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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 FOR *AMICI CURIAE* CIVIL PROCEDURE AND SECURITIES LAW PROFESSORS IN SUPPORT OF RESPONDENT

DAVID MARCUS
PROFESSOR OF LAW
UNIVERSITY OF ARIZONA
ROGERS COLLEGE OF LAW
1201 E. Speedway Blvd.
Tucson, Arizona 85721
(520) 626-3915

DARREN J. ROBBINS
ERIC ALAN ISAACSON
Counsel of Record
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058
erici@rgrdlaw.com

Counsel for Amici Curiae
Civil Procedure and Securities Law Professors

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INTEREST OF *AMICI CURIAE*[1]

The 18 *amici curiae* identified in the Appendix to this brief are law professors with scholarly expertise in the areas of civil procedure and securities regulation, and an abiding interest in the sensible development and application of the law. They respectfully submit this brief to assist the Court.

Amici civil-procedure professors agree with Respondent that proof of materiality is neither required nor appropriate at the class-certification stage to assure that common questions predominate under Rule 23(b)(3). When a defendant makes a public misstatement, the objective materiality of that misstatement, under this Court's reasonable-investor standard, is a common question for the entire class, to be determined on the merits. This conclusion is supported by the history of Rule 23, which demonstrates that Rule 23(b)(3)'s drafters had securities-fraud class actions specifically in mind when framing the 1966 Amendments to Rule 23.

Amici securities-law professors agree that materiality need not be proved at the class-certification stage. Under the fraud-on-the-market theory adopted in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), when securities trade in an open and developed or "efficient" market, reliance converges with the objective, common question of whether the statement was material. This conclusion is supported by the history of the fraud-on-the-market presumption and

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[1] The parties have filed blanket consents to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part. No party or its counsel made any contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or printing of this brief.

by the federal securities laws' focus on stemming the manipulation of securities prices and ensuring honest markets. Because materiality is an element of liability, moreover, a failure to show materiality cannot cause individual issues of reliance to predominate, as one who relies on an immaterial misstatement has no claim.

SUMMARY OF ARGUMENT

Petitioners and their *amici* would have this Court assume that class actions for securities fraud perpetrated on vast numbers of investors are a surprising anomaly, made possible only by this Court's decision in *Basic*, which they portray as relying upon an extreme conception of market "efficiency" to fashion its presumption of investors' reliance on securities markets' integrity.

In truth, however, Rule 23(b)(3)'s drafters had securities-fraud class actions specifically in mind when they framed the 1966 Amendments to Rule 23 in order to liberalize class proceedings' availability. The Advisory Committee Note says so. And the federal courts appropriately certify fraud class actions involving similar misrepresentations or a single cause of fraudulent conduct.

Basic's holding that objective materiality raises an inference of effect on the market prices on which investors rely developed against a backdrop of precedent recognizing that materiality supports an inference of reliance, even as it serves as an objective check. But the premise that a failure of materiality would require individualized determinations of whether each class member relied upon misstatements is unfounded. For if statements are immaterial, individual class members' reliance upon them is irrelevant – since one who relies on an immaterial statement has no claim. And to the extent that misinformation is not reflected in stock price, plaintiff class members are not harmed.

The principles underlying *Basic* are rooted in the law and economics of market manipulation entirely familiar to §10(b)'s framers. Congress targeted stock-market fraud and manipulation against the backdrop of both judicial decisions and legal scholarship recognizing that investors are defrauded when market prices are subject to manipulation by false statements. The very text of §10(b) targets "any *manipulative* or deceptive device or contrivance." 15 U.S.C. §78j(b) (emphasis added). And though two law professors have filed an *amicus* brief asserting that *Basic*'s holding rests upon an unrealistically strict conception of market efficiency,[2] this Court's opinion says that "[b]y accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Basic*, 485 U.S. at 249 n.28. "Because *most* publicly available information is reflected in market price," this Court held, "an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247 (emphasis added). Thus, the two professors' quibbles about the literal accuracy of the Efficient Capital Market Hypothesis are quite beside the point.

ARGUMENT

I. Rule 23(b)(3)'s Framers Sought to Facilitate Securities-Fraud Class Actions

Petitioners' assumption that securities-fraud cases are, generally speaking, ill-suited to class treatment under Rule 23 ignores the Rule's very history and purpose.

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[2] *See Brief of Law Professors as Amici Curiae in Support of Petitioners* at 1, filed on behalf of Professors Adam C. Pritchard and M. Todd Henderson.

Although this Court had long recognized and approved the class-action device,[3] the original Rule 23's adoption in 1938 was intended "to encourage more frequent use of class actions."[4] Shortly after the original Rule 23's promulgation, influential commentators appreciated the class action's promise for securities regulation through private litigation.[5] So did federal courts, as they recognized private rights of action in the federal securities laws.[6] Throughout the 1938-1966 era, courts routinely approved Rule 23's use in cases grounded upon a common course of misrepresentation or fraud.[7]

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3 *See, e.g.*, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1853).

4 Charles Alan Wright, Arthur M. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* §1752 at 18 (2005).

5 Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 684-87 (1941). For this article's influence, *see, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 n.12 (1974); *Snyder v. Harris*, 394 U.S. 332, 351 n.15 (1969); *Dickinson v. Burnham*, 197 F.2d 973, 981 n.4 (2d Cir. 1952) (Clark, J.).

6 The first recognition of a private right of action came in *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 n.10 (1982). For an example of an approved securities-fraud class action in the wake of *Kardon*, *see, e.g.*, *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 833 (D. Del. 1951).

