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IN THE
Supreme Court of the United States

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

CONNECTICUT RETIREMENT PLANS & TRUST FUNDS,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae address the following issues:

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

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT.................................. 5

ARGUMENT 7

I. THE DECISION BELOW UNDERMINES THIS COURT'S CLEAR PRECEDENT ON THE PRESUMPTION OF RELIANCE 7

A. *Basic* and *Erica P. John Fund* Establish That Evidence Rebutting the Presumption of Reliance Is Not Premature at the Class Certification Stage 8

B. The Decision Below Ignores *Wal-Mart*'s Admonition That Courts Should Not Avoid Addressing Issues Relevant to Class Certification Simply Because They Are Also Merits-Based Issues.. 15

C. The Decision Below Contravenes *Basic*'s Repeated Emphasis on the Need for Evidence to Establish the Starting and Ending Dates for the Class Period 18

II. BECAUSE CLASS CERTIFICATION DECISIONS ARE USUALLY OUTCOME DETERMINATIVE, CLASS ACTION DEFENDANTS SHOULD BE FREE TO REBUTT THE PRESUMPTION OF RELIANCE 20

CONCLUSION...24

TABLE OF AUTHORITIES

Page(s)

CASES:

Basic Inc. v. Levinson,
485 U.S. 224 (1988) ....*passim*

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 7-8

Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).................. 1, 6, 8, 13-15

Ganino v. Citizens Util. Co.,
228 F.3d 154 (2d Cir. 2000) 11

Gen. Tel. Co. S.W. v. Falcon,
457 U.S. 147 (1982) 7, 17

In re Fed. Nat'l Mortg. Ass'n Sec., Derivatives, & ERISA Litig.,
247 F.R.D. 32 (D.D.C. 2008) 18

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir.),
cert. denied, 516 U.S. 867 (1995) 21

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006)....................................... 23

Morrison v. Nat'l Australia Bank Ltd.,
130 S. Ct. 2869 (2010) 1

Page(s)

Peil v. Speiser,
806 F.2d 1154 (3d Cir. 1986) 9

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 13

Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.,
552 U.S. 148 (2008) 1

Tellabs, Inc. v. Makor Issue & Rights, Ltd.,
551 U.S. 308 (2007) 22

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 1, 7, 15, 16, 17

STATUTES & RULES:

Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737 .... 22, 23

Securities Exchange Act of 1934,
15 U.S.C. § 78a *et seq*. 22
15 U.S.C. § 78u-4(b) 22
§ 10(b) 12

Fed. R. Civ. P. 23..................................... 7, 10, 15, 17

Fed. R. Civ. P. 23(a) 3, 7

Fed. R. Civ. P. 23(b)(3) 3, 5, 7, 8, 12, 17

Page(s)

MISCELLANEOUS :

H.R. Rep. No. 104-369 (1995) (Conf. Rep.) 23

Janet Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (Feb. 1991) 21

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Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 21

INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. To that end, WLF routinely litigates in cases concerning the proper scope of the federal securities laws. *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.*, 552 U.S. 148 (2008). WLF has also participated extensively in litigation in support of its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied each of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

Amici are deeply concerned by the proliferation of class action lawsuits being filed throughout the federal court system—especially lawsuits alleging securities fraud—and the inhibiting effect that such litigation can have on the development and expansion of business. *Amici* believe that the district court's certification decision, if allowed to stand, will only exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes. Because the decision to certify a class is so often outcome determinative, class action defendants should be free at the certification stage to present evidence rebutting the presumption of reliance.

STATEMENT OF THE CASE

Respondent Connecticut Retirements Plans and Trust Funds alleges that Petitioners (collectively, "Amgen") violated federal securities laws by issuing misleading information (and omitting material information) regarding two of Amgen's biologics. Respondent alleges that Amgen's violations caused it to purchase Amgen stock at an artificially inflated price, resulting in significant losses.

