No. 11-1085

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

REPLY BRIEF FOR PETITIONERS

NOAH A. LEVINE
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

STEVEN O. KRAMER
JOHN M. LANDRY
JONATHAN D. MOSS
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street
Forty-Third Floor
Los Angeles, CA 90071
(213) 620-1780

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
ANDREW N. VOLLMER
WEILI J. SHAW
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE

Supreme Court of the United States

No. 11-1085

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

REPLY BRIEF FOR PETITIONERS

Respondent's opposition rests largely on denying an acknowledged, deep, mature, and important circuit split. The circuits in conflict account for approximately three-fourths of all securities fraud class-action filings, and their conflicting holdings require district courts to apply different class-certification standards depending on where a case is filed. The conflict is squarely presented in this case; it will not be resolved by recent decisions of this Court; and since none of the circuits is likely to grant a further petition under Rule 23(f) on the questions presented here, the chance to resolve the conflict may not recur. The Court should grant the petition and reverse.

I. RESPONDENT MISCHARACTERIZES THE PETITION

Many of respondent's arguments rest on the assertion that Amgen seeks review of a "bright-line rule requiring proof of 'price impact.'" Opp. i-ii. That assertion is incorrect. The first question presented is whether "the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory." Pet. i. The question does not refer to "price impact," and the petition does not argue that proof of price impact is the only way to show materiality. The second question presented is whether a district court, before certifying a class, must allow a defendant to rebut the applicability of the fraud-on-the-market theory in the manner described by this Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 (1988). Here, the lower courts barred Amgen from rebutting the theory with evidence showing that, because the market was "privy to the truth," the alleged misrepresentations were not material. *Id.*

Amgen's position was and is that a plaintiff must prove materiality, in any manner, and that a defendant's showing that the market was already "privy to the truth" would defeat materiality. Amgen's position flows directly from *Basic*, which recognized that if a defendant can show that the market is "privy to the truth," then "the basis for finding that the fraud had been transmitted through market price would be gone." 485 U.S. at 248. The point is that by disproving materiality a defendant indirectly shows lack of price impact and defeats the fraud-on-the-market theory, but neither *Basic* nor the petition suggest that "quantitative evidence" of price impact (Opp. i) is required.

II. THE NINTH CIRCUIT'S DECISION DEEPENS A MATURE CIRCUIT SPLIT

A. The Circuit Split Is Real And Acknowledged By The Courts Of Appeals

The Ninth Circuit understood that it was deepening a serious split between the courts of appeals, acknowledging the split (App. 9a-11a) and explicitly rejecting the holdings of those "circuits that require a plaintiff to prove materiality at the class certification stage." App. 10a. The Seventh Circuit also understood that its decision conflicted with the holdings of other courts of appeals that "materiality [is] a condition to class certification." *Schleicher* v. *Wendt*, 618 F.3d 679, 687 (7th Cir. 2010). Though respondent defends the decision below, it disagrees with the Ninth Circuit's (and Seventh Circuit's) view of the law, contending that this acknowledged split is "illusory." Opp. 12. Respondent bases this statement on two assertions, neither of which is correct: (1) that the Second, Third, and Fifth Circuit's statements on the questions presented are dicta, and (2) that the decisions of those courts relate not to materiality, but only to "price impact." Opp. 18, 20-24.

1. The text of the Second Circuit's decision directly refutes respondent's first assertion: "[W]e *hold* that plaintiffs must show that the statement is material (a prima facie showing will not suffice)." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 486 n.9 (2d Cir. 2008) (emphasis added). The Second Circuit's holding on the point was essential to the court's judgment. *See Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 66-67 (1996) (court's holding includes the "rationale upon which [it] based the result[]"). The holding provided the basis for the court's ruling that the plaintiffs had adequately shown materiality at class certification,

even though they had not sought to prove price impact independently from their proof of the fraud-on-the-market predicates. 544 F.3d at 483-485. The Second Circuit explained: "The 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. There is no doubt that district courts in the Second Circuit now must require plaintiffs to prove materiality at the class-certification stage.

