No. 11-

IN THE

Supreme Court of the United States

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

v.

CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

CORPORATE DISCLOSURE STATEMENT

Amgen Inc. does not have a parent corporation, and no publicly-held company owns 10% or more of Amgen Inc.'s stock.

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Petitioners Amgen Inc., Kevin W. Sharer, Richard D. Nanula, Roger M. Perlmutter, and George J. Morrow ("Amgen") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 660 F.3d 1170. The opinion of the district court granting respondent's motion for class certification (App. 15a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2011. A timely petition for rehearing en banc was denied on December 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND RULES INVOLVED

Pertinent portions of the following statutory, regulatory, and rule provisions are reproduced in the appendix to this petition: Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a) (App. 53a-54a); Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (App. 55a); and Federal Rule of Civil Procedure 23 (App. 56a-57a).

STATEMENT

To prevail in a private action alleging a misrepresentation in violation of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, a plaintiff must prove reliance on the alleged misrepresentation. In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), this Court recognized that plaintiffs could not proceed with a class action if they were required to prove direct individual reliance on the misrepresentation by each class member, because individual questions would overwhelm common ones. The Court, however, endorsed a rebuttable presumption of reliance by every class member in cases where the fraud-on-the-market theory applies. The theory is that if a security trades in an efficient market, all public material information is reflected in the price of the security. Purchasers or sellers who rely on the integrity of that market price therefore also rely, indirectly, on any material misrepresentations, which would be reflected in that price. The Court also

held that the presumption of reliance can be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation" and "the price received (or paid) by the plaintiff." *Id.* at 248.

Under this Court's decisions, a plaintiff must demonstrate at the class certification stage that certain predicates to the fraud-on-the-market theory have been satisfied, including that the market for the security is efficient, that the alleged misrepresentation was public, and that the plaintiff traded the shares "between the time the misrepresentations were made and the time the truth was revealed." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (quoting *Basic*, 485 U.S. at 248 n.27). The courts of appeals are split, however, on the question whether plaintiffs must also prove, for class certification, an additional predicate to the fraud-on-the-market theory—that the alleged misrepresentation was material. The courts of appeals also are split on the related question whether a defendant may, at the class certification stage, present evidence rebutting the applicability of the fraud-on-the-market theory.

In this case, the Ninth Circuit deepened these existing splits, joining the Seventh Circuit in wrongly excusing plaintiffs from any showing of the materiality predicate and refusing defendants an opportunity to present rebuttal evidence on that issue at the class certification stage. Given the well-recognized *in terrorem* power of class certification to force settlements of even non-meritorious securities fraud complaints, *see, e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975), the likely effect of the Ninth Circuit's rule is that, as a practical matter, defendants will rarely be able to test the materiality predicate to the fraud-on-the-market theory, notwithstanding the central impor-

tance of that theory in enabling class certification in the first place. The Ninth Circuit's decision is wrong and should be reversed.

1. Respondent Connecticut Retirement Plans and Trust Funds is the lead plaintiff in this action brought under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78t(a) (App. 53a-54a)) and Rule 10b-5 (17 C.F.R. § 240.10b-5 (App. 55a)). Respondent alleges that Amgen made misrepresentations regarding the safety of two of its products, Aranesp® and Epogen®, causing the artificial inflation of the market price for Amgen stock. App. 16a. Aranesp and Epogen are erythropoiesis-stimulating agents (ESAs), which stimulate the production of red blood cells and thus reduce the need for patient transfusions. Pet. C.A. Br. 6. Respondent alleges that Amgen made misrepresentations about the subject matter of a May 2004 FDA advisory committee meeting, clinical trials involving Aranesp, the safety of on-label uses of Aranesp and Epogen, and the marketing of the two drugs. App. 17a-20a.

2. Respondent moved to certify a class of persons who purchased Amgen stock from April 22, 2004 through May 10, 2007. App. 16a. The start of the period corresponds to a public statement by Amgen regarding a May 2004 FDA advisory committee meeting. Respondent alleges that Amgen misrepresented that the meeting would not focus on the safety of Aranesp. App. 17a. The end of the class period corresponds with a later meeting of the same FDA committee. Respondent alleges that that meeting constituted a corrective disclosure, revealing information about the safety of ESAs, including Aranesp and Epogen. App. 19a.

