.Y. 2008), the plaintiff alleged that as part of an illicit agreement between Credit Suisse and Lantronix, a Credit Suisse analyst issued false favorable reports on Lantronix. Credit Suisse offered evidence that the alleged corrective disclosure that supposedly caused the stock-price decline had previously entered the marketplace with no effect on the stock price. *Id.* at 147-149. In the face of this evidence, the court held that the plaintiff did not meet its burden to prove by a preponderance of the evidence that the disclosure of the misleading nature of the analyst reports resulted in the price decrease. *Id.* at 142-143 & n.11. "With the benefit of ample evidence * * * that demonstrates the absence of market impact, the Court finds that the *Basic* presumption is not properly applicable here and thus that Plaintiff has not carried his burden of demonstrating that the elements of Rule 23(b) have been satisfied." *Id.* at 143. "In the alternative," the court reasoned, "if Plaintiff's showing is sufficient to establish the presumption, Defendants have rebutted it here." *Id.* at 143 n.11.

By contrast, district courts have certified classes where the plaintiff proved materiality and the preponderance of the evidence showed that the alleged misrepresentations distorted the market price. Thus, in *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298 (S.D.N.Y. 2010), the district court certified the class after extensively analyzing the alleged misstatements' materiality and comparing event studies and expert reports that revealed the misrepresentations' impact on stock price. *Id.* at 310-315. And, in *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132 (S.D.N.Y. 2008), the court certified the class upon holding that plaintiff proved materiality with evidence that the defendant had "tacitly acknowledged"

making materially misleading statements and its independent auditor had "publicly opined" that the defendant had made "material misstatements in annual financial statements." *Id.* at 138-139. Moreover, the court found that the stock price declined by a statistically significant amount when the alleged fraud was revealed. *Ibid.*

A proper individualized assessment of each misrepresentation's materiality and price impact means that courts may certify a class with respect to some misrepresentations, but not others. That is what happened in *In re American International Group Sec. Litig.*, 265 F.R.D. 157 (S.D.N.Y. 2010), where the court reduced the size of the class after considering both plaintiff's and defendant's price-impact evidence with respect to each alleged misrepresentation. *Id.* at 181-182, 189.

Courts, moreover, have faithfully enforced *Basic*'s instruction that a plaintiff does not achieve class certification merely by making an initial showing that a given misstatement was material. The defendant may rebut by proving that the misrepresentation did not distort the market price and therefore could not support the presumption of classwide reliance. For example, in *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480 (S.D.N.Y. 2011), the court found that "Plaintiffs have satisfied [their] burden" to show that Moody's alleged misrepresentations about its issuer-pays rating model were material. *Id.* at 490. But after carefully analyzing dueling event studies concerning the alleged misrepresentations' impact on market price, the court denied certification because the "Defendants have successfully rebutted the fraud on the market presumption." *Id.* at 492-493. Thus, plaintiffs were "unable to satisfy their burden of proving that common questions of reliance predominate." *Id.* at 494.

Amici discuss these cases not to endorse every aspect of the reasoning or outcome of any given case. Rather, these cases helpfully illustrate that district courts are perfectly capable of assessing materiality and price-impact evidence at the class-certification stage. And they show that courts have reached a range of results—granting certification, partially certifying, and denying certification—depending on the materiality and price impact of the relevant misrepresentations. Ensuring that putative securities-fraud classes in fact satisfy Rule 23 neither burdens district courts nor results in decisions that are favorable to only plaintiffs or only defendants. Indeed, it advances judicial efficiency and the due-process rights of both plaintiffs and defendants.

2. Even in courts that do not formally require proof that each misrepresentation is material and distorted the market price, district judges make evidentiary inquiries that differ little from those undertaken in courts that fully enforce *Basic*'s requirements. For instance, securities-fraud plaintiffs already use event studies and expert testimony to demonstrate market efficiency, which undisputedly must be proven to invoke the presumption. Cf. *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989) (to establish market efficiency, a plaintiff must prove stock price reacted to unexpected company-specific news). And the same event studies used to show market efficiency are often likewise used to show that the alleged misrepresentations materially affected the market price. See, *e.g.*, Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 Emory L.J. 843, 871, 878 (2005); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512 & n.10, 513 (1st Cir. 2005) (affirming finding of market efficiency where plaintiffs presented an "event study" showing that stock "reacted strongly * * * to new information concerning the company (including *

* * disclosures at issue in this case"). Some courts even deny class certification after market-efficiency assessments that closely track materiality and price-impact inquiries. See, *e.g.*, *Dean* v. *China Agritech*, No. 11-CV-01331-RGK, 2012 WL 1835708, at *3, *7–*8 (C.D. Cal. May 3, 2012) (denying class certification after holding that because the calculations and analysis in plaintiffs' expert's event study were flawed, plaintiffs did not meet their burden to show a causal relationship between the disclosures and the price declines, and thus did not provide sufficient evidence of market efficiency); *In re Polymedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 265 (D. Mass. 2006) (denying class certification where plaintiff failed to show "a cause-and-effect relationship over time between unexpected corporate events or financial releases and an immediate response in stock price"); cf. *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174, 182 (S.D.N.Y. 2012) (denying class certification after holding that, due to flaws in plaintiff's expert's event study, plaintiff provided no persuasive evidence that material news promptly affected the market price, and thus did not meet its burden to show market efficiency).

