No. 11-1085

IN THE
Supreme Court of the United States

AMGEN INC., ET AL.,
Petitioners,

v.

CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The decision below is the first and thus far the only court of appeals decision to consider two recent decisions of this Court, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), in the context of a Rule 23(f) appeal of an order certifying a class in a misrepresentation case under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), based on the fraud-on-the-market theory. In considering these recent decisions, the court below held that, to satisfy Rule 23(b)(3)'s requirement that common questions "predominate over any questions affecting only individual members," a plaintiff who moves to certify an investor class based on the presumption of reliance under the fraud-on-the-market theory need not show that a defendant's misrepresentation is "material." Rather, if the plaintiff establishes that the market on which the subject security trades is efficient and the misrepresentation was made publicly, materiality is a merits question common to all class members. The court below further held that a defendant may not, at the class-certification stage, rebut the application of the fraud-on-the-market theory by attempting to show that an alleged misrepresentation was not material. The questions presented are:

1. Whether proof of materiality in a securities fraud case predicated on the fraud-on-the-market theory, as posited by Petitioners to be a bright-line rule requiring proof of "price impact," is required for class certification.

2. Whether the Petition should be denied because Petitioners failed to press their "price impact" standard below and offered no quantitative evidence in

support of the "price impact" test they seek to make the subject of review by this Court, and the Ninth Circuit did not pass on that issue.

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STATEMENT OF THE CASE

1. Respondent Connecticut Retirement Plans and Trust Funds ("Connecticut") brought securities fraud claims against Petitioners (collectively, "Amgen") under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78t(a) (App. 53a-54a)) and Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. § 240.10b-5 (App. 55a)). This action centers on alleged misrepresentations and omissions Amgen made about two of its flagship products, Aranesp® and Epogen®. Both products are in a drug class known as erythropoiesis-stimulating agents ("ESAs") and have been approved by the U.S. Food and Drug Administration ("FDA") to reduce the need for transfusions in certain patients with anemia, including cancer patients with anemia associated with chemotherapy. App. 16a-17a.[1]

The misrepresentations primarily concern product safety. "Off-label" clinical trial data of ESAs used in Europe raised concerns within the FDA over whether the "on-label" use of ESAs approved for use in the U.S. increased mortality or tumor growth rates in cancer patients.[2] R104-05 V.2 Tab 6. Amgen is alleged to have misrepresented that its ESAs were "safe" when, in fact, the "on-label" use of Aranesp and Epogen produced unknown effects on patient

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

[2] "On-label" means using the product in accordance with the FDA-approved labeling; "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.

mortality, tumor growth rates, and other clinically significant events.

The class period begins on April 22, 2004 (App. 16a); in response to a question about an upcoming meeting of an FDA advisory committee to discuss the FDA's on-label safety concerns, Amgen reassured investors by stating that there was no safety "signal" associated with Aranesp and that its safety was "comparable to placebo" in two clinical trials. R105-06 V.2 Tab 6. At the advisory committee meeting itself, held in early May 2004, Amgen specifically sought to allay the FDA's concerns by announcing that Amgen had instituted a program of five clinical trials it described as "a responsible and credible approach to definitively resolving the questions raise[d]" at the meeting concerning ESA safety. R106-07 V.2 Tab 6.

Amgen then repeatedly reassured investors during the class period that Aranesp and Epogen were safe when used on-label (R134-38 V.2 Tab 6), even as additional off-label clinical trials continued to demonstrate various safety problems with ESAs, including Amgen's. R107-113 V.2 Tab 6. Only three weeks before the end of the class period, Petitioner Sharer (Amgen's Chairman and CEO) stated "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.

The class period ends on May 10, 2007 (App. 16a), the date of a second FDA advisory committee meeting to discuss ESA safety. Contrary to Amgen's reassuring statements and purportedly "responsible and credible" clinical trial program, 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 FDA official revealed that Amgen failed to provide the FDA with sufficient data concerning its clinical trial program. R129-30 V.2 Tab 6. The committee 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. R155 V.2 Tab 6.[3]

On the merits, Amgen contends that it cannot be liable for any of its misrepresentations because the "truth" was already on the market. Pet. 5. However, "not every mixture with the true will neutralize the deceptive," *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991), and Connecticut alleges that Amgen's deceptive reassurances (which were also, prominently, on the market) had the effect of artificially inflating Amgen's stock price. Until the advisory committee meeting of May 10, 2007, the truth about the *lack* of evidence of "on-label" ESA safety was not "conveyed to the public 'with a degree of intensity and credibility sufficient to counter-

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[3] 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 these allegations flow from Amgen's misleading statements concerning product safety. *Cf. Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) (statements on revenue and earnings held actionable based on underlying safety issues with defendant's "leading revenue-generating" product). In 2006, Amgen generated roughly half of its $14.3 billion in annual revenue from sales of Aranesp and Epogen. R100 V.2 Tab 6.

balance effectively any misleading information created by' the alleged misstatements" Amgen made that its ESAs were safe when used on-label. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989)).