Respondent sought class certification pursuant to Federal Rule of Civil Procedure 23(b)(3) (App. 22a), which requires, among other factors, that "questions of law or fact common to class members predominate over any questions affecting only individual members." As with most misrepresentation claims under Rule 10b-5, the "predominance" inquiry in this case "turn[ed] on the element of reliance." *Erica P. John Fund*, 131 S. Ct. at 2184; App. 31a-34a. Respondent asserted that the putative class members were entitled to a common presumption of reliance based on the fraud-on-the-market theory. App. 31a. In support, respondent submitted expert evidence to establish the efficiency of the market for Amgen stock. App. 40a. Respondent made no similar evidentiary showing, however, about the materiality of Amgen's alleged misstatements. App. 33a-34a.

3. Amgen opposed class certification principally on the ground that respondent did not, and could not, establish that the alleged misrepresentations were material. App. 8a. To the contrary, Amgen showed through analyst reports and public documents that the market was aware of all the information respondent claimed Amgen had concealed through alleged misrepresentations during the class period. Pet. C.A. Br. 2, 8-9. Proof of market efficiency alone, Amgen argued, without any corresponding proof of the materiality of the alleged misrepresentations, was not sufficient to invoke a presumption of class-wide reliance based on the fraud-on-the-market theory. App. 32a.

Amgen also sought affirmatively to rebut any such presumption, again by showing that the market already was "privy to the truth," and accordingly that no alleged misrepresentation had any impact on the price of Amgen stock. *Basic*, 485 U.S. at 248; App. 41a. For

example, respondent claimed that the class period started when an Amgen executive purportedly stated that an upcoming May 2004 FDA advisory committee meeting would not focus on the safety of Aranesp.[1] App. 17a. Amgen demonstrated, however, through numerous analyst reports and public documents before and after the advisory committee meeting, that analysts were well aware that the committee would discuss possible safety concerns associated with Aranesp. Pet. C.A. Br. 9-10. The public documents included the agenda of the meeting itself, which was published in the Federal Register more than a month in advance of the meeting. App. 41a-42a. Amgen made similar showings regarding the other alleged misrepresentations. App. 42a-43a. Based on this rebuttal evidence, Amgen argued that respondent was not entitled to a class-wide presumption of reliance based on the fraud-on-the-market theory and therefore could not satisfy the Rule 23(b)(3) predominance requirement. App. 32a.

4. The district court rejected Amgen's arguments and granted respondent's class certification motion. App. 15a. The court held that respondent could invoke the presumption of reliance arising from the fraud-on-the-market theory because, "to trigger" the presumption, respondent "need only establish that an efficient market exists." App. 40a. The court therefore refused to consider whether respondent had established the materiality predicate—*i.e.*, whether the alleged misrepresentations were in fact material. "[T]he inquiries

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[1] The Amgen executive's statement did not, in fact, say that the advisory committee meeting would not discuss Aranesp. Rather, the executive truthfully explained that the studies that prompted the meeting did not involve Aranesp.

Defendants urge the Court to make do not concern the requirements of Rule 23, but instead concern the merits of the case," the court reasoned, holding that they should be deferred until "a later stage in this proceeding." App. 38a, 40a. For the same reasons, the court also refused to consider Amgen's evidence rebutting the applicability of the fraud-on-the-market theory to this case, holding that class certification "is an inappropriate time to consider [Amgen's] contentions." App. 44a.

5. The Ninth Circuit granted Amgen leave to appeal the district court's certification order pursuant to Federal Rule of Civil Procedure 23(f) and affirmed the district court's order. App. 6a, 13a. The court of appeals rejected Amgen's contention that respondent must provide proof of materiality at the class certification stage. While acknowledging that respondent was required "to prove at the class certification stage [1] that the market for Amgen's stock was efficient and [2] that Amgen's supposed misstatements were public," the Ninth Circuit held that respondent did not need to "prove [3] materiality to avail [itself and the class] of the fraud-on-the-market presumption of reliance at the class certification stage." App. 9a, 12a (emphasis omitted). Rather, respondent had only to "allege materiality with sufficient plausibility to withstand a 12(b)(6) motion." App. 12a.

The reason, the Ninth Circuit explained, is that materiality is an "element[] of the merits of a securities fraud claim," whereas the efficient-market and public-statement predicates to the fraud-on-the-market theory are not. App. 8a-9a. As a "merits issue," the court reasoned, materiality should be addressed only "at trial or by summary judgment motion." App. 13a. The court also grounded its distinction of the materiality predi-

cate from the efficient-market and public-statement predicates on its view that, as to materiality, the arguments of respondent and the class "stand or fall together," rendering "the reliance issue common to the class." App. 8a-9a. Because the court of appeals had concluded that materiality need not be proven for class certification, it also approved the district court's refusal to consider Amgen's rebuttal evidence on that issue. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepens an irreconcilable, mature circuit split on important questions of class certification law in securities litigation. While the Ninth Circuit acknowledged that a plaintiff bringing a private action under Rule 10b-5 must prove certain predicates to the fraud-on-the-market theory for class certification, the court wrongly held that plaintiffs need not prove an equally important predicate to that theory—the materiality of the alleged misrepresentation. Yet, absent proof of materiality, the fundamental premise of this Court's decision in *Basic* v. *Levinson*, 485 U.S. 224 (1988), is absent. That premise is "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *Erica P. John Fund* v. *Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) (emphasis added).

