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 FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether, under Federal Rule of Civil Procedure 23, proof of materiality is required for class certification in a securities fraud action predicated on the fraud-on-the-market theory, pursuant to § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b).

2. Whether defendants, in a 1934 Act § 10(b) securities fraud action predicated on the fraud-on-the-market theory, must be allowed to present evidence at the class-certification stage rebutting the materiality of the alleged misstatements.

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INTRODUCTION

Congress authorized class actions in Federal Rule of Civil Procedure 23 so that federal courts could efficiently resolve controversies involving large numbers of similarly situated litigants in a single proceeding. Federal securities fraud class actions have long served that function, because fraudulent statements by defendants affect large numbers of investors who trade securities in efficient markets.

Both courts below rightly concluded that proof of materiality is unnecessary to certify a class under Rule 23. The materiality of a defendant's misstatement is a merits question—and indisputably a common one for the entire class. Materiality can have only one class-wide answer because it relates to the misstatement's importance to a reasonable investor. Materiality thus exemplifies the type of question amenable to class-wide resolution under Rule 23.

Proof of materiality also is unnecessary to show that reliance is a common question. The fraud-on-the-market theory recognized in *Basic Inc. v. Levinson*, 485 U.S. 224, 227 (1988), eliminates the individualized state-of-mind of each investor as a barrier to class certification. If the securities at issue were traded in an efficient market (which Amgen concedes in this case), then reliance converges with the objective, common questions of materiality and falsity. But *Basic* does not alter the fact that materiality remains a common question that need not be proved to certify a class. *See Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) (Easterbrook, J.).

Basic held that the presumption of reliance is rebuttable, but rebuttal is appropriate at the class-certification stage only if it would demonstrate intra-class dissimilarities that prevent "common *answers*

apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotations omitted). Rebuttal evidence on materiality does not disprove commonality; it disproves materiality for the entire class. Rebuttal of materiality thus is not appropriate at the class-certification stage under Rule 23.

Amgen's gambit to infect class-certification motions with the common question of materiality would defeat the efficiency for federal courts in resolving securities fraud cases, to the detriment of plaintiffs and defendants alike. Lack of materiality should end the case on the merits, but refusing class certification on that basis would merely splinter a single class action into countless individual cases, because denial of class certification on materiality grounds does not have issue-preclusive effect on the materiality issue on the merits. That inefficient result harms both plaintiffs, who would face unnecessary costs associated with multiplicitous individual lawsuits, and defendants, who rely on class certification to bind all similarly situated plaintiffs and thereby avoid relitigating the same issues repeatedly.

Ultimately, Amgen concedes (at 27) that it is asking this Court to adopt "naked public policy arguments" rather than follow Rule 23. Those policy arguments ignore the fact that Congress has enacted statutory provisions to strike the proper balance between allowing class actions that hold companies and individuals accountable for their false statements and eliminating actions that might be abusive. Amgen's arguments provide no basis for this Court to displace Congress's considered policy judgments.

STATEMENT

A. Statutory And Doctrinal Background

1. Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934 ("1934 Act") in response to widespread abuses in the securities industry. To promote "honest markets," *Basic*, 485 U.S. at 230 (internal quotations omitted), 1934 Act § 10(b) broadly forbids the use of "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b).

Securities and Exchange Commission ("SEC") Rule 10b-5 implements § 10(b) by prohibiting "(a) . . . any device, scheme, or artifice to defraud, (b) . . . any untrue statement of a material fact or . . . omi[ssion of] . . . a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, [and] (c) . . . any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5. A private plaintiff seeking relief for a § 10(b) violation must show "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317-18 (2011).

The reliance element of a federal securities fraud action, also called transaction causation, requires proof of a "'connection between a defendant's misrepresentation and a plaintiff's injury.'" *Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2184 (2011) (quoting *Basic*, 485 U.S. at 243). One way

for plaintiffs to demonstrate reliance is to present evidence that they directly relied on misstatements to buy or sell the securities. In *Basic*, this Court reaffirmed that plaintiffs must prove reliance in a securities fraud action, rejecting the suggestion to do away with reliance as an element of a § 10(b) claim. 485 U.S. at 243. In doing so, however, the *Basic* Court embraced an alternate way for securities fraud plaintiffs to establish reliance in cases involving misrepresentations by companies in well-developed, efficient markets. The Court explained that, in modern securities markets, proof of direct reliance would "place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff." *Id.* at 245. Rather than proving direct, personal reliance, the Court held that, "where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed." *Id.* at 247 (noting that "nearly every court that ha[d] considered the proposition" had come to this conclusion).

2. As Solicitor General Fried explained in the government's *Basic* brief in supporting the fraud-on-the-market presumption: "The fraud on the market theory . . . recogniz[es] the obvious, that market prices generally reflect corporate information and that investors generally rely on the integrity of the market price." Brief for the Securities and Exchange Commission as Amicus Curiae at 27, *Basic*, *supra* (No. 86-279), 1987 WL 881068 ("U.S. *Basic* Br.").[1]

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[1] *See* U.S. *Basic* Br. 18 n.20 ("The importance of accurate and complete issuer disclosure to the integrity of the securities markets cannot be overemphasized. To the extent that investors cannot rely upon the accuracy and completeness of issuer

That premise rests on a view that markets operate efficiently, which Congress accepted when it enacted the federal securities laws and which law-and-economics scholars "widely accepted" in the years leading up to *Basic*. *See Basic*, 485 U.S. at 246 (noting "Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information"); Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 4 n.9 (1982) (noting that "[t]he literature on efficient capital market theory and its applications is massive and growing"); *Schleicher*, 618 F.3d at 685. Because "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices," the reliance of an individual purchaser or seller of securities on such statements can be presumed once it is shown that the statements were made to an efficient market. *Basic*, 485 U.S. at 246 n.24.

The fraud-on-the-market presumption and its underlying economic rationales apply equally to both individual actions and class actions alleging securities fraud. *See*, *e.g.*, *Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005). As Judge Koelsch's opinion in the first court of appeals case to accept the presumption explained, for example, "the standards of proof of [transaction] causation we have set out apply to all fraud on the market cases, individual as well as class actions. No interpretation of Rule 23 is involved." *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975). The government made the same point in

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statements, they will be less likely to invest, thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike.").

its brief in *Basic*, which noted that "the presumption of reliance in a fraud on the market case is grounded on characteristics of the securities markets and investor behavior, as well as on policy objectives, that are equally applicable to individual and class actions." U.S. *Basic* Br. 26 n.32. As such, the fraud-on-the-market theory is not a procedural rule governing the preconditions for a class action, but rather a substantive rule of securities law construing § 10(b). *See Basic*, 485 U.S. at 243-44 ("The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and *our understanding of Rule 10b-5's reliance requirement* must encompass these differences.") (emphasis added; footnote omitted).

3. Whereas *Basic* interpreted 1934 Act § 10(b) and SEC Rule 10b-5, Federal Rule of Civil Procedure 23 governs the certification of class actions, including securities fraud actions. Rule 23(a) requires as a threshold matter that (1) "the class is so numerous that joinder of all members is impracticable"; (2) "there are questions of law or fact common to the class"; (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Petitioners do not contest on appeal that those threshold requirements are met in this case.

If the Rule 23(a) threshold requirements are satisfied, Rule 23(b) permits a class to be certified if (as relevant in this case) "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to

other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The "predominance inquiry" of Rule 23(b)(3) "tests whether proposed classes are sufficiently cohesive to warrant" class treatment. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also* 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4.25, at 156 (4th ed. 2002) (the "predominance test asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit").

What constitutes a "common question" was recently clarified by this Court in *Dukes*. There, this Court explained that "'[w]hat 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.'" 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis by Nagareda; ellipsis in original).[2] Under *Dukes*, to satisfy Rule 23 the proposed class members' "claims must depend upon a common contention" and "[t]hat common contention, moreover, must be 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.*

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[2] Although the question in *Dukes* concerned the Rule 23(a)(2) commonality requirement, the 23(b)(3) requirement that common questions "predominate" draws on the same concept. *Cf. Dukes*, 131 S. Ct. at 2556; *see also Amchem*, 521 U.S. at 609 (Rule 23(a)(2) "subsumed under" Rule 23(b)(3) predominance requirement).

Under Rule 23, "the court must determine by order whether to certify the action as a class action" "[a]t an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). However, an order granting or denying class certification "may be altered or amended" at any time "before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The rule also permits interlocutory appeals from an order granting or denying certification. Fed. R. Civ. P. 23(f).

4. In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA") (codified as amended in various sections of Titles 15 and 18, U.S.C.) in response to concerns that certain "abusive practices committed in private securities litigation" were leading to a situation in which "innocent parties are often forced to pay exorbitant 'settlements.'" Joint Explanatory Statement of the Committee of Conference, 141 Cong. Rec. 34,753 (1995). Congress provided specific mechanisms for curbing such practices, but maintained the private class action, noting that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing." *Id.*

B. Nature Of The Action

Respondent Connecticut Retirement Plans and Trust Funds ("Connecticut")[3] brought this securities fraud class action against petitioners Amgen Inc. and four individuals who were executives at Amgen during the relevant time period (collectively, "Amgen").