2. In cases like this "involving publicly traded securities and purchases or sales in public securities markets," *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005), the six elements that a securities fraud plaintiff ultimately must prove at trial are:

(1) *a material misrepresentation (or omission)*, see *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988);

(2) *scienter*, *i.e.*, a wrongful state of mind, see *Ernst & Ernst* [*v. Hochfelder*, 425 U.S. 185, 197 (1976)];

(3) *a connection with the purchase or sale of a security*, see *Blue Chip Stamps* [*v. Manor Drug Stores*, 421 U.S. 723, 730-31 (1975)];

(4) *reliance*, often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation," see *Basic*, *supra*, at 248-249 (non-conclusively presuming that the price of a publicly traded share reflects a material misrepresentation and that plaintiffs have relied upon that misrepresentation as long as they would not have bought the share in its absence);

(5) *economic loss*, 15 U.S.C. § 78u-4(b)(4); and

(6) "*loss causation*," *i.e.*, a causal connection between the material misrepresentation

> and the loss, *ibid.*; cf. T. Hazen, Law of Securities Regulation §§ 12.11[1], [3] (5th ed.2005).

Id. at 341-42 (parallel citations omitted).

In an action brought under Federal Rule of Civil Procedure 23, a plaintiff seeking to certify a class must first satisfy the four prerequisites of Rule 23(a), including Rule 23(a)(2)'s prerequisite that "there are questions of law or fact common to the class," before moving on to the requirements in Rule 23(b). Class actions that proceed under Rule 23(b)(3) require in relevant part that "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." The two rules operate in tandem. Rule 23(a)(2) addresses whether there exists at least one "common contention . . . 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." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Rule 23(b)(3), in turn, seeks to determine whether an action possessing at least one such contention "would achieve economies of time, effort, and expense" by proceeding as a class action. Fed. R. Civ. P. 23 advisory committee's note (1966) (subdivision (b)(3)).

To allow plaintiffs in securities class actions involving publicly traded securities to satisfy the predominance requirement of Rule 23(b)(3) when moving for class certification, this Court has "permitt[ed] plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the 'fraud-on-the-market' theory." *Erica P. John Fund, Inc. v. Halli-*

burton Co., 131 S. Ct. 2179, 2185 (2011). Without the presumption, the reliance element in securities fraud actions would make Rule 23(b)(3)'s predominance requirement a significant hurdle: "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would . . . prevent [investors] from proceeding with a class action, since individual issues then would . . . overwhelm[] the common ones." *Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988).

Central to the fraud-on-the-market theory is the concept of an efficient market:

> According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." Because the market "transmits information to the investor in the processed form of a market price," we can assume . . . that an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market."

Erica P. John Fund, 131 S. Ct at 2185 (quoting *Basic*, 485 U.S. at 244-247) (citation omitted). This Court elaborated on the "efficient market predicate to the fraud-on-the-market theory" (*id.* at 2186) in *Dukes*:

> But the [Rule 23(b)(3) predominance] problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. *To*

> *invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market*, an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

131 S. Ct. at 2552 n.6 (citing *Erica P. John Fund*, 131 S. Ct. at 2185) (first emphasis added).

3. In moving for class certification, Connecticut established each of the four prerequisites of Rule 23(a) (App. 22a-31a) and, to satisfy the predominance requirement of Rule 23(b)(3), presented unchallenged evidence that the market for Amgen common stock was efficient. App. 40a. Amgen conceded the point in its answer to Connecticut's complaint.[4]

In opposing class certification, Amgen filed a request for judicial notice ("RJN") that contained 81 exhibits, all of which were described as "publicly available." R1565 V.8 Tab 23. In the district court, Amgen cited the RJN exhibits to oppose the fraud-on-the-market presumption on loss-causation grounds. Specifically, Amgen relied on *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007)—which has since been abrogated by *Erica P. John Fund*—in opposing the presumption. R1350-53 V.7 Tab 11. Amgen's RJN exhibits were

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[4] In answering the complaint, Amgen admitted that "the market for Amgen securities was an efficient market." App. 40a. However, the district court imposed no limitation that precluded Amgen from opposing class certification with evidence to rebut market efficiency. Accordingly, the second of Amgen's "Questions Presented," concerning "whether . . . [a] district court must allow" evidence rebutting the fraud-on-the-market theory, is flawed; Amgen was "allowed" to rebut Connecticut's evidence proving market efficiency but chose not to.

not offered to establish that Amgen investors suffered no losses, but rather to demonstrate 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.[5]

4. The district court granted Connecticut's motion. After acknowledging that it "must conduct as 'rigorous' an analysis as is necessary to determine whether class certification is appropriate" (App. 22a), and after conducting such an analysis, the court found that each of the requirements of Rule 23 had been satisfied. App. 31a. Concerning Rule 23(b)(3), the court found that "Plaintiff has established that it purchased its securities on an efficient market" (App. 40a) and that, as a result, "common questions of fact and law predominate over individual questions." App. 44a. Discussing Amgen's evidence and arguments, the court held that "the inquiries Defendants urge the Court to make do not concern the requirements of Rule 23, but instead concern the merits of the case." App. 38a. The court also noted that Amgen remained able to "rebut the [fraud-on-the-market] presumption at the summary judgment stage." App. 44a.