Relying on the fraud-on-the-market theory, Respondent sought certification of a plaintiff class comprising all those who purchased Amgen stock between April 22, 2004 (the date of Amgen's first alleged misrepresentation) and May 10, 2007 (the date on which the truth allegedly was fully disclosed). Respondent argued that the court could simply presume that members of the proposed class relied on Amgen's alleged misrepresentations—

regardless whether they ever heard the misrepresentations—because the stock traded on the open market. As a result, Respondent argued, the price paid for the stock likely included a premium reflecting the market's awareness of and reliance on the alleged misrepresentations.

The district court granted the certification motion in August 2009, finding that Respondent satisfied the prerequisites of Fed. R. Civ. P. 23(a) and 23(b)(3). Pet. App. 15a-50a. In particular, the court determined that Respondent met Rule 23(b)(3)'s "predominance" requirement because—based on the fraud-on-the-market theory of liability—Respondent was entitled to a presumption that all class members relied on Amgen's alleged misrepresentations. *Id.* at 31a-40a. It stated that Respondent was entitled to that presumption because Respondent had established that class members purchased their securities on an "efficient market." *Id.* at 40a. It explained, "the Court agrees with Plaintiff that to trigger the presumption of reliance, Plaintiff need only establish that an efficient market exists. Other inquiries into issues such as materiality and loss causation are properly taken up at a later stage in this proceeding." *Id.*

The court further held that Amgen would not be given an opportunity at the certification stage to rebut the presumption by attempting to demonstrate that "the truth" was known to the market throughout all or most of the class period. *Id.* at 40a-44a. Rather, the court held that a party opposing class certification is not permitted to have its rebuttal evidence considered until the summary judgment stage. *Id.* at 44a. The court reasoned that

if it were to allow Amgen "to present evidence that none of the investors were misled because the truth was on the market, the Court would essentially be allowing [Amgen] to assert a defense of non-reliance as a basis for denial of class certification. But such is not allowed." *Id.*

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* at 1a-13a. The panel held that a fraud-on-the-market presumption attaches if a plaintiff can merely demonstrate "whether the securities market was efficient and whether the defendant's purported falsehoods were public." *Id.* at 9a. The appeals court rejected arguments that the availability of the presumption hinged on proving that the alleged misstatements were material, *i.e.*, that the market was actually misled by and relied on the misstatements. *Id.* at 12a. Concluding that materiality is a "merits" question inappropriate for consideration at the class certification stage, the court explained that "the plaintiff must plausibly allege—but need not *prove* at this juncture—that the claimed misrepresentations were material." *Id.* at 2a, 8a-9a. The court further held that any effort by defendants to rebut materiality was always premature at the class certification stage; rather such evidence may be offered only at trial or "by summary judgment motion if the facts are uncontested." *Id.* at 12a-13a.

SUMMARY OF ARGUMENT

In affirming class certification, the Ninth Circuit adopted an alarmingly narrow view among the federal appeals courts regarding what must be shown to satisfy Fed. R. Civ. P. 23(b)(3)'s predominance requirement in a securities law class action. The court held that certification is required under a fraud-on-the-market theory whenever the plaintiff demonstrates that the securities market was efficient and that the defendant's alleged falsehoods were public. So long as those perfunctory showings are made, under the Ninth Circuit's view, it is irrelevant how much evidence exists showing that the alleged falsehoods were not deemed material by the market—the class must be certified.

The shortcomings of this rule are obvious: because the market for the common stock of virtually every major corporation is likely to be "efficient" (especially as that concept has been simplistically applied in the lower federal courts), all but the dullest plaintiffs' lawyer will always be able to win class certification. All that is necessary is to point to some public statement of the corporate defendant and allege that the statement was misleading and caused stock prices to be artificially inflated. Once the shareholder class is certified, public corporations face overwhelming pressures to settle even the most insubstantial or frivolous claims.