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[3] The Connecticut State Treasurer is the principal fiduciary for Connecticut Retirement Plans and Trust Funds, which consists of six state pension and eight state trust funds.

The Consolidated Amended Class Action Complaint ("Complaint") was filed on October 1, 2007, on behalf of a class of purchasers of Amgen's publicly traded securities. R151 V.2 Tab 6.[4] The Complaint alleges that, between April 22, 2004, and May 10, 2007 (the "class period"), Amgen violated §§ 10(b) and 20(a) of the 1934 Act, 15 U.S.C. §§ 78j(b), 78t(a), and SEC Rule 10b-5 by knowingly or recklessly making materially misleading statements and omissions concerning two of Amgen's flagship products, Aranesp® and Epogen®. R87-88, 156-60 V.2 Tab 6.

1. *Amgen's ESA Products*

Aranesp and Epogen are in a drug class known as erythropoiesis-stimulating agents ("ESAs"). ESAs stimulate the production of red blood cells, which contain hemoglobin—a protein that transports oxygen from the lungs to the tissues of the body. R89, 97-98 V.2 Tab 6. The U.S. Food and Drug Administration ("FDA") has approved ESAs to reduce the need for transfusions in certain patients with anemia, including cancer patients with anemia associated with chemotherapy. App. 16a-17a.[5] Amgen's ESA "franchise" was critical to its fortunes, accounting for "approximately half" of all the company's revenues. R100 V.2 Tab 6.

2. *Amgen's Misrepresentations and Omissions During the Class Period*

The misrepresentations and omissions at issue primarily concern the safety of Aranesp and Epogen.

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[4] References to "R__ V.__ Tab __" are to the page, volume, and tab number of "Defendants-Appellants' Excerpts of Record" filed by Amgen in the court below.

[5] References to "App. __" are to the appendix accompanying the certiorari petition.

Both before and during the class period, a growing body of clinical trial evidence demonstrated that, when used "off-label" (for example, to achieve or maintain higher hemoglobin levels than recommended in FDA-approved ESA labeling),[6] ESAs were becoming more strongly associated with increased mortality, accelerated tumor growth in certain cancer patients, and other serious health problems. R103-05, 107-13 V.2 Tab 6.

Largely in response to this evidence, Amgen repeatedly reassured investors during the class period that evidence existed confirming that Amgen's ESAs were safe when used "on-label," i.e., in accordance with FDA labeling instructions. The Complaint alleges that these and other statements were materially misleading. On the critical issues of whether the on-label use of ESAs adversely affected patient survival or stimulated the growth of tumors, Amgen in fact had no evidence demonstrating that its ESAs were "safe." Nonetheless, Amgen deceptively and misleadingly equated the absence of definitive evidence of on-label harm with affirmative evidence of on-label safety.[7]

In 2003 and early 2004, data from two clinical studies known as BEST and ENHANCE sparked

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[6] "Off-label" means for indications, dosage forms, dose regimens, populations, or other use parameters not mentioned in the FDA-approved labeling. R90 V.2 Tab 6.

[7] Amgen is also alleged to have made actionable misrepresentations and omissions concerning the marketing, revenues, and earnings of Aranesp and Epogen (R138-44 V.2 Tab 6), but those allegations flow from Amgen's misleading statements concerning product safety. *Cf. Matrixx*, 131 S. Ct. at 1323 (statements on revenue and earnings held actionable based on underlying safety issues with defendant's "leading revenue-generating product").

concerns within the FDA over the safety of Aranesp, even though the ESAs in those studies were made by companies other than Amgen, were not approved for use in the United States, and were administered using what would be considered "off-label" treatment strategies—achieving or maintaining higher hemoglobin levels than recommended for ESAs approved for use in the United States.[8] Because of the safety concerns the BEST and ENHANCE studies raised, the FDA sought advice and recommendations concerning the safety of ESAs approved for use in the United States from its Oncologic Drugs Advisory Committee ("ODAC"), which includes leading experts in the field of oncology. R104-05 V.2 Tab 6; R2445-46, V.11 Tab 101.

On April 22, 2004, the first day of the class period, Amgen was asked about the upcoming ODAC meeting scheduled for May 4, 2004. Petitioner Morrow (then Amgen's executive vice president of global commercial operations) reassured investors: "[T]here is no [safety] signal associated with Aranesp. We've had two perspective [sic] randomized placebo controlled trials. And the safety for Aranesp has been comparable to placebo." R87, 105-06 V.2 Tab 6.

At the May 2004 ODAC meeting itself, oncology experts raised questions about the safety of Amgen's ESAs. Amgen sought to allay those concerns by

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[8] ENHANCE involved more than 350 patients with head and neck cancer. Patients who were administered Hoffmann-La Roche's ESA, Neorecormon, had substantially shorter progression-free survival and overall survival than patients receiving a placebo. BEST involved more than 900 patients with breast cancer and was stopped after only four months because of increased mortality versus placebo in patients receiving Eprex, an ESA manufactured by a Johnson & Johnson company for marketing outside the United States. R104-05 V.2 Tab 6.

announcing that it had instituted a series of five clinical trials, dubbed the "Amgen Pharmacovigilance Program," which it described as "a responsible and credible approach to definitively resolving the questions raise[d]" at the ODAC meeting. R106-07 V.2 Tab 6 (alteration in original). Those reassurances were not true, however, because Amgen had not conducted and did not plan to conduct the types of clinical trials necessary to address the FDA's concerns.

Additional troubling off-label safety data emerged from clinical study results made public in late 2006 and early 2007. R107-13 V.2 Tab 6. In response, Amgen repeatedly gave false and misleading reassurances to investors that its ESAs were safe when used on-label. R134-38 V.2 Tab 6. Indeed, as late as April 2007, less than three weeks before the end of the class period, petitioner Sharer (then Amgen's president, chief executive officer, and chairman of its board of directors) stated on a call with securities analysts that "on label our drugs are certainly safe" and "[i]t is certainly our very, very strong conviction that our products are very safe when used on label." R91, 137-38 V.2 Tab 6.

Amgen's ability to mislead the market with its on-label safety claims ended on May 10, 2007, the last day of the class period. App. 16a. On that day, the FDA held a second ODAC meeting to discuss ESA safety. Contrary to Amgen's reassuring statements of on-label safety and purportedly "responsible and credible" clinical trial program, the *absence* of evidence of on-label ESA safety prompted one ODAC member to note that "[t]he burning question is does this thing actually kill people in the doses that we think are reasonable and appropriate? *I don't see anything that has approached an answer to that ques-*

tion." R688 V.4 Tab 10 (emphasis added). An FDA official at the meeting made clear that "no completed or ongoing trial has addressed safety issues of ESAs in cancer patients with chemotherapy-associated anemia using currently approved dosing regimens in a generalizable tumor type." R129 V.2 Tab 6. Another official revealed that Amgen had failed to provide the FDA with sufficient data concerning its clinical trial program. R129-30 V.2 Tab 6.

The ODAC panel recommended that the FDA require ESA manufacturers to conduct further studies and carry stronger warnings on ESA labels. R130 V.2 Tab 6. Amgen's common stock dropped by more than 9% on May 10, 2007—compared to a decline of only 1.2% in the overall NASDAQ index. R155 V.2 Tab 6.[9]

C. District Court Proceedings

Amgen moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), attacking each of several different categories of misstatements and omissions on grounds including lack of materiality, falsity, loss causation, and scienter. The district court considered and rejected each of those grounds. *See In re Amgen Inc. Sec. Litig.*, 544 F. Supp. 2d 1009, 1024-34 (C.D. Cal. 2008). The court ordered dismissal without prejudice of claims that had

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[9] Amgen mischaracterizes (at 4) the gravamen of Connecticut's claims. This case is not about whether Amgen misled investors concerning the topic of the 2004 ODAC meeting. Amgen positioned itself as seemingly responsive to the FDA's safety concerns with its pharmacovigilance program, and it repeatedly sought to diminish the significance of any safety concerns with its "safe when used on-label" narrative. This case is about the damages that investors suffered when the 2007 ODAC meeting effectively prevented Amgen from continuing to mislead the market on ESA safety and related issues.

been brought against "outside directors" and "non-speaking officers" only, and sustained all of the claims against the company and each of the four officers who made statements about the safety and growth of Amgen's ESAs. *Id.* at 1036-37, 1038. In its Answer, Amgen admitted the allegation in the Complaint that, "[a]t all relevant times, the market for Amgen securities was an efficient market." R153 V.2 Tab 6; D. Ct. Dkt. 149.

After conducting limited discovery,[10] Connecticut moved for class certification. App. 15a. The court granted the motion after conducting a "'rigorous' . . . analysis . . . to determine whether class certification [wa]s appropriate." App. 22a. First, the court found that the four prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—were satisfied. App. 23a-31a. Specifically, the court noted that it was "undisputed" that Rule 23(a)(2)'s requirement of "questions of law or fact common to the class" was met. App. 24a.