5. On appeal, Amgen changed course, and opposed the fraud-on-the-market theory not on loss-

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[5] The RJN exhibits consisted of analyst reports, press releases, news articles, transcripts and a slide presentation from earnings calls, articles published in medical journals, filings with the SEC, documents available on the FDA's website, an interim analysis of a clinical trial involving Aranesp, letters sent to legislators or regulators, and a lone stock price chart showing the closing stock price for Amgen on May 9, 2007, and Amgen's intraday stock prices for May 10, 2007—the last day of the class period. R1565-75 V.8 Tab 23.

causation grounds, but by relying for the first time on materiality as a "necessary element" of the presumption. Defendants-Appellants' Opening Brief at 19 (filed Mar. 26, 2010) ("Pet'rs C.A. Br."), 2010 WL 4316245. Amgen argued that the publicly available exhibits in its RJN "demonstrated the market was already aware of the information concerning Aranesp® and Epogen® that Defendants allegedly misstated or concealed, thus rendering the alleged misstatements and omissions not material as a matter of law." *Id.* at 2. Amgen again relied on *Oscar*, but only to support the argument that it could rebut the fraud-on-the-market presumption at the class-certification stage. Amgen also cited *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), in support of that argument. *See* Pet'rs C.A. Br. 27 n.12, 37, 40; Defendants-Appellants' Reply Brief at 17 n.9, 19 & n.10 (filed June 9, 2010), 2010 WL 4316251.[6]

The court below affirmed. App. 13a. Relying on this "Court's more recent formulations of the [fraud-on-the-market] presumption in *Erica P. John Fund* and *Dukes*," the court "join[ed] the Third and Seventh Circuits" in holding that plaintiffs must demonstrate two things to avail themselves of the fraud-on-the-market presumption at the class-certification stage: (1) "that the security in question was traded in an efficient market (a fact conceded here)," and (2) "that the alleged misrepresentations were public (a fact not contested here)." App. 2a, 11a. "As for the element of materiality, the plaintiff

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[6] Although *Salomon* had been published seven months before Amgen opposed class certification in the district court, Amgen did not cite *Salomon* in its brief. *See* R1321-57 V.7 Tab 11.

must plausibly allege—but need not prove at this juncture—that the claimed misrepresentations were material." *Id.* Because "the only elements a plaintiff must prove at the class certification stage are whether the market for the stock was efficient and whether the alleged misrepresentations were public—issues that Amgen does not contest here"—"the district court correctly refused to consider Amgen's truth-on-the-market defense at the class certification stage." App. 13a. The court below also denied Amgen's request for *en banc* review. App. 51a-52a.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted in this case for four reasons. First, no mature, irreconcilable conflict exists among the courts of appeals on either question presented by Amgen. The decision below is the first decision by any court of appeals to address those questions in the aftermath of *Dukes*, *Erica P. John Fund*, and *Matrixx*—decisions this Court issued barely one year ago. The reasoning and holding of the decision below are correct and consistent with these recent decisions. All of the other court of appeals cases cited by Amgen predate these key recent decisions, and one was abrogated by and is currently being reconsidered in light of *Erica P. John Fund*. This Court's most recent cases make clear that the decision below is correct: if public statements are made in an efficient market, the materiality of the statements affects all purchasers similarly. There is thus no error, and no circuit conflict, warranting this Court's review.

Second, no court of appeals that has squarely considered the question whether a district court must make a determination on materiality, as defined by

Basic, before certifying a fraud-on-the-market securities class action has issued a holding contrary to the decision below. Amgen's claimed circuit split rests on strained readings of *dicta* rather than settled holdings. Any disagreement among the courts of appeals is, at best, a shallow and undeveloped one. Accordingly, this case does not present a square conflict necessitating this Court's review. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) ("We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments, not statements in opinions.'") (citation omitted; alteration in original).

Third, the Petition presents a poor vehicle for review because Amgen advocates an evidentiary standard that it made no effort to meet in the courts below. Specifically, Amgen introduced no evidence demonstrating that the misrepresentations alleged in the complaint did not measurably impact the market price of Amgen stock. As a result, Amgen did not create a record sufficient to afford it relief under the rule it propounds in this Court.

Fourth, the questions presented are not of sufficient national importance to warrant this Court's intervention, especially on the heels of this Court's recent decisions in *Dukes*, *Erica P. John Fund*, and *Matrixx*. At core, Amgen and its *amici* are not making a legal argument, but are requesting that the rules be changed on public policy grounds. They seek to engineer a fourth bite at the apple because the three existing procedural junctures for dismissing claims on materiality grounds (Rule 12 motions, Rule 56 motions, and trial) apparently are not enough. Tellingly, the pressures of settlement are discussed in the Petition sooner than (and twice as often as)

Rule 23(b). *Compare* Pet. 3, 9, 14, 15 & n.6, 17, 23 *with* Pet. 5, 6, 10, 11, 26. But Amgen and its *amici* articulate no legitimate public policy concerns that merit departing from the proper application of Rule 23(b)(3).

I. There Is No Mature, Irreconcilable Conflict

Amgen contends that the decision below conflicts with the decisions of the Second and Fifth Circuits in *Salomon* and *Oscar*, and a Third Circuit decision, *In re DVI, Inc. Securities Litigation*, 639 F.3d 623 (3d Cir. 2011). Pet. 9-11.[7] However, the supposed circuit split is illusory and does not warrant this Court's intervention. First, the asserted circuit split is not mature given that none of the other circuits cited by Amgen has yet had an opportunity to consider this Court's recent and highly relevant decisions in *Dukes*, *Erica P. John Fund*, and *Matrixx*. Second, *Oscar*, *Salomon*, and *DVI* do not irreconcilably conflict with the decision below.