The Second Circuit's ruling on the rebuttal issue—that "the [district] court must permit defendants to present their rebuttal arguments 'before certifying a class'"—was also undisputedly a holding. 544 F.3d at 485 (citation omitted). Indeed, it was the basis for the remand. *See id.* at 486 ("We thus vacate the order certifying the class and remand to allow the district court to permit defendants the opportunity to rebut the *Basic* presumption prior to class certification."). The Second Circuit did not, as respondent alleges (Opp. 22), confine rebuttal to proof of price impact. Instead, the court listed price impact as an example, while also recognizing that defendants could "rebut proof of the elements giving rise to the [fraud-on-the-market] presumption." 544 F.3d at 483. Relying on *Basic*, the Second Circuit stated that rebuttal could occur through "*[a]ny showing* that *severs the link* between the alleged misrepresentation and … the price." *Id.* at 484 (quoting *Basic*, 485 U.S. at 248) (first emphasis added).

2. Respondent's assertions (Opp. 20-22) about the Third Circuit's decision in *In re DVI, Inc. Securities Litigation*, 639 F.3d 623 (3d Cir. 2011), are also contradicted by the opinion's text. The Third Circuit held that "rebuttal of the presumption of reliance falls within the ambit of issues that, if relevant, should be ad-

dressed by district courts at the class certification stage." *Id.* at 638. The court did not limit rebuttal to proof of an absence of price impact. To the contrary, the Third Circuit explicitly identified immateriality as "a distinct basis for rebuttal." *Id.*; *see also id.* at 637 (providing "non-exhaustive list of ways that defendants can rebut the presumption, including by showing … the misrepresentations were immaterial"). To the extent the Third Circuit identified proof of absence of price impact as one basis for rebuttal, the court grounded its conclusion on the explanation that such proof "serve[s] as a rebuttal … *because* it renders the misstatement *immaterial*." *Id.* at 638 (emphases added).

3. Finally, respondent wrongly characterizes (Opp. 18-19) as dictum the Fifth Circuit's requirement of "proof of a material misstatement" as a precondition to certifying a class based on the fraud-on-the-market theory. *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, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011). The Fifth Circuit has consistently included materiality in the list of elements plaintiffs must prove to invoke the fraud-on-the-market theory.[1] The court has also explained that its precedent "*mandates* 'a complete analysis of fraud-on-the-market indicators' at the class certification stage, insisting that district courts 'find' the facts favoring class certification." *Oscar*, 487 F.3d at 268-269 (emphasis added); *see also Unger* v. *Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (same).

---

[1] *See, e.g.*, *Fener* v. *Operating Eng'rs Const. Indus.*, 579 F.3d 401, 406-407 (5th Cir. 2009); *Alaska Elec. Pension Fund* v. *Flowserve Corp.*, 572 F.3d 221, 227-228 (5th Cir. 2009); *Oscar*, 487 F.3d at 264; *Greenberg* v. *Crossroads Sys., Inc.*, 364 F.3d 65 (5th Cir. 2004).

The Fifth Circuit's holding in *Oscar* that it "require[s] … proof of a material misstatement" (487 F.3d at 265) was necessary to the result. Starting with (1) this holding on materiality and (2) the court's recognition that "'materiality translates into information that alters the price of the firm's stock,'" the Fifth Circuit ultimately held in *Oscar* (3) that a plaintiff must "'prove that the defendant's non-disclosure materially affected the market price of security'" through proof of "loss causation." *Id.* at 265 & n.14. This Court's decision in *Erica P. John Fund* abrogated *Oscar*'s holding only on the third point. This Court did not overrule or otherwise call into question the Fifth Circuit's holding on the first point, which is binding on district courts in that circuit. *See* 131 S. Ct. at 2187.[2]

B. The Circuit Split Is Mature And Firm, And Will Not Benefit From (Or Likely Receive) Further "Percolation"

The split involves circuits in which approximately three-fourths of all securities class actions are filed, the issues have been fully considered in circuit court opinions, and there is no sign that any of the courts will *sua sponte* reverse itself. There is accordingly no need for, or likely prospect of, further percolation.