The court then considered whether Connecticut had shown that "'questions of law or fact common to class members predominate over any questions affecting only individual members.'" App. 31a (quoting Fed. R. Civ. P. 23(b)(3)). To defeat Amgen's argument that individual questions of reliance predominated over common questions, Connecticut established that the fraud-on-the-market presumption

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[10] Amgen sought to limit discovery to "class certification" issues only, whereas Connecticut sought plenary merits discovery. To avoid motions practice, the parties reached an agreement that limited the applicability of Connecticut's document requests to a small group of custodians until after Connecticut's class-certification motion was decided. *See* Order and Stipulation Re Discovery and Motion Schedule (June 26, 2008) (D. Ct. Dkt. 172); R2952-53 V.13 Tab 114; R1237-40 V.6 Tab 10.

of reliance under *Basic* could be invoked on a class-wide basis because Amgen's public misstatements were made to an efficient market. App. 33a.

Amgen argued that, as a threshold to class certification, Connecticut must establish loss causation. App. 32a-33a.[11] Amgen filed more than 80 "publicly available" exhibits, R1565-75 V.8 Tab 23, and argued that the "truth" as contained therein demonstrated that "the market drops that Plaintiff relies on to establish loss causation were not caused by the revelation of any allegedly concealed information," R1350 V.7 Tab 11.[12] Pointing to these same exhibits, Amgen also sought to oppose class certification on materiality grounds, arguing that the exhibits "can adequately rebut [the fraud-on-the-market] presumption by showing that the 'truth' was known to the market." App. 40a-41a.

The court rejected Amgen's arguments and held that Connecticut had to prove that Amgen stock traded in an efficient market (a point that Amgen had conceded in its Answer), but that "[o]ther inquiries into issues such as materiality and loss causation are properly taken up at a later stage in this proceeding." App. 40a. The court reasoned that it was required to consider "evidence which goes to the

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[11] While the case was on appeal, this Court rejected in *Halliburton* the contention that a plaintiff must prove loss causation at the class-certification stage.

[12] Amgen did not articulate what standard the district court should apply in assessing its evidence. Instead, Amgen claimed to have made a "showing" that the "truth" was on the market, which, according to Amgen, caused "the burden [to] shift[] to Plaintiff" to establish loss causation. R1350 V.7 Tab 11. Amgen's "showing" did not include any expert report or analysis demonstrating that the alleged misrepresentations failed measurably to affect the market price of Amgen stock.

requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case," but that proof of loss causation and materiality do "not concern the requirements of Rule 23." App. 38a (internal quotations omitted; alterations in original).

Amgen did not file a motion for summary judgment on materiality, despite its belief that its truth-on-the-market exhibits "render[ed] the alleged misstatements and omissions not material as a matter of law." Defendants-Appellants' Opening Brief at 2 (9th Cir. filed Mar. 26, 2010).

D. The Court Of Appeals' Decision

The Ninth Circuit granted permission to appeal the district court's class-certification order and affirmed, rejecting Amgen's argument that materiality must be proved for class certification. Applying *Dukes*, the court held that the "critical question in the Rule 23 inquiry" is whether the plaintiffs' claims "stand or fall together"—in other words, "'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" App. 8a-9a (quoting *Dukes*, 131 S. Ct. at 2551 (quoting in turn Nagareda, *Class Certification*, 84 N.Y.U. L. Rev. at 132)) (emphasis by Nagareda).

The Court reasoned that materiality did not have to be proved at the class-certification stage because, whether the misstatements were material or immaterial, "[e]ither way, the plaintiffs' claims stand or fall together." *Id.* "If the misrepresentations turn out to be material," then they are material for the entire class in the same way "and class treatment is appropriate." App. 8a. "But if the misrepresentations turn out to be immaterial," plaintiffs' claims still generate common answers, because then "*every*

plaintiff's claim fails on the merits." *Id.* In other words, materiality does not "'affect the decisions essential under Rule 23'" because it "'affect[s] investors alike.'" App. 10a (quoting *Schleicher*, 618 F.3d at 685). Thus, proof of materiality was not required under Rule 23. *See* App. 12a. The court noted that its holding was consistent with *Basic*, which, in adopting the fraud-on-the-market presumption, did not require proof of materiality for class certification. App. 11a.

The court contrasted the materiality of the misstatements with the requirement for the fraud-on-the-market presumption that the market for the shares be efficient. If plaintiffs failed to prove market efficiency, then each plaintiff could still have a viable claim, but would have to "seek to prove reliance individually," as there would no longer be a basis for presuming that the statements affected all plaintiffs in the same way through the market price. App. 9a. The court thus held it appropriate to require proof of efficiency at the class-certification stage, to ensure that common questions predominate. *Id.* In the instant case, however, the efficiency of the market and the public nature of the alleged misstatements were uncontested. *Id.*

Finally, the court rejected Amgen's contention that it should be allowed to introduce evidence in support of its truth-on-the-market defense at the class-certification stage. The court reasoned that the truth-on-the-market defense is "a method of refuting an alleged misrepresentation's *materiality*." App. 13a. Because defeating materiality would not rebut predominance under Rule 23(b)(3), neither proof of materiality nor evidence refuting it was required at class certification. *Id.*

SUMMARY OF ARGUMENT

I.A. A suit that meets the criteria of Rule 23 may proceed as a class action. Courts are not free to impose requirements for class certification that go beyond Rule 23. The Rule 23 requirement at issue here requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Proof of materiality at the class-certification stage is therefore only required if, absent such proof, individual questions would predominate over common ones.

Proof of materiality is not required for class certification because the immateriality of the defendant's misstatements would not demonstrate a dissimilarity among the class members leading to predominance of individual questions. Rather, the immateriality of the misstatements would affect all class members alike. Under *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and *Basic*, the materiality standard "is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC*, 426 U.S. at 445. That standard does not turn on any particular investor's subjective views. If the misstatement is material (or immaterial), it will be so for all investors. Proof of materiality therefore is not necessary to show that common questions predominate in a 1934 Act § 10(b) class action. Materiality is itself a "common question" capable of class-wide resolution under Rule 23 and *Dukes*.

B. Proof of materiality likewise is not required to make reliance based on the fraud-on-the-market theory a common question. Under the fraud-on-the-market theory as adopted in *Basic*, a plaintiff in an open and developed efficient market is presumed to

rely on a material misstatement through reliance on the integrity of the market price. The plaintiff need not prove individualized, direct reliance on any particular misstatement. *Basic* converts reliance from an individualized question into an objective, common question applicable to all investors who purchased a given stock in the open market.

Basic made clear that materiality in the context of the fraud-on-the-market theory has the same objective meaning as it does under § 10(b) generally. Accordingly, materiality in the fraud-on-the-market context remains a common question. Moreover, *Basic*'s core insight was that, as long as the market is efficient, the market price will reflect any material misstatements, and therefore reliance on those misstatements can be presumed via reliance on the integrity of the market price. Under this market-integrity framework, once the efficiency of the market is shown, if the statement is materially false, reliance is presumed for the entire class of investors who bought at the market price; if the statement is not materially false, then no one in the class can establish reliance via the integrity of the market price. Reliance via the integrity of the market price therefore becomes, like materiality and falsity, a common question capable of only one answer for the entire class.

Because both materiality and reliance via the integrity of the market price are common questions, not susceptible of different answers for individual class members, requiring proof of materiality for class certification goes beyond what is required by Rule 23 and this Court's Rule 23 precedents. *Basic* itself confirms that proof of materiality is not required for class certification, affirming the lower court's certifi-

cation of the class based on the fraud-on-the-market theory even while remanding the lower court's summary judgment decision on the question of materiality.

C. Requiring proof of materiality at the class-certification stage would have adverse effects on courts' ability to administer securities fraud class actions. Courts would have to consider a particularly fact-intensive issue at an early stage of the case, before full discovery. Plaintiffs would have the burden of proving materiality at this early stage under the evidentiary standard that plaintiffs would face at trial, increasing the chance that courts will fail to certify a class in situations where full discovery would reveal the materiality of the misstatements. Resolving materiality at the class-certification stage, instead of on the merits, would also deprive *defendants* of a class-wide preclusive determination of the issue and would splinter investors' claims, increasing the burden on the courts. The practical difficulties of requiring proof of materiality at the class-certification stage are not justified by Amgen's repeated invocation of the "in terrorem" effect of class certification. Congress has specifically addressed the concerns expressed by Amgen through legislative action, and there is no reason to distort Rule 23 in response to Amgen's perceived concerns.

D. Amgen incorrectly argues that proof of materiality is required to show that reliance is a common question under the fraud-on-the-market theory. Amgen's claim that absent proof of materiality courts will have to decide issues of individualized reliance is misplaced. If the misstatements are not material, then all plaintiffs' claims will fail on the merits, and there will never be any need to address individual-

ized reliance, because materiality is a precondition to liability under § 10(b) and Rule 10b-5. Moreover, Amgen's argument that a plaintiff must prove at the class-certification stage all of the elements required to show fraud on the market at the merits is clearly wrong. Indeed, Amgen's logic would suggest that plaintiffs must also prove at the class-certification stage that the statements at issue were false, but not even Amgen has suggested that such a requirement would be consistent with Rule 23.