None of the reasons given by the Ninth Circuit for treating the materiality predicate differently from the efficient-market and public-statement predicates has merit. To the contrary, the Ninth Circuit's reasoning contravenes this Court's precedents, including *Basic* and *Erica P. John Fund*. The Ninth Circuit's error—deferring an important step in the fraud-on-the-market analysis until after class certification—will have the

harmful effect of depriving many defendants of any real opportunity to challenge class-wide reliance, given the immense and immediate settlement pressure created by a class certification order in securities litigation.

I. THE NINTH CIRCUIT'S DECISION DEEPENS AN IRRECONCILABLE CONFLICT AMONG THE COURTS OF APPEALS

1. Five circuits have addressed the questions presented by this petition, with those courts dividing into three camps.

The Second and Fifth Circuits hold that a plaintiff must prove materiality for class certification and that defendants may present evidence to rebut the applicability of the fraud-on-the-market theory at the class certification stage. The Second Circuit, in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), held that for a plaintiff to obtain class certification based on the fraud-on-the-market theory, it must show that the defendant "publicly made ... a *material* misrepresentation." *Id.* at 481 (emphasis added). The court explained that "[t]he point of *Basic* is that an effect on market price is presumed based on the *materiality* of the information and a well-developed market's ability to readily incorporate that information into the price of securities." *Id.* at 483 (emphasis added; emphasis in original omitted). Because both of these factors—materiality and market efficiency—are predicates to the class-wide presumption of reliance, the Second Circuit ruled that an examination of materiality is necessarily part of the required "definitive assessment" of "factual disputes relevant to each Rule 23 requirement." *Id.* at 484 (emphasis and internal quotation marks omitted). In contrast to the Ninth Circuit's ruling here, the Second Circuit explained: "we hold that

plaintiffs must show that the statement is material (a prima facie showing will not suffice)." *Id.* at 486 n.9.

The Second Circuit also held in *In re Salomon* that once a plaintiff has offered proof as to all the predicates to the fraud-on-the-market theory, a defendant is then "allowed to *rebut* the presumption, prior to class certification, by showing, for example, the absence of a price impact." 544 F.3d at 484 (emphasis added). The court explained: "a successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement." *Id.* at 485. "Hence, the court must permit defendants to present their rebuttal arguments 'before certifying a class[.]'" *Id.* (quoting *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

The Fifth Circuit likewise requires plaintiffs to offer "proof of a *material* misstatement … in order to trigger the fraud-on-the-market presumption." *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007), *abrogated on other grounds by Erica P. John Fund*, 131 S. Ct. 2179 (emphasis added). This principle followed from the court's earlier holding in *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 322 (5th Cir. 2005), that a Rule 10b-5 plaintiff must also prove the efficient-market predicate at the class certification stage. In *Unger*, the Fifth Circuit explained: "When a court considers class certification based on the fraud on the market theory, it must engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence." *Id.* at 325. Like the Second Circuit, the Fifth Circuit also holds that the class certification stage, not summary judgment or trial, is "the proper time for defendants to rebut lead Plaintiffs'

fraud-on-the-market presumption." *Oscar Private Equity*, 487 F.3d at 270.[2]

The Third Circuit has adopted an intermediate approach. That court holds that plaintiffs need not demonstrate materiality as part of an initial showing before class certification. *See In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 631 (3d Cir. 2011). However, as in the Second and Fifth Circuits, defendants in the Third Circuit may rebut the applicability of the fraud-on-the-market theory by disproving the materiality of the alleged misrepresentation. In *In re DVI*, the Third Circuit held that "rebuttal of the presumption of reliance falls within the ambit of issues that, if relevant, should be addressed by district courts at the class certification stage." *Id.* at 638. One way that a defendant can rebut the presumption of reliance is by showing that "the misrepresentations were immaterial." *Id.* at 637. The Third Circuit also explicitly agreed with the Second Circuit's decision in *In re Salomon* that "a defendant's successful rebuttal demonstrating that misleading material statements or corrective disclosures did not affect the market price of the security defeats the presumption of reliance for the entire class, thereby defeating the Rule 23(b) predominance requirement." *Id.* at 638.