---

[2] The passages respondents quote (Opp. 19) from *Greenberg*, 364 F.3d at 664, and *Nathenson* v. *Zonagen Inc.*, 267 F.3d 400, 415 (5th Cir. 2001), are inapposite, as each merely states the undisputed proposition that the fraud-on-the-market theory is a means of satisfying the reliance element, rather than the materiality element, of a Rule 10b-5 claim. These passages do not concern the distinct proposition, recognized in other parts of both opinions, that materiality is a necessary predicate for invoking the fraud-on-the-market theory. *Greenberg*, 364 F.3d at 661; *Nathenson*, 267 F.3d at 413.

1. Contrary to respondent's argument (Opp. 12-16), this Court's decisions in *Erica P. John Fund* and *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), do not render the split any less mature or offer any reasons to believe that the courts of appeals will reconsider their decisions or resolve the split on their own. *Erica P. John Fund* is explicit that, apart from the loss-causation issue considered there, this Court did not "address any other question about *Basic*, its presumption, or how and when it may be rebutted." 131 S. Ct. at 2187.

Dukes is relevant in that it *raised* the bar for class certification, confirming that district courts must conduct a "rigorous analysis" under Rule 23 and holding that "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551. This Court specifically admonished lower courts that had "mistakenly" read precedent to foreclose inquiry into merits issues at the class-certification stage. *Id.* at 2552 n.6. *Dukes* thus indicates that district courts should conduct a *more* rigorous analysis of the predicates to the fraud-on-the-market theory, regardless of whether that analysis overlaps with merits issues to be addressed at summary judgment or trial. *See generally* Pet. 24-26.

The Ninth Circuit considered *Dukes*, but mistakenly joined the Seventh Circuit in requiring a *less* rigorous analysis of the predicates to the fraud-on-the-market theory at the class-certification stage. Having made its decision with the benefit of both *Dukes* and *Erica P. John Fund*, and having denied Amgen's petition for rehearing *en banc*, the Ninth Circuit has no reason to reconsider and *sua sponte* reverse itself.

Neither *Dukes* nor *Erica P. John Fund* provides any reason to expect the Second, Third, and Fifth Circuits to revisit their holdings. To the contrary, as explained in Amgen's petition (Pet. 21-26), this Court's decisions support the Second and Fifth Circuits, and support the Third Circuit's position regarding rebuttal of the fraud-on-the-market theory. In sum, the courts of appeals are at an impasse that only review by this Court can resolve.[3]

2. It is unlikely that another opportunity will arise for this Court to review the questions presented. Circuits accounting for the substantial majority of securities litigation have resolved the issues, albeit differently, and are unlikely to grant Rule 23(f) discretionary appeals in cases raising the issues here so long as the district courts adhere to circuit precedent. Respondent's only quibble on this point (Opp. 26) is a factual one—namely, that on remand in *Erica P. John Fund* the district court granted class certification and the defendant is seeking leave to appeal under Rule 23(f). The Fifth Circuit has not granted the petition, however, and in any event Amgen's point is not that it is impossible for the questions presented to arise in those circuits but only that the chances are very low, given the circuits' rules governing Rule 23(f) appeals. *See* Pet. 18 & n.7.

---

[3] Respondent's assertion (Opp. 16-17) that *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309 (2011), will cause further review of the questions presented in the lower courts turns on respondent's mischaracterization of Amgen's petition as proposing a bright-line, price-impact rule and, for that reason, has no merit.

III. This Case Presents A Good Vehicle For Review Of The Questions Presented

1. This case cleanly presents both questions on which Amgen seeks review. Amgen argued in the district court and Ninth Circuit that respondent needed to prove materiality for a class to be certified based on the fraud-on-the-market theory and that Amgen should be allowed to rebut any such showing. Both the district court and Ninth Circuit addressed Amgen's contentions by squarely holding, as a matter of law, that respondent did not need to prove materiality and that Amgen was not entitled to rebuttal on the issue. *See* App. 8a-13a (court of appeals); App. 32a-38a, 40a-44a (district court).