Amgen's appeal (at 27) to "naked public policy arguments" fares no better. Congress specifically addressed Amgen's concerns but chose not to heighten the requirements for class certification of federal securities law cases. The data show that Congress's chosen solutions are working. Amgen's criticism of existing lower-court tests for measuring the efficiency of the market at the class-certification stage do not logically support artificially imposing proof of materiality as a requirement for class certification. Finally, Amgen's criticisms of the decision below are red herrings based on mischaracterizations of the appeals court's reasoning.

II.A. Evidence rebutting materiality is not required at the class-certification stage. Under Rule 23(b)(3), rebuttal evidence is warranted at the class-certification stage only if it would demonstrate that individual issues predominate. Evidence rebutting the materiality of the alleged misstatements does not negate the predominance of common questions because it does not show the existence of individualized questions. Rather, rebutting materiality defeats the claims of all class members alike.

B. Amgen's proffered "truth on the market" rebuttal evidence similarly cannot disprove predominance.

If the truth really was on the market, that cannot affect individual class members differently, such that individual questions would predominate. Rather, that would mean that *all* members of the class were not defrauded. *Basic* confirms that truth-on-the-market evidence is not appropriate for class certification.

ARGUMENT

I. PROOF OF MATERIALITY IS NOT REQUIRED AT THE CLASS-CERTIFICATION STAGE IN A FEDERAL SECURITIES FRAUD CASE

A. Under Rule 23(b)(3) And *Dukes*, Materiality Is A Common Question Not Susceptible To Different Answers For Individual Class Members

1. As this Court held just three Terms ago: "By its terms," 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 Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *see also Amchem*, 521 U.S. at 620 (explaining that Rule 23 sets out "requirements the[] [courts] are bound to enforce"). Rule 23 authorizes a party to maintain a class action if the Rule 23(a) prerequisites are satisfied and, as relevant here, "the court finds 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). Because Amgen does not contest that Rule 23(a)'s requirements are met, it can prevail only if it shows that proof of materiality is necessary to show that common questions predominate over individual ones.

Notwithstanding Amgen's lengthy policy arguments against securities fraud class actions, courts are not free to impose additional prerequisites to class certification beyond the requirements of Rule 23. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317-18 (3d Cir. 2008) (concluding that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), precludes "a merits inquiry that is not necessary to determine a Rule 23 requirement"); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2006) ("in making such [certification] determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement"), *clarified on reh'g denial*, 483 F.3d 70 (2d Cir. 2007).

This Court's recent decision in *Dukes* reaffirms that principle. *Dukes* explained that the lower court committed error by refusing to consider certain issues that pertain to the Rule 23 inquiry simply because they overlapped with the merits; similarly, it also is error for a court to demand proof at the class-certification stage on merits issues that do not overlap with the Rule 23 inquiry. *See* 131 S. Ct. at 2551-52 (citing, *inter alia*, *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001) (Easterbrook, J.)); *see also Schleicher*, 618 F.3d at 685 ("Although we concluded in *Szabo* . . . 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."); *infra* pp. 30-31.

2. Materiality is not necessary to show predominance in a Rule 23(b)(3) class action. "The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."

TSC, 426 U.S. at 445. Specifically, materiality turns on whether a "'reasonable investor'" would view the misstatement or omission at issue as altering the "'total mix'" of available information. *Matrixx*, 131 S. Ct. at 1318 (quoting *Basic*, 485 U.S. at 231-32). Materiality thus trains on the objective importance of the misstatements (or omissions) made by the defendant to the reasonable investor. *See TSC*, 426 U.S. at 450. It does not relate to the characteristics of any particular investor or to any particular investor's subjective views about the importance of the information. *See Matrixx*, 131 S. Ct. at 1318 (courts view materiality through lens of a "'reasonable investor'") (quoting *Basic*, 485 U.S. at 231-32).

Under these well-settled precedents, materiality in a § 10(b) class action is inherently a "common question" for the class rather than a question "affecting only individual members." Fed. R. Civ. P. 23(b)(3).[13] This Court so held in *Basic*: "This case required resolution of several common questions of law and fact concerning the falsity or misleading nature of the three public statements made by Basic, the presence or absence of scienter, *and the materiality of the misrepresentations, if any*." 485 U.S. at 242 (emphasis added). That unequivocal holding in *Basic* is itself sufficient to dispose of this case: any dispute over materiality is irrelevant to class certification because materiality is a common question, not a question that affects individual members differently.

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[13] *See, e.g.*, 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1763, at 234 (3d ed. 2005) (in a securities fraud suit, "the required common questions relate to the existence, materiality, and type of false statements that have been made"); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1212 (2d Cir. 1972) ("The existence and materiality of these misrepresentations undoubtedly present significant common questions.").

Moreover, as a matter of first principles under Rule 23, *Basic*'s holding is correct. Because the materiality of a misstatement (or omission) is measured by the objective "reasonable investor" standard, by definition it cannot differ from one class member to another. If the misstatement (or omission) at issue is material, it will be material for the entire class in the same exact way. Likewise, if it is immaterial, the misstatement (or omission) will be immaterial in the same exact way for the entire class. Materiality is therefore a quintessential "common contention . . . capable of classwide resolution" where "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." *Dukes*, 131 S. Ct. at 2551.

In that respect, materiality is no different from the falsity of the statements at issue, which *Basic* and numerous other courts have recognized as a paradigmatic common question that need not be decided at class certification. *See Basic*, 485 U.S. at 242; *Schleicher*, 618 F.3d at 685; *cf. Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965) ("The theoretical possibility of having to try that issue thirty-five hundred times . . . demonstrate[s] the desirability of providing for a representative action in which the issue of falsity need be tried only once."). Materiality, like falsity, relates to the nature of the statement (or omission) made by the defendant, not to any act or characteristic of any individual investor. Materiality is also no different from scienter: just as there is only one possible answer to whether the defendant made a particular misstatement with the necessary fraudulent intent, there is only one possible answer to the question whether a misstatement altered the total mix of information to a reasonable

investor. Thus, like falsity and scienter, "materiality affect[s] investors alike." *Schleicher*, 618 F.3d at 685.

A failure to prove materiality is an example of what Professor Nagareda has described as a fatal *similarity* that defeats the claims for the entire class, and thus is appropriately addressed not at the class-certification stage but at summary judgment or trial. *See* Nagareda, *Class Certification*, 84 N.Y.U. L. Rev. at 107; *see also id.* at 131 (what "really matters" at the class-certification stage is "dissimilarity that has the capacity to undercut the prospects for joint resolution," whereas "the question of whether the class exhibits some fatal similarity—a failure of proof as to all class members on an element of their cause of action—is properly engaged as a matter of summary judgment").[14] Under Rule 23(b)(3), therefore, materiality is inherently a common question and plaintiffs need not prove it to establish predominance in a § 10(b) class action.

B. The Fraud-On-The-Market Theory Does Not Require Proof Of Materiality For Class Certification

Proof of materiality also is not required to make reliance a common question under Rule 23. *Basic* made clear that materiality in the context of the fraud-on-the-market theory has the same meaning as when it is considered as an independent element of a

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[14] Accordingly, securities fraud cases are routinely viewed as exemplars of when the predominance requirement of Rule 23 is met. *See Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."); *see also Schleicher*, 618 F.3d at 682 ("[w]hen a company's stock trades in a large and efficient market, . . . common questions predominate and class certification is routine").

§ 10(b) claim. *See* 485 U.S. at 248 n.27. As explained above, materiality is inherently an objective question that yields a single answer for the entire class. Whether a statement is material for purposes of proving fraud on the market therefore is a common question to be adjudicated on a class-wide basis. Indeed, this Court in *Halliburton* did not mention materiality among the elements that a plaintiff must show "to invoke *Basic*'s rebuttable presumption of reliance" at the class-certification stage. 131 S. Ct. at 2185. Like the element of loss causation, which this Court in *Halliburton* held is not a prerequisite to class certification in a securities fraud case, proof of materiality is not required to show that common questions predominate. The reasoning and result in *Basic* and *Halliburton*, as well as this Court's recent Rule 23 decisions, all support affirmance.

1. In *Basic*, this Court recognized that reliance in the context of modern securities markets stems from the "integrity of the price set by the market" rather than the traditional conception of direct reliance on a particular piece of information. 485 U.S. at 245. "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.* at 247. As the Court stated, "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Id.* at 246-47 (internal quotations omitted).

As *Basic* pointed out, this understanding of reliance under § 10(b) is necessary to account for the fundamental differences between impersonal securities markets and traditional face-to-face transactions contemplated by common-law fraud cases. *See id.* at 244. Quoting Judge Higginbotham's decision in *In re LTV Securities Litigation*, 88 F.R.D. 134 (N.D. Tex.

1980), the Court stated: "'In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor.'" 485 U.S. at 244 (quoting 88 F.R.D. at 143). In contrast, "'[w]ith the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price.'" *Id.* (quoting 88 F.R.D. at 143).

In short, *Basic*'s key holding was that, if the market in a security is "open and developed," any investor that bought at the market price is presumed to have relied on any misrepresentation that impaired the integrity of the market price—even absent specific evidence that the investor knew of or relied on the particular misrepresentation. *See id.* at 241-42 ("Misleading statements will . . . defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.") (internal quotations omitted). That insight from *Basic* creates an alternative to the individualized question typical of reliance in fraud cases and provides a path for resolving the reliance element based on the common, objective question whether the misstatement impaired the integrity of the market price for securities traded in an efficient market.