The decision below flies in the face of this Court's binding precedent. The Court first addressed the fraud-on-the-market theory in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Acknowledging that the theory supported application of a "rebuttable presumption of reliance"

when a plaintiff makes the requisite showings, the Court concluded that "[i]t is not inappropriate" for a district court to apply the presumption, subject to rebuttal. 485 U.S. at 250. Contrary to the Ninth Circuit, *Basic* never suggested that a defendant's rebuttal must be deferred to trial. And only last year, the Court reiterated a defendant's right to rebuttal and explicitly conditioned any presumption of investor reliance on a finding that the defendant's misrepresentation is actually "reflected in the market price at the time of [the investor's] transaction." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185-86 (2011). Of course, a misrepresentation that is not "material" will never be reflected in the market price. But the Ninth Circuit's flawed approach to class certification completely ignores this crucial distinction.

Indeed, a key factor in determining whether the plaintiff is entitled to a presumption of reliance is "the time the truth was revealed." This was the precise issue on which Amgen sought to be permitted to introduce important rebuttal evidence below. Its consistent position throughout this litigation has been that "the time the truth was revealed" occurred on or before the time it made its alleged misrepresentations. Accordingly, the Ninth Circuit's determination that Amgen could not be allowed to introduce important rebuttal evidence at the class certification stage simply cannot be harmonized with this Court's statements in *Erica P. John Fund*.

The Ninth's Circuit's approach also fails to appreciate the crucial role that certification decisions play in the outcome of high-stakes securities class-action litigation. Empirical research demonstrates

that litigation costs make it very difficult for the party that loses the class certification decision to continue with the litigation—with the result that erroneous certification decisions are effectively unreviewable. In light of that concern, this Court should adopt a clear rule that will encourage district judges to grant certification motions only after determining that *all* the requirements of Rule 23 have been satisfied.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THIS COURT'S CLEAR PRECEDENT ON THE PRESUMPTION OF RELIANCE

Respondent claims the right to sue Amgen not only on its own behalf but also as a representative of the thousands of others who purchased Amgen stock during a three-year period beginning in April 2004. Fed. R. Civ. P. 23 imposes numerous requirements on those seeking to maintain such a representative action, including (under the circumstances of this case) a judicial finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Certification of a class is appropriate only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. S.W. v. Falcon*, 457 U.S. 147, 161 (1982)).

To prevail in a securities fraud action, a plaintiff must demonstrate, *inter alia*, actual *reliance* on the defendant's misrepresentation. *Dura*

Pharms v. Broudo, 544 U.S. 336, 341-42 (2005). Thus, to satisfy Rule 23(b)(s)'s predominance requirement, a plaintiff must demonstrate that reliance can be established on a class-wide basis, because if reliance can only be established on a plaintiff-by-plaintiff basis, questions of law or fact common to class members could never "predominate" over questions affecting only individual members. *See Basic*, 485 U.S. at 242. As a result, whether Respondent is entitled to a presumption of reliance is very much a Rule 23(b)(3) class certification issue, because Respondent cannot possibly satisfy the "predominance" requirements (and thus is not entitled to certification) unless it is afforded that presumption.

A. *Basic* and *Erica P. John Fund* Establish That Evidence Rebutting the Presumption of Reliance Is Not Premature at the Class Certification Stage

This Court's opinion in *Basic, Inc. v. Levinson* endorsed the "general validity" of the fraud-on-the-market theory and held that, under appropriate circumstances, the theory supports recognition of a presumption of reliance in securities fraud cases. 485 U.S. at 242. The Court described the theory as follows:

> The fraud on the market theory is based on the hypothesis that, in an open and developed market, the price of a company's stock is determined by the available information regarding the company and its business. . . . Misleading statements will

> therefore defraud purchasers of stock even if the purchasers of stock do not directly rely on the misstatements. . . . The casual connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Id. at 241-42 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

The Court determined that (1) "it is not inappropriate to apply a presumption of reliance supported by the fraud-on-the-market theory"; (2) that presumption is "rebuttable"; and (3) the district court's initial certification of the class "was appropriate when made but is subject on remand to such adjustment, if any, as developing circumstances demand." *Id.* at 250. Although the Court upheld the trial court's class certification decision, nothing in the Court's summation of its holding even remotely suggests that a defendant's efforts to rebut the presumption of reliance are premature at the class certification stage.

