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

# BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA SUPPORTING PETITIONERS


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## QUESTIONS PRESENTED

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

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

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## INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are the Chamber of Commerce of the United States of America (the "Chamber"), and the Pharmaceutical Research and Manufacturers of America ("PhRMA"). Each has a significant interest in the interpretation and enforcement of the federal securities laws

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record provided timely notice of of *amici*'s intent to file this brief. Consent letters have been filed with the Clerk concurrently with this brief.

and the rules governing class actions in private securities cases.

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

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

## SUMMARY OF ARGUMENT

The court of appeals' decision joins the wrong side of circuit splits on both questions presented in the petition.

The decision below also conflicts with this Court's opinions. It conflicts with both *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), and *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), because in those cases the Court declared that the "fundamental premise" of the presumption of reliance is a misrepresentation's impact on the market price. If an alleged misrepresentation is not material, it will not move the market price of a stock that trades in an efficient market. And if the market price is not distorted, there is no basis for presuming that the entire class relied on misrepresentations by relying on a market price that reflects the misrepresentation. Individual class members will need to prove actual reliance on the misrepresentation, rendering class certification impossible.

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

## ARGUMENT

Petitioners have demonstrated that the court of appeals' decision deepens a festering circuit split with respect to (1) whether Rule 10b-5 plaintiffs must prove ma-

teriality in order to use the presumption of classwide reliance and obtain class certification and (2) whether defendants are entitled to rebut the presumption of reliance at the class-certification stage. Certiorari is warranted for these reasons alone. Further review is urgently needed for at least three additional reasons: the court of appeals' decision (1) contradicts the reasoning of *Basic* and *Erica P. John Fund* that the "fundamental premise" of the fraud-on-the-market presumption is that a misrepresentation distorted the stock price, by certifying a class where that fundamental premise is absent; (2) defies this Court's recent holding in *Wal-Mart* that plaintiffs must satisfy all of the Rule 23 requirements, even if doing so requires submission of merits-related evidence; and (3) subjects defendants to immense settlement pressure in cases where defendants have not only meritorious substantive defenses, but also have evidence that defeats class certification.

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

1. As this Court recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988), "[r]equiring proof of individualized reliance * * * effectively * * * prevented [securities-fraud plaintiffs] from proceeding with a class action, since individual issues * * * overwhelmed the common ones." To remedy that perceived problem, *Basic*'s four-Justice majority ruled that a putative class-action plaintiff may obtain a rebuttable presumption of classwide reliance by using the "fraud-on-the-market" theory. 485 U.S. at 245.[2]

[2] Chief Justice Rehnquist and Justices Scalia and Kennedy did not participate. *Basic*, 485 U.S. at 250. Justice Blackmun wrote the majority opinion joined by Justices Brennan, Marshall, and Stevens. *Id.* at 226. Justices White and O'Connor dissented in relevant part. *Id.* at 250-263.

The fraud-on-the-market theory assumes that in an efficient, well-developed market, all public, material information about a company is known to the market and reflected in the company's stock price. *Id.* at 246. The theory further posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Because material misrepresentations presumably distort the market price, "an investor's reliance on any public, material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Ibid.*

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

Even if the plaintiff establishes these threshold facts, the presumption of reliance remains "subject to rebuttal." *Basic*, 485 U.S. at 245. A defendant may rebut the presumption of reliance in multiple ways. It may "rebu[t] proof of the elements giving rise to the presumption"—for example, by showing that the statements were not material or not public, or that the market was not efficient. *Id.* at 248. Or the defendant may "show that the misrepresentation in fact did not lead to a distortion of price." *Ibid.* The Court summarized the permissible rebuttal proof in the broadest possible language: "*Any showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff" will "rebut the presumption of reliance." *Ibid.* (emphasis added). Thus, where the record shows that "the market price [was] not * * * affected by [the] mis-

representations," the presumption is rebutted—the plaintiff class *cannot* have relied on misrepresentations by relying on a distorted market price where the market price was not affected. *Ibid.*

2. Under the court of appeals' holding, by contrast, the fraud-on-the-market presumption provides a free pass to class certification for any plaintiff suing a company whose stock trades in an efficient market. That approach rests on a misreading of *Basic* and this Court's recent explication of the presumption of reliance in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011).