2. "[I]n an open and developed securities market, the price of a company's stock is determined by the available *material* information regarding the company and its business." *Basic*, 485 U.S. at 241 (internal quotations omitted; emphasis added); *see also id.* at 244 ("the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value") (internal quotations omitted).

Thus, under *Basic*'s market-integrity framework for proving reliance, once a plaintiff-investor shows that the defendant's statement was made to an efficient market, the question of reliance will be resolved by the answers to purely objective, common questions. If the statement is materially false, then reliance is presumed because material false statements affect the integrity of the market price at which investors bought or sold the stock. *See id.* at 247. If the statement is not materially false, then no one in the class can establish reliance via the integrity of the market. *See Schleicher*, 618 F.3d at 682 (once the plaintiff establishes that the defendant's statements are made to an efficient market, "the contestable elements of the Rule 10b-5 claim reduce to falsehood, scienter, materiality, and loss"); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Geo. L.J. 371, 392 (2001) ("In sum, fraud-on-the-market enables certification by turning common-law individual issues into market-based common issues, leaving for adjudicative resolution only the shared question of whether the misstatement was material."). And, because materiality (like falsity) is a common question capable of only a single answer for all investors, once an efficient market is shown, reliance via the integrity of the market price is a "common contention . . . capable of classwide resolution." *Dukes*, 131 S. Ct. at 2551.

3. Amgen's attempt to add proof of materiality as an additional precondition to class certification contravenes this Court's recent Rule 23 precedents. Amgen's erroneous position is akin to the error that this Court corrected in *Dukes*. As Professor Nagareda explained, the Ninth Circuit in *Dukes* had "underreache[d]" in "declining to decide whether class

members are relevantly the same." Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 168 (2010). "Elsewhere, however, other courts have *overreached* by engaging in the posture of class certification matters appropriately decided on a motion for summary judgment. That, however, is simply the flip side of the error [by the Ninth Circuit] in *Dukes*." *Id.* (emphasis added).

Amgen's position exemplifies that second kind of "overreaching" error. The question of materiality necessarily affects all investors equally. It therefore presents a classic "situation[] in which the dispute is not over whether the members of the proposed class are relevantly the same or relevantly different but, instead, over whether they are the same in such a way as to indicate that *all* class members should lose on the merits." *Id.* And, once an efficient market is shown, reliance also becomes a common question that turns on the materiality of the false statement. Thus, on the question whether the false statement was material for purposes of the fraud-on-the-market presumption, "the proper mode of judicial analysis is summary judgment, not class certification." *Id.* at 169.

Basic itself also confirms that understanding. The Court in *Basic* vacated the lower courts' rulings on materiality, holding resolution of that issue to be a matter for summary judgment or trial. *See* 485 U.S. at 240-41. Significantly, this Court simultaneously *affirmed* the district court's order certifying the class. *See id.* at 250. Thus, this Court did not regard proof of materiality as a necessary precondition to class certification under the fraud-on-the-market framework. If Amgen's understanding of the law were correct, this Court would have vacated and remanded

the class-certification order for further consideration along with the question of materiality. In sum, this Court's securities law and class-action cases converge to demonstrate that proof of materiality is not required to certify a § 10(b) class action under Rule 23.

C. Requiring Proof Of Materiality For Class Certification Will Have Adverse Effects And Is Unnecessary

1. Requiring proof of materiality is not only contrary to Rule 23 and this Court's decisions, but such a requirement would impair the judicial administration of securities fraud class actions. Materiality is both an objective standard, *see supra* pp. 23-24, and a highly fact-intensive one. As this Court has stated, the materiality "determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him"—assessments that are "peculiarly . . . for the trier of fact." *TSC*, 426 U.S. at 450.

This Court also has rejected as necessarily overinclusive or underinclusive various efforts to reduce materiality to a simplistic, single-variable inquiry. *See Basic*, 485 U.S. at 236 ("Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive."); *see also Matrixx*, 131 S. Ct. at 1318-19 (reiterating this Court's rejection of "bright-line" rules for materiality).[15] Amgen's suggestion,

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[15] Although *Basic* held that material misstatements affect the integrity of the market price, that by no means suggests that price impact is the only way to determine materiality. This Court's decisions emphatically reject any such simplistic, single-variable test for materiality. *See, e.g.*, *Matrixx*, 131 S. Ct. at

therefore, unnecessarily places courts in the difficult position of having to resolve an especially nuanced and fact-intensive issue at an early stage of litigation.[16]

Amgen's proposal also subverts the proper evidentiary standards for securities class actions. Some courts that have addressed this question believe that a preponderance-of-the-evidence standard attaches to facts supporting Rule 23 requirements.[17] That proposed standard is far higher than the standard for demonstrating the existence of a genuine issue of material fact sufficient to defeat a motion for summary judgment.[18] Amgen's position would require

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1318-19. Rather, "[p]roof that a misrepresentation or omission is material may be offered in a variety of ways." 1 Louis Loss et al., *Fundamentals of Securities Regulation* 791 (6th ed. 2011) ("Loss, *Fundamentals*"); *see also Matrixx*, 131 S. Ct. at 1322-23 (materiality adequately alleged based on information provided to defendant from medical experts regarding Matrixx's leading product); *infra* pp. 35-36 & nn.22-24 (discussing cases finding materiality from several non-price impact methods).

[16] In its petition, Amgen contended that its "rebuttal evidence disproved materiality" by establishing "that no alleged misrepresentation had any impact on the price of Amgen stock." Pet. 5, 17. In other words, its CEO's statement that "on label our drugs are certainly safe," while not inherently immaterial, was rendered so because of other information available to investors. By Amgen's logic, its allegedly false statements about the safety of one of its most important products did not themselves have the capacity to alter the "total mix" of information; rather, those false statements were neutralized by other information in the "total mix" available to reasonable investors.

[17] *See*, *e.g.*, *Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320; *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

[18] *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

plaintiffs to satisfy the standard that plaintiffs would face *at trial*, before discovery is even completed. Amgen offers no support from this Court's cases for imposing that heightened evidentiary obligation on investors seeking to proceed as a class.

Despite that extreme position, Amgen itself concedes (at 26 n.3) that materiality is so fact-intensive that it is difficult to resolve even at summary judgment. *See also TSC*, 426 U.S. at 450 n.12 (noting that "the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment" on materiality).[19] Amgen's recognition of the fact-intensive nature of the materiality inquiry at summary judgment belies its contention (at 27-28) that proving materiality at the class-certification stage "creates no unfairness to plaintiffs" because, "[i]f such proof exists, it can be offered as readily at the certification stage as later." Indeed, Amgen fails to offer any insight regarding how plaintiffs should demonstrate materiality at the class-certification stage.

Amgen's position also ignores the well-established mechanisms for resolving issues such as materiality prior to trial. Although materiality is often a fact-intensive inquiry, courts have ample tools to weed out cases involving false statements that are obviously immaterial as a matter of law at an earlier stage. *See*, *e.g.*, *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944 (6th Cir. 2009) ("Courts have

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[19] If materiality is often too fact-intensive for resolution at summary judgment, after full discovery, then requiring courts to consider this issue at the class-certification stage, with even less discovery and with a higher burden on plaintiffs, is illogical and one-sided.

consistently found immaterial a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important.") (internal quotations omitted); 15 U.S.C. § 78u-5(c)(1)(A)(i) (providing safe harbor for forward-looking statements accompanied by meaningful cautionary statements).

Worse yet, Amgen's position also would substantially increase the burdens on federal courts. The core purpose behind Rule 23 is to "save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (internal quotations omitted; second alteration in original). Materiality is an issue that should have a single answer for all investors. But because class-certification decisions do not have issue-preclusive effect on the merits for any class members,[20] resolving materiality against plaintiffs at the class-certification stage would not dispose of *any* of plaintiffs' claims; it would merely splinter them into separate claims by individual investors.

For example, Connecticut and every other large investor that had losses significant enough to be worth pursuing on an individual basis would still be able to pursue the very same allegations against Amgen through individual § 10(b) lawsuits. These suits presumably would be brought in different

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[20] *See Dukes*, 131 S. Ct. at 2552 n.6 (plaintiffs must prove efficiency of market for class certification and again at trial on the merits).

courts across the country, depending on where each institutional investor was located. Denying certification would lead to the very real prospect of inconsistent jury verdicts on a question that should have a single, consistent answer. Perversely, that result harms *defendants* in securities class actions by eliminating the preclusive effect of a judgment in their favor on materiality as to the entire class.[21]

2. Requiring plaintiffs to prove materiality at the class-certification stage also imposes unwarranted barriers to the enforcement of the securities laws because materiality is so highly fact-intensive that it is extremely difficult to prove without the benefit of full merits discovery. For example, a defendant's own records often contain powerful evidence that the defendant itself viewed the statements as material.[22]

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[21] Amgen's argument (at 26-27) that failure to decide materiality at the class-certification stage "wastes judicial resources" gets it exactly backward. A certified class action may consume more judicial resources than an individual, non-class lawsuit, but the relevant point is that a single class action is more economical than hundreds of individual lawsuits. Thus, certification of a class does not waste judicial resources in cases where the evidence later shows that "the alleged misstatements underlying a plaintiff's class claim are immaterial" (*id.* at 26); certification saves judicial resources by allowing a single court to resolve the entire class's claim on the merits in a single action. The Multi-District Litigation ("MDL") process would not be a superior alternative in this context, given the requirement that the transferee court transfer back cases for trial after pre-trial procedures. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Because, as Amgen acknowledges, disputed issues of fact often cause summary judgment to be inappropriate for materiality, the MDL court would be obliged to transfer most cases back to the transferor court for trial.

