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 THE NEW YORK CITY PENSION FUNDS, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are institutional investors that regularly engage in transactions of publicly traded securities. The New York City Pension Funds consist of the actuarial pension systems of the New York City Employees' Retirement System, the New York City Policy Pension Fund, the New York City Fire Department Pension Fund, the New York City Board of Education Retirement System, and the Teachers' Retirement System of the City of New York. Collectively, the New York City Pension Funds have assets under management exceeding $123 billion and serve more than 700,000 current and retired employees.

Because *amici* have an obligation to protect the integrity of the investments they make on behalf of the thousands of individual clients they serve, the *amici* have a fundamental interest in the procedural requirements for bringing actions against publicly-traded companies and their officers to redress violations of the federal securities laws. Indeed, perhaps no *amici* have a greater stake in the procedural requirements for securities class actions lawsuits than institutional investors because the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995), includes "several requisites … to encourage the selection of institutional investors as lead plaintiffs," in securities class action

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from counsel for both petitioners and respondent granting blanket consent to the filing of *amicus* briefs are on file with the Clerk.

lawsuits. Mary K. Kane, et al., *Federal Practice & Procedure* §1806 (2012); *see also* Charles M. Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions*, 57 DEPAUL L. REV. 471 (2008).

The PSLRA in fact mandates that district courts appoint as lead plaintiff investors the "largest financial interest" in the relief sought by the class. *In re Cavanaugh*, 306 F.3d 702 (9th Cir. 2002); *In re Cendant Corp. Secs. Litig.*, 264 F.3d 201 (3rd Cir. 2001). This requirement was designed to encourage the selection of institutional investors as lead plaintiffs because such entities are "deemed to have a large enough financial interest in the litigation and sufficient professional expertise in directing litigation to ensure that class members' interests are competently and dutifully served." *Federal Practice & Procedure* §1806, at n.22. "Institutional investors, [Congress] believed, are less likely to bring abusive or meritless litigation." *Id.* at n.23. As part of the overall congressional design, therefore, *Amici* have a unique and compelling interest in the procedural requirements for securities class action cases.

Affirmance of the decision below thus would further a primary purpose of the PSLRA by assisting institutional investors, such as *Amici*, in fulfilling their congressionally assigned obligation to prosecute securities fraud actions.

SUMMARY OF ARGUMENT

The sole question for this Court is whether the courts below correctly applied the "predominate" standard of Federal Rule of Civil Procedure 23(b)(3). The answer is emphatically yes.

I.A.1. The text of Rule 23(b)(3) controls this case. Petitioners' brief does little more than regale this Court with a series of debatable, subjective public policy contentions. The Court's lodestar in Federal Rules cases, however, is the plain meaning of the text. *See Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 123 (1989); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

To the extent Petitioners engage the text of Rule 23 at all, see *Pet. Br*. at 19–24, they abandon the Rule's plain language and add a requirement that is simply not there. Although district courts may take a "peek" at the merits in some instances at the class-certification stage, Rule 23 authorizes that quick look only for the narrow purpose of ensuring that common questions susceptible to *common answers* will predominate at trial. FED. R. CIV. P. 23, official cmts. (2003). Petitioners attempt to extrapolate this limited merits review into a requirement that the district court actually adjudicate the common answer to the merits question of "materiality" at the certification stage. The plain text of Rule 23(b)(3), however, speaks in terms of "find[ing]" "common questions" not determining common pro-plaintiff conclusions.

I.A.2. Nor does Petitioners' interpretation of Rule 23 square with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because an essential determinant for class certification is "the capacity of a classwide proceeding to generate common answers." *Id*. at 2552 (internal quotations omitted). Petitioners would add

an additional requirement: that the district court actually adjudicate the common answers in favor of the putative class. *Wal-Mart* rejected that course, emphasizing that the court's duty at the certification stage is to find "a common contention .... [that is] of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. at 2551.