The *Basic* Court created the presumption of reliance for the express purpose of making class certification *possible* in Rule 10b-5 cases. But it did not make certification *automatic*, nor did it judicially repeal Rule 23(b)(3)'s predominance requirement. The Court simply held that common issues of reliance predominate if the class presumptively relied on misrepresentations by relying on a market price that has been distorted by those misrepresentations. To that end, the Court required assurances that the market price was in fact affected by the alleged misrepresentations. *Basic*, 485 U.S. at 248. That makes sense, for the entire class cannot claim to have relied on the misrepresentation by relying on the market price if "the market price [was] not * * * affected by [the] misrepresentation." *Ibid.* Without such evidence, "the causal connection" between the misrepresentation and the plaintiff's reliance "[w]ould be broken" because "the basis for finding that the fraud had been transmitted through market price would be gone." *Ibid.*

The focus on the misrepresentation's effect on market price underlies every aspect of *Basic.* To trigger the rebuttable presumption in the first instance, a plaintiff must prove certain "threshold facts," each of which is designed to ensure that the alleged misrepresentations ac-

tually affected the market price. The requirement of public misstatements ensures that the statement reached the market in the first place. The requirement of an efficient market ensures that the market price of a given stock typically incorporates available information in a timely fashion. And of particular salience here, the materiality requirement ensures that the misrepresentation is sufficiently important and relevant to affect the market price. If a plaintiff cannot make any one of these threshold showings, there is no basis for presuming that the entire class relied on the misrepresentations by relying on the market price.

Likewise, the defendant may "rebut the presumption of reliance" with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff." *Basic*, 485 U.S. at 248. As noted, rebuttal evidence may include direct proof that the statements were immaterial or proof that they did not distort the market price (perhaps because they were immaterial or because the market was inefficient with respect to the particular misrepresentations). Evidence pertaining to materiality rests at the very heart of the presumption of reliance.

3. The court of appeals asserted that this Court did not require proof of materiality in *Basic*, claiming instead that the Court merely observed in a footnote the lower court's imposition of a materiality requirement. Pet. App. 10a-11a. That is not so. To be sure, the Court first recounted the court of appeals' holding that a plaintiff seeking to use the presumption of reliance must show, *inter alia*, that the defendant's "misrepresentations were material" and that those misrepresentations "would induce a reasonable, relying investor to misjudge the value of the shares." *Basic*, 485 U.S. at 248 n.27. But the Court then added: "Given today's discussion regarding

the definition of materiality as to preliminary merger discussions," those "[two] elements * * * may collapse into one." *Ibid*. In so doing, the Court plainly signaled its endorsement of the requirement that a plaintiff establish materiality (as defined in *Basic*) to trigger the presumption of reliance.

Throughout its opinion, moreover, the Court repeatedly emphasized that the presumption of reliance applies to "material" misstatements. *E.g., Basic*, 485 U.S. at 241, 244, 245, 246, 247, 248; see also *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005) (emphasis added) (referring to the "nonconclusiv[e] presum[ption] that the price of a publicly traded share reflects a *material* misrepresentation and that plaintiffs have relied upon that misrepresentation"). And for good reason: materiality is a logical prerequisite to establishing the presumption of classwide reliance. Without a material misstatement that moves the market, there is no basis for presuming that reliance on the integrity of the market price equals reliance on the alleged misrepresentation.

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

As this Court held in *Basic* and reaffirmed just last Term, the "materiality requirement is satisfied when there is a substantial likelihood that the disclosure * * * would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc.* v. *Siracusano* 131 S. Ct. 1309, 1318 (2011) (quoting *Basic*, 485 U.S. at

231-232). A statement that does not alter the total mix of information available will not affect the company's stock price in an efficient market. As then-Judge Alito wrote for the Third Circuit, "[i]n the context of an 'efficient' market, the concept of materiality translates into information that alters the price of the firm's stock." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997). Accord *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) ("if a company's disclosure of information has no effect on stock prices, it follows that the information disclosed * * * was immaterial as a matter of law") (quotation omitted).