In contrast to the Second, Third, and Fifth Circuits, the Seventh Circuit holds that district courts are barred from evaluating materiality at the class certification stage. In *Schleicher* v. *Wendt*, 618 F.3d 679, 685

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[2] The First and Fourth Circuits have also stated that a plaintiff must prove materiality at the class certification stage, albeit in dicta. *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 7 n.11 (1st Cir. 2005); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 364 (4th Cir. 2004).

(7th Cir. 2010), that court held that materiality is exclusively a "merits" question that courts may not even "peek" at for purposes of class certification. A plaintiff accordingly "need not establish that the false statements or misleading omissions are material" at the class certification stage. *Id.* at 687. In reaching this conclusion, the Seventh Circuit disagreed with the First and Second Circuits, labeling their decisions a "misread[ing]" of *Basic*. *Id.*[3]

The Ninth Circuit's decision in this case places it firmly on the Seventh Circuit's side in this preexisting split. The decision explicitly acknowledges and then rejects the position of those "circuits that require a plaintiff to prove materiality at the class certification stage," pointing to decisions of the First, Second, and Fifth Circuits. App. 10a-11a. And, by condoning the district court's refusal to consider Amgen's evidence rebutting materiality, the Ninth Circuit's holding is also in direct conflict with the holdings of the Second, Third, and Fifth Circuits that a defendant may present evidence at the class certification stage rebutting the applicability of the fraud-on-the-market theory. *See* App. 12a-13a. The Ninth Circuit instead expressly aligns itself with the Seventh Circuit, stating that it joins that court in holding that a plaintiff "must plausibly allege—but need not *prove* at this juncture—that the claimed misrepresentations were material." App. 2a (emphasis in original).[4]

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[3] No petition for certiorari was filed seeking review of the judgment in the Seventh Circuit.

[4] The Ninth Circuit also said that it was joining the Third Circuit. *See* App. 2a. But the Ninth Circuit did not acknowledge that the Third Circuit does permit examination of materiality at the

This circuit split is entrenched and mature. Moreover, with the Ninth Circuit having entered the fray, the split now involves courts of appeals for circuits that account for a substantial majority of securities fraud litigation. In 2010 and 2011, 74% and 73% (respectively) of all securities fraud class actions were filed in the Second, Third, Fifth, Seventh, and Ninth Circuits.[5]

2. The circuit split concerns important issues of class certification law in the securities field that only this Court can resolve. This Court endorsed the presumption of reliance based on the fraud-on-the-market theory to "alleviate" the concern that the reliance element of a securities fraud claim could make class-action litigation impossible. *Erica P. John Fund*, 131 S. Ct. at 2185; *see Basic*, 485 U.S. at 242. This Court endorsed only a presumption, however, allowing defendants to rebut it. *See Basic*, 485 U.S. at 248. The issue at the heart of the circuit split here is whether defendants should be forced to defend securities fraud litigation against a class of plaintiffs, based on a rebuttable presumption, in instances where the named plaintiff has yet even to prove all the predicates to the very theory that allows for class certification in the first place, and

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class certification stage, as part of a defendant's rebuttal of the applicability of the fraud-on-the-market theory.

[5] *See* Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2010 Year in Review* 30 (2011), *available at* http://securities.stanford.edu/clearinghouse_research/2010_YIR/Cornerstone_Research_Filings_2010_YIR.pdf; Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2011 Year in Review* 32 app. 4 (2012), *available at* http://securities.stanford.edu/clearinghouse_research/2011_YIR/Cornerstone_Research_Filings_2011_YIR.pdf.

where the defendant is given no opportunity for rebuttal prior to certification.

In addition to illogic, there is an important fairness concern. It is commonly recognized that "[a]n order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note, 1998 Amendments. This Court and others have recognized this phenomenon. *See, e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("[C]lass certification would place hydraulic pressure on defendants to settle[.]"); 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.").

This "*in terrorem* power of certification" is particularly acute in the securities litigation context. *Oscar Private Equity*, 487 F.3d at 267; *see also Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial[.]"). Only 0.3 percent of all securities fraud class actions ever reach a verdict at trial. *See* Stanford Law School Secu-

rities Class Action Clearinghouse & Cornerstone Research, *2010 Year in Review*, *supra*, at 14.