Indeed, numerous passages in the decision point in the opposite direction. On several occasions, in connection with its ruling that the presumption of reliance was rebuttable, *Basic* emphasized that a class certification order is subject to revision at all times prior to final judgment. *See, e.g., id.* at 250 (emphasizing that class certification is subject on remand to adjustments "as developing circumstances demand"). Those passages show that the Court contemplated that defendants should *not* be required to wait for a bull blown trial before attempting to

rebut the presumption of reliance.

In contrast, the panel below held that it is "premature" for a defendant seeking to demonstrate a lack of preponderance to try to rebut the presumption of reliance at the class certification stage by introducing evidence that the allegedly misleading statements were immaterial and thus never relied on by the market. *See* Pet. App. 12a-13a. Rather, the appeals court held, such rebuttal evidence may only be presented at trial. *Id.* That holding is in significant tension with the passages from *Basic* cited above.

The Ninth Circuit's rejection of Amgen's efforts to raise a truth-on-the-market defense is particularly problematic. While conceding that a truth-on-the-market defense negates a stock fraud claim by demonstrating that the market was fully aware of Amgen's financial condition and thus that the market price was unaffected by any misrepresentation, the appeals court inexplicably concluded that such evidence is merely "a method of refuting an alleged misrepresentation's materiality" and thus may not be introduced to defeat class certification. *Id*. at 13a.

Properly understood, however, the truth-on-the-market theory is both a defense on the merits *and* a perfectly appropriate basis for rebutting the presumption of reliance. As such, it is also highly relevant in determining whether the Rule 23 requirements have been satisfied. The truth–on-the-market theory postulates that a misrepresentation cannot possibly have a fraudulent effect on a stock's value after information contrary to the

misrepresentation becomes known to an efficient market. It posits that the market will naturally not rely on a defendant's allegedly misleading information if the "truth" is widely disseminated during the class period and is thus known to the market. *See, e.g., Ganino v. Citizens Utility Co.*, 228 F.3d 154, 167 (2d Cir. 2000).

That is why this Court has included truth-on-the-market as one of the theories a securities law defendant may deploy to rebut the presumption of reliance in a fraud-on-the-market case:

> Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance. For example, if petitioners could show that the "market makers" were privy to the truth about [the alleged misrepresentations] and thus that the market price would not have been affected by their misrepresentations, 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. It would have made little sense for the Court to discuss truth-on-the-market in connection with efforts "to rebut the presumption of reliance" if it truly contemplated (as the Ninth Circuit held) that any such rebuttal must be forsworn until trial. But if a securities law defendant must await trial for a rebuttal

opportunity, any trial victory would be of limited value; after all, a holding that rejects the presumption of reliance would result in decertification of the class for failure to meet Rule 23(b)(3)'s predominance requirement, not in a class-wide victory on the merits.

In concluding that materiality is not properly considered at the class certification stage, the appeals court relied in substantial part on its curious conclusion that a "no materiality" finding would defeat the claims of *every* shareholder. Pet. App. 8a. But that conclusion is belied by common sense. For even if the market as a whole did not rely on the alleged misrepresentations, it is entirely conceivable that individual shareholders did so. For example, they might have been unwilling to purchase shares at the market price *but for* their belief in the truth of misrepresentations. And if such shareholders can establish loss, there is no reason why they should not be permitted to proceed with their securities fraud claims on an individual basis.

Indeed, in its most recent opinion regarding fraud-on-the-market claims, this Court explicitly contemplated the propriety of such individual suits:

> Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) cause of action. . . . The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction, *e.g.*, purchasing common stock—based on that specific

> representation. In that situation, the plaintiff plainly would have relied on the company's deceptive conduct.