I.B. Last term's decision in *Erica P. John Fund v Halliburton*, 131 S.Ct. 2179 (2011), sets the better course here. In *Halliburton*, a unanimous Court rejected the proposition that in order to certify a class in a fraud-on-the-market suit the district court must adjudicate the merits of "loss causation." *Id*. at 2184. Just as it did in *Halliburton*, the Court should reject Petitioners' invitation to add another certification requirement–proof of the element of materiality–to Rule 23(b)(3), because such a "requirement is not justified by *Basic* or its logic." *Halliburton*, 131 S. Ct. at 2185; *see also Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) ("whether a statement is materially false is a question common to all class members and therefore may be resolved on a class-wide basis after certification.").

II.A. Affirmance will not deprive Petitioners of an opportunity to air their policy arguments. When confronted with non-textual arguments for revising the Federal Rules, this Court consistently re-routes such arguments to the Civil Rules Advisory Committee and the rulemaking process. *See, e.g., Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd*., 484 U.S. 97, 111 (1987). Indeed, the rulemaking process is the more appropriate venue for instituting policy-based

amendments to the Federal Rules. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 609 (2009). That is especially true when, as here, the public policy arguments presume wide-ranging empirical facts, see Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1217 (2012), and achieving policy goals may require amendment to several rules simultaneously. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1120–24 (2002).

II.B. Moreover, Congress has enacted significant reforms to the procedures governing securities fraud class actions while leaving Rule 23 untouched. *See* Mary K. Kane, et al., *Federal Practice & Procedure* §1806 (2012). Congress is the quintessential policy-making body, and in a better position to consider any further reforms that Petitioners hope to propose.

ARGUMENT

I. THIS IS A FEDERAL RULES OF CIVIL PROCEDURE CASE, NOT A SECURITIES LAW PUBLIC POLICY DEBATE.

Fundamentally, this is a case about *procedure*. Petitioners are in the wrong forum for a securities law public policy debate. As the District Court and the Court of Appeals correctly concluded, this case begins and ends with the interpretation of Federal Rule of Civil Procedure 23(b)(3).

Petitioners, however, invite this Court to act as a quasi-Congress and resolve public policy debates regarding the scope and substance of the federal securities laws. Indeed, a substantial portion of Petitioners' opening brief is consumed not with matters of procedure, but policy arguments about the securities laws. *See Pet. Br*. at 13–19 (a "primer" on securities law), *id*. at 24–30 (discovery-based policy concerns), *id*. at 30–34 (economic theories).

The question the Court must resolve here is both narrow and clear: Have the putative class plaintiffs satisfied the requirements of Rule 23(b)(3) in light of this Court's most recent Rule 23 cases such as *Erica P. John Fund v. Halliburton*, 131 S.Ct. 2179 (2011), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)? The answer is emphatically yes.

A. This Case Turns On The Interpretation Of Rule 23(b)(3).

1. *The Text of 23(b)(3) Does Not Support Petitioners' Interpretation Of The Rule.*

Petitioners' many public policy arguments, unmoored as they are from the text of Rule 23, are irrelevant to the class certification question facing the Court. In fact, Petitioners' public policy arguments

have no place in the interpretation of Rule 23(b)(3) in a judicial forum. *See infra* Part II. To the contrary, this Court uniformly holds that Federal Rules questions are to be treated as matters of statutory interpretation, giving "the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, when we find the terms unambiguous, [the] judicial inquiry is complete." *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 123 (1989) (internal citations and quotations omitted).

Moreover, Rule 23 is "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule['s] mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *see also* FED. R. CIV. P. 1 (Federal Rules "*govern* the procedure in the United States district courts in all suits of a civil nature") (emphasis added); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141–52 (2002) (the Court is more constrained in interpreting the Rules than in interpreting statutes because the Rules Enabling Act strictly limits Rule amendment to the formal rulemaking process).