Respondent asserts that Amgen "changed course" between the district court and the Ninth Circuit, raising materiality for the first time at the court of appeals. Opp. 8-9. The assertion is just not correct, as even a cursory review of Amgen's briefs and the lower court's decision show. *See* App. 32a-34a, 40a-41a (district court's description of Amgen's arguments); Dkt. 198, Pet. Mem. Opposing Class Cert. 20-23, 25. Indeed, the assertion is refuted by respondent's own description of Amgen's district court position:

> [Amgen] argued that Plaintiff must also prove each of the other facts required to establish the applicability of the presumption, including, among others, the *materiality* and falsity of the alleged misstatements and omissions … , plus loss causation … , and that, in any event, [Amgen] should have an opportunity to rebut the applicability of the presumption with a truth-on-the-market defense against the allegation of materiality.

Resp. C.A. Br. 7-8 (emphasis added). Respondent's contention here (Opp. 7-9) that Amgen opposed class certification only on loss-causation grounds is incorrect.

2. Respondent's only other "vehicle" argument is the observation that "Amgen presented no evidence to support the 'price impact' test" that respondent says Amgen proposes. Opp. 26-29. As explained (*supra* p. 2), however, respondent's characterization of Amgen's position is wrong. This case presents a strong vehicle for review of the questions that Amgen's petition does present and that Amgen did litigate below: whether respondent needed to prove materiality for a class to be certified based on the fraud-on-the-market theory, and whether Amgen should have been allowed to rebut any such showing.

IV. THE NINTH CIRCUIT'S DECISION IS WRONG

Respondent largely ignores whether the Ninth Circuit decision is correct. *See* Opp. 12-32. It is not: the petition explains why the fundamental logic of *Basic* requires that district courts demand proof of the materiality predicate before class certification. *See* Pet. 19-24. The petition also explains why there is no logical basis for the Ninth Circuit's separation of materiality, alone among all the predicates to the fraud-on-the-market theory, for different treatment at the class-certification stage. *See* Pet. 24-28. Respondent has no answer.

Respondent's only defense of the Ninth Circuit is the contention that the court correctly applied *Dukes*. *See* Opp. 12-16. In making this argument, however, respondent again ignores Amgen's several reasons (Pet. 24-26) why *Dukes* proves the opposite. And the argument respondent does make—that *Dukes* purportedly shows that the materiality predicate is irrelevant to class certification—is flawed.

There is no dispute that, like market efficiency, materiality is a predicate to the fraud-on-the-market theory. *See* Pet. 20-21. There is also no dispute that absent the fraud-on-the-market theory, individual issues would predominate in purported class actions for securities fraud because of the need to prove individual reliance. *See* Pet. 2. Respondent's argument (Opp. 14)—like the Ninth Circuit's (App. 8a-9a)—is that inquiry into the materiality predicate nevertheless should be deferred because, if a plaintiff were unable to prove materiality as an element of the claim, then every class member would lose on the merits, leaving no individual issues for litigation. But this argument confuses the question. A Rule 23 determination must be made before and independently of any merits determination. And Rule 23 provides no exception for subjects that, if litigated at class certification, might reveal that the plaintiff's and class's claims lack merit. Indeed, that is the very point of *Dukes*. *See* 131 S. Ct. at 2551-2552.

This principle is especially relevant here, where the reason for the Rule 23 inquiry into materiality is distinct from the reason for the merits inquiry into the same issue. Rule 23 requires courts to examine materiality as a predicate to the fraud-on-the-market theory because only application of that theory allows for classwide proof on the reliance element. That a plaintiff's failure to prove the *materiality predicate* might have ramifications for the case's merits on the *materiality element*—even as to all class members—is irrelevant to whether individualized issues predominate on the *reliance element*.

This Court and the courts of appeals agree that the efficient-market and public-statement predicates must be proven at class certification. The materiality predi-

cate should be treated the same. The Ninth Circuit erred in holding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

STEVEN O. KRAMER
JOHN M. LANDRY
JONATHAN D. MOSS
SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP
333 South Hope Street
Forty-Third Floor
Los Angeles, CA 90071
(213) 620-1780

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
ANDREW N. VOLLMER
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

MAY 2012