Erica P. John Fund, 131 S. Ct. at 2184-85. Contrary to the Ninth Circuit's analysis, then, a "no materiality" finding for the entire class would in no way defeat the claims of *every* shareholder.

It would be patently unfair to those shareholders who actually relied on the alleged misrepresentation to force them to be bound by a fraud-on-the-market class action, particularly where there is serious doubt that "the market" also relied on the misrepresentation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). By allowing rebuttal evidence on materiality to be introduced at the class certification stage, courts can protect individual shareholders who might otherwise have their rights cut off if a class were certified in a fraud-on-the-market case in which "the market" did not deem the misrepresentations to be material (in which case, the class is destined for eventual defeat).

The panel below cited *Erica P. John Fund* in support of its contention that a plaintiff need make only two showings to be entitled to class certification: an efficient market and public representations. Pet. App. 11a. But, contrary to the Ninth Circuit's characterization, *Erica P. John Fund* squarely imposes *at least three* requirements on securities fraud plaintiffs seeking to obtain class certification:

> It is undisputed that securities fraud plaintiffs must prove certain things in order

> to invoke *Basic*'s rebuttable presumption. It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that *the relevant transaction took place "between the time the misrepresentations were made and the time the truth was revealed*."

Erica P. John Fund, 131 S. Ct. at 2185 (quoting *Basic*, 485 U.S. at 248 n.27) (emphasis added).[2]

This Court, therefore, has already established that a key factor in determining whether the plaintiff is entitled to a presumption of reliance is "the time the truth was revealed." This was the precise issue on which Amgen sought to be permitted to introduce important rebuttal evidence below. Its consistent position throughout this litigation has been that "the time the truth was revealed" occurred on or before the time it made its alleged misrepresentations. The Ninth Circuit's determination that Amgen could not be allowed to

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[2] Footnote 27 of *Basic* sets forth the requirements that a plaintiff must meet in order to invoke the presumption of reliance. In an effort to side step these requirements, the Ninth Circuit insists that Footnote 27 was merely reciting the requirements listed by the Sixth Circuit, whose opinion was under review. Pet. App. 11a. But that explanation cannot possibly be squared with this Court's returning to that exact same footnote in *Erica P. John Fund* to support the proposition that there are at least three well-established requirements that must be met to invoke the presumption of reliance.

introduce important rebuttal evidence at the class certification stage simply cannot be harmonized with this Court's statements in *Erica P. John Fund*.

B. The Decision Below Ignores *Wal-Mart*'s Admonition That Courts Should Not Avoid Addressing Issues Relevant to Class Certification Simply Because They Are Also Merits-Based Issues

The appeals court held that, for purposes of class certification, Rule 23 requires only that a plaintiff adequately plead materiality—it need not introduce supporting evidence. Pet. App. 2a. ("As for the element of materiality, the plaintiff must plausibly allege—but need not prove at this juncture—that the claimed misrepresentation was material."). But this Court has already rejected that view in *Wal-Mart v. Dukes*, holding that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. Rather, 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." *Id.* (emphasis in original). As a result, courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits." *Id.* at 2552 n.6.

The Ninth Circuit attempted to support its decision not to require proof of materiality at the class certification stage with the fact that

"materiality is an element of the *merits* of their securities fraud claim." Pet. App. 8a (emphasis in original). Under this view,

> the plaintiffs cannot fail to prove materiality yet still have a viable claim for which they would need to prove reliance individually. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). If the misrepresentations turn out to be material, then the fraud-on-the-market presumption makes the reliance issue common to the class, and class treatment is appropriate. But if the representations turn out to be immaterial, then *every* plaintiff's claim fails on the merits (materiality being a standalone merits element), and there would be no need for a trial on each plaintiff's individual reliance. Either way, the plaintiff's claims stand or fall together—the critical question in the Rule 23 inquiry.