7 *See, e.g.*, *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1964); *Amen v. Black*, 234 F.2d 12, 16 (10th Cir. 1956); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 49-50 (3d Cir. 1947); *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); *York v. Guar. Trust Co.*, 143 F.2d 503, 528 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945); *Independence Shares Corp. v. Deckert*, 108 F.2d 51, 55 & n.1 (3d Cir. 1939), *rev'd in part on other grounds*, 311 U.S. 282, 287-88 (1940) (re-

The modern class action dates to the Federal Civil Rules Advisory Committee's 1966 revision of Rule 23 to expand the device's range and force.[8] By the time the Committee began its deliberations, Rule 23's importance to securities enforcement was indisputable. The Ninth Circuit expressed a widely shared sentiment in 1964 when it adopted Professor Moore's observation that "Class actions under Rule 23(a)(3) have 'proved useful where a large number of purchasers or holders of securities claim to have been defrauded by a common course of dealing on the part of the defendants.'"[9] Quoting Professor Loss's leading treatise on *Securities Regulation*, the court added "'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device.'"[10] The Securities and Exchange Commission ("SEC") agreed that "[t]he availability of the representative suit for class actions on behalf of investors similarly situated . . . has contributed substantially to the feasibility of prosecution by investors of causes of actions

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versing Third Circuit's holding that relief was limited to damages only, sustaining the district court's equitable "power to make effective the right of recovery" where "petitioners' bill states a cause of action tested by the customary rules governing suits of this character" and a defendant "is threatened with many law suits"), *on remand sub nom.*, *Pa. Co. for Ins. on Lives etc. v. Deckert*, 123 F.2d 979, 983 (3d Cir. 1941) ("if a corporation engaged in the sale of stock by fraudulent means to a number of individuals, under rule 23(a)(2) they might join together as parties-plaintiff in one action to avoid a multiplicity of suits").

[8] *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999) ("modern class action practice emerged in the 1966 revision of Rule 23").

[9] *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964) (quoting 3 James Wm. Moore, *Moore's Federal Practice* ¶23.10 (2d ed. 1963)).

[10] *Harris*, 329 F.2d at 913 (quoting 3 Louis Loss, *Securities Regulation* 1819-20 (2d ed. 1961)).

based on violations of the federal securities laws."[11] The SEC hoped that courts would not misconstrue the revised Rule "to impose unwarranted obstacles" to securities class actions.[12]

Consistent with this broadly shared appreciation for the class action's role, the Committee drafted Rule 23(b)(3) with securities cases as a model.

The Advisory Committee Note to the 1966 amendments itself identifies "a fraud perpetrated on numerous persons by the use of similar misrepresentations" as "an appealing situation for a class action," even when the case involves individual issues as to injury and damages suffered.[13] Thus, if a case involves reliance on "similar representations," or where plaintiffs complain that material facts were concealed from all, common questions would predominate, and the case would be appropriate for class treatment. Citing the Advisory Committee Note, this

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[11] Memorandum of Securities and Exchange Commission With Respect to Amendments to Rule 23 of the Federal Rules of Civil Procedure, at 2, 4 (May 7, 1965), *in* Records of the U.S. Judicial Conference, *microfilmed at* Cong. Inf. Serv., CI-7010-77.

[12] *Id.*

[13] Fed. R. Civ. P. 23(b)(3), Advisory Committee Note to 1966 Amendment; *see* 39 F.R.D. at 103. The Advisory Committee Note to subdivision (c)(4)'s provision that "an action may be maintained as a class action with respect to particular issues," Fed. R. Civ. P. 23(c)(4), added that "in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Fed. R. Civ. P. 23(c)(4), Advisory Committee Note to 1966 Amendment; *see* 39 F.R.D. 69, 106 (1966). Thus, the Advisory Committee clearly understood that the merits of many fraud cases are properly subject to initial class-wide proof.

Court rightly noted in *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997), that predominance "is a test readily met" in cases alleging securities fraud.

The Advisory Committee Note concedes that, "although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."[14] Courts at the time of the revision understood this to mean that common issues might not predominate where the defendant's oral communications varied significantly from one class member to the next.[15] The Committee intended this exception to be quite narrow. In his oft-cited article on the amended rule, Committee reporter Professor Benjamin Kaplan confirmed that "[t]he Advisory Committee forecast that cases of fraudulent misrepresentation or antitrust violations would be likely, although not by any means sure candidates for class treatment under subdivision (b)(3)."[16] He cited *York*, 143 F.2d 503, as "illustrative" of Rule 23(b)(3)'s proper deployment. There, the Second Circuit allowed class proceedings, even though the plaintiffs could not rule out the possibility that evi-

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[14] *Id.*

[15] *E.g.*, *Morris v. Burchard*, 51 F.R.D. 530, 533-35 (S.D.N.Y. 1971); *but cf. Fischer v. Kletz*, 41 F.R.D. 377, 382-83 (S.D.N.Y. 1966) (certifying a securities fraud class under Rule 23(b)(3) even though the defendant made different statements at different times, and the class members made purchases based on different representations).

[16] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 393 (1967). For examples of this Court's citations to Professor Kaplan's article, see *Ortiz*, 527 U.S. at 833, *Amchem*, 521 U.S. at 613-14, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 & 813 n.4 (1985), and *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 356 n.21 (1978).

dence of causation might differ from one class member to another.[17]

Federal courts from the late 1960s onward have respected the Advisory Committee's intentions and applied Rule 23 to permit class certification in securities-fraud cases. "[T]he new rule is designed to expand the situations in which a class action is appropriate," the Tenth Circuit observed in a 1968 securities case, and to "favor . . . the maintenance of the class action."[18] Throughout Rule 23's modern era, courts often have found that common questions predominate where a single course of fraudulent conduct has many victims, notwithstanding various individualized issues that a crabbed treatment of the device might stress.[19]

As the Ninth Circuit observed in its 1975 *Blackie v. Barrack*[20] opinion: "Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions."[21] An influential early opinion on Rule 23's use in securities cases got

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17 *York*, 143 F.2d at 528.

18 *Esplin v. Hirschi*, 402 F.2d 94, 99-100 (10th Cir. 1968); *see also Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968) (quoting *Esplin*).