A. The Decision Below Is The Only Decision To Apply This Court's Recent Precedents To The Questions Presented

1. The Decision Below Correctly Applied *Dukes* And *Erica P. John Fund*

The Ninth Circuit was the first and thus far only court of appeals to apply this Court's recent

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[7] Although Amgen cites statements by the First Circuit in *In re PolyMedica Corp. Securities Litigation*, 432 F.3d 1, 7 n.11 (1st Cir. 2005), and the Fourth Circuit in *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 364 (4th Cir. 2004), that plaintiffs must show materiality to gain the benefit of the presumption of reliance, Amgen correctly acknowledges that these statements are *dicta* (Pet. 11 n.2) and does not rely on them as evidence of a mature circuit split.

holding in *Dukes* to address whether materiality must be established or may be rebutted at the class-certification stage. The court below correctly applied *Dukes* in holding that, once an efficient market is demonstrated, materiality is an issue that is common to the class and therefore need not be demonstrated as a condition to class certification.

As this Court held in *Dukes*:

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

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)).

Applying that standard, the court below correctly recognized that "proof of materiality is not necessary to ensure that the question of reliance is common among all prospective class members' securities fraud claims." App. 12a. Rather, once an efficient market is demonstrated, "falsehood and materiality affect investors alike." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, J.). As the court below correctly reasoned, if the statement is material, then all plaintiffs in an efficient market will have relied on it. By contrast,

> if the misrepresentations turn out to be immaterial, then *every* plaintiff's claim fails on the merits (materiality being a standalone merits element), and there would be no need

> for a trial on each plaintiff's individual reliance. Either way, the plaintiffs' claims stand or fall together—the critical question in the Rule 23 inquiry.

App. 8a-9a.

Accordingly, the court below correctly applied *Dukes* in rejecting Amgen's argument that, if misrepresentations were shown to be immaterial, "each individual plaintiff would be left to prove reliance at trial individually—making a class proceeding unwieldy." App. 8a. That argument is flawed, because a finding at the class-certification stage that the alleged false statements were immaterial would not result in an unwieldy class predominated by individual reliance issues; it would defeat reliance for *all* class members. As the court below correctly reasoned, "the plaintiffs cannot both fail to prove materiality yet still have a viable claim for which they would need to prove reliance individually." *Id.* Thus, Amgen's position is incorrect under Rule 23(b)(3) and *Dukes* because answering the materiality question addresses neither whether individual or common issues predominate nor whether a class-wide proceeding has the capacity to generate common answers critical to the resolution of the litigation; it addresses whether *any* plaintiff should win or lose on the merits.

The logic and holding of the court below are entirely consistent with *Dukes*. Because the market in Amgen securities is efficient, the class-action mechanism has "the capacity . . . to generate" a common answer on whether Amgen's misrepresentations were material. 131 S. Ct. at 2551. Resolving materiality at the class-certification stage is inappropriate

because doing so would not expose "[d]issimilarities within the proposed class [with] the potential to impede the generation of common answers." *Id.* Materiality is a "common contention" the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Likewise, the decision below is consistent with *Erica P. John Fund*, which held that proof of loss causation is not required at the class-certification stage. In its decision, this Court enumerated the "undisputed" required proofs for invoking the "rebuttable presumption of reliance" at the class-certification stage. 131 S. Ct. at 2185. It listed as "common ground" three requirements: that the alleged misrepresentation be public, that the market for the stock be efficient, and that the plaintiff's transaction take place between the time of the alleged misrepresentation and any later corrective disclosure. *Id.*[8] Nowhere did this Court mention materiality. As the court below correctly noted in discussing class-certification requisites, "the Supreme Court's more recent formulations of the presumption in *Erica P. John Fund* and *Dukes* . . . require the plaintiff to show that the stock was traded in an efficient market but do not mention materiality as a requirement." App. 11a (citing *Erica P. John Fund*, 131 S. Ct. at 2185, and *Dukes*, 131 S. Ct. at 2552 n.6).

Because the decision below is the first decision to consider the questions presented in light of *Dukes* and *Erica P. John Fund*, and correctly applied those precedents, certiorari is not warranted until other

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[8] Amgen did not oppose Connecticut's class-certification motion on any of these grounds.

circuits have had an opportunity fully to consider the questions presented in light of those cases and the decision below. Indeed, as discussed below (*see infra* pp. 25-26), the proposed class in the *Erica P. John Fund* case has been certified on remand and that decision is now the subject of a pending Rule 23(f) appeal to the Fifth Circuit.

Further percolation therefore is warranted. If other circuits agree with the Ninth Circuit's reasonable application of this Court's precedents, the need for review is vitiated. If the circuits disagree with the judgment below, the disagreement will have benefited from further refinement and analysis of this Court's recent decisions. Under either scenario, it would be premature for this Court to intercede only a year after *Dukes* and *Erica P. John Fund* were decided.

2. The Decision Below Is Also Consistent With *Matrixx*

The Ninth Circuit did not rely on *Matrixx*, but the decision below is consistent with its holding, which addressed the element of materiality on the merits and did not address any class-certification question. Amgen contends that it should be permitted to "disprov[e] the materiality of the alleged misrepresentation" by establishing that the misrepresentation did not impact the market price of the security. Pet. 11. That notion substitutes the materiality inquiry with a bright-line rule and is inconsistent with *Matrixx*.

Matrixx confirmed that the securities fraud element of materiality "is satisfied when there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix

of information made available." 131 S. Ct. at 1318 (internal quotation marks omitted). This Court rejected the defendant company's request that it "adopt a bright-line rule" excusing pharmaceutical companies from disclosing adverse event data until the data "establish[es] a statistically significant risk that the product is in fact causing the events." *Id.* at 1318-19. The proposed "categorical rule would artificially exclude information that would otherwise be considered significant to the trading decision of a reasonable investor." *Id.* at 1319 (internal quotation marks and alteration omitted).