Id. at 8a-9a (citing *Wal-Mart*) (emphasis in original). In the court's view, because materiality was a common question of fact and could be determined on a class-wide basis, its resolution must await a full-blown trial on the merits.

But the Ninth Circuit's analysis is based on a serious misreading of *Wal-Mart* and ignores this Court's holding in that decision. *Wal-Mart* repeatedly emphasized that the trial courts should *not* shy away from delving into issues that touch on the merits of the lawsuit if doing so is necessary to determine whether class certification is appropriate

under Rule 23. This Court called on district courts to engage in a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been satisfied, and added:

> Frequently the "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." . . . Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.

Wal-Mart, 131 S. Ct. at 2551-52 (quoting *Falco*n, 459 U.S. at 160).

Notwithstanding this Court's prior holdings, the Ninth Circuit's position that no issue capable of being resolved on a class-wide basis should be deferred until trial, even when the issue is relevant to class certification, has little to recommend it. Of course, it may sometimes be true that a defendant who rebuts the presumption of reliance defeats the plaintiffs' claims on the merits. But even the Ninth Circuit would surely concede that such a rebuttal also defeats a claim for class certification by demonstrating the absence of the predominance required by Rule 23(b)(3). Under such circumstances, what possible justification remains for allowing class certification to proceed? A court should not make it easier for a plaintiff to win

certification in those cases where the defendant has evidence demonstrating that the entire securities fraud claim is meritless. For that reason alone, this Court should reverse the decision of the Ninth Circuit.

C. The Decision Below Contravenes *Basic*'s Repeated Emphasis On the Need for Evidence to Establish the Starting and Ending Dates for the Class Period

Truth-on-the-market rebuttal evidence is particularly relevant in determining appropriate starting and ending dates for the class period. The district court included within the certified class all those who purchased Amgen stock between April 2004 and May 2007. Amgen asserts that the "truth" regarding its two biologics had entered the market by April 2004 and continued to enter the market throughout the unusually lengthy three-year class period certified in this case. By denying Amgen an opportunity to submit its rebuttal evidence, both the Ninth Circuit and the district court deprived themselves of crucial evidence regarding the dates, if any, on which the misleading information was affecting share prices and the dates when the "truth" effectively counterbalanced the allegedly misleading information. *See, e.g., In re Fed. Nat'l Mortg. Ass'n Sec., Derivatives, and "ERISA" Litig.*, 247 F.R.D. 32, 38 (D.D.C. 2008) ("[W]hether the fraud-on the-market presumption applies as a matter of law is essential for determining the duration of the class period.").

The panel below held that the *only* evidence

relevant to the class certification issue is whether the market for the stock was efficient and whether the alleged misrepresentations were public. But unless a trial court agrees to hear all evidence regarding when and if the "truth" reached the market, it cannot possibly ascertain when the class ought to begin and end. If Amgen's excluded evidence would have shown that truth on the market had eliminated the misrepresentations effects on market price by May 2004, there can be no justification for certifying a class that runs until May 2007 simply because the plaintiff has merely alleged—but has not been asked to prove—that it was only after May 2007 that the market became fully aware of the truth.

Similarly, if Amgen's evidence would have demonstrated that the truth was revealed by April 2004 (the same date on which Respondent alleges that the misrepresentations were first made), then there can be no justification for establishing any class period, and class certification should be denied. By mandating exclusion of all rebuttal evidence as to when the truth entered the market, the decision below deprives district courts of the ability to determine an appropriate class period.