Petitioners' only purported textual argument, *Pet. Br.* at 19–24, rests upon a faulty two-prong construction of Rule 23(b)(3)'s requirement that a district court must "find" "that the questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). Petitioners argue that Rule 23(b)(3) "predominance" requires district courts to make *two* distinct findings, but Petitioners are only half-correct. First, Petitioners rightly contend that

Rule 23(b)(3) requires the court to find the case susceptible to common answers to central issues in the suit. *Pet. Br.* at 21. But Petitioners then fabricate a second directive: that the court also find the plaintiff class will prevail *on the merits* of the questions that "predominate." *Id.* at 22.

The second part of Petitioners' interpretation is nowhere in the text of Rule 23(b)(3). Nowhere does the Rule require that the district court resolve the predominate questions *in plaintiffs' favor* or otherwise adjudicate the merits. In fact, the Rule's very use of the term "common questions," as opposed to any sort of "merits" indicative terminology, emphasizes that Rule 23 addresses preliminary considerations only, leaving the merits for later adjudication.

The Seventh Circuit rejected Petitioners' proposed reading in *Szabo v. Bridgeport Machines*, 249 F3d 672, 677 (7th Cir. 2001)—a case this Court cited with approval in *Wal-Mart*, 131 S.Ct. at 2552—holding that Rule 23 precludes district courts from adopting the analysis that "I'm not going to certify a class unless I think that the plaintiffs will prevail." *See also Bertrand ex rel. Bertrand v. Maram*, 495 F3d 452, 455 (7th Cir. 2007) (similar).

Petitioners attempt to evade Rule 23(b)(3)'s text by arguing that the Court has approved the practice of district courts considering merits issues during the class certification stage in instances where the certification and merits questions overlap. *See Pet. Br.* at 35–37. Further, Petitioners appear to argue that fraud-on-the-market cases are unique because Rule 23(b)(3) predominance is proved by class-wide reliance upon false statements made in a well-functioning market. *Pet. Br.* at 21.

Amici do not dispute that a "peek" at the merits may be appropriate in some cases, but Petitioners go off the rails when they ignore the strict limitations of that doctrine. In reality, Petitioners do not want merely a "preview" of the movie; they want the district court to actually watch the movie itself. That approach improperly transforms a legitimate "peek" to ensure that common questions predominate into a decision *on the merits* at the class certification stage.[2]

The Official Comments to the 2003 Rule 23 revisions emphasize the limited purpose of a "peek":

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information *required to identify the nature of the issues that actually will be presented at trial*. In this sense it is appropriate to conduct controlled discovery into the "merits," *limited to those aspects relevant to making the certification decision on an informed basis*. . . . A critical need is to determine how the case will be tried. An increasing number of courts require a party request-

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[2] It is clear that the 1966 revisions that produced, by and large, the current version of Rule 23(b)(3) envisioned cases precisely such as this one as archetypal class actions:

> The court is required to find, as a condition of holding that a class action may be maintained under this subdivision [(b)(3)], that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, *a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action*, and it may remain so despite the need, *if liability is found*, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

FED. R. CIV. P. 23, Official cmts. (1966) (emphasis added). Here, just as the Committee comment envisioned, the plaintiffs' allegation is that Petitioners made the *very same* fraudulent misrepresentations to *all* members of the class.

> ing class certification to present a "trial plan" that describes the issues likely to be presented at trial and *tests whether they are susceptible of class-wide proof*.

FED. R. CIV. P. 23, official cmts. (2003) (emphasis added). Indeed, the Advisory Committee made clear that any "peek" at the merits is legitimate only if such a review will assist the district court in analyzing the requirements of Rule 23 itself.

The Committee did not sanction (much less require) a merits resolution of predominate questions at certification. Rather, the Committee contemplated a very truncated merits review, and even then only for a limited purpose: to ensure that predominant issues may be resolved with class-wide proof. Any other approach contravenes Rule 23's text, which simply mandates that the district court "find" that common questions "predominate" among the putative class – not that the questions will be resolved in favor of either side on the merits.