Amgen's "price impact" test is, in effect, a "bright-line rule" that may "artificially exclude" misrepresentations from being considered material. It replaces a materiality analysis based on whether the misrepresentation would be "significant to the trading decision of a reasonable investor" (*id.*) with a metric—demonstrating whether a defendant's stock price increased by a statistically significant margin following a misrepresentation. Certiorari review is not warranted until other circuits fully consider and explore whether the materiality inquiry should be reduced to such a determination.

B. There Is No Clear Split Among The Circuits

There is no meaningful circuit split on the question that was decided below: whether a district court must make a determination on materiality, as defined by *Basic*, before certifying a fraud-on-the-market securities class action. On this specific question, the supposedly "irreconcilable, mature circuit split" (Pet. 8) pressed by Amgen is at best a shallow one premised on *dicta* and a misreading of opinions.

1. *Oscar* Has Been Abrogated By This Court

Oscar held that a securities fraud class-action plaintiff invoking the fraud-on-the-market presumption must prove loss causation to obtain class certification. As discussed above, *Erica P. John Fund* expressly abrogated that holding. 131 S. Ct. at 2179. *Oscar* therefore is no longer good law in the Fifth Circuit, and thus provides no basis for Amgen's assertion of a conflict with the decision below.

Amgen uses a misleadingly truncated quotation from *Oscar* to assert that some portion of the decision remains viable after *Erica P. John Fund*. According to Amgen, plaintiffs are required "to offer 'proof of a *material* misstatement . . . in order to trigger the fraud-on-the-market presumption.'" Pet. 10 (quoting *Oscar*, 487 F.3d at 265) (emphasis added by Amgen). What the Fifth Circuit actually held, however, was the following: "We now require more than proof of a material misstatement; we require proof that the misstatement *actually moved* the market. . . . Essentially, we require plaintiffs to establish loss causation." *Oscar*, 487 F.3d at 265. As this fuller quotation makes clear, *Oscar* was focused on the separate securities fraud element of loss causation, which in the court's view needed to be demonstrated at the class-certification stage with evidence of an impact on stock price. That holding is precisely what *Erica P. John Fund* abrogated.

Moreover, the aspect of *Oscar* that Amgen contends survives *Erica P. John Fund* would be no more than *dicta* in any event. Materiality, as defined by *Basic*, was never disputed by the parties in *Oscar*. *See Oscar Private Equity Invs. v. Holland*, No.

Civ. 3:03-CV-2761H, 2005 WL 877936, at *8 (N.D. Tex. Apr. 15, 2005), *vacated sub nom. Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007). *See also* Brief for Appellants, *Oscar*, *supra* (No. 05-10791), 2006 WL 5428292 (grounds for appeal were plaintiff's failure to show price impact and loss causation). Unlike the decision below, the Fifth Circuit's passing reference in *Oscar* to a "material" misstatement was not the product of careful consideration after full briefing.

Moreover, *Oscar*'s *dicta* are at odds with pre-existing Fifth Circuit law explicitly holding that the fraud-on-the-market theory *does not* relate to materiality. *See Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 664 (5th Cir. 2004) ("The fraud-on-the-market presumption addresses reliance, *not materiality, and the two elements are fundamentally different*.") (emphasis added). *See also Nathenson v. Zonagen Inc.*, 267 F.3d 400, 415 (5th Cir. 2001) ("[T]he complained of misrepresentation or omission [must] have actually affected the market price of the stock, [and] we conclude that it is more appropriate in such cases to relate this requirement to reliance *rather than to materiality*.") (emphasis added).

In sum, *Oscar* provides no support for the Petition because it is no longer good law. And contrary to Amgen's assertion, *Oscar* never squarely held that, in a securities fraud class action in which the plaintiff invokes the fraud-on-the-market presumption, the Rule 23(b)(3) predominance inquiry requires proof of or permits rebuttal on the element of materiality.

2. *DVI* Supports The Decision Below

The Third Circuit's decision in *DVI* does not warrant certiorari because it supports the decision below. To the extent Amgen argues otherwise, it mischaracterizes the Third Circuit's opinion.

Amgen concedes that, in the Third Circuit, "plaintiffs need not demonstrate materiality as part of an initial showing before class certification." Pet. 11 (citing *DVI*, 639 F.3d at 631). The decision below agreed with that holding. App. 2a. Thus, there is no split between the Ninth and Third Circuits on the first question presented by the Petition—namely, whether a plaintiff must establish materiality at the class-certification stage.

Amgen's argument that *DVI* creates a circuit split on the Petition's second question presented rests on a mischaracterization of the Third Circuit's decision. Amgen quotes *DVI* as holding that "[o]ne way that a defendant can rebut the presumption of reliance is by showing that 'the misrepresentations were immaterial.'" Pet. 11 (quoting *DVI*, 639 F.3d at 637). That language, however, was taken from an introductory paragraph in the *DVI* opinion summarizing *Basic*'s guidance on rebuttal generally; that passage was not describing requirements for class certification. *See* 639 F.3d at 637 (providing the "non-exhaustive list of ways that defendants can rebut the presumption" set forth in *Basic*). The *DVI* court *never* held that this statement applies in the class-certification context.

