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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 OF *AMICUS CURIAE* AARP
IN SUPPORT OF RESPONDENT**

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INTERESTS OF AMICUS CURIAE[1]

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

A significant percentage of the investing public in the United States' markets is comprised of members of the age fifty and older population.

Older persons are frequent targets of financial fraud because they often have significant assets and they look for investment opportunities that will supplement Social Security and other sources of retirement income. As a result, AARP has elevated the need to combat securities fraud and made this issue a high priority. AARP has regularly commented

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented and the parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

on legislative and regulatory proposals that address investment fraud, filed amicus briefs in cases involving the securities laws, and opposed legislative efforts to limit the remedies of defrauded investors.

The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets. The remediation of securities fraud is of particular concern to AARP at this time. The entry of many first-time investors into the market, the responsibility for retirement investing that pensioners have had to assume as a result of the shift in the retirement plan paradigm from defined benefit pension plans (under which employers bear the risk of loss) to defined contribution pension plans (under which plan participants bear the risk of loss), and the need to protect the interests of small investors in the securities markets are all facets of this issue that greatly impact the financial security of older persons.

SUMMARY OF ARGUMENT

Securities fraud litigation initiated by private parties under the U.S. Securities and Exchange Commission's Rule 10b-5, 17 C.F.R. § 240.10(b) ("Rule 10b-5"), serves as an essential means of protecting the integrity of the securities markets for investors, maintaining investor confidence in the markets, and making victims whole. As the Ninth Circuit recognized, enforcing a materiality requirement at the class certification stage of a class action suit undermines private securities actions in

contravention of *Basic v. Levinson*, 485 U.S. 224 (1988) and Congress's support for securities fraud class action litigation.

Implementing a materiality requirement hurdle at the class certification stage would disproportionately harm small investors, and compromise their role in policing securities fraud. Congress has repeatedly expressed the intent to protect small investors under securities law. To further this intent, Congress has explicitly refrained from limiting the certification of a class action under securities law in order to facilitate remedies for investors who otherwise would have claims too small to litigate. Class action lawsuits including small investors have served a vital role in the deterrence of securities fraud and enforcement of penalties. Amgen's approach would go against precedent and be detrimental to the individuals who most need protection under securities law.

ARGUMENT

I. Requiring Proof of Materiality at the Class Certification Stage in Securities Law Class Actions Would Impose an Unwarranted, Judicially-created Hurdle That Would Hurt Small Investors and Impair the Use of Private Securities Litigation to Enforce Securities Laws.

A. Amgen's proposed approach creates an unnecessary hurdle to class certification that cuts against this Court's precedent, Congress's enactment of securities fraud remedial provisions under Section 10(b), and the SEC's regulatory authority expressed in Rule 10b-5

Class actions serve the important functions of compensation, efficiency, and deterrence. As discussed further in Part I.B., *infra*, where individuals are harmed by a common wrong yet have claims for only small individual amounts, the class action device will often be the only mechanism to compensate those individuals for their losses. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). To the extent that individuals have sufficient losses to bring individual suits, the class action device leads to efficiencies for the courts by consolidating multiple individual claims into one proceeding. *See Am. Pipe Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974). Where they do not, class actions allow individuals to pool their resources and share in

the expense of litigation. *See* Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1941). These efficiencies translate into enhanced compensation for the class. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Studies 248, 264 (2010) ("By aggregating smaller claims into a single larger action, economies of scale in legal services are achieved, which can be passed onto class members in the form of enhanced recoveries."). Class actions also deter wrongdoing and supplement governmental enforcement of securities law. "The aggregation of individual claims in the context of a *classwide* suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

As for securities fraud class actions, the Court has long recognized the vital importance of legitimate private securities litigation to the federal enforcement regime for securities fraud. *See, e.g., Lampf v. Gilbertson*, 501 U.S. 350 (1991); *Pinter v. Dahl*, 486 U.S. 622 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985)(observing that "implied private actions are a most effective weapon in the enforcement of the securities laws"); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)(stating that "private enforcement" of Rule 10b-5 is "a necessary supplement to Commission action"). In these and

other decisions, the Court has recognized a strong Congressional policy of favoring private actions as a means of achieving the fundamental goals of our securities laws: fraud deterrence, victim compensation, and the promotion of investor confidence.

A requirement that the named plaintiff prove materiality by a preponderance of the evidence prior to class certification creates an insurmountable hurdle that will close the door to the private securities actions that Congress embraced under Section 10(b) of the Securities and Exchange Act of 1934 and the U.S. Securities and Exchange Commission implemented through Rule 10b-5. This substantial burden of proof results in the trial of Rule10b-5 claims on the merits before discovery is substantially completed or even underway. This result directly contravenes this Court's rationale in *Basic* and imposes severe restrictions on class certification under Rule 10b-5.