2. *Petitioners' Interpretation Runs Afoul Of The "Common Answers" Principle Of* Wal-Mart Stores, Inc. v. Dukes.

Petitioners' textually unmoored suggestion that the district court must determine "materiality" ignores the lesson of *Wal-Mart Stores, Inc. v. Dukes*: what matters in the certification process is whether the suit involves class-wide *common answers*.[3] Petitioners' approach, in contrast, seeks to add another requirement—that the common answers must favor the putative class, a position that goes well beyond *Wal-Mart*'s holding.

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[3] *Amici* agree with Petitioners that *Wal-Mart*'s discussion of Rule 23(a)'s "common contention" language is germane to the Rule 23(b)(3) analysis of "predominate," because an issue must be common before it can predominate. *See Pet. Br.* at 36 n.6.

The Court in *Wal-Mart* clarified that a putative class cannot raise common questions by the mere assertion that all class members seek redress under the same federal statute, or that they all assert similar injuries. *Wal-Mart* 131 S.Ct. at 2551. Rather, the putative class must show that "claims ... depend upon a common contention," a more contextual assertion than merely collective reliance upon the same federal statute for a cause of action. *Id*. Moreover, the common contention must be susceptible of a common resolution:

> What matters to class certification is not the raising of common questions even in droves but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (internal quotations omitted)).

Thus, Rule 23 requires "a common contention...[that is] of such a nature that it is capable of classwide resolution—which means that determination of its truth *or falsity* will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S.Ct. at 2551 (emphasis added). To certify a class, the district court must affirmatively "*find*," not merely accept as pleaded, that resolution of a central issue is susceptible to a *common answer*. *Id*. at 2552. In this regard, *amici* agree with Petitioners that district courts must rigorously review certification motions to ensure conformity with the Rule 23 "common contention" and "predominate" requirements, and "find" that central issues are amenable to resolution by common answer. *See Pet. Br*. at 19–21.

What Petitioners ignore, however, is that this Court specifically excluded the ultimate determination of common answers from the certification analysis. At the certification stage, a district court is only to "find" that a common answer will exist, not that such an answer will be favorable to one side or the other: a district court should not determine the "truth or falsity" of predominate questions at the certification stage. *Wal-Mart* 131 S.Ct. at 2551. *See also id*. at 2551 n. 6; *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 160 (1982) (district court must conduct a "rigorous analysis" of Rule 23 factors at the certification stage, but only to ensure Rule 23 requirements are met); *Coopers & Lybrand*, 437 U.S. at 469 & n.12 (even if Rule 23 determinations relate to merits questions, district courts are not authorized to resolve matters beyond the scope of Rule 23 at the certification stage).[4]

Petitioners are wrong to suggest that *Wal-Mart* goes further and requires district courts to make a

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[4] The courts of appeals similarly have approved of a limited merits review at certification, but only to determine "whether those elements will be subject to class-wide proof." *Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1358 (11th Cir. 2009). S*ee also Schleicher*, 618 F.3d at 685 ("Although we concluded in *Szabo v. Bridgeport Machines, Inc*., 249 F.3d 672 (7th Cir. 2001), that a court may take a peek at the merits before certifying a class, *Szabo* insisted that this peek be limited to those aspects of the merits that affect the decisions essential under Rule 23."); *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 318 (3d Cir. 2008) ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action."); *In re Initial Public Offering Sec. Litig*., 471 F.3d 24, 38–41 (2d Cir. 2006) (a district court may consider merits issues, but only insofar as they speak directly to a Rule 23 requirement).

merits determination in the putative class's favor. Rather, Petitioners' defense that the statements were immaterial—an argument that if successful would impact all members of the putative class uniformly—demonstrates that the "materiality" answer will be common to all, regardless of who wins, and that is all Rule 23(b)(3) requires in order to establish predominance. 131 S.Ct. at 2551.[5]