19 *See, e.g.*, *In re First Alliance Mortg. Co.*, 471 F.3d 977, 990-91 (9th Cir. 2006); *In re Prudential Ins. Co. of America, Sales Practice Litig.*, 148 F.3d 283, 290 (3d Cir. 1998); *Korn v. Franchard Co.*, 456 F.2d 1206, 1212-14 (2d Cir. 1972); *Green*, 406 F.2d at 300-01; *Esplin*, 402 F.2d at 99-100.

20 524 F.2d 891 (9th Cir. 1975).

21 *Id.* at 902.

it right: to approach the class-certification question in securities cases otherwise would "emasculate" the class-action device.[22]

Frauds "perpetrated on numerous persons by the use of similar misrepresentations" have always lain and continue to lie in Rule 23's wheelhouse. Few such cases are better suited to class treatment than those where it is alleged that a given security's market price had been fraudulently manipulated.

II. The Common Law of Deceit and the Rise of the Fraud-on-the-Market Theory

One reason why fraud claims may be readily susceptible to class-wide proof is that even the common law permitted plaintiffs' reliance to be inferred circumstantially, without their direct testimony, from a misrepresentation or omission's material falsity. Federal courts have rightly concluded that such inferences also are warranted in order to give the federal securities laws their intended effect.

When *Pasley v. Freeman*[23] recognized an independent action for deceit in 1789, the court held "'an action upon the case for a deceit lies when a man does any deceit to the damage of another.'"[24] This Court has long recognized an action for fraud thus generally lies whenever words or conduct are employed to mislead another to his or her det-

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[22] *Dolgow v. Anderson*, 43 F.R.D. 472, 481 (E.D.N.Y. 1968); *see also Green*, 406 F.2d at 301 ("Carried to its logical end, [an undue focus on individualized issues] would negate any attempted class action under Rule 10b-5 . . . .").

[23] [1789] 3 Term Rep. 51, 100 Eng. Rep. 450 (K.B.).

[24] *Id.*, 3 Term Rep. at 64, 100 Eng. Rep. at 457 (per Lord Kenyon, Ch. J.; quoting Lord Ch. B. John Comyns, *Digest of the Laws of England*).

riment – no matter how the deception is in fact accomplished.[25] In *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), this Court found support for §10(b)'s loss-causation requirement in *Pasley's* rule that "if 'no injury is occasioned by the lie, it is not actionable: but if it then be attended with a damage, it then becomes the subject of an action.'"[26]

The common law's elements of "reliance" and "materiality" were developed to make the principle effective. Reliance, in particular, ensures a causal connection between deceit and injury.[27] Indeed, the *Restatement* captions the reliance element as "Causation in Fact."[28]

Petitioners and their *amici* suggest that establishing this causal connection ordinarily should require individualized proof, and even testimony from every class member. Yet when the action was first recognized, and into the nineteenth century's latter half, common-law rules of evi-

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[25] *See Stewart v. Wyo. Cattle Ranche Co.*, 128 U.S. 383, 388 (1888).

[26] *Dura*, 544 U.S. at 344 (2005) (quoting *Pasley*, 3 Term Rep. at 65, 100 Eng. Rep. at 457).

[27] *See* 2 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* §7.13 at 464-65 (2d ed. 1986); Leon Green, *Deceit*, 16 Va. L. Rev. 749, 762 (1930).

[28] **§546. Causation in Fact**

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss.

Restatement (Second) of Torts §546 (1977). The *Restatement's* commentary explains: "For a misrepresentation to be a cause in fact of the pecuniary loss that results from the plaintiff's action or inaction, the plaintiff must have relied upon the misrepresentation in incurring the loss." *Id.*, cmt. b.

dence *barred* the parties from testifying.[29] Under the common-law rules, reliance had to be shown without the benefit of the plaintiff's testimony, typically being inferred from evidence showing that a misrepresentation was made, and that the plaintiff took action *consistent with* reliance upon it – that is, by entering a transaction to which the misrepresentation related.[30]

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[29] John T. Loughran, *Evidence* §136, at 380, in 10 *Modern American Law* (1917) ("The parties to a suit and others interested in the event of a litigation were incompetent witnesses because it was feared that their interests in the suit might tempt them to disregard their oaths."); James Fitzjames Stephen, *A Digest of the Law of Evidence* 168 (London: MacMillan & Co., 1876) ("At Common Law the parties and their husbands and wives were incompetent in all cases."); Dale A. Nance, *The Best Evidence Principle*, 73 Iowa L. Rev. 227, 255 n.145 (1988) (citing danger of perjury as the rule's rationale); John H. Wigmore, *Looking Behind the Letter of the Law,* 4 U. Chi. L. Rev. 259, 262-63 (1937) (same); *see also* 4 Jeremy Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice* 104 (London: Hurt & Clark, 1827) (criticizing the common-law rule); Society for Promoting the Amendment of the Law, *Report of the Committee of Common Law on Evidence of Parties* (London: 1848) (urging reform permitting parties to testify).

[30] *Ste. Marie v. Wells*, 93 Vt. 398, 108 A. 270, 270 (1919) ("*Pasley v. Freeman* . . . is the case generally regarded as the foundation of the modern law of actionable misrepresentation. At the time that decision was rendered (1789) the parties to a suit were by the common law disqualified as witnesses because of their interest in the outcome of the litigation. . . . So it appears that the principle that reliance, in fraud cases, might be inferred from the circumstances was one of early inception."); *Smith v. Chadwick*, [1884] H.L. 9 App. Cas. 187 at 196, All E. R. Rep 242 at 247 (per Lord Blackburn: "I do not think it is necessary . . . that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley v Freeman* . . . was decided, and for many years afterwards, he could not be so called. I think that if it is

But if misrepresentations amount to something about which no one could reasonably care, it is unlikely that they induced reliance or caused genuine harm.[31] Common-law decisions permitting reliance to be circumstantially inferred thus demanded that the reliance be "justifiable," requiring plaintiffs to show that "fraud was an inducing cause to the contract, for which purpose it must be material."[32]

Materiality accordingly functions both as a circumstantial indicator of, and as an objective check on, subjective reliance. "The notion of justifiable reliance is limited by the rule of materiality: Even a fraudulent misrepresentation is not actionable if the representation is 'immaterial.'"[33] Or, as the *Restatement (Second)* puts it: "Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material."[34]

Nineteenth-century evidence codes and twentieth-century rules of evidence eventually established the plain-

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proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.").