In fact, later portions of the opinion undercut Amgen's characterization of *DVI*. *DVI* held that "rebuttal *of the presumption of reliance* falls within the ambit of issues that, if relevant, should be addressed by district courts at the class certification stage."

Id. at 638 (emphasis added). The court went on to state that evidence that an allegedly false statement "did not affect the market price" of the stock may be relevant to rebut that presumption because the lack of price impact "may undercut the general claim of market efficiency or demonstrate market inefficiency relating to the securities in issue." *Id.*

That holding did *not*, however, license a free-wheeling inquiry into the *materiality* of every alleged misstatement at the class-certification stage. Lack of price impact may be one indication of lack of materiality, but lack of price impact may result from other factors unrelated to materiality: a lack of price impact is not dispositive on the question of materiality, which requires a far broader inquiry. *See infra* pp. 24-25.

Materiality was not in dispute in *DVI*, and the district court did not consider the question whether materiality could be rebutted at the class-certification stage. *See In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 207-08 (E.D. Pa. 2008), *aff'd*, 639 F.3d 623 (3d Cir. 2011). Likewise, the Third Circuit in *DVI* held *only* that evidence of lack of price impact is relevant rebuttal at the class-certification stage, because it may disprove the existence of an efficient market in the security in question.[9] It nowhere held (or had any occasion to hold) that the materiality of each alleged false statement should be the subject of rebuttal at the class-certification stage.[10] *DVI*

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[9] Amgen never sought to present rebuttal evidence on the issue of price impact in the district court. *See infra* pp. 26-29.

[10] The *DVI* opinion as a whole makes clear that the only relevant rebuttal at the class-certification stage is rebuttal of the presumption of reliance created by the efficient capital markets hypothesis. While *DVI* does note in passing that mate-

thus does not create a circuit conflict even on the Petition's second question presented.

3. *Salomon* Does Not Create A Circuit Split Warranting This Court's Review

This leaves as Amgen's only remaining support for alleged circuit conflict the Second Circuit's decision in *Salomon*. Like *DVI*, *Salomon* addressed the relevance of evidence of price impact, as distinct from materiality, at the class-certification stage. The *Salomon* defendants' primary argument against applying the fraud-on-the-market presumption, setting aside the question of its applicability to suits against research analysts, was that the plaintiffs had not made an adequate showing of "market price effect." Brief of Defendants-Appellants at 4, *Salomon*, *supra* (No. 06-3225-cv) ("*Salomon* Appellants Br."), 2007 WL 6196992. The court rejected this argument but held that the defendants should have the opportunity to rebut the presumption of reliance by showing the absence of a price impact. *See Salomon*, 544 F.3d at 485-86.[11] The court did not state that the defendants would be permitted the opportunity to rebut materiality.

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riality is a "distinct basis for rebuttal" where a corrective disclosure does not result in a drop in stock price (639 F.3d at 638), it cites only to decisions on pleadings motions for support. Moreover, the passage describes a fact pattern not relevant here; in the district court, Amgen disputed the *reasons why* stock drops occurred (a loss-causation analysis now prohibited by *Erica P. John Fund*), but it *did not* argue that there were no impacts to Amgen's stock price on alleged corrective disclosure dates.

[11] The Second Circuit also held that the defendants should have the opportunity to rebut the presumption by showing that other market commentary had been responsible for the price impact or that particular plaintiffs had not relied on the market price. *See Salomon*, 544 F.3d at 485.

Salomon also does not support certiorari because its discussion of materiality at the class-certification stage was *dicta*. Unlike here, in *Salomon* there was no serious dispute that the alleged misrepresentations were material. *See In re Salomon Analyst Metromedia*, 236 F.R.D. 208, 222-23 (S.D.N.Y. 2006), *vacated and remanded*, 544 F.3d 474 (2d Cir. 2008). Based on a very cursory analysis of this undisputed issue, the district court found that the *Basic* standard of materiality was satisfied. *Id.* On appeal, the defendants did not challenge the district court's ruling on this point, and the issue of whether a showing of materiality was required was not, in fact, briefed. *See Salomon* Appellants Br.

For this reason, when the Second Circuit stated that plaintiffs must make a showing of materiality at the class-certification stage, *see Salomon*, 544 F.3d at 486 n.9, that issue had not been presented to that court, nor was deciding it necessary to the ultimate resolution of the issues properly on appeal. Accordingly, this statement is *dictum* that will not bind the Second Circuit in future cases and thus does not warrant this Court's review. *See United States v. Garcia*, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, J., concurring) ("Holdings—what is necessary to a decision—are binding. Dicta—no matter how strong or how characterized—are not.").

Indeed, the issue was so little examined that the Second Circuit did not provide any guidance on how courts should make a materiality determination, a deeply fact-intensive inquiry that is generally a question for the jury. *See Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999). Thus, a close examination of relevant circuit court authority fails to show an irreconcilable conflict on the need for a

plaintiff to demonstrate materiality on a class-certification motion.

The mere fact that different circuit courts have made inconsistent statements in *dicta* does not mean that this Court "'must act to eradicate disuniformity as soon as it appears.'" *California v. Carney*, 471 U.S. 386, 401 n.11 (1985) (quoting Samuel Estreicher, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984)). Here, certiorari is not warranted because there is, at most, some conflicting *dicta* from other circuits; there is no well-established split on either question presented.