[22] *See Basic*, 485 U.S. at 239 (materiality of merger discussions depends in part on "indicia of interest in the transaction at the highest corporate levels" and "by way of example . . .

Moreover, proof of materiality often requires third-party discovery—for example, from brokers and other market participants that can offer testimony about the importance of the statement to a reasonable investor.[23] And materiality often requires expert evidence.[24] Absent the opportunity to conduct comprehensive merits discovery, plaintiffs would be deprived of key tools critical to proving materiality.[25] Amgen's position thus creates a significant risk that courts will fail to certify federal securities fraud class actions even in cases where the evidence after full discovery would show that the misstatements were material.

That result is wholly inconsistent with the core policies behind the federal securities laws. This Court

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board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest"); *cf. United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498, 508 (S.D.N.Y. 2011) (finding sufficient evidence of materiality based in part on wiretapped call between defendant and his brother).

[23] *See Weiner v. Quaker Oats Co.*, No. 98 C 3123, 2000 WL 1700136, at *12 (N.D. Ill. Nov. 13, 2000) (noting expectation of testimony at trial from "a securities analyst, mutual fund manager, or other expert on the importance of the leverage ratio figure to a reasonable investor's assessment of corporate health").

[24] *See* 1 Loss, *Fundamentals* 795; *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 620 n.10 (8th Cir. 1991) ("There was expert testimony in the record indicating that disclosure of the risk of loan default would be important to investors. Thus, the plaintiffs should be allowed to test that claim before a jury.").

[25] Proof of materiality is thus not the simple matter that Amgen's *amici* suggest. *See also* Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 187 ("[E]vent studies . . . simply do not produce clean results when there are two or more simultaneous issuer-specific events being measured over a short time horizon.").

repeatedly has recognized that private securities claims are "an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see also Basic*, 485 U.S. at 231 (private cause of action for violation of § 10(b) and Rule 10b-5 "constitutes an essential tool for enforcement of the 1934 Act's requirements"); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (noting that this Court has "repeatedly . . . emphasized that implied private actions [under Rule 10b-5] provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

Because securities violations often create small-dollar damages for a multitude of investors, the securities laws would often go unenforced or under-enforced if private class actions were unduly restricted. *See* X Louis Loss & Joel Seligman, *Securities Regulation* 4625-26 (3d ed. rev. 2005) ("The ultimate effectiveness of the federal remedies . . . may depend in large measure on the applicability of the class action device.") (internal quotations omitted; ellipsis in original); *see also Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (internal quotations omitted). Imposing an unduly high burden on plaintiffs seeking to certify class actions thus undermines the federal securities laws by creating the risk that millions of small investors—especially ordinary individuals whose losses are too small to

support individual actions—will be deprived of the ability to vindicate their claims.

There is no workable solution to this problem that does not undermine another core purpose of Rule 23, which is to provide clarity as to which parties will be bound by the proceedings "[a]t an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). Deferring the class-certification decision until after full merits discovery would mean that the parties and the court would not know whether the proceeding was an individual or a class proceeding until a very late stage of the litigation. Alternatively, conducting a two-phase proceeding—one phase involving discovery and trial on materiality and a separate phase involving discovery and trial on other merits issues such as falsity and scienter—would unnecessarily prolong every federal securities class action for courts and parties.

In sum, turning a pure *merits* issue into a *class-certification* question not only violates Rule 23, but also creates serious practical difficulties. Those difficulties will tax the lower federal courts, create unfairness to both defendants and plaintiffs, and undermine Congress's intent.

3. Amgen argues that all of these adverse consequences are required to avoid the "in terrorem" effects of class actions. But requiring materiality to be proved at the class-certification stage is not a justifiable solution to that perceived problem because Congress has specifically addressed it through other means. Amgen and its *amici* ignore the fact that the PSLRA was enacted explicitly in response to the concern that "extortionate 'settlements'" were being "extracted" from companies. Joint Explanatory Statement of the Committee of Conference, 141 Cong. Rec. 34,753 (1995). Both the House and Senate committee reports, while recognizing the importance of pri-

vate actions in providing compensation for victims of securities fraud and in deterring fraudulent conduct, *see* S. Rep. No. 104-98, at 8 (1995); H.R. Rep. No. 104-50, pt. 1, at 14 (1995), explained that the PSLRA was enacted to eliminate the abusive practices that had led to this perceived in terrorem effect. *See* S. Rep. No. 104-98, at 7 (Senate bill "includes several provisions to reduce the settlement value of frivolous securities class actions"); H.R. Rep. No. 104-50, pt. 1, at 18 ("Perhaps the most offensive fact about strike suits is that studies show that a very large percentage of securities fraud class action suits settle and that the average investor recovers pennies on the dollar.").

Specifically, Congress raised the pleading standard for scienter, created an automatic stay of discovery before a motion to dismiss, provided lead-plaintiff provisions that would result in large institutional investors controlling the litigation in a responsible manner, and required courts to consider whether plaintiffs' lawyers' claims were sanctionable. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). And, in the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Congress sought to ensure that securities fraud class litigation occurs in federal court under the standards governed by the PSLRA. *See id.* at 82. These changes raised the bar for plaintiffs pleading a securities fraud action, directly addressed the issue of the cost of discovery, and effectively dealt with the perceived abuses of securities class actions.

At the same time, Congress was cognizant of the benefits of private litigation and rejected efforts that would have blocked the effective prosecution of well-pleaded meritorious actions. The PSLRA, for example, did not undo *Basic*'s presumption of reliance

based on the fraud-on-the-market doctrine, despite Congress being specifically "urged to do so by politicians and lobbyists pushing an aggressive reform package." Langevoort, *Basic at Twenty*, 2009 Wis. L. Rev. at 153; *see also*, *e.g.*, *Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecomms. and Finance of the H. Comm. on Commerce*, 104th Cong. 92 (1995) ("*H.R. 10 Hearings*") (statement of Dennis W. Bakke, President and CEO of AES Corporation) (advocating for direct-reliance requirement "as opposed to the fraud on the market theory"); *id.* at 251-52 (statement of John F. Olson, Washington counsel to the Corporate Governance Task Force of The Business Roundtable) (advocating rejection of the fraud-on-the-market theory, which is "simply unfair"); *id.* at 272 (statement of Daniel L. Goelzer on behalf of the Securities Industry Association) (expressing support for provision of initial House bill that would require actual direct reliance).[26] The changes that Congress did enact in the PSLRA, moreover, have sufficiently ameliorated the policy objections raised by Amgen. *See infra* pp. 43-47. Given that Congress has specifically addressed these policy concerns, there is no

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[26] The initial bill introduced, H.R. 10, 104th Cong. (1st Sess. 1995), "would have undone *Basic*." Langevoort, *Basic at Twenty*, 2009 Wis. L. Rev. at 153 n.8. The then-Chairman of the SEC, Arthur Levitt, testified before Congress that "H.R. 10 would effectively eliminate the fraud-on-the-market theory by requiring that each plaintiff prove that he or she had actual knowledge of and actually relied on a misstatement or omission in connection with the purchase or sale of stock" and "would also make it virtually impossible for investors to assert their claims as part of a class action," and that "overturning" *Basic* "would have a detrimental effect on our disclosure system, a system that has led to fair and efficient markets in our country." *H.R. 10 Hearings* at 203-04.

basis for this Court to alter Rule 23 to create additional, artificial roadblocks to the certification of securities fraud class actions.

D. Amgen's Arguments Distort The Fraud-On-The-Market Presumption And Rule 23, Rely On Unpersuasive Policy Arguments, And Mischaracterize The Decision Below

1. Amgen's argument boils down to the following: "If a misstatement is not material, there is no basis for presuming a market-price distortion upon which plaintiffs could have commonly relied, and thus the reliance question cannot be resolved for all class members 'in one stroke.'" Amgen Br. 23 (quoting *Dukes*, 131 S. Ct. at 2551). That analysis is contrary to the logic of *Basic*. Under *Basic*, if the market in Amgen stock is efficient (a point Amgen concedes), the integrity of the market price will be impaired by—and investors presumed to rely on—any materially false statement. It is not necessary for plaintiffs to prove materiality to show that reliance can be answered in a class-wide fashion. Rather, resolution of the materiality question in a fraud-on-the-market case will resolve the reliance question for all class members "in one stroke."