Until this Court resolves the circuit conflict on the questions presented, class certification frequently will depend on the circuit in which a case is filed. Had this case been filed in the Second or Fifth Circuit, respondent would have been required to establish materiality as a precondition to class certification, and in the Second, Third, or Fifth Circuit, Amgen would have had an opportunity to rebut any such showing. Yet, in the Seventh and Ninth Circuits, as was the case for Amgen here, a class can be certified without any proof of the materiality predicate and notwithstanding the defendant's offer of evidence rebutting materiality.

The practical consequences are substantial. Given the immense settlement pressure generated by class certification orders in securities fraud litigation, defendants in the Seventh and Ninth Circuits will frequently be forced, by practical realities, to settle cases for enormous sums regardless of whether they have a meritorious materiality defense that would rebut application of the fraud-on-the-market theory. The result is that in some circuits, but not others, there may be no realistic opportunity for defendants to litigate a critical underpinning of the fraud-on-the-market theory—materiality. A rule that postpones consideration of materiality until summary judgment or trial effectively means that, in most cases, there will be no examination of materiality—at any stage of litigation.[6]

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[6] The availability of the summary-judgment procedure does not alter this risk calculus. First, materiality is a "mixed question of law and fact" involving "inferences" that "are peculiarly ones for the trier of fact." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438,

3. There are compelling reasons for this Court to address the questions presented now, in this case. As the Court is aware, the respondent in *Erica P. John Fund* sought to raise effectively the same issues, but the Court could not reach them because the lower court decision in that case concerned only "loss causation," a "familiar and distinct concept" from reliance. 131 S. Ct. at 2187; *see id.* ("Halliburton's theory is that if a misrepresentation does not affect market price, an investor cannot be said to have relied on the misrepresentation[.] We do not accept Halliburton's wishful interpretation of the Court of Appeals' opinion. . . . [W]e simply cannot ignore the Court of Appeals' repeated and explicit references to 'loss causation.'"). This Court thus explained in its decision that it was refraining from addressing any questions about *Basic* v. *Levinson* beyond the narrow holding about the "distinct concept" of loss causation. Because "the Court of Appeals erred by requiring [petitioner] to prove loss causation at the certification stage, we need not, and do not, address *any other question* about *Basic*, its presumption, or how and when it may be rebutted." *Id.* (emphasis added); *see also id.* at 2187 n.* (declining to address Halliburton's argument that defendants can raise price impact in rebuttal). The Ninth Circuit's decision here, issued after this Court's ruling in *Erica P. John Fund*, has now cemented the preexisting circuit split on the questions presented in this petition—with the Ninth Circuit ac-

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450 (1976); *see also Basic*, 485 U.S. at 236 (materiality is an "inherently fact-specific finding"). Second, once a class has been certified, the risks associated with litigating such a summary judgment motion to a decision increase exponentially, and constitute a critical part of the settlement pressure recognized by this Court and other authorities.

knowledging the conflict among the courts of appeals and joining the minority position.

This petition squarely presents for this Court's review both the question whether the materiality predicate must be examined at the class certification stage and the question whether it may be rebutted at the same stage. Among Amgen's principal defenses to class certification were its arguments that respondent failed to prove the materiality of the alleged misstatements and that rebuttal evidence disproved materiality. The Ninth Circuit's decision cleanly resolved class certification on the purely legal grounds that respondent did not need to prove materiality for class certification and Amgen was not permitted to present rebuttal evidence on the issue. *See* App. 12a-13a. Unless both of those rulings are correct, the lower courts' orders granting and affirming class certification cannot stand.

This petition also presents this Court with what may be a rare opportunity to resolve the important questions presented. When class certification orders reach the appellate courts for review, it is normally by means of an interlocutory appeal under Rule 23(f). For example, that is true of all of the cases in the circuit split at issue here. *See* App. 6a; *In re DVI*, 639 F.3d at 629 & n.6; *Schleicher*, 618 F.3d at 683; *In re Salomon Analyst Metromedia Litig.*, 544 F.3d at 479-480; *Oscar Private Equity*, 487 F.3d at 263. Given the frequent settlement of large-scale securities class actions after district courts grant class certification motions, and the rarity of plaintiffs continuing to litigate putative class actions after district courts deny class certification, it is rare that contested class certification orders are reviewed in appeals from district court final judgments.

Now that the Second, Third, Fifth, Seventh, and Ninth Circuits have resolved the questions presented for their respective circuits, the likelihood that the issues will be presented again in a discretionary Rule 23(f) appeal is necessarily low. Courts of appeals generally grant permission for a Rule 23(f) appeal only when the district court's class certification order presents an important question of class-action law that is unsettled within the circuit, or the order is both questionable and likely to have a case-ending effect. *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).[7] In the five circuits that are part of the split, the courts of appeals have settled the law on the questions here presented, making further Rule 23(f) appeals of those issues unlikely. These circuits account for almost three quarters of all securities fraud class action filings. *See supra* p. 13 & n.5. This petition accordingly presents the right opportunity for this Court to resolve a circuit conflict that has ongoing major importance but may not be presented again to this Court.