4. Amgen's Contention That It May "Disprove Materiality" On Rebuttal Confuses Materiality With "Price Impact"

Amgen's argument that there is a circuit split repeatedly conflates the concepts of materiality and price impact. For example, Amgen has not simply argued that it was wrongly denied the opportunity to "rebut the applicability of the fraud-on-the-market theory by disproving the materiality of the alleged misrepresentation." Pet. 11. Amgen also has specifically stated that its method of "disproving materiality" is with evidence "showing that the market already was 'privy to the truth,' and accordingly *that no alleged misrepresentation had any impact on the price of Amgen stock*." Pet. 5 (emphasis added) (citing *Basic*, 485 U.S. at 248). Amgen thus equates a lack of price impact with a lack of materiality. But, as the Second Circuit acknowledged in *Salomon*, it is "a misreading of *Basic*" to "argue that the concept of materiality in *Basic* . . . refers to a material [e]ffect

on market price." 544 F.3d at 482 (internal quotation marks omitted). *See also In re SLM Corp. Sec. Litig.*, No. 08 Civ. 1029 (WHP), 2012 WL 209095, at *5 (S.D.N.Y. Jan. 24, 2012) ("A legal assessment of materiality is . . . not determined by a single factor such as price impact, but must take into account all the relevant circumstances in a particular case.") (citing *Matrixx*, 131 S. Ct. at 1317).[12]

C. There Is No Need For This Court To Rush To Grant Review

Amgen asserts that this Court should grant certiorari because "the likelihood that the issues will be presented again in a discretionary Rule 23(f) appeal is necessarily low." Pet. 18.[13] However, there is strong evidence to the contrary.

Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330 (5th Cir. 2010), is the Fifth Circuit decision applying *Oscar*'s loss-causation standard that was subsequently vacated by this Court in *Erica P. John Fund*. On remand, the district court granted the plaintiff's motion to certify the class. *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2012 WL 565997, at *1 (N.D. Tex. Jan. 27, 2012).

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[12] Amgen did not preserve the issue of price impact below and therefore has waived it as an issue in this Court. As a result, its assertion of a circuit split regarding the question of price impact at the class-certification stage is academic, because this is not a suitable case in which to address it. *See infra* p. 28.

[13] Amgen's assertion about the bleak prospects of future Rule 23(f) appeals is a complete about-face from what it said to the Ninth Circuit: "[a] *growing* number of circuit courts have *begun* to address this issue through Rule 23(f) review." Petition for Permission To Appeal at 1, No. 09-80141 (filed Aug. 28, 2009) (emphases added).

That ruling is currently the subject of a pending Rule 23(f) petition in which the viability of price impact rebuttal evidence is at issue. The defendants assert that the district court improperly failed to consider their fraud-on-the-market rebuttal evidence establishing "that the alleged misrepresentations did not distort the market price" of defendant Halliburton's stock. Defendants' Petition for Permission to Appeal the District Court's January 27, 2012 Order Granting Plaintiff's Motion To Certify Class at 1, *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 12-90007 (5th Cir. filed Feb. 10, 2012), 2012 WL 560072. Notwithstanding Amgen's contention that the purported conflict is "entrenched" (Pet. 13), this example illustrates that Rule 23(f) appeals are pending and do arise regarding the appropriateness of "price impact" evidence at the class-certification stage.[14] Accordingly, as with the materiality discussion in Part I.A, above, in light of this Court's recent decisions, any split in authority that arguably might exist on the issue of "price impact" is not mature, irreconcilable, or entrenched.

II. The Petition Presents A Poor Vehicle For Certiorari Review

This case presents a poor vehicle for reviewing the questions presented because Amgen failed to

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[14] Even if the Fifth Circuit declines to hear the pending petition, there are likely to be others. In abrogating the Fifth Circuit's holding in *Oscar*, this Court noted that *Oscar* "include[d] some language consistent with a 'price impact' approach." *Erica P. John Fund*, 131 S. Ct. at 2187. Whether or how the Fifth Circuit will permit rebuttal at the class-certification stage based on price impact evidence are questions that losing litigants will be motivated to have that court answer via the Rule 23(f) appeal process.

satisfy the very evidentiary standard it seeks to have this Court adopt. Amgen contends that it "sought affirmatively to rebut" the presumption of reliance that Connecticut invoked in moving for class certification "by showing that the market already was privy to the truth, and accordingly that no alleged misrepresentation had any impact on the price of Amgen stock." Pet. 5 (internal quotation marks omitted). But Amgen's evidentiary showings fell far short of sustaining that burden. Thus, this Court's resolution of the questions presented would not affect the correctness of the judgment below, making this case a poor candidate for this Court's review.

Despite its effort to invoke *Salomon* and *DVI*, Amgen in fact presented *no* evidence "showing that [the] market price [of Amgen's stock] was not affected" by its alleged misrepresentations. *Salomon*, 544 F.3d at 485; *see also DVI*, 639 F.3d at 638 (stating that defendant must show that misleading material statements or corrective disclosures "*did not affect the market price of the security* [to] defeat[] the presumption of reliance for the entire class").