Amgen also argues that, at the class-certification stage, plaintiffs must prove all of the elements necessary to establish fraud on the market on the merits, including materiality. Absent such proof, Amgen asserts (at 21), questions of individualized reliance predominate. That analysis also is flawed under Rule 23, because failure to prove materiality on the merits would not mean that "class members would have to prove reliance individually." *Id.*

First, because materiality is a separate, independent element of plaintiffs' cause of action, the claims

of the entire class will fail on the merits if the defendant's misstatements were immaterial. The immateriality of the defendant's misstatements thus would never leave the court with the need to resolve the individualized issues of reliance for any class member. Amgen is incorrect to assert as "irrelevant" to the Rule 23 analysis (at 36) that plaintiffs must prove materiality as a distinct element of their claim. Such a requirement is central to the Rule 23 inquiry, because it eliminates any possibility that failure to prove materiality would result in individual issues predominating over common ones.

Moreover, Amgen's argument mischaracterizes the nature of Connecticut's claims. Connecticut here seeks certification of a class consisting of all purchasers of Amgen stock during the relevant period, excluding company insiders; the class is not limited to those that directly relied on Amgen's misstatements. R151-52 V.2 Tab 6. Proof that the market in Amgen stock is efficient (a point Amgen concedes) is sufficient to demonstrate that the question of reliance is common to the class, because all class members can demonstrate reliance by proving on the merits that Amgen's material misstatements impaired the integrity of the market price. Thus, even focusing solely on the question of reliance, proof of materiality is not necessary to demonstrate that common issues predominate over individual questions.

To the extent Amgen suggests (at 19) that *Basic* held that materiality is a "predicate" for certification of a class that seeks to proceed under the fraud-on-the-market presumption, that suggestion is unpersuasive. When the Court in *Basic* discussed the factors the court of appeals had required for the fraud-on-the-market theory, including materiality,

see Basic, 485 U.S. at 248 n.27, the Court described these factors as what was required for "proving [the plaintiffs'] loss" on the merits, *id.* at 248 (internal quotations omitted), not requirements for class certification. Nowhere did *Basic* suggest that it was requiring proof of materiality as a prerequisite for class certification. *See Schleicher*, 618 F.3d at 687 ("the Justices [in *Basic*] did not adopt [materiality] as a precondition to class certification"). To the contrary, the Court's disposition in *Basic* demonstrates that it did *not* view proof of materiality as a precondition to class certification. *See supra* pp. 31-32. Similarly, not even Amgen suggests that plaintiffs must prove the falsity of the defendant's statement at the class-certification stage, even though *Basic* described the existence of "public *misrepresentations*" as one of the factors the court of appeals had required. 485 U.S. at 248 n.27 (emphasis added).

2. Amgen devotes most of its brief to what it concedes are "naked public policy arguments" for imposing a materiality precondition to class certification in securities fraud cases (Br. 27). Even if such policy arguments were relevant, none of them is persuasive.

a. Amgen's primary argument is the tired and out-dated mantra by defendants that class certification must be curbed because it creates irresistible settlement pressures. *See* Br. 10, 20, 24-30. But that policy argument should be directed to Congress, which has twice addressed it by electing "to require more at the pleading stage and to ensure that litigation occurs in federal court under these special standards, rather than state court under looser ones." *Schleicher*, 618 F.3d at 686. Congress chose *not* to alter the rules for certification of federal securities class actions, and this Court should not do so uni-

laterally in the face of that congressional choice. *See id.* ("We do not think it 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."); *In re Cavanaugh*, 306 F.3d 726, 738-39 (9th Cir. 2002) ("Although Congress made several important changes in the [PSLRA], it pointedly did not change the requirements of Rule 23."); *see also supra* pp. 22-23 (explaining that Rule 23 does not permit courts to alter its requirements based on perceived unfairness to defendants).

Even if Amgen's policy arguments were relevant in this forum, they are misplaced. The assertion that class certification breeds rampant settlements of meritless actions is dubious generally[27] and contradicted by empirical data in the context of federal securities class actions. In 2011, there were only 188 federal securities class-action filings out of 289,252 civil lawsuits filed in federal courts.[28] And there

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[27] *See, e.g.*, Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1357 (2003) (factual assertions such as "the claim that class actions always settle or that risk aversion drives the decision to settle on the defense side" are "questionable or unproven"); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1536 n.5 (2006) ("The true 'strike suit' nuisance action, filed only because it was too expensive to defend, is, in this author's judgment, a beast like the unicorn, more discussed than directly observed.").

[28] *See* Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Actions Filings: 2012 Mid-Year Assessment* 3 & Fig. 3 (2012), *available at* http://securities.stanford.edu/clearinghouse_research/2012_YIR/Cornerstone_Research_Securities_Class_Action_Filings_2012_MYR.pdf; Admin. Office of the United States Courts, *2011*

were only 65 class-action settlements approved in 2011.[29] The data simply do not support the idea that the courts are inundated with securities class-action filings and settlements.

The data also do not support the idea that these settlements are for exorbitant amounts. The median amount of the settlements in 2011 was only $5.8 million.[30] And, "[d]espite the publicity that often accompanies mega-settlements, more than half of post-[PSLRA] cases have settled for less than $10 million . . . . Approximately 80 percent of post-[PSLRA] cases have settled for less than $25 million, and only 7 percent of cases have settled for $100 million or higher."[31]

It also is not the case that all securities class actions end in settlement. More than one-third of securities class actions filed in the year 2000 (all of which have reached resolution by now) resulted in dismissal, not settlement.[32] For securities class actions filed in 2005 (almost 97% of which had reached

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Annual Report of the Director: Judicial Business of the United States Courts 9 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

[29] *See* Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Actions Settlements: 2011 Review and Analysis* 2 (2012), *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2011/Settlements_Through_12_2011.pdf.

[30] *See id.*

[31] *Id.* at 4.

[32] *See* Jordan Milev et al., NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review* 13 & Fig. 16 (Dec. 14, 2011), *available at* http://www.nera.com/nera-files/PUB_Trends_Year-End_1211_final.pdf.

resolution), nearly half ended in dismissal.[33] Those data strongly demonstrate that the PSLRA and the SLUSA are achieving Congress's goal of minimizing any strike suits while permitting meritorious cases to proceed. Further, the failure to proceed to trial is not unique to class actions but is a feature of all civil litigation. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 461 (2004) (finding that the percentage of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1260 (2005) ("The recent decline has been precipitous in the federal courts, where the number of civil trials fell by two-thirds from a high of 12,570 in 1985 to 4206 in 2003.").

In a similar vein, Amgen also argues (at 26-27) that "[i]t is unfair" to certify a class where the likely result is that materiality "will never be examined" on the merits due to settlement. To the extent this argument rests on the premise that class actions force defendants to settle meritless cases, it is belied by the data. In any event, as this Court's decision in *Halliburton* makes clear, the argument proves far too much. Halliburton repeatedly argued that proof of loss causation should be required for class certification because of the "*in terrorem* effect of class certification."[34] Yet this Court squarely held that such proof is not required for class certification. 131 S. Ct. at 2183. Indeed, the exact same argument could be made with respect to *any* of the elements of a 1934

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[33] *See id.*

[34] Brief for Respondents at 2, *Halliburton*, *supra* (No. 09-1403), 2011 WL 1149040; *see also id.* at 12, 14.

Act § 10(b) claim. But Rule 23 surely does not allow courts to require plaintiffs to prove the merits of their entire claim at the class-certification stage, simply because of a concern that defendants may settle without testing plaintiffs' claims on the merits.

b. Amgen also argues that materiality must be proved for class certification because post-*Basic* research about the efficient-capital-markets hypothesis ("ECMH") supposedly shows that information presented to the market in easier-to-understand form may be absorbed more quickly than if "investors must expend substantial time and resources to acquire or understand the information." Br. 33.[35] Amgen contends that lower courts' various multi-factor tests for market efficiency "fail to account for these common issues regarding the assimilation of information into the price of a security." Br. 34; *see* Br. 31 (citing the so-called *Cammer*/*Krogman* factors).[36]

Even assuming Amgen's concerns were well-founded, they do nothing to support Amgen's position in this case. If the lower courts' existing tests for market efficiency are, in Amgen's view, inadequate to capture certain nuances of the efficient-capital-markets hypothesis, the solution is to revise the test for market efficiency. But Amgen conceded the issue of market efficiency in the courts below without asserting any of these concerns. And it never sought

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[35] For example, news buried in the fine print of an SEC filing may be absorbed into the market price less quickly than news highlighted in a press release. *See In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 269-70 (3d Cir. 2005).