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

> if petitioners could show that the "market makers" were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone. *Basic*, 485 U.S. at 248.

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

5. The Court's decision last Term in *Erica P. John Fund* held that a plaintiff need not prove "loss causation" in order to trigger the presumption of reliance and declined to "address any other question about *Basic,* its presumption, or how and when it may be rebutted." 131 S. Ct. at 2187. This case presents the opportunity to ad-

dress the issues that the Court in *Erica P. John Fund* found unnecessary to reach. Those issues continue to divide the circuits and are presented cleanly here.

While *Erica P. John Fund* did not answer the question presented here, its powerful reaffirmation of *Basic*'s price-centered rationale strongly suggests that the court of appeals was wrong to certify a class based on immaterial statements. The Court declared that "*Basic*'s fundamental premise" is "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." (emphasis added). *Erica P. John Fund*, 131 S. Ct. at 2186. Time and again, the Court emphasized that the fraud-on-the-market presumption is inapplicable without evidence that the alleged misrepresentations distorted the market price. *Ibid.* ("Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if* that 'information is reflected in the market price' of the stock at the time of the transaction.") (emphasis added); *ibid.* (the presumption applies when "the investor purchased the stock *at a distorted price*, and *thereby* presumptively relied on the misrepresentation reflected in that price") (emphasis added). Indeed, the Court directly contrasted *Basic*'s requirement that "a misrepresentation * * * affected the integrity of the market price" with its rejection of the Fifth Circuit's requirement that the misrepresentation "also caused a subsequent economic loss." *Ibid.*

The opinion in *Erica P. John Fund* also reaffirms that "the presumption was just that, and could be rebutted by appropriate evidence." 131 S. Ct. at 2185 (citing *Basic*, 485 U.S. at 248). And it cited *Basic*'s recognition that absent a plaintiff's ability to sustain the presumption of reliance, a class cannot be certified because individualized issues of reliance will predominate. *Ibid.*

In refusing to consider whether the alleged misrepresentations were immaterial, the court of appeals certified a class where *Basic*'s "fundamental premise" of price distortion was missing. Likewise, in refusing to consider rebuttal evidence, the court ignored *Erica P. John Fund*'s reminder that *Basic* created a *rebuttable* presumption, without which classes may not be certified. A rebuttable presumption created for the purpose of aiding class certification must necessarily be rebuttable at the class-certification stage. Otherwise, the presumption would be effectively irrebuttable and classes would be routinely certified in error. Cf. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) ("the word 'rebuttable' means that the presumption is not conclusive"). A defendant's rebuttal of the presumption defeats class certification because individual issues of reliance predominate.

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

The court of appeals held that respondent was not required to prove materiality in order to trigger the presumption of reliance because materiality is a classwide, merits element of a Rule 10b-5 claim. Pet. App. 8a-10a. That reasoning fatally conflicts with this Court's recent decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011).

1. For purposes of this case, *Wal-Mart* establishes two fundamental principles. First, to certify a class, a plaintiff "must affirmatively demonstrate [its] compliance" with Rule 23; it must "prove" that it "*in fact*" satisfies all of the Rule's requirements. *Wal-Mart*, 131 S. Ct. at 2551. Second, in determining whether the plaintiff has carried its burden to satisfy Rule 23, the court must often consider issues that "overlap with the merits of the plaintiff's underlying claim." *Id.* at 2551-2552. Consideration

of the merits is *verboten* only when it is unrelated to any of the Rule 23 requirements for class certification. *Id.* at 2552 n.6.