[31] *See* W. Page Keeton, *et al.*, *Prosser & Keeton on the Law of Torts* §108 at 753 (5th ed. 1984) ("There are misstatements which are so trivial, or so far unrelated to anything of real importance in the transaction, that the plaintiff will not be heard to say that they substantially affected his decision.").

[32] *See Smith*, 9 App. Cas. at 190 (per Lord Selborne L.C.); *see id*. at 195 (per Lord Blackburn).

[33] Harper, James & Gray, *The Law of Torts*, *supra* note 27, §7.9 at 435; *see also* William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake* 39-40 (3d ed. 1902).

[34] Restatement (Second) of Torts §538(1) (1977).

tiff's right to testify.[35] Yet common-law reliance still may be inferred without the plaintiff's direct testimony, based rather upon a statement's objective materiality.[36] This,

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[35] *See, e.g.*, Fed. R. Evid. 601, 1972 Advisory Committee Note ("among the grounds [for testimonial incompetency] thus abolished are . . . connection with the litigation as a party or interested person or spouse of a party or interested person"); Stephen, *Digest of the Law of Evidence*, *supra* note 29, at 168-69 ("This incompetency was removed as to the parties . . . by 14 & 15 Vict. c. 99, s.2; and as to their husbands and wives, by 16 & 17 Vict. c. 83, ss. 1, 2.").

[36] *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 814, 484 P.2d 964, 972 (1971) ("The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence. 'The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect.'") (quoting *Hunter v. McKenzie*, 197 Cal. 176, 185, 239 P. 1090, 1094 (1925)); *Enequist v. Bemis*, 115 Vt. 209, 214, 56 A.2d 617, 621 (1947) ("[I]n absence of direct testimony on this point, where the representation is of such a nature as would induce a person to enter a contract, and he does so, it is a fair inference, which the jury may draw, that reliance was placed thereon."); *see also De Cicco v. Schweizer*, 221 N.Y. 431, 438, 117 N.E. 807, 809 (1917) ("'If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement . . . of such a nature as would likely induce a person to enter the contract, it is a fair inference of fact that he was induced to do so by the statement.'") (quoting *Smith*, 9 App. Cas. 187); *Taylor v. Guest*, 58 N.Y. 262, 266 (1874) ("It is incumbent upon the party claiming to recover in an action for deceit, founded upon false representations, to show that he was influenced by them. It does not require very strong proof to establish it. In most cases it may be inferred from the circumstances attending the transaction."); *Ste. Marie*, 93 Vt. at 399-400, 108 A. at 270-71 ("The plaintiff did not testify in terms that he acted in reliance upon defendant's representations in the purchase of the farm. But there is ample authority for the proposition that the fact of reliance need not be proved by direct

quite obviously, may facilitate class treatment where similar misrepresentations are made to members of a class who have then entered similar transactions. Thus, federal courts have readily certified class actions for fraud, as intended by Rule 23(b)(3)'s framers. *See supra* 5-9.

This Court has, of course, made both reliance and materiality elements of a §10(b) claim. *See Erica P. John Fund, Inc. v. Halliburton Co.*, __ U.S. __, 131 S. Ct. 2179, 2184 (2011) (listing elements); *Matrixx Initiatives, Inc. v. Siracusano*, __ U.S. __, 131 S. Ct. 1309, 1317 (2011) (same).

It permitted inferences of reliance from materiality in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). In a case involving failure to make full disclosures in certain face-to-face transactions, this Court held "[a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* at 153-54. "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery," as an obligation to disclose and the "withholding of a material fact establish the requisite element of causation in fact." *Id.*

Lower courts soon recognized that a similar inference may be drawn in cases where false statements manipulated an actively traded security's market price. The early cases explained that for transactions in an active securities market, an inference of reliance naturally follows from a showing that public statements were materially misleading. "Materiality circumstantially establishes the re-

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evidence, but may be inferred from the circumstances; and where the representations complained of are material and of a nature calculated to induce the person to whom they are made to take a certain course of action with regard to the subject-matter of the representations, the question whether he relied thereon in so doing is one of fact for the jury.").

liance of some market traders and hence the inflation in the stock price – when the purchase is made the causational chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a prima facie case." *Blackie*, 524 F.2d at 906. Because securities markets tend to respond to public information, materiality allowed the inference that the misrepresentations likely affected stock price, which in turn implied reliance (a causal link between misrepresentation and injury). *See id.*

In *Panzirer v. Wolf*, 663 F.2d 365, 367 (2d Cir. 1981), *vacated on other grounds sub nom., Price Waterhouse v. Panzirer*, 459 U.S. 1027 (1982), where statements appeared in the financial press, the Second Circuit relied on both *Affiliated Ute* and *Blackie* to conclude that where the alleged "fraud consists of a failure to disclose, the difficult nature of plaintiff's claim – that if there had been disclosure, plaintiff would not have been harmed – has led the Supreme Court to hold that if the omission is material, reliance upon the omission will be presumed." *Id.* at 368.