On two issues alone—the safety of Amgen's ESAs and their growth potential—Connecticut alleges that Amgen made false and misleading statements on a dozen dates in 2004, 2005, 2006, and each of the first five months of 2007. R133-40 V.2 Tab 6. Amgen did not file an expert report, conduct an event study, or otherwise attempt empirically to analyze Amgen's stock price movement (or the lack thereof) on or immediately after any of these dates. Of the 81 "publicly available" exhibits in its RJN, only *one* was explicitly identified as relating to Amgen's stock price, and that one exhibit included only information relating to the close of the class period: "the closing

stock price for Amgen . . . on May 9, 2007, and Amgen's intraday stock prices for May 10, 2007." R1574 V.8 Tab 23.[15]

In sum, Amgen presented no evidence to support the "price impact" test articulated in *Salomon* and *DVI*. Nor did it raise the issue of price impact below, and the Ninth Circuit never decided whether rebuttal evidence on price impact is permitted at the class-certification stage. Not only did Amgen fail to raise this issue below, it affirmatively argued that once a plaintiff establishes materiality it may be "*presume[d]* [that] a misrepresentation or omission affected a security's market price." Pet'rs C.A. Br. 20 (emphasis added). Accordingly, Amgen has waived its right to argue that plaintiffs must show price impact to trigger the presumption of reliance or that defendants must be permitted to rebut the presumption by showing the absence of price impact. This issue is therefore not properly before this Court. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (stating that this Court will "refrain from addressing issues not raised in the Court of Appeals").

Indeed, Amgen's own *amici* recognize that Amgen failed to link its truth-on-the-market assertions with any impact (or demonstrable lack of impact) on Amgen's stock price: "Petitioners here introduced rebuttal evidence that the alleged misrepresentations were immaterial because the truth was already known to the market and therefore *presumably* was already incorporated into the market price." Brief of

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[15] On the quoted page, Amgen misidentifies the chart as Exhibit 78; elsewhere in the document it is correctly identified as Exhibit 79. The chart itself may be found at R2450 V.11 Tab 103.

Amici Curiae Chamber of Commerce and PhRMA Supporting Petitioners at 8 ("Chamber/PhRMA Brief") (emphasis added). But the cases on which Amgen relies do not create a legal *presumption* of a lack of price impact; the evidence must *show* a lack of price impact to succeed.

Amgen's complete failure to introduce "price impact" evidence is directly at odds with the evidentiary burden it asks this Court to address. Accordingly, the Petition presents a poor vehicle for certiorari review.

III. Amgen Overstates The Importance Of This Case

At its core, the Petition does not present a coherent legal argument for why *Basic*'s presumption of reliance requires a threshold showing of materiality at the class-certification stage. As the court below held, adopting the persuasive reasoning of Judge Easterbrook's opinion in *Schleicher*, once the market in a given security is shown to be efficient, the question of the materiality of a public statement affects all class members similarly. *See supra* pp. 12-15.

Instead of a coherent legal argument, the Petition advances naked public policy arguments about the perceived unfairness of securities fraud defendants having to face the prospect of defending against claims brought by a certified class. These blunderbuss arguments are not, without more, sufficient reason for this Court to grant certiorari where there is no well-established circuit split, and where this Court last Term issued three important decisions that will significantly affect the development of the law.

Moreover, many of the policy arguments by Amgen and its *amici* are demonstrably flawed. For instance, the Chamber/PhRMA Brief (at 16) notes that, in the "era" before the Fifth (2007), Second (2008), and Third (2011) Circuits imposed their versions of the price impact test, "at least 94% of 10b-5 class certification motions were granted." That statistic is originally from a 1996 law review article using data from four district courts for a two-year period prior to the implementation of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 82 (1996). Post-PSLRA data, in contrast, confirm that, to a great degree, securities class-action defendants already can and do employ the pre-trial procedural devices designed to address merits issues.

Based on data from 1996-2011, 57% of securities class actions do not make it past the first ruling on a motion to dismiss.[16] Of those that do, 18.6% reach a ruling on summary judgment.[17] The Chamber/PhRMA Brief contends (at 17) that only 8% of securities class actions reach a ruling on summary judgment, but this is highly misleading because it includes in its denominator the 57% of cases that are dismissed at the first challenge on the pleadings, rather than the remaining 43% of actions that survive the first ruling on a motion to dismiss. What

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

[17] *Id.*

these statistics show is that securities class-action defendants already have numerous opportunities, prior to trial, to challenge materiality or other merits questions "capable of classwide resolution." *Dukes*, 131 S. Ct. at 2551.

Moreover, Amgen's position threatens to disrupt the effective administration of class actions across the country. Were the nature of the certification determination judicially changed in the manner that Amgen suggests so that it could routinely involve the equivalent of Rule 56 determinations, the timing of the certification decision would need to be routinely deferred until after full merits discovery. The result, for practical purposes, would be the elimination of the distinction between Rule 56 and Rule 23 determinations, with a consequent diminution in the number of case management tools available to the district court.

Finally, on the issue of forum shopping, *amici*'s assertions are greatly overblown. The Second Circuit's *Salomon* decision was issued on September 30, 2008. From 1997-2008, on average, 23.9% of securities class actions were filed in the Second Circuit.[18] From 2009-2011, the so-called *Salomon* "era," the Second Circuit's share of filings *increased* to a range of between 25.6% and 34.7%.[19] The exodus to other jurisdictions envisioned by *amici* (*see* Brief of *Amici Curiae* Former SEC Commissioners and Officials and

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[18] Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings – 2009: A Year in Review* 25 (2010), *available at* http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research_Filings_2009_YIR.pdf.

[19] 2011 Stanford at 26.

Law and Finance Professors at 9-11) is simply not borne out by the facts. As with the other arguments of Amgen's *amici*, the data do not support granting certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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