The Court in *Wal-Mart* applied these teachings to fraud-on-the-market cases, which it termed "perhaps the most common example of considering a merits question at the Rule 23 stage." 131 S. Ct. at 2552 n.6. The Court explained that in a fraud-on-the-market case, the plaintiff may seek to satisfy Rule 23(b)(3)'s predominance requirement via the presumption of reliance, but only "if the plaintiffs can establish the applicability" of the presumption. *Ibid.* The Court noted that such plaintiffs will have to show that their shares were traded on an efficient market, even though "they will surely have to prove [market efficiency] again at trial to make out their case on the merits." *Ibid.*

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

The necessity of proving classwide, merits-related facts inheres in a plaintiff's choice to proceed under the presumption of reliance. A plaintiff seeking to use the presumption must necessarily make a number of classwide showings to establish that a classwide presumption makes sense: the statements must be public, material,

and received by a generally efficient market. These are all common issues that plaintiffs will have to prove again at trial in order to establish the merits element of reliance. Of course, at the class-certification stage, the district court is not considering these issues for the sake of determining the substantive merits of plaintiffs' claims, but only to determine whether they may proceed as a class.[3] Materiality, like market efficiency, presents precisely the "overlap" between merits and Rule 23 issues that *Wal-Mart* requires district courts to embrace. And as in *Wal-Mart*, the existence or not of a classwide, merits-related prerequisite to class certification cannot itself be the "glue" that binds together the class. 131 S. Ct. at 2551-2552 (rejecting certification where plaintiffs failed to show a corporate-level policy of discrimination).

In any event, a Rule 10b-5 plaintiff generally has two options for pursuing class certification. He may seek to prove actual reliance on the alleged misrepresentations and show that such actual reliance was common to class members. Or he may attempt to use the presumption of classwide reliance recognized by this Court. The latter option, while more readily achieved than the first, requires proof of merits-related elements to ensure that the

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[3] Proof of materiality for purposes of proving the substantive merits of a 10b-5 claim is properly preserved for summary judgment or trial. And a judge's rulings on materiality for certification purposes do not bind the judge or jury when they later address materiality for merits purposes. *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("[T]he determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge."); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.19 (3d Cir. 2008); accord *Blades* v. *Monsanto Co.*, 400 F.3d 562, 566-567 (8th Cir. 2005).

presumption of classwide reliance is warranted, such as materiality and market efficiency. Just as a plaintiff choosing the first method may not escape Rule 23's stringent requirements, a plaintiff who elects to proceed under the judicially-created option cannot relieve himself of Rule 23's burdens merely because the option he chose requires proof that pertains to both class certification and the merits.

3. Even if a plaintiff initially triggers the presumption of reliance by making the required threshold showing (including materiality), *Wal-Mart*'s "rigorous" Rule 23 inquiry is not at an end. 131 S. Ct. at 2551. Completing the *prima facie* stage of the rebuttable presumption does not mean plaintiffs have "prove[n]" that they "*in fact*" satisfy Rule 23(b)(3)'s predominance requirement. *Ibid.*

In creating the presumption, the Court cited Federal Rule of Evidence 301. *Basic*, 485 U.S. at 245. Rule 301 states that a rebuttable presumption "does not shift the burden of persuasion, which remains on the party who had it originally," Fed. R. Evid. 301, which under Rule 23 is the plaintiff. Thus, once plaintiffs successfully trigger the presumption, defendants merely have "the burden of producing evidence to rebut the presumption." *Ibid.*[4] Under Rule 301, a defendant's rebuttal of the presumption requires that class certification be denied unless a plaintiff can show by a preponderance of the evi-

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[4] Cf. *Tex. Dept. of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252-254 (1981) (although plaintiff may invoke a rebuttable presumption that he suffered from discriminatory acts, the defendant may rebut the presumption by any admissible evidence of non-discriminatory motive, and the "ultimate burden of persuading the trier of fact * * * remains at all times with the plaintiff").

dence that the market price was in fact distorted, and thereby carry its ultimate Rule 23 burden of showing that common issues predominate. As the Second Circuit correctly explained, "[i]f defendants attempt to make a rebuttal * * * the district judge must receive enough evidence * * * to be satisfied that each Rule 23 requirement has been met." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 486 (2d Cir. 2008).