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[7] *See also, e.g.*, *Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) (appeals permitted where "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or … the certification order implicates a legal question about which there is a compelling need for immediate resolution."); *Newton*, 259 F.3d at 165 (appeals permitted where they would allow the court to address "(1) the possible case-ending effect of an imprudent class certification decision (the decision is likely dispositive of the litigation); (2) an erroneous ruling; or (3) facilitate development of the law on class certification"); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834-835 (7th Cir. 1999) (appeal permitted if it would "facilitate the development of the law" or the petitioner has "a solid argument in opposition to the district court's decision" and can show that the decision effectively terminates the litigation).

II. THE NINTH CIRCUIT'S DECISION IS WRONG

The petition should be granted for the further reason that the Ninth Circuit fundamentally erred. Logic, fairness, and this Court's analogous precedents require proof of materiality and an opportunity for rebuttal before class certification.

A. A District Court Must Demand Proof Of The Materiality Predicate To The Fraud-On-The-Market Theory Before Class Certification

In private securities fraud cases where a plaintiff seeks to invoke the fraud-on-the-market theory to prove reliance on a class-wide basis, the plaintiff must prove *all* of the theory's predicates for a district court to certify a class. This Court has held that plaintiffs must prove, and district courts must rigorously analyze, the efficient-market and public-statement predicates to the fraud-on-the-market theory:

> It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. 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); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011). The courts of appeals hold the same. *See, e.g.*, *In re DVI*, 639 F.3d at 631, 633; *Schleicher*, 618 F.3d at 682, 688; *Unger*, 401

F.3d at 322. Indeed, the Ninth Circuit so held in this case, ruling that "the district court was correct to require [respondent] to prove at the class certification stage that the market for Amgen stock was efficient and that Amgen's supposed misstatements were public." App. 9a.

The question whether an alleged misstatement is material is just as important to determining the applicability of the fraud-on-the-market theory. Absent materiality, the fundamental premise of *Basic* is not established, because an essential link between the misstatement and the plaintiff is entirely missing. The premise of *Basic* is that a purchaser or seller of a security can be presumed to have *indirectly* relied on a material misstatement through that person's *direct* reliance on the integrity of the market price for the security, which price in turn reflects all material information. This Court explained in *Basic*:

> An investor who buys or sells stock at the price set by the market [presumably] does so in reliance on the integrity of that price. 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.

485 U.S. at 247 (emphasis added); *see also id.* at 244 ("In an open and developed market, 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." (emphasis added; internal quotation marks omitted)).

There is no logical basis for courts analyzing the applicability of the fraud-on-the-market theory at the class certification stage to treat any of the predicates to the theory differently from the others. There is more than one reason why an alleged misrepresentation would not be "reflected in the market price at the time of [a plaintiff's] transaction." *Erica P. John Fund*, 131 S. Ct. at 2186. It may be that the market for the security is not efficient, hence the requirement by courts that a plaintiff demonstrate the efficient-market predicate for class certification. But it may also be that the misstatement itself is not material, in which case the statement cannot be presumed to have affected the security's price. *Basic* and its logic thus require that all predicates to the fraud-on-the-market theory—including the materiality predicate—be examined before class certification to determine whether the named plaintiff has any way to prove the reliance element of a Rule 10b-5 claim on a class-wide basis.

Failing to examine materiality is especially inappropriate and prejudicial in light of more recent studies of the efficient capital markets theory. When this Court decided *Basic*, it relied in part on evidence that "[r]ecent empirical studies" tended to confirm the efficient-market theory. 485 U.S. at 246. Subsequent studies paint a more complex picture. Some studies have shown that the criteria commonly applied in federal courts to determine "efficiency," *see, e.g.*, *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1286-1287 (D.N.J. 1989), do not invariably predict whether new, material information will be incorporated into a security's market

price.[8] Other studies have shown that markets can be efficient in some respects, but not in others—*e.g.*, as to some types of information but not as to other types, as to some sources of information but not as to other sources, and over some periods of time but not others.[9] A rule that requires examination of only the efficient-market and public-statement predicates, and pays no attention to the alleged misstatements themselves, will therefore be inadequate to support a conclusion at class certification that reliance can in fact be proven on a class-wide basis through the fraud-on-the-market theory.