It is beyond argument that additional restrictive measures, such as the need to prove materiality during class certification under Rule 10b-5, directly contravene Congress's intent by creating requirements that Congress itself omitted from its enactments. This Court determined the elements for class certification through Rule 23. In enacting the Private Securities Litigation Reform Act of 2005 ("PSLRA"), 15 U.S.C. 78u-4 (2006), and the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78a (2006), Congress provided additional requirements for private

securities litigation. These requirements, however, represent the full extent of the hurdles that plaintiffs must overcome in order to certify a class under Section 10(b) and the related Rule 10b-5 and Rule 23. Congress in its lawmaking has recognized the interests that must be balanced in facilitating private securities litigation and plainly addressed these interests through the PSLRA and the SLUSA. Introducing the element of materiality into the class certification process tampers with the balance struck in these statutes and implements a hurdle that Congress chose not to enact.

Limiting the use of private litigation under Rule 10b-5 has serious repercussions, as federal limitations on state law securities fraud claims render 10b-5 plaintiffs' only source of redress. State law offers limited recourse for investors in the Petitioner's position, as Congress has expressly limited the use of class action suits seeking recovery for securities fraud under state law. In 1998, Congress enacted SLUSA to address the concern that "securities class action lawsuits [had] shifted from Federal to state courts" as a means of circumventing the Reform Act. *See* 15 U.S.C. § 78a (findings set forth in Pub. L. 105-353, § 2, Nov. 3, 1998). With certain exceptions, SLUSA provides that no class action based upon state law may be maintained in any state court on behalf of more than 50 class members. *See id.* at § 77p(b). Moreover, state courts generally have not recognized the doctrine of fraud-on-the-market in cases seeking relief under state common law, further limiting the state courts as an alternative forum for investors aggrieved by

misconduct of the sort alleged in this case. *See, e.g., Peil v. Speiser*, 806 F.2d 1154, 1163 (3rd Cir. 1986) (noting that no state has adopted fraud on the market theory); *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1193-94 (N.J. 2000); *Mirkin v. Wasserman*, 858 P.2d 568, 584 (Cal. 1993).

Amgen advocates for requiring the plaintiff to demonstrate materiality prior to proceeding on the fraud-on-the-market presumption, and allowing the defendant to present evidence to rebut the presumption. However, requiring proof of materiality at the class certification stage cuts against the Court's interpretation in *Basic* and undermines private securities litigation by adding a prerequisite for class certification that is not part of the plain language of Rule 23.

Basic endorses the fraud-on-the-market presumption on account of the difficulty of proving reliance for each individual class member. Materiality, however, does not share this characteristic. This Court remanded the issue of materiality in *Basic*- proof of materiality did not come into play at class certification. *Basic Inc. v. Levinson*, 485 U.S. 224, 240-41 (1988).

In addition to contravening the underlying rationale in *Basic*, a requirement that the plaintiff establish materiality at the certification stage would create an impermissible hurdle. The named plaintiff would have to demonstrate materiality prior to having the benefit of discovery – a substantial burden, to be sure! Amgen's approach would without

legal or logical warrant, require plaintiffs to undertake a merits inquiry unrelated to class certification prior to having access to full discovery.

The purpose of class certification proceedings is to determine whether the requirements of Rule 23 are met and not to determine whether the plaintiff will be successful on the merits. The office of the fraud on the market theory is to circumvent an unnecessarily burdensome merits inquiry in the class certification process. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (U.S. 2011). Rule 23 has never stood as an insurmountable bar for plaintiffs by requiring a trial on the merits before discovery is complete and the courts venture out of their proper bounds in erecting such a hurdle. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (explaining in the context of Rule 23 that "[c]ourts are not free to amend a rule outside the process Congress ordered"). A materiality requirement, however, contravenes the generally understood and previously accepted operative plan of Rule 23 by requiring a series of "mini-trials on the merits of cases at the class certification stage." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 272 (Dennis, J., dissenting). Rather than permitting the erection of hurdles not previously recognized, this Court should focus on the plain language of Rule 23 and consider whether the plaintiffs satisfied the requirements of the Rule as interpreted by *Basic*. *See Eisen*, 417 U.S. at 177-78. Proof of materiality at the class certification stage is an unnecessary and unwarranted burden for

plaintiffs that serves no legitimate purpose under Rule 23.

Amgen justifies creating a premature materiality proof hurdle to class certification by reasoning that it will reduce the number of frivolous "strike suits" against corporations. However, the problem of frivolous class actions is overstated, given that "economic evidence that strike suits predominate…seems unpersuasive," Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. Mich. J.L. Reform 323, 377 (2010), and as scholars have argued and research has supported, "there probably is a stronger correlation between the merits and both the filing and settlement of these actions than critics have claimed." Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 Case W. Res. 143, 158 (2010)(quoting Donald Langevoort). Congress addressed the concern over class action lawsuits having an in terrorem effect on defendants in the PSLRA. It has subsequently declined to add additional obstacles to class certification. If the Court imposes additional burdens on Rule 23 it will without adequate cause impede one of the "first duties of government": the duty to provide access to courts for meritorious claims. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Vague protestations about prospects for gains in the integrity of the legal system can hardly justify the shuttering of the courthouse door to plaintiffs with legitimate securities fraud claims.

B. Requiring Materiality at Class Certification Will Hurt Small Investors, a Group Securities Laws Were Designed to Protect

Class action lawsuits have been recognized as an irreplaceable tool for individuals with small claims and protecting these individuals has been a goal of securities law since its inception. Without the class action mechanism, small investors who suffer losses will effectively be left without access to any remedy for companies' fraudulent conduct.