In *Lipton v. Documation, Inc.*, 734 F.2d 740, 748 (11th Cir. 1984), the Eleventh Circuit agreed with *Blackie*, that "reliance may be presumed where securities are traded on the open market." In *Harris v. Union Elec. Co.*, 787 F.2d 355, 367 (8th Cir. 1986), the Eighth Circuit relied on *Affiliated Ute* to hold that "[b]ecause the plaintiffs' complaint consists primarily of allegations of a failure to adequately disclose . . ., reliance in this case can be inferred from materiality." And the Third Circuit held in *Peil v. Speiser*, 806 F.2d 1154, 1161 (3d Cir. 1986), that open-market securities purchasers "need not prove direct reliance," but only "that the defendants made material misrepresentations."

Relying on this history, *Basic* adopted the fraud-on-the-market presumption, replacing individualized questions of direct reliance with reliance on the market price. Noting

arguments "that reliance is and long has been an element of common-law fraud," this Court "agree[d] that reliance is an element of a Rule 10b-5 cause of action," as well. 485 U.S. at 243. "Reliance," *Basic* held, "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Id.*

"There is, however, more than one way to demonstrate the causal connection." *Id.* "'Misleading statements will . . . defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.'" *Id.* at 241-42 (citation omitted). Thus, "'the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value.'" *Id.* at 244 (citation omitted).

Basic held a statement (or omission) is material if a "reasonable investor" would view it as affecting the "total mix" of available information. *Id.* at 231-32. "Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be over- or underinclusive." *Id.* at 236. Thus, suggestions that materiality only can be determined by showing statistically significant price movements are mistaken, and exclusive reliance on "event studies" to measure a statements' effect on price can be problematic.[37]

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[37] *See* Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 180 (2009) ("If we assume that markets often over- or under-react to news (and pseudonews) and sometimes develop troublesome bubbles where price strays from intrinsic value, then the simple statistical showing of an impact cannot so easily be treated as a precise measure of either the omitted information or the defendant's responsibility. In other words, the event study no longer offers a clean assessment of the intrinsic value of the fraud because

Far from implicating any individual issues of subjective reliance, however, "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 445 (1976). That makes it a common question, subject to common proof at trial.

Though proof of materiality supports an inference of reliance under *Basic*, failure of materiality would not, as Petitioners and their *amici* assume, require further individualized proof of reliance. If statements are not material, there is no point in proving individualized reliance on them – as investors who rely on an immaterial misstatement have no claim in any event. *See Basic*, 485 U.S. at 231-32 (holding that materiality is an essential element of *any* §10(b) claim). Thus, a case such as this would not produce individualized issues of reliance if the misrepresentations at issue turned out to be immaterial.

III. Congress Framed §10(b) in Light of Market-Manipulation Principles Recognizing that False Statements Inflating Securities Markets Operate to Defraud All Who Purchase at the Affected Prices and Then Suffer a Loss

Petitioners and their *amici* would have this Court believe that *Basic*'s holding that investors may rely on the integrity of America's securities markets rests upon, and is limited by, strict validity of the Efficient Capital Market Hypothesis, framed by economists and tested in the 1970s,

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noise and sentiment can influence price as well, hence the econometrician's ability to discipline the litigation process diminishes.").

which they insist requires *instantaneous* and *complete* incorporation of *all* public information in a security's market price. In truth, *Basic*'s holding is well-grounded in the framing Congress's understanding of securities markets, and of false statements' capacity to manipulate those markets, even if adjustments are not always instantaneous. Even Petitioners' *amici* agree that strict efficiency should not be required – and about that, at least, they are right.

Section 10(b), by its plain terms, is framed to address the use "in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance," 15 U.S.C. §78j(b), and this Court holds "a §10(b) action can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security." *Herman & MacLean*, 459 U.S. at 382 (Court's emphasis).

The statutory text and implied cause of action are thus plainly rooted in the law of market manipulation and deceit. "The meaning the Court has given the term 'manipulative' is consistent with the use of the term at common law," according to *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 (1985), and the Court often has noted §10(b)'s affinity with §9 of the Securities Exchange Act of 1934 ("Exchange Act"), which outlaws a variety of manipulative practices.[38]

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[38] *See, e.g.*, *Musick, Peeler & Garrett v. Emp'rs Ins.*, 508 U.S. 286, 295-96 (1993); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360-61, 364 n.9 (1991); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 494 (1977).

What does "manipulation" mean? It means that misleading statements or actions can be employed to distort prices from what would have prevailed in their absence.[39]

At the time Congress legislated against "any manipulative or deceptive device or contrivance," the seminal decision on market manipulation was *Rex v. De Berenger*,[40] an English case that this Court had cited favorably to find bid-rigging agreements against public policy in *McMullen v. Hoffman*.[41] *De Berenger* also figured quite prominently in the 1933 American market-manipulation precedent *United States v. Brown*,[42] which has itself informed this Court's understanding of what manipulative devices the Exchange Act proscribes.[43]

De Berenger involved an early fraud on the market for British securities. Lord Cochrane and several others were convicted of a conspiracy to spread false rumors on February 19, 1814, that Napoleon Bonaparte had died, thus "unlawfully contriving, etc. by false reports, rumours, arts, and contrivances," to induce the public to think that peace

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39 *See generally* Jill E. Fisch, *The Trouble with Basic: Price Distortion after Halliburton*, __ Wash. U. L. Rev. __ (2013) (publication forthcoming April 2013).

40 [1814] 3 Maule & Selwyn 67, 105 Eng. Rep. 536 (K.B.), All E.R. Rep. 513; *see* 8 Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* 517-19 (4th ed. 2012). The Earl of Birkenhead placed the *De Berenger* case prominently among his *Famous Trials of History*. *See* Earl of Birkenhead, *Famous Trials of History* 196-208 (1926).

41 174 U.S. 639, 649 (1899).

42 5 F. Supp. 81, 85-88 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935); *cf.* Adolph A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 395-96 (1938) (discussing "the now famous case of *United States v. Brown*").