Rather, market efficiency and materiality are both essential and often intertwined when determining whether a presumption of reliance is appropriate. Both must be examined. The misrepresentation at issue must have been material, the market must have been efficient, and the market must have been efficient as to that misrepresentation. That is, a presumption of reliance is appropriate only "so long as [the misrepresenta-

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[8] *See, e.g.*, Erenburg et al., *The Paradox of "Fraud-on-the-Market Theory": Who Relies on the Efficiency of Market Prices?*, 8 J. Empirical Legal Stud. 260, 264, 300 (2011); Macey et al., *Lessons From Financial Economics: Materiality, Reliance, and Extending the Reach of Basic v. Levinson*, 77 Va. L. Rev. 1017, 1025-1026, 1049 (1991).

[9] *See, e.g.*, Macey & Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 Stan. L. Rev. 1059, 1079-1091 (1990); Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* 2 (2000); Dunbar & Heller, *Fraud on the Market Meets Behavioral Finance*, 31 Del. J. Corp. L. 455, 471 (2006); Fox, *The Myth of the Rational Market* (2009); Brown et al., *Analyst Recommendations, Mutual Fund Herding, and Overreaction in Stock Prices* 33-34 (AFA 2010 Atlanta Meetings Paper 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1363837.

tion] *was reflected in* the market price at the time of [the] transaction." *Erica P. John Fund*, 131 S. Ct. at 2186 (emphasis added). A rule that instead permits a presumption of reliance at class certification without any examination of the materiality of the statement itself is supported by neither "common sense" nor "probability." *Basic*, 485 U.S. at 246.

For the same reasons, the fundamental logic of *Basic* requires that defendants be permitted to rebut application of the fraud-on-the-market theory to the facts of their cases—whether that rebuttal is based on the immateriality of the statements at issue, the inefficiency of the market, or some other pertinent fact. This Court endorsed the presumption of reliance in *Basic* with the express understanding that defendants could rebut it. *See* 485 U.S. at 248. Given the immense settlement pressure created by class certification in securities fraud cases, that right would be effectively meaningless if it could not be exercised until after class certification.

Nor is there any rationale for excluding materiality alone from the issues on which a defendant can seek to rebut a plaintiff's invocation of the fraud-on-the-market theory. This Court made no such distinction in *Basic* in describing the potential rebuttal evidence a defendant might present, holding that "*[a]ny showing* that severs the link between the alleged misrepresentation and ... the price received (or paid) by the plaintiff" is "sufficient to rebut the presumption of reliance." 485 U.S. at 248 (emphasis added). Indeed, this Court specifically discussed facts relevant to materiality, including the very type of showing that Amgen made in this case, as adequate to rebut the presumption of reliance. For example, the Court explained that if "the 'market makers' were privy to the truth" of the alleged misrepresenta-

tions, "the market price would not have been affected by [the] misrepresentations," and "the basis for finding that the fraud had been transmitted through market price would be gone." *Id.* *Basic* itself therefore directs that defendants be permitted to rebut the application of the fraud-on-the-market theory to the facts of a case, including by rebutting a showing of materiality.

B. The Ninth Circuit's Reasons For Refusing To Examine Materiality Before Class Certification Have No Merit

The Ninth Circuit offered two reasons for refusing to examine materiality (or permit any rebuttal evidence on the issue) before class certification, but neither has merit.

1. The court reasoned first that materiality is "an element of the *merits* of [the] securities fraud claim," and therefore should "be reached at trial or by summary judgment motion." App. 8a, 13a. In contrast, the court reasoned, market efficiency and the public nature of the alleged misstatements "are not elements of the merits of a securities fraud claim," and therefore are appropriately examined at the class certification stage. App. 9a. This reasoning is flawed for at least two reasons.

First, it is directly contrary to this Court's decision in *Dukes*, 131 S. Ct. 2541. There, this Court held that district courts must examine all issues relevant to the Rule 23 class certification inquiry, regardless of whether those issues overlap with or are identical to issues that must later be considered at summary judgment or at trial. "A party seeking class certification must affirmatively demonstrate his compliance with" Rule 23 by proving "*in fact*" that the Rule's requirements are satisfied. *Id.* at 2551. "[C]ertification is

proper only if 'the trial court is satisfied, after a rigorous analysis,'" that Rule 23's prerequisites are met. *Id.* (quoting *General Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)). "Frequently, that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim," this Court recognized, but "[t]hat cannot be helped." *Id.* Class certification, of necessity, "'generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 2551-2552 (quoting *Falcon*, 457 U.S. at 160).