B. This Court's Decision In *Erica P. John Fund v. Halliburton Co.* Is A Roadmap For Affirmance.

1. This case is on a par with *Erica P. John Fund v. Halliburton*, 131 S.Ct. 2179 (2011). As in that case, "the sole dispute here is whether [plaintiff] satisfied the prerequisites of Rule 23(b)(3)." *Id.* at 2184. Thus, "[i]n order to certify a class under that Rule, a court must find" that questions of law or fact predominate as to the members of the class. *Id.* Further, deter-

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[5] The Rule 23(b)(3) predominance standard might be compared to the hypothetical of a birdwatcher who spots a flock of birds but forgot his Peterson's field guide at home. The amateur ornithologist observes that the birds are small in size, orange breasted, black beaked, and possess white striping on their wings. Even if unable to be sure of their species, our birdwatcher could readily "certify" or "find" that the birds are all of a common flock, and thus his ultimate identification of the birds is susceptible of a uniform answer in "one stroke," once he returns home and can review definitive sources.

In this case, however, Petitioners would require a district judge to make a positive determination of merits issues while still "in the field" and without essential evaluative tools. That is not the way that Rule 23 directs a district judge to proceed. Like the ornithologist, a district judge simply needs to "find" that common issues "predominate" and will be susceptible of "common answers." Ultimately, Petitioners' proposed interpretation of Rule 23(b)(3) does not fly (unlike the unidentified birds), either as a textual matter or as an application of the "common answers" principle of *Wal-Mart*.

mining whether common questions (and thus common *answers* under *Wal-Mart*) "predominate," "begins, of course, with the elements of the underlying cause of action." *Id.* at 2184.[6]

Halliburton recognized that "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." 131 S.Ct. at 2184. In *Halliburton*, however, as in this case, the defendants argued that the class also had to prove an additional element of a securities fraud claim—there it was "loss causation"—at the certification stage. *Id.* The Court rejected that claim, just as it should reject the Petitioners' claim here that "materiality"—the first element of a securities fraud claim—must be *proved* at certification.

In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the Court held that class plaintiffs could invoke a "fraud-on-the-market" presumption of reliance, if certain conditions are met. *Basic* did not require plaintiffs to prove materiality as a prerequisite for class certification (in fact the Court affirmed the district court's order certifying the class there while remanding the summary judgment decision to consider the materiality question). But Petitioners here seek to add proof of materiality as a prerequisite to class certification, contrary to *Basic*. *Cf. Halliburton*, 131 S.Ct. at 2185 ("the Court of Appeals" held that "EPJ Fund also had

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[6] The "elements of a private securities fraud claim based on violations of §10(b) and Rule 10b-5 are: (1) a material misrepresentation … by the defendant: (2) scienter; (3) a connection between the misrepresentation … and the purchase or sale of a security; (4) reliance upon the misrepresentation …; (5) economic loss; and (6) loss causation." 131 S.Ct. at 2184 (citing *Matrixx Initiatives*, 131 S.Ct. at 1317 (quoting *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008))).

to establish loss causation at the certification stage to trigger" the *Basic* presumption).

Just, as it did in *Halliburton*, however, the Court should reject that invitation because such a "requirement is not justified by *Basic* or its logic." *Id.* Materiality, like loss causation, "addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Id.* at 2186; *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 664 (5th Cir. 2004) ("The fraud-on-the-market presumption addresses reliance, not materiality, and the two elements are fundamentally different.")

Indeed, here, Petitioners already tested the sufficiency of plaintiffs' allegation of materiality and lost, when the District Court denied Petitioners' Rule 12(b)(6) motion. To permit defendants who have lost on 12(b)(6) grounds to compel the plaintiffs *to prove* "materiality" at the class certification stage (as opposed to testing that at summary judgment) is contrary to the overall scheme of the Federal Rules, as *Halliburton* recognized. Moreover, the PSLRA imposes heightened pleading standards on securities fraud actions, and those "[h]eightened pleading standards in securities fraud actions … contribute to a 39.1% dismissal rate at [the Rule 12(b)(6)] litigation phase." Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic* Ex Post *Regulation*, 43 GA. L. REV. 63, 79 (2008).