43 *See Schreiber*, 472 U.S. at 7 (quoting *Brown*, 5 F. Supp. at 85).

with France was imminent.[44] This caused "a great increase and rise of the government funds and government securities" of Britain – to the injury of all "who should on the 21st of February [1814] purchase and buy any part or parts, and share or shares of and in the said public Government funds."[45]

In words that this Court repeated in *McMullen*, Lord Ellenborough declared that such conduct "'strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.'"[46] The King's Bench was unanimous in so holding.[47]

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[44] *De Berenger*, 3 Maule & Selwyn at 68, 105 Eng. Rep. at 537 (syllabus).

[45] *Id.*

[46] *McMullen*, 174 U.S. at 649 (quoting *De Berenger*, 3 Maule & Selwyn at 72-73, 105 Eng. Rep. at 538) (Lord Ellenborough, Ch. J.); *see also Brown*, 5 F. Supp. at 85-86; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 187-88 (1871); *State v. Buchanan*, 5 H. & J. 317, 348 (Md. App. 1821).

[47] Judge LeBlanc agreed that the "object was to injure all those who should become purchasers on that day, and not some individuals in particular." *De Berenger*, 3 Maule & Selwyn at 74, 105 Eng. Rep. at 539 (LeBlanc, J.). Judge Bayley declared that deceptive conduct affecting the prices at which securities trade "will certainly prejudice a large portion of the King's subjects who have occasion to purchase on that day," its "necessary consequence" being "to prejudice all those who become purchasers during the period of that fluctuation." *Id.*, 3 Maule & Selwyn at 75, 105 Eng. Rep. at 539 (Bayley, J.). Judge Dampier recited the charge, "that the defendants by false rumours conspired to give a temporary rise to the funds of this Kingdom, in order to deceive those persons who should purchase into the funds on a particular day," and then summed up: "The means used are wrong, they were false rumours; the object is wrong, it

From false rumors influencing securities' prices, the precedents proceeded to deceptive acts and transactions similarly designed to affect market prices, but by creating the false appearance of active trading. This Court observed in *Schreiber* that the "seminal English case of *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724 (C. A.), which broke new ground in recognizing that manipulation could occur without the dissemination of false statements," was one that nevertheless "placed emphasis on the presence of deception" created by the appearance of active trading in the market. *Schreiber*, 472 U.S. at 7 n.4. "As Lord Lopes stated in that case, 'I can see no substantial distinction between false rumours and false and fictitious acts.'" *Id.* (quoting *Scott*, [1892] 2 Q.B. at 730 (Lord Lopes)). Or, as the district court put it in *Brown*: "'[Even] a speculator is entitled not to have any present fact involving the subject matter of his speculative purchase or the price thereof misrepresented by word or act.'" *Schreiber*, 472 U.S. at 7 n.4 (quoting *Brown*, 5 F. Supp. at 85) (*Schreiber's* brackets); *see also Willcox v. Harriman Sec. Corp.*, 10 F. Supp. 532, 535 (S.D.N.Y. 1933).

The concept of manipulation thus had by 1892 come to include not just misleading statements and rumors disseminated on a public market, as in *De Berenger*, but also "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity,"[48] which Exchange Act §9 and §10(b) together proscribe.[49] Such schemes all involve

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was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." *Id.*, 3 Maule & Selwyn at 76-77, 105 Eng. Rep. at 540 (Dampier, J.).

48 *Santa Fe*, 430 U.S. at 476.

49 *See* Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 398-400. A "wash sale" is an ostensible market transaction in which a security's owner has in truth merely "sold shares on the stock exchange to himself," while with "matched

deception affecting the entire market – just as the false statements in *De Berenger* did – giving rise to claims on behalf of all to transact at the affected prices. *See* 15 U.S.C. §78i(f) ("[a]ny person who willfully participates . . . shall be liable to any person who shall purchase or sell any security at a price which was affected").

The 1934 Congress's understanding of stock-market fraud and manipulation doubtless was grounded as well in contemporary legal scholarship. Among the era's greatest authorities on corporate finance and securities markets was Professor Adolph A. Berle, Jr. of the Columbia University School of Law, a member of Franklin Roosevelt's "Brain Trust,"[50] whose 1931 article on *Liability for Stock Market Manipulation* laid out the fundamentals of what *Basic* embraced as the "fraud on the market" theory of reliance.[51]

Professor Berle wrote that "all markets move in a nexus of information gathered from all sources and circulated in a variety of ways, recognized and unrecognized."[52] Thus, if a publicly traded company issues false statements affect-

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orders" the "conspirators shuttle the stock back and forth between each other" to produce market quotations and the appearance of active trading. *Id.* at 394-95.

[50] *The Yale Biographical Dictionary of American Law* 39-40 (Roger K. Newman, ed., 2009); James Stuart Olson, *Historical Dictionary of the Great Depression, 1929-1940* 32-33 (2001); Adam Cohen, *Nothing to Fear: FDR's Inner Circle and the Hundred Days that Created Modern America* 60-63 (2009).

[51] *See* Adolph A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); *Willcox v. Harriman Sec. Corp.*, 10 F. Supp. 532, 535 (S.D.N.Y. 1933) (citing Professor Berle's article to sustain private claims for market manipulation); *see also* Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 393-94 & nn.3-6, 395-97, 399-400.

[52] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268.

ing the price of its securities, "any purchaser in the market would seem to have an action in deceit or fraud for damage suffered there from."[53] "If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market price, he has relied on the market situation, which in turn resulted from the false statement."[54]

If someone "circulates a false report as to the earnings of a particular corporation which affects the price of its stock," Professor Berle continued, "relief may be had against him by any person buying or selling in the market, where it appears that the report was designed to affect the market."[55]

> It may be asked if this is a variation of the common law rule that the statement must be intended to be relied upon. Obviously not; for while the maker of the false representation has not singled out a specific individual for his victim, he has tossed his squib into a crowd, one or

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[53] *Id.* at 268-69 (footnotes omitted).