Class actions favor small investors because they aggregate small claims that are not viable on their own. Individual investors' losses are invariably smaller than attorneys' fees in an individual securities fraud action. Class actions are an effective tool that enables these small investors to attract competent legal counsel by aggregating the fees they may recover. Louis Loss & Joel Seligman, *Securities Regulation* 4626-27 (3rd ed. 2005). A policy recognizing the power of strength in numbers to recover on these small claims is "at the very core of the class action mechanism." *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 344 (7th Cir. 1997). When Rule 23(b)(3) was enacted Congress "expected [the rule] to be particularly helpful" to individuals with small claims by allowing them "to combine their resources and bring an action to vindicate their collective rights." Arthur R. Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 502 (1975); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617

(1997)(observing that although cases where individual damages are substantial are not excluded by the text of Rule 23(b)(3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"). Notably, while the Supreme Court restricted the opportunity for small claimants to certify as a class it has not so limited cases addressing antitrust and securities laws. Arthur R. Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 503 (1975). Undermining class actions would remove the historically favored power of small investors, authorized and favored by Congress, to combat securities fraud through private litigation.

If materiality is reviewed as early in the litigation process as Amgen advocates, the practical result will be that plaintiffs will not be able to rise to the demand to demonstrate materiality because of the lack of discovery opportunities as of that stage. Plaintiffs will have incomplete resources to meet their burden and their expenses will increase greatly. Class actions will become more difficult to bring relative to individual actions. Inevitably, the incentive for small investors to bring litigation to police the market will be greatly reduced.

If achieving class certification becomes more burdensome, institutional investors may tend to bring individual actions rather than class actions, and small investors' interests will be denied representation altogether. *See Eisen*, 417 U.S. at 186

(1974)(remarking that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo"). While institutional investors may bring individual actions, this is not an option for those small or individual investors "whose claims may seem *de minimus* but who alone have no practical recourse for either remuneration or injunctive relief." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 186. Institutional investors already make up a large percentage of the lead plaintiffs in securities class actions because of policy considerations behind the PSLRA. David H. Webber, *Is "Pay-to-play" Driving Public Pension Fund Activism In Securities Class Actions? An Empirical Study*, 90 B.U.L. Rev. 2031, 2036-38 (2010). Congress encouraged the use of institutional investors as lead plaintiffs rather than plaintiff's attorneys because it believed those investors were more likely to have interests aligned with all investors. *Id.* The greater the incentive for institutional investors to bring individual actions, the less incentive for institutional investors to act in the interest of small investors and likewise the less likelihood that small investors will recover their losses. Undermining class actions would tilt securities fraud law even more strongly toward the interests of large investors and inhibit the recovery of small investors, creating an inequality of recovery for equal injury. The potential effect of this injury on small investors, particularly older investors, is especially compelling given the percentage of their income that comes from investments. In 2010, income from assets comprised 11.8 % of the total income of individuals aged 65 and older. Employee

Benefit Research Institute, *EBRI Databook on Employee Benefits Chapter 7: Sources of Income for Persons Aged 55 and Over* (Nov. 2011), *available at* http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2007.pdf. The PSLRA sets a ceiling rather than a floor as to the burdens that Congress intended to be cast upon small investor plaintiffs. Amgen's position seeks to stretch the PSLRA beyond Congress's initiative. A regime incentivizing institutional investors to bring individual actions instead of class actions would permit large institutional investors to recover where small investors cannot, for precisely the same injury caused by the same fraudulent conduct. This scenario amounts to an all-out assault on small investor interests.

If institutional investors bring individual cases rather than joining class actions, individual investors and small investors will suffer losses from their lack of protection. This scenario brings no integrity to the legal system. Congressional initiatives to promote enforcement of the securities laws do not point in this direction either. Given the nature of the public securities markets and prevailing practices pertaining to investment in securities, large investors are more likely to have any loss due to fraud offset by gains on shares of other stock with temporarily inflated prices due to undisclosed fraud. John D. Glater, *Critics of Shareholder Suits Aim at Big Holders*, N.Y. Times (Oct. 27, 2005), http://www.nytimes.com/2005/10/27/business/27suit.html?_r=0. Smaller investors are predictably less likely to have stock holdings as diverse as those of

large investors and therefore they are at greater risk for loss from securities fraud. *Id.* These individuals are "exposed to a greater risk from securities fraud because they lack the natural 'hedge' that exists within large, diversified portfolios." Anjan V. Thakor, Ph.D., *The Economic Reality of Securities Class Action Litigation*, Abstract (2005). Precluding small investors from making use of class actions in securities fraud cases therefore hurts investors in addition to undermining enforcement of securities laws through private litigation.

If the public investment markets are to remain accessible to small investors, protecting access by small investors to the class action mechanism as a means of redressing fraudulent market conduct by securities issuers is essential.

CONCLUSION

For all of the foregoing reasons, amicus respectfully submits that the decision of the Ninth Circuit should be upheld.

Respectfully submitted,

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