There can be no serious dispute that parties are able to contest—and district courts are equipped to adjudicate—evidentiary disputes over materiality and price impact at the class-certification stage. Thus, there is no practical reason preventing this Court from assigning district judges the tasks that *Basic* and Rule 23 mandate.

V. Reversal Is Necessary To Ensure That The Presumption Of Reliance Is Not Used To Coerce Settlements Where Class-Action Treatment Is Inappropriate.

1. The framework set forth in *Basic* imposes carefully calibrated burdens on plaintiffs and permits defendants

broad rights of rebuttal, all to ensure that class-action treatment is appropriate. The court of appeals' decision, however, misuses the *Basic* presumption as a virtual rubberstamp for class certification in Rule 10b-5 securities cases involving public companies. Such a result cannot be reconciled with the notions of "fairness, public policy, * * * probability, [and] judicial economy," on which *Basic* relied in creating its presumption of reliance. 485 U.S. at 245. To defer for merits resolution questions essential to whether the case should proceed as a class action in the first instance is wasteful in the extreme.

2. The *in terrorem* effects of a class-certification order also counsel against lightening the Rule 23 burden for securities-fraud plaintiffs. Class certification is usually the entire ballgame for defendants. "A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting). Judge Friendly aptly described such settlements as "blackmail." Friendly, *Federal Jurisdiction: A General View* 120 (1973). Certifying fraud-on-the-market classes without requiring plaintiffs to prove materiality or affording defendants the opportunity to rebut will inevitably lead to the settlement of countless weak cases—indeed, cases that are not only meritless, but which never should have been certified—because the amounts at stake are simply too enormous to justify the risk of litigation. That, in turn, would give rise to more frivolous lawsuits. See Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002). By requiring proof of materiality and allowing rebuttal prior to class certification, "[t]he law guards against a flood of frivolous or vexatious lawsuits." *Salomon*, 544 F.3d at 484.

3. Careful gatekeeping at the Rule 23 stage protects not only judicial efficiency and fundamental fairness; it also safeguards the productivity of the U.S. economy. In an average year during the past decade, health-care companies representing 18% of that sector's S&P 500 market capitalization were targeted in securities class actions.[6] In 2010, the percentage skyrocketed to nearly 34%. Stanford Clearinghouse at 13. The securities laws are not intended "to provide investors with broad insurance against market losses" in huge segments of our economy. *Dura*, 544 U.S. at 345 (citing *Basic*, 485 U.S. at 252 (White, J., dissenting)). Allowing enormous classes to be certified based on a judicially created presumption where the evidence shows that the statements were immaterial hardly deters fraud. Rather, it punishes innocent defendants (and their current shareholders) who must settle cases after certification to avoid the massive risks and expense of litigation. As this Court declared in *Dura*, a rule that promotes settlement of meritless cases improperly "transform[s] a private securities action into a partial downside insurance policy." *Id.* at 347-348. The Court should not countenance the court of appeals' adoption of such a rule in this case.

The effect is particularly pernicious on smaller companies that invest heavily in research and development to produce the creative breakthroughs that drive our prosperity. Companies with lower revenues or fewer product lines are more susceptible to the stock-price swings that tend to attract securities-fraud lawsuits. And they are

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[6] Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2011 Year in Review* 13 (2012) (hereinafter, "Stanford Clearinghouse"), http://securities.stanford.edu/clearinghouse_research/2011_YIR/Cornerstone_Research_Filings_2011_YIR.pdf

uniquely vulnerable to the massive costs of defending a class action. Firm enforcement of Rule 23 in securities cases will help ensure that innovation is not stifled by meritless lawsuits.

4. The modesty of the economic reasoning that undergirds *Basic*'s presumption also weighs strongly against weakening Rule 23 safeguards in securities cases. The four-Justice majority in *Basic* invoked the theory with some tentativeness, relying on "common sense," "probability," "recent empirical studies," and the "applau[se]" of three "commentators," 485 U.S. at 246, to conclude only that "[i]t is *not inappropriate* to apply a presumption of reliance supported by the fraud-on-the-market theory." *Id.* at 250 (emphasis added). *Basic*, moreover, rested on an efficient-market theory that was hotly disputed even when *Basic* was decided. For one thing, rather than investors relying on the integrity of the market price—which was *Basic*'s rationale for the adoption of the fraud-on-the-market presumption of reliance—many investors attempt to locate undervalued stocks in an effort to "beat the market," thus "betting that the market for the securities they are buying is in fact inefficient." Macey, *The Fraud on the Market Theory: Some Preliminary Issues*, 74 Cornell L. Rev. 923, 925 (1989). Skepticism has grown since: "Doubts about the strength and pervasiveness of market efficiency are much greater today than they were in the mid 1980s." Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 175 (2009). And the fraud-on-the-market regime established in *Basic* has been criticized for "shift[ing] money from one shareholder pocket to another at enormous expense." Pritchard, Stoneridge Investment Partners *v.* Scientific Atlanta*: The Political Economy of Securities Class Action Reform*, 2008 Cato S. Ct. Rev. 217, 255 (2008). These concerns weigh dispo-

sitively against converting fraud-on-the-market reliance from an ordinary rebuttable presumption to a categorical imperative.

For these reasons, *amici* respectfully suggest that the Court should not further expand the judicially created presumption of reliance that aids plaintiffs who invoke the judicially created Rule 10b-5 cause of action.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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