Thus, as in *Halliburton*, there is no justification for construing Rule 23(b)(3) to impose a trial-like "proof" requirement with respect to inquiries that do not pertain to the Rule 23 analysis. Indeed, like "loss causation," "materiality" "has no logical connection to the facts necessary to establish the efficient market

predicate to the fraud-on-the market theory." 131 S.Ct. at 2186. Thus, "a complaint must support allegations of falsehood and *scienter* in the way required by the PSLRA …, but proof can await motions for summary judgment and trial." *Schleicher*, 618 F.3d at 687–88.

2. This Court recently recognized that "[p]erhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud" because "each of the individual investors would have to prove reliance on the alleged misrepresentation." *Wal-Mart,* 131 S.Ct. at 2552 n.6. But, the Court expressly noted that "the problem dissipates if the plaintiffs can establish the applicability of the so-called 'fraud on the market' presumption …." *Id.* And nothing in *Wal-Mart* indicates that other elements of a securities fraud claim, *e.g.*, materiality, *scienter*, or economic loss, should be imported into the fraud on the market presumption analysis.

Just as in *Halliburton*, Rule 23(b)(3)'s requirement that a court "find" that common questions predominate does not bear the load that Petitioners seek to impress upon it here. Rather, "whether statements were false, or whether the effects were large enough to be called material, are questions on the merits." *Schleicher*, 618 F.3d at 685. Importantly in light of the Court's focus in *Wal-Mart* on "common answers," it is decisive that "[f]alsehood and materiality affect investors alike…." *Id.* at 685.

Thus, the Federal Rules certainly contemplate that it "is possible to certify a class under Rule 23(b)(3) even though all statements turn out to have only trivial effects on stock prices. Certification is appropriate, but the class will lose on the merits." *Schlei-*

cher, 618 F.3d at 685; *see also id.* ("Under the current rule [23(b)(3),] certification is largely independent of the merits … and a certified class can go down in flames on the merits"); *id.* at 686 ("Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win."); *id.* at 687 ("The chance, even the certainty, that a class will lose on the merits does not prevent its certification."). Indeed, "whether a statement is materially false is a question common to all class members and therefore may be resolved on a class-wide basis after certification." *Schleicher*, 618 F.3d at 687.

Ultimately, the determination whether any misrepresentations were material is a question *on the merits* of a plaintiff's claim, a determination inappropriate for final resolution when a district court is applying Rule 23(b)(3). As it did in *Halliburton*, the Court should reject Petitioners' invitation to import additional elements of a securities fraud claim into the Rule 23(b)(3) analysis.

II. PETITIONERS' DISAGREEMENTS WITH CURRENT LAW ARE BETTER DIRECTED ELSEWHERE.

This Court is not the appropriate forum to weigh Petitioners' purported concerns about securities class actions generally, nor the multitude of policies that may bear on the substance of federal securities laws. First, under the auspices of this Court, there is an elaborate rulemaking process available for amending the Rules of Civil Procedure, a process in which Congress plays a role. Second, Congress itself may act directly to alter the law governing securities fraud and class action litigation, just as it has done on several occasions in recent years. Thus, Petitioners are

hardly without a forum in which to press their public policy arguments about federal securities law.

In light of these avenues, it would not be "appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits." *Schleicher*, 618 F.3d at 686.

A. The Federal Rulemaking Process Is The Better Venue For Evaluating Petitioners' Public Policy Concerns

1. Petitioners frame their argument primarily as one of substantive securities-law policy, with only a scant five pages of their brief speaking to Rule 23(b)(3) *per se*. *See Pet. Br.* at 19–24. Petitioners seem to believe that only when policy is in doubt should one resort to the text of Rule 23(b)(3).[7] Given the binding nature of Rule 23(b)(3)'s text, however, Petitioners' pure policy arguments untethered to the text of the Rule necessarily fail.