[36] *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989); *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001).

review by this Court of the market-efficiency standard. Having thoroughly waived the issue, it cannot be heard now to complain that the tests applied by the lower courts are inadequate. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

More fundamentally, Amgen provides no explanation why requiring proof of materiality would solve these concerns. Whether a communication is clear or opaque has no bearing on whether the substance of the information contained in that communication —once understood—would affect the total mix of information available to a reasonable investor. Requiring proof of materiality thus would not address the concern whether the information in question (material or immaterial) was rapidly absorbed into the market price because of the manner in which it was communicated. In short, Amgen's concerns about the varying rates at which different types of communications may be factored into the market price are irrelevant to the questions presented in this case.[37]

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[37] To the extent Amgen is arguing that the fraud-on-the-market theory for demonstrating reliance is no longer valid, that question is not before the Court. And, even if it was, much of the scholarship Amgen cites in fact recognizes that the semi-strong form of the efficient-capital-markets hypothesis—the form underlying the fraud-on-the-market presumption adopted in *Basic*, *see Schleicher*, 618 F.3d at 685—still enjoys strong empirical support. *See*, *e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 Stan. L. Rev. 1059, 1078 n.100 (1990) (noting that "there is substantial empirical support for the weak and semi-strong forms of the ECMH"); Langevoort, *Basic at Twenty*, 2009 Wis. L. Rev. at 175 & n.109 (observing that, "[a]lthough researchers debate whether some observed anomalies are such that profitable trading strategies can be devised from them, any such strategies are usually only margin-

3. Finally, Amgen's criticisms of the court below are simply red herrings based on mischaracterizations. Amgen erroneously claims (at 35) that the court of appeals held that materiality need not be proved for class certification simply because materiality is a "merits" issue. The Ninth Circuit never said that courts are precluded from looking at merits issues at the class-certification stage. Rather, the court of appeals held that materiality need not be proved for class certification because it is a *common* question capable of generating a common answer, not merely because it is a merits question. As the court below stated, whether the statement is material or immaterial, "[e]ither way, the plaintiffs' claims stand or fall together." App. 8a-9a. As discussed above, that conclusion faithfully adhered to this Court's decisions in *Basic*, *Shady Grove*, and *Dukes*.

Amgen also argues (at 38) that the court of appeals' logic was flawed because it does not distinguish materiality from market efficiency, which the court held does have to be proved for class certification. Again, however, that simply mischaracterizes the decision below. As the court of appeals explained, it is sensible to require proof of market efficiency at the class-certification stage because such proof is necessary to demonstrate that the economic conditions for the fraud-on-the-market presumption are present.

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ally profitable, short-lived, or both," and noting that "Professor Fischel emphasized this in arguing that doubts about efficiency should not undermine the *Basic* presumption"); Victor L. Bernard et al., *Challenges to the Efficient Market Hypothesis: Limits to the Applicability of Fraud-on-the-Market Theory*, 73 Neb. L. Rev. 781, 792 (1994) ("[E]ven in light of the recent challenges to market efficiency, reliance on [the fraud-on-the-market theory] still appears justified for the large stocks comprising the majority of listings on the major exchanges.").

App. 9a. Once those conditions are established, however, the class as a whole can prove reliance on the merits by demonstrating that the defendant's statements were materially false and therefore impaired the integrity of the market price. Once efficiency is shown, proof of materiality is not required for class certification, because either way the class's claims "stand or fall together." App. 8a-9a.

II. REBUTTAL EVIDENCE REGARDING MATERIALITY IS NOT APPROPRIATE AT THE CLASS-CERTIFICATION STAGE

Amgen sought to offer evidence at the class-certification stage that the "truth" was known to the market in an effort to rebut loss causation and materiality. While the case was on appeal, this Court in *Halliburton* held that proof of loss causation was not necessary for class certification. As for materiality, the court of appeals concluded that, because (1) Amgen's truth-on-the-market defense was an effort to rebut materiality, and (2) materiality was not necessary to be proved at the class-certification stage under Rule 23, Amgen's rebuttal evidence on the issue of materiality should be considered at the merits stage, not at the class-certification stage. *See supra* p. 17.[38] Amgen does not contest the first premise of the court's reasoning;[39] and the second

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[38] Contrary to Amgen's claims (at 40-45), the lower courts did not hold that rebuttal of the presumption is never permissible at the class-certification stage. Instead, they addressed only the particular "truth on the market" defense that Amgen offered.

[39] *See* Pet. 17 ("This petition squarely presents for this Court's review both the question whether the materiality predicate must be examined at the class certification stage and the question whether it may be rebutted at the same stage."); *id.* ("Among Amgen's principal defenses to class certification w[as]

premise is correct for the reasons set forth in Part I. The court of appeals' conclusion on this issue thus should be affirmed.

A. Rebuttal Of Materiality Is Inappropriate Because It Would Not Demonstrate A Lack Of Predominance Under Rule 23(b)(3)

Any evidence rebutting predominance at the class-certification stage must address whether "questions affecting only individual members" would predominate over questions common to the class. Fed. R. Civ. P. 23(b)(3). Thus, rebuttal evidence can be appropriate at the class-certification stage only if it would negate the existence of a fact necessary to establish predominance of common questions under Rule 23(b)(3).

Amgen does not dispute this point, citing *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), for the proposition that "'a successful rebuttal defeats certification by defeating the Rule 23(b)(3) predominance requirement.'" Br. 40 (quoting 544 F.3d at 485). A recent Second Circuit case interpreting *Salomon* further explains that rebuttal is appropriate at the class-certification stage only where such evidence "could demonstrate that individual reliance issues would render a trial unmanageable, thereby defeating the predominance requirement." *In re American Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229, 242 (2d Cir. 2012).

Under that standard, rebuttal of materiality is not relevant at the class-certification stage. As discussed above, *see supra* pp. 22-31, 41-43, disproving materiality would not demonstrate the existence of indi-

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its argument[] . . . that rebuttal evidence disproved materiality.").

vidual questions; it would negate the elements of materiality and reliance for all class members alike. Because materiality is an objective inquiry relating to the capacity of the defendant's misstatement to affect the decisions of a reasonable investor, rebuttal evidence showing that certain statements are immaterial would necessarily affect everyone in the class. Such rebuttal evidence cannot disprove predominance.

B. Amgen's Attempted Truth-On-The-Market Defense Is Irrelevant At The Class-Certification Stage

The particular type of rebuttal that Amgen offered in this case—a so-called "truth on the market" defense—cannot disprove predominance, and thus is irrelevant at the class-certification stage. Rebuttal of that kind does not actually rebut the fraud-on-the-market presumption of reliance:

> In the . . . situation where the market price is not artificially inflated because the truth becomes known from other sources, it is inaccurate to suggest that the presumption of reliance is rebutted. In fact, the example has nothing to do with reliance. Investors do not rely any less on the market price because that price has not been artificially inflated. It would be more accurate to characterize this situation as one where no fraud on the market occurred.

Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 Cornell L. Rev. 907, 918-19 (1989). *See also* Langevoort, *Basic at Twenty*, 2009 Wis. L. Rev. at 162 (explaining that "truth on the market" defense is an assertion that there was no fraud at all, because the market was privy to the truth and therefore "has in fact not been deceived"). Thus, truth-on-the-market evidence

does not establish the existence of individual issues; it proves that no one in the class was defrauded. It is thus fodder for merits motions and is not appropriate rebuttal at the class-certification stage.[40]

Amgen incorrectly contends (at 40-45) that, without the ability to present truth-on-the-market evidence, defendants have no ability to challenge or rebut the application of the fraud-on-the-market presumption at the class-certification stage. To the extent the proffered evidence has the possibility to demonstrate that the class lacks cohesion, it may be appropriate at the class-certification stage. Defendants have successfully opposed the application of the presumption at the class-certification stage by, for example, demonstrating that the relevant market is not efficient or that the statements were not made publicly. *See*, *e.g.*, *Initial Pub. Offerings Sec. Litig.*, 471 F.3d at 42-43 (denying class certification because market was not efficient); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (denying class certification when alleged fraud involved non-public statements). Rebuttal through the truth-on-the-market defense, however, is inappropriate because such evidence does not have the capacity to show the existence of indi-

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[40] Like materiality, the question whether the truth was on the market "is intensely fact-specific." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000). The "truth on the market" defense requires the defendant to show not only that it made corrective disclosures but that those disclosures were conveyed to the public "with a degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by" the misstatements. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989); *accord Ganino*, 228 F.3d at 167.

vidual issues that could predominate and defeat class certification.[41]

Basic confirms that truth-on-the-market rebuttal evidence is not appropriate at the class-certification stage. *Basic* affirmed the lower courts' class-certification order, notwithstanding the Court's remand for further proceedings on the issue of materiality. *See supra* pp. 30-31. That disposition would not have been appropriate had the Court thought truth-on-the-market rebuttal evidence, used to show that the alleged misstatements did not significantly alter the "total mix" of information (Br. 40-41), was relevant to class certification.

Moreover, *Basic* explicitly stated that truth-on-the-market defenses should be addressed at trial. The Court gave examples of ways that defendants may "sever[] the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price," including if defendants could show that the "market makers" were "privy to the truth" and thus that the market price would not have been affected by the misrepresentations, or if other news credibly entered the market and "dissipated the effects of the misstatements." 485 U.S. at 248-49. After discussing these two hypotheticals—which raise truth-on-the-market type defenses—the Court noted that "[p]roof of that sort is a matter for trial." *Id.* at 249 n.29. Thus, *Basic* confirms what Rule 23 already makes clear: truth-on-the-market rebuttal evidence does not concern whether a case should be certified as a class action.

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[41] Of course, defendants will have the opportunity to rebut the application of the fraud-on-the-market presumption, including via a "truth on the market" defense, at the merits stage.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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