The facts of *Dukes* well illustrate why the Ninth Circuit's reasoning is mistaken. In *Dukes*, this Court fully appreciated that the requisite "proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination." 131 S. Ct. at 2552 (emphasis omitted). To establish the Rule 23 commonality requirement, plaintiffs had to show that "Wal-Mart 'operated under a general policy of discrimination.'" *Id.* at 2553. And to establish the merits requirement of a "pattern or practice of discrimination," *id.* at 2552 (emphasis omitted), plaintiffs had to show that "discrimination was the company's standard operating procedure," *id.* at 2552 n.7 (internal quotation marks omitted). Notwithstanding this overlap, the Court held that plaintiff had to submit—at the class certification stage—"significant proof" of a "general policy of discrimination." *Id.* at 2553 (internal quotation marks omitted).

Second, the Ninth Circuit's logic does not, in any event, distinguish materiality from the efficient-market and public-statement predicates. In a case in which the plaintiff is proceeding on a fraud-on-the-market theory, all of those predicates are effectively elements of the claim. This is because the plaintiff seeks to establish

both its own claim and those of the class based on a common presumption of indirect reliance arising from the fraud-on-the-market theory.[10] Thus, for the plaintiff to prove both its own claim and the claims of the class members at trial or on summary judgment, the plaintiff must prove not only that the misrepresentation was material, but also that the misrepresentation was public and the market was efficient. *See Dukes*, 131 S. Ct. at 2552 n.6 ("To invoke [the fraud-on-the-market] presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, an issue they will surely have to prove *again* at trial in order to make out their case on the merits." (citing *Erica P. John Fund*, 131 S. Ct. at 2185)). Absent proof of all three predicates—materiality, market efficiency, and the public nature of the misstatement—liability could not be established because the plaintiff would not have proven reliance for either itself or the class.

Thus, whether the Ninth Circuit labels these predicates as "elements of the merits of a securities fraud claim" (App. 9a) or something else, all three must be proven again at the merits stage to establish reliance. *Dukes* makes plain that this fact provides no basis for excusing proof at the class certification stage. *See* 131 S. Ct. at 2552 n.6.[11]

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[10] That was the case here, as respondent admitted that it did not rely on, consult, review, or even see any of the misstatements it alleged.

[11] This Court's disposition of the pending certiorari petition in *Comcast Corp.* v. *Behrend*, No. 11-864 (U.S. petition for cert. filed Jan. 11, 2012), should not affect consideration of the petition in this case. That petition seeks summary reversal of a Third Circuit de-

2. The Ninth Circuit's second reason for refusing to examine materiality (or to permit any rebuttal evidence on the issue) before class certification was that the arguments for and against a misstatement's materiality are themselves common to the class, and therefore support, rather than undermine, the basis for class certification. *See* App. 8a-10a. That reasoning again fails to distinguish materiality from the efficient-market and public-statement predicates. The arguments for and against market efficiency also are common across a putative class. Nevertheless, because of the importance of the fraud-on-the-market theory to overcoming an otherwise insuperable bar to class certification in securities fraud cases, *see Basic*, 485 U.S. at 242, this Court and courts of appeals hold that plaintiffs must prove, district courts must rigorously analyze, and defendants may present rebuttal evidence on whether the market is efficient for the security in question. *See supra*, pp. 19-20 (citing cases).

The determination whether the fraud-on-the-market theory applies on the facts of any single case is

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cision because, the petition alleges, the court contravened *Wal-Mart Stores, Inc.* v. *Dukes* by refusing to consider merits issues bearing on class certification. It is an antitrust case, not a fraud-on-the-market securities case. It therefore does not touch upon the questions presented here, which are particular to this Court's jurisprudence regarding the fraud-on-the-market theory, the corresponding presumption of reliance, and the right of rebuttal described in *Basic*. While this Court's holding in *Wal-Mart* is relevant to refute one strand of the Ninth Circuit's reasoning here, reversal of the Third Circuit's decision in *Comcast*, on the authority of *Wal-Mart*, would not resolve the very different securities-law circuit splits at issue here. Indeed, the Ninth Circuit has already fully considered *Wal-Mart* for itself and nevertheless ruled the way it did on the fraud-on-the-market issues presented here.

instrumental to deciding whether a securities fraud plaintiff has any way to prove a case on behalf of a broad class. Rule 23, and this Court's precedents, require that district courts analyze all of the issues pertinent to Rule 23—not some. The Ninth Circuit's selection of materiality for different treatment than the other fraud-on-the-market predicates has no basis in the logic of *Basic*, its progeny, or Rule 23.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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