[54] *Id.* at 269-70. *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 407 n.96 (1990) ("Writing in 1931, Adolf Berle, probably the era's most influential commentator on corporate finance, asserted that courts had already gone much further than [is] commonly assumed to protect the stock market from fraud.").

[55] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 270.

> many of whom may be hit; and this fact is, or at least should be, known to him.[56]

"The intellectual patrimony of the Securities Exchange Act," Judge Richard A. Posner observed in a Seventh Circuit decision construing §10(b), also "includes Berle and Means' influential book (published two years before the Act was passed), *The Modern Corporation and Private Property* (1932)."[57] In that book Professor Berle and his coauthor Professor Gardiner C. Means, a statistical economist, restated the basics of fraud-on-the-market reliance, explaining that "if a corporation consciously overstated its income leading to a rise in the value of the shares, a buyer on the faith of such valuation should have no greater difficulty in recovering" than would an investor to whom false statements were directly made.[58]

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[56] *Id*. *See also* Robert A. Prentice, *Stoneridge*, *Securities Fraud Litigation, and the Supreme Court*, 45 Am. Bus. L.J. 611, 662-63 & nn.221-222 (2008); Norman S. Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 U. Miami L. Rev. 671, 697-700 (1986).

[57] *Sutter v. Groen*, 687 F.2d 197, 201 (7th Cir. 1982) (Posner, J., for the court, employing Professor Berle's book to interpret §10(b)) (italics added) (citing Aldoph A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (1932)). This Court too has cited and relied on the book. *See, e.g.*, *Wolf v. Weinstein*, 372 U.S. 633, 644 n.12 (1963); *Niagara Hudson Power Corp. v. Leventritt*, 340 U.S. 336, 346 n.7 (1964). Further examples of this Court's reliance on Professor Berle's scholarship include: *Simpson v. Union Oil Co.*, 377 U.S. 13, 22 n.9 (1964);*United States v. Phila. Nat'l Bank*, 374 U.S. 321, 324 n.2 (1963); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 404 (1960); *Price v. Gurney*, 324 U.S. 100, 105 (1945); *Helvering v. Sw. Consol. Corp.*, 315 U.S. 194, 200 (1942).

[58] Berle & Means, *The Modern Corporation*, *supra* at 314 & n.1, 322.

Significantly, the presumption of reliance on the integrity of market price did not depend upon the Efficient Capital Market Hypothesis, which had yet to be framed. Neither did §9(e)'s provision that where market prices are affected by deceptive statements or actions, "[a]ny person who willfully participates . . . shall be liable to any person who shall purchase or sell any security at a price which was affected." 15 U.S.C. §78i(f).

The enactment of §10(b)'s proscription of "any manipulative or deceptive device or contrivance," 15 U.S.C. §78j(b), against this backdrop is significant. For the statute itself clearly embraces Professor Berle's understanding of securities markets and their manipulation.

Describing the "Necessity for regulation" in Exchange Act §2, Congress observed that market transactions establishing securities' prices may be subject to any variety of manipulative or deceptive practices, and declared that the Exchange Act is "to insure the maintenance of fair and honest markets."[59] Section 2(2) states that "[t]he prices established and offered in such transactions are generally disseminated and quoted throughout the United States," and that they "constitute a basis for determining and establishing the prices at which securities are bought and sold."[60] "Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control," Congress added in §2(3), warranting regulations requiring both the full disclosure of truthful information by securities issuers, and also a blanket proscription of fraud and manipulation affecting those prices.[61] Section 10(b) thus makes it unlawful "directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of

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[59] 15 U.S.C. §78b.

[60] 15 U.S.C. §78b(2).

[61] 15 U.S.C. §78b(3).

any security . . . any manipulative or deceptive device or contrivance" that contravenes SEC rules. 15 U.S.C. §78j(b).

The Exchange Act's legislative history confirms the understanding, expressed in §2. "The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market," said House Report No. 1383.[62] Congress clearly intended that investors should be entitled to rely on the integrity of prices thus established, even if information was not "instantaneously" reflected. *See id.*

"In drafting [the Exchange] Act," this Court held in *Basic*, "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets."[63] This Court quoted from the House Report:

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just

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[62] H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 11 (1934), *reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 18.

[63] *Basic*, 485 U.S. at 245-46.

> price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value."[64]

Though *Basic* does not mention it, Congress also addressed the element of reliance with the Exchange Act's amendment inserting a new reliance requirement for certain claimants under §11 of the Securities Act of 1933 ("Securities Act"), expressly specifying that "such reliance may be established without proof of the reading of the registration statement."[65] The Conference Report explained that while it could be assumed that statements in offering documents initially determined a security's price, where an intervening 12 months of audited financial results have been released, proof of a lingering effect should be required.[66]

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64 *Id.* at 246 (quoting H.R. Rep. No. 1383, at 11).

65 Exchange Act §206(a), 48 Stat. 907, amending Securities Act §11(a), as *codified at* 15 U.S.C. §77k(a), states:

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection *shall be conditioned on proof that such person acquired the security relying upon such untrue statement* in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established *without proof of the reading of the registration statement by such person*.

15 U.S.C. §77k(a) (emphasis added).

66 The Conference Report explained:

> Section 11(a) is amended so as to require proof that the purchaser of a security at the time he

Thus, the 1934 Congress's focus clearly was on the integrity of market prices established on the basis of available material information, and on investors' presumptive reliance on the integrity of the price established. "An investor who buys or sells stock at the price set by the market," this Court concluded in *Basic*, "does so in reliance on the integrity of that price."[67] "Because *most* publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[68]

Yet Petitioners and their *amici* insist that *Basic* rests instead upon the Efficient Capital Market Hypothesis, which was framed and used by economists in the 1960s and after to test just *how quickly and completely* markets respond to new information. The researchers' answer:

> acquired the security, relied upon the untrue statement in the registration statement or upon the registration statement and did not know of the omission. But this requirement is imposed only in the case of purchase after a period of 12 months subsequent to the effective registration date and then only when the issuer shall have published an earning statement to its security holders covering a period of at least 12 months after the registration date. The basis of this provision is that in all likelihood the purchase and price of the security purchased after publication of such an earning statement will be predicated on that statement rather than upon the information disclosed upon registration.