The court of appeals failed to ensure that respondent carried its ultimate burden to satisfy Rule 23(b)(3)'s predominance requirement. Petitioners' evidence that the alleged misrepresentations were not material constituted a rebuttal showing severing the link between the misrepresentation and the price paid. *Basic*, 485 U.S. at 248-249. That should have returned the burden of proof to respondent to establish that common issues of reliance nonetheless predominate, consistent with Rule 301 and *Wal-Mart*. Instead, by refusing to consider petitioners' rebuttal evidence, the court of appeals effectively rendered *Basic*'s presumption conclusive and improperly certified a class without imposing on respondent the ultimate burden of satisfying Rule 23's requirements.

4. Saying that materiality can be considered at summary judgment, Pet. App. 2a-3a, does not alleviate the harm of failing to decide an essential Rule 23 issue at the class-certification stage. A court is bound to deny summary judgment on materiality if there is any genuine issue of fact that the misrepresentations were material. Thus, under the court of appeals' approach, a case could proceed to trial as a class action without plaintiffs having ever had to prove that the Rule 23 prerequisite of materiality was "in fact" satisfied. Of course, given the miniscule number of class actions that go to trial, the defendant likely would be coerced into settlement long before. See Part III, *infra*.

### III. Immediate Review Is Warranted To Ensure That The Presumption Of Reliance Is Not Used To Coerce Settlements Where Class-Action Treatment Is Inappropriate.

The framework set forth in *Basic* imposes carefully calibrated burdens on plaintiffs and permits defendants broad rights of rebuttal, all to ensure that class-action treatment is appropriate. Some lower courts, however, routinely misuse the *Basic* presumption as a virtual rubberstamp for class certification in Rule 10b-5 securities cases involving public companies. In the era before the Second, Third, and Fifth Circuits began putting plaintiffs to the proof required by *Basic*, at least 94% of 10b-5 class-certification motions were granted. Roosevelt, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 407 (2003). Absent this Court's intervention, that reality will continue to persist in the Ninth and Seventh Circuits, where proof of materiality is not required and defendants are barred from introducing rebuttal evidence prior to class certification.

Such a result cannot be reconciled with the notions of "fairness, public policy, * * * probability, [and] judicial economy," on which *Basic* relied in creating its presumption of reliance. 485 U.S. at 245. To defer for merits resolution questions essential to whether the case should have proceeded as a class action in the first instance is wasteful in the extreme. The Court has cautioned against further expansion of the judicially-created 10b-5 cause of action, and those concerns are magnified when lower courts expand the judicially-created presumption of reliance that allows such cases to proceed as class actions. Indeed, "[t]he practical consequences of an expansion" for defendants are stark. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159, 163 (2008). "[E]xtensive discovery and the potential for un-

certainty and disruption in a lawsuit allow plaintiffs with weak" securities fraud "claims to extort settlements from innocent companies." *Ibid.* (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-741 (1975)).

That prospect is grave once a class is certified. Class certification is usually the entire ballgame for defendants. Only 8% of putative class actions even reach a ruling on summary judgment.[5] "A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting). Judge Friendly aptly described such settlements as "blackmail." Friendly, *Federal Jurisdiction: A General View* 120 (1973). Certifying fraud-on-the-market classes without requiring plaintiffs to prove materiality or affording defendants the opportunity to rebut will inevitably lead to the settlement of countless marginal cases—indeed, cases that are not only meritless, but which never should have been certified—because the amounts at stake are simply too enormous to justify the risk of litigation. That, in turn, would give rise to more frivolous lawsuits. See Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002). By requiring proof of materiality and allowing rebuttal prior to class certification, "[t]he law guards against a flood of frivolous or vexatious lawsuits." *Salomon*, 544 F.3d at 484.

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[5] Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2011 Year in Review* 18 (2012) (hereinafter, "Stanford Clearinghouse"), *available at* http://securities.stanford.edu/clearinghouse_research/2011_YIR/Cornerstone_Research_Filings_2011_YIR.pdf.

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

## CONCLUSION

The petition should be granted.

Respectfully submitted.

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