That is inconsistent with this Court's approach to certification in securities class actions. Throughout its *Basic* decision, the Court exhibited a keen awareness of the need to limit the class period to the dates during which the defendant's misstatements were distorting market price. *See, e.g.,* 485 U.S. at 249 (clarifying that the presumption of reliance is rebutted, and thus class certification is inappropriate, with respect to those who trade the

defendant's shares after truthful information "credibly entered the market" and "dissipated the effects of the misstatements"). Indeed, the Court expressed skepticism that a "well-developed, efficient and information-hungry market" could remain misinformed—and thus mistake the value of the defendant's stock—throughout a 14-month class period as a result of a small number of statements by the defendant. *Id.* at 249 n.29. Yet Respondent asks this Court to believe that the market was mistaken about the value of Amgen stock throughout a class period that was almost three times as long (37 months). By preventing Amgen from introducing evidence that the class period is excessive because the market knew the "truth" for some or all of that period, the decision below brazenly contravenes this Court's decision in *Basic*. The decision below should be reversed.

II. BECAUSE CLASS CERTIFICATION DECISIONS ARE USUALLY OUTCOME DETERMINATIVE, CLASS ACTION DEFENDANTS SHOULD BE FREE TO REBUTT THE PRESUMPTION OF RELIANCE

Empirical research demonstrates the crucial role that class certification decisions play in the outcome of high-stakes class action lawsuits. Litigation costs make it very difficult for the party that loses the class certification decision to continue with the litigation—with the result that erroneous certification decisions are often effectively unreviewable. In light of that concern, *amici* respectfully urge the Court to adopt clear rules that will encourage district judges to certify plaintiff

classes only after they have determined that all the requirements of Rule 23 have been satisfied.

As numerous courts have recognized, companies that face a large certified class (and enormous potential damages) are "under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 867 (1995). Unless defendants want to "roll the dice," they must settle—often without regard to the merits of the plaintiffs' underlying claims. *Id.* In many instances, such settlements can legitimately be characterized as "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

Securities fraud class action litigation presents particular problems for defendants because they are especially prone to asymmetrical discovery costs: though plaintiffs possess few relevant documents subject to discovery, they can routinely demand that millions of pages of documents be produced by the defendants. Janet Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 548-49, 571 (Feb. 1991). Moreover, because securities fraud cases often require the attention and participation of senior corporate executives, defendants in such actions can face costly and debilitating disruptions of their business activities.

Robert Bone & David Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1299 (Feb. 2002). Driven largely by litigation costs, "the vast majority of certified [securities fraud] class actions settle, most soon after certification." *Id.* at 1291. *See also* William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69 (2011); John C. Coffee Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006).

The tendency of securities fraud class actions to settle without regard to the underlying merits undermines the aim of federal securities law—to deter securities fraud or manipulation. But economists doubt that these laws can achieve their purpose given the consensus view that little if any correlation exists between being named in a securities fraud lawsuit and the actual incidence of fraud. *See, e.g.,* Marilyn Johnson, *et al.*, In re Silicon Graphics Inc.: *Shareholders Wealth Effects Resulting from the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. Cal. L. Rev. 773, 782 (May 2000).

Congress has recognized the severity of the problem and has adopted legislation designed to curb abusive securities law class actions. The Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, adopted numerous reform measures, including a provision that imposed strict pleading requirements upon "any private action" arising from the Securities Exchange Act. *See* 15 U.S.C. § 78u-4(b). Congress enacted the PSLRA "as a check against abusive litigation by private parties."

Tellabs, Inc. v. Makor Issue & Rights, Ltd., 551 U.S. 308, 313 (2007). It recognized that private securities fraud actions, "if not adequately controlled, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Id.* *See* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (citing evidence of abuse, including "routine filing of lawsuits . . . whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of [the defendants]," and "abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized [defendant] to settle"). As this Court has previously recognized, "Proponents of the [PSLRA] argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from servicing on boards of directors." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

By certifying securities law class actions without regard to whether the defendants' alleged misrepresentations were material and thereby affected the market, lower federal courts are encouraging the sorts of abuses that the PSLRA has long sought to discourage. Unfortunately, these abuses will continue until this Court adopts a clear rule encouraging district judges to grant certification motions only after determining that *all* the requirements of Rule 23 have been satisfied.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse the Ninth Circuit's holding below.

Respectfully submitted,

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