H.R. Rep. No. 1838, 73d Cong. 2d Sess., at 41 (1934) (Conference Report), *reprinted in* 5 Ellenberger & Mahar, Item 20.

67 485 U.S. at 247.

68 *Id*. (emphasis added).

very quickly.[69] Citing efficient-markets research in *Basic*, this Court observed: "Recent empirical studies have tended to confirm Congress's premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations."[70]

From this, Petitioners and their *amici* conclude *Basic*'s presumption of reliance necessarily rests upon the universal validity of the hypothesis that *all* public information is *instantaneously* incorporated in market price. Yet even the efficient-markets literature recognized, from the outset, that its "hypothesis that securities prices at any point in time 'fully reflect' *all* available information," is quite "obviously an extreme null hypothesis," and that "like any other extreme null hypothesis, we do not expect it to be literally true." [71]

Petitioners and their *amici* insist that *Basic's* holding nevertheless depended upon the hypothesis being strictly and literally true. *Basic* itself rejected that position. Having noted that the efficient-markets research "tended to confirm Congress's premise," the Court immediately added:

> We need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the ap-

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[69] *See* Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383 (1970); Eugene Fama, *et al.*, *The Adjustment of Stock Market Prices to New Information*, 10 Int'l Econ. Rev. 1 (1969).

[70] *Basic*, 485 U.S. at 246.

[71] Fama, *Efficient Capital Markets*, 25 J. Fin. at 388 (emphasis in original); *see also* Eugene Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1575 (1991).

> plication of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider *most* publicly announced material statements about companies, thereby affecting stock market prices.

Basic, 485 U.S. at 247 n.24 (emphasis added). "By accepting this rebuttable presumption," this Court added, "we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id*. at 249 n.28.

False statements, publicly disseminated, lie at the core of §10(b)'s proscription against "artificially affecting the price of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). Market prices need only be "efficient" enough to think it likely that a misrepresentation will be picked up. There is no question that Amgen's stock is sufficiently efficient. The parties so stipulated.

Criticisms of the Efficient Capital Market Hypothesis fundamentally misunderstand *Basic's* holding, which is expressly grounded in the enacting Congress's understanding that securities markets tend to incorporate publicly available information. *See Basic*, 485 U.S. at 245-46. Based on that understanding (which efficient-markets research, despite some fairly minor anomalies, still strongly confirms) the Court held that investors are entitled to rely on securities markets' integrity. As material misstatements disseminated in an "open and developed" market typically affect a security's price, objective materiality circumstantially establishes investors' reliance. That *Basic* remanded for reconsideration of summary judgment on materiality, *id.* at 241, while *affirming* class certification entered without factual findings on materiality, clearly

indicates that statements' materiality and effect on the market present a common question for classwide resolution under Rule 23 rather than a predicate to certification.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DARREN J. ROBBINS
ERIC ALAN ISAACSON
Counsel of Record
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway
Suite 1900
San Diego, California 92101
(619) 231-1058
(erici@rgrdlaw.com)

DAVID MARCUS
Professor of Law
UNIVERSITY OF ARIZONA
ROGERS COLLEGE OF LAW
1201 E. Speedway Blvd.
Tucson, Arizona 85721
(520) 626-3915
(dmarcus@email.arizona.edu)

Counsel for Amici Curiae *Civil Procedure and Securities Law Professors*

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APPENDIX

APPENDIX
Law Professors Joining this Brief

Robert P. Bartlett, III, is Professor of Law at the University of California – Berkeley School of Law.

Barbara Black is the Charles Hartsock Professor of Law and Director of the Corporate Law Center at the University of Cincinnati College of Law.

Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School.

James D. Cox is the Brainerd Currie Professor of Law at the Duke University School of Law.

Jill E. Fisch is the Perry Golkin Professor of Law and Co-Director of the Institute for Law and Economics at the University of Pennsylvania Law School.

Merritt B. Fox is the Michael E. Patterson Professor of Law and the NASDAQ Professor for Law and Economics of Capital Markets at the Columbia Law School.

Theresa A. Gabaldon is the Lyle T. Alverson Professor of Law and Director of Academic Programs and Administration, Center for Law, Economics & Finance (C-LEAF) at the George Washington University School of Law.

Thomas Lee Hazen is the Cary C. Boshamer Distinguished Professor of Law at the University of North Carolina School of Law.

Michael J. Kaufman is Professor of Law and Associate Dean for Academic Affairs at the Loyola University Chicago School of Law.

Donald C. Langevoort is the Thomas Aquinas Reynolds Professor of Law at the Georgetown University Law Center.

Arthur R. Miller is University Professor of Law at the New York University School of Law.

Lawrence E. Mitchell is the Dean and Joseph C. Hostetler – Baker Hostetler Professor of Law at the Case Western Reserve University School of Law.

Daniel J. Morrissey is Professor of Law at the Gonzaga University School of Law.

Frank Partnoy is the George E. Barrett Professor of Law and Finance and Co-Director of the Center for Corporate and Securities Law at the University of San Diego School of Law.

Margaret V. Sachs is the Robert Cotten Alston Chair in Corporate Law at the University of Georgia School of Law.

Hillary A. Sale is the Walter D. Coles Professor of Law and Professor of Management at the Washington University School of Law.

Cynthia A. Williams is Professor of Law at the University of Illinois College of Law.

Arthur E. Wilmarth, Jr. is Professor of Law and Executive Director, Center for Law, Economics & Finance (C-LEAF) at the George Washington University School of Law.