In *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987), the Court faced a similar argument about a Federal Rule of Civil Procedure, where the question was whether a defendant was subject to service of process when Rule 4 did not authorize service in the circumstances presented. *Id.* at 101–02. The Court considered whether it could nevertheless judicially craft a service rule because such a rule would further important public policy goals. *Id.* at 108. The Court emphatically "decline[d] to embark on that adventure," even while also acknowl-

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[7] *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 543 (1947) ("to give point to the quip that only when legislative history is doubtful do you go to the statute").

edging that a new service rule could "well serve the ends of the CEA and other federal statutes." *Id.* at 111. In so holding, the Court put policy arguments aside: "It is not for the federal courts ... to create such a rule, ... That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress." *Id. Cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978) (rejecting the policy argument "that an interlocutory order may induce a party to abandon his claim before final judgment," as an insufficient reason to abandon a plain-text approach to the interpretation of "'final decision' within the meaning of § 1291.").

2. Instead, as this Court has often noted, the rulemaking process is the appropriate setting for considering policy-based amendments to the Federal Rules of Civil Procedure. This case is certainly an instance in which change, if any is needed, is better achieved by the rules process.

As the Court has made clear, "the rulemaking process has important virtues. It draws on the collective experience of bench and bar, see 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 609 (2009). In addition, the rulemaking process has numerous institutional advantages. "[T]he Advisory Committee on Civil Rules can collect and process information, assess global effects, and compare different . . . options, [in addition to] invit[ing] public participation by holding hearings and soliciting written input." Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 884 (2010).

Moreover, policy change via rulemaking may better comport with congressional intent than does Federal Rules policy change by judicial decision. *See Swint v. Chambers Cnty Comm'n*, 514 U.S. 35, 48 (1995) (recognizing a congressional preference for rulemaking in the context of the finality rule for appellate jurisdiction); Struve, 150 U. PA. L. REV. at 1141–52 (arguing that the terms of delegated rulemaking authority in the Rules Enabling Act limit Rule amendment power to the rulemaking process). Furthermore, Congress itself plays an important role in the rulemaking process. *See* 28 U.S.C. § 2074(a) (2006). Finally, the Court is not alone in recognizing the virtues of rulemaking over adjudication in resolving policy matters—the vast weight of scholarly authority endorses the Court's view as well.[8]

Here, Petitioners are making broad empirical claims about securities law, discovery, settlements, and economic theory. *See Pet. Br.* at 13–19 (a "primer" on securities law), *id.* at 24–30 (discovery-based policy concerns), *id.* at 30–34 (economic theories).

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[8] *See, e.g.,* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010) (arguing that Federal Civil Rules issues that have ramifications across multiple rules are better resolved by the Civil Rules Advisory Committee); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 889 (1999) ("[A] centralized, court-based, and committee-centered process is well suited for making general constitutive rules that define the basic framework of a civil procedure system and more detailed rules that control particularly costly forms of strategic behavior."); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 282 (arguing that the technical nature of the promulgation of judicial rules cannot sustain interest through typical political channels and should be left to the formal advisory committee process).

Whether Petitioners' policy arguments are sound largely depends upon matters such as statistical rates of settlement in class-action suits after certification and similar determinations. "Notice-and-comment rulemaking ... is well suited to accurately determining legislative facts" of this type, especially as compared to the institutional capacity of appellate litigation of individual cases. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1217 (2012). Additionally, Petitioners' interpretation of Rule 23 could well interact with pleading standards under the Rules and the PSLRA, and the summary judgment standard, to name just a few examples of interrelatedness of the Rules. The interconnected nature of the rules, therefore, strongly favors a rulemaking approach to reform, if reform is to be had. *See* Struve, 150 U. PA. L. REV. at 1120–24.

The Court should sharply discount, if not disregard altogether, Petitioners' many naked policy arguments, arguments that are better presented to the Civil Rules Advisory Committee or to Congress directly. *See Omni Capital,* 484 U.S. at 111; Mulligan & Staszewski, 59 UCLA L. REV. at 1215–34.

3. Another flaw in Petitioners' policy-based justification for amending Rule 23(b)(3) is that their arguments are specific to fraud-on-the-market cases. Rule 23, however, is a general *procedural* rule, not a rule that varies based on the whether the lawsuit is a securities fraud action, as here, an employment discrimination case (*Wal-Mart*), an antitrust action (*Comcast Corp. v. Behrend*, No. 11-864), or involves any other particular substantive area of the law.

Instead, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *see Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (rejecting the notion that *Twombly*'s interpretation of Rule 8(a)(2) applies only to complex anti-trust cases: "Rule [8(a)(2)] in turn governs the pleading standard in all civil actions .... Our decision in *Twombly* expounded the pleading standard for all civil actions.")

Ultimately, Petitioners fail to present arguments that speak to class certification generally. Instead, Petitioners start from the faulty premise that this Court should and will adopt different readings of Rule 23(b)(3) for cases involving different subject matters. Such a result would be irreconcilable with the well-established principle that the Rules are trans-substantive. The Court must reject Petitioners' invitation to go down that garden path in the guise of interpreting the text of Rule 23.

B. Congress Already Has Taken An Active Role In Reforming Securities Fraud And Class Action Law.

Congress has been receptive to public policy arguments about securities and class action law. For example, in 1995, Congress enacted the PSLRA, which imposed several significant new requirements on securities fraud actions, particularly class actions. In 1998, Congress enacted the Securities Litigation Uniform Standards Act, Pub. L. No. 105-353, 112 Stat. 3227, to require that securities fraud class actions of any significant size be brought and resolved in federal rather than state court, a forum in which federal rules would control the litigation. Finally, in 2005

Congress enacted the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005). See *Std. Fire Ins. Co. v. Knowles*, No. 11-1450, *cert. granted* (Aug. 31, 2012) (addressing whether a plaintiff may evade the CAFA by stipulating that damages are less than the threshold for federal jurisdiction).

Thus, "Congress has been concerned about the potential for class certification to create pressure for settlement…." *Schleicher*, 618 F.3d at 686. In addressing that issue, "Congress chose to deal with settlement pressure ... [by] requir[ing] more at the pleading stage and ... [by] ensur[ing] that litigation occurs in federal court under these special standards, rather than state court under looser ones." *Id*.

Indeed, in 1998, "Congress enacted legislation that bars class-action lawsuits in state courts involving securities traded on national markets." *Federal Practice & Procedure* §1806, at n.2. Importantly, this Court then "held that the 1998 Act applies broadly to pre-empt state-law class-action claims brought by holders of securities, as well as by purchasers and sellers of securities, alleging fraudulent misrepresentation of stock prices." *Id*. at n.2.1. (citing *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006)). "Thus, most all national securities class actions now must be filed in federal courts where they are subject to the 1995 Reform Act." *Id*.

In 1995, the PSLRA imposed significant new requirements for securities fraud class actions in particular. Among them were the following: (1) a provision that each plaintiff seeking to serve as a representative party must file a sworn certified statement with the complaint that includes a number of assurances and disclosures; (2) new procedures and criteria for appointing a lead plaintiff for the class, with a

strong preference for institutional investors to serve in that role; and (3) significant provisions regarding settlement agreements, including limitations on sealed agreements and attorney's fees, and what must be included in settlement notices. *Federal Practice & Procedure* §1806.

Ultimately, Petitioners' real complaint is that, in their view, Congress has not gone far enough in restricting securities fraud class actions. But the fact that Congress has addressed public policy arguments about this area of law in recent years is yet another reason this Court should decline Petitioners' invitation to take up the public policy debate in the guise of interpreting Rule 23, the text of which clearly bars Petitioners' proposed interpretation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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