No. 11-1085

IN THE

Supreme Court of the United States

AMGEN INC., KEVIN W. SHARER, RICHARD D. NANULA, ROGER M. PERLMUTTER, and GEORGE J. MURROW,
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 OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this and other federal courts in numerous cases raising issues related to the proper scope of the federal securities laws. *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179 (2011); *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.*, 532 U.S. 148 (2008); *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336 (2005). WLF has also participated extensively in litigation in support of its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied each of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of *amici*'s intent to file.

dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF and AEF are concerned by the proliferation of class action lawsuits being filed in federal court – particularly lawsuits alleging securities fraud – and the inhibiting effect that such suits can have on the development and expansion of business. They believe that the district court's certification decision, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes. A decision to certify such a class is often outcome determinative, because it creates enormous pressure on defendants to settle the suit without regard to the underlying merits.

STATEMENT OF THE CASE

Respondent Connecticut Retirement Plans and Trust Funds alleges that Petitioners (collectively, "Amgen") violated federal securities laws by issuing misleading information (and omitting material information) regarding two of Amgen's biologics. Respondent alleges that Amgen's violations caused it to purchase Amgen stock at an inflated price, and it thereby suffered losses.

Respondent sought certification of a plaintiff class consisting of all those who purchased Amgen stock between April 22, 2004 (the date of Amgen's first alleged misrepresentation) and May 10, 2007 (the date on which the truth allegedly was fully disclosed). Respondent relied upon the fraud-on-the-market theory

when seeking class certification. It argued that the court could presume that members of the proposed class relied on Amgen's misrepresentations – regardless whether they ever heard the misrepresentations – because the stock traded in an open and developed securities market, such that the price they paid for their stock would likely include a premium reflecting the market's awareness of and reliance on the misrepresentations.

The district court granted the certification motion in August 2009, finding that Respondent met the prerequisites of FRCP 23(a) and 23(b)(3). Pet. App. 15a-50a. In particular, the court determined that Respondent met Rule 23(b)(3)'s "predominance" requirement because – based on the fraud-on-the-market theory – Respondent was entitled to a presumption that all class members relied on Amgen's alleged misrepresentations. *Id.* at 31a-40a. It stated that Respondent was entitled to that presumption because Respondent had established that class members purchased their securities on an "efficient market." *Id.* at 40a. It explained, "[T]he Court agrees with Plaintiff that to trigger the presumption of reliance, Plaintiff need only establish that an efficient market exists. Other inquiries into issues such as materiality and loss causation are properly taken up at a later stage in this proceeding." *Id.*

The court held further that Amgen would not be permitted an opportunity, at the certification stage, to rebut the presumption by attempting to demonstrate that "the truth" was known to the market throughout all or most of the class period. *Id.* at 40a-44a. Rather,

the court said, a party opposing class certification is not permitted to have its rebuttal evidence considered until the summary judgment stage. *Id.* at 44a. The court explained that if it were to allow Amgen "to present evidence that none of the investors were misled because the truth was on the market, the Court would essentially be allowing [Amgen] to assert a defense of non-reliance as a basis for denial of class certification. But such is not allowed." *Id*.

The Ninth Circuit affirmed. Pet. App. 1a-13a. It held that the only elements of the fraud-on-the-market presumption are "whether the securities market was efficient and whether the defendant's purported falsehoods were public." *Id.* at 9a. The court rejected arguments that the availability of the presumption was dependent on proving that the alleged misstatements were material, *i.e.,* that the market was actually misled by and relied on the misstatements. *Id.* at 12a. The court reasoned that materiality is a "merits" question that can be determined on a class-wide basis and thus is inappropriate for consideration at the class certification stage. *Id.* at 8a-9a. It explained, "As for the element of materiality, the plaintiff must plausibly allege – but need not *prove* at this juncture – that the claimed misrepresentations were material." *Id.* at 2a. The court further held that any effort by defendants to rebut materiality is premature at the class certification stage but instead may only be made at trial or "by summary judgment motion if the facts are uncontested." *Id.* at 12a-13a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. In affirming class certification, the Ninth Circuit adopted a distinctly minority view among the federal appeals courts regarding what must be shown to meet FRCP 23(b)(3)'s predominance requirement in a securities law class action. The court held that certification is mandated under a fraud-on-the-market theory whenever the plaintiff demonstrates that the securities market was efficient and that the defendant's purported falsehoods were public. If those showings are made, it is immaterial how much evidence there is that the alleged falsehoods were not deemed material by the market; the class must be certified. The shortcomings of that rule are obvious: since the market for the common stock of virtually every large corporation is likely to be efficient, all but the most dull plaintiffs' lawyer will *always* be able to win class certification– all he/she need do is point to some public statement of the corporate defendant and allege that the statement was misleading and caused stock prices to be artificially inflated. And once the shareholder class is certified, public corporations face overwhelming pressures to settle even the most insubstantial claims.

The Petition thoroughly documents the sharp split among the federal circuits regarding the outcome-determinative issues raised by this case: whether fraud-on-the-market class certification under FRCP 23(b)(3) requires proof that the allegedly misleading statements were material, and whether a defendant is permitted to oppose certification by submitting evidence designed to rebut a finding of materiality. *Amici* will not repeat the

evidence of a sharp circuit split, which the Ninth Circuit expressly conceded. Pet. App. 10a-11a.

Amici write instead to highlight the conflict between the decision below and the decisions of this Court. The Court first addressed the fraud-on-the-market theory in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). The Court concluded that the theory supported application of a "rebuttable presumption of reliance" when a plaintiff makes the requisite showings, and thus that "[i]t is not inappropriate" for a district court to apply the presumption, subject to rebuttal. 485 U.S. at 250. Contrary to the Ninth Circuit, *Basic* makes no suggestion that a defendant's rebuttal must be deferred to trial. In a decision issued last year, the Court reiterated a defendant's right to rebuttal and explicitly conditioned any presumption of investor reliance on a finding that the defendant's misrepresentation is "reflected in the market price at the time of [the investor's] transaction." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185, 2186 (2011). Misrepresentations will not, of course, be reflected in the market price if they are not "material." Review is warranted to resolve the conflict between the decisions of this Court and the Ninth Circuit's understanding of the materiality requirement.

Review is also warranted because of the crucial role that certification decisions play in the outcome of high-stakes securities law class-action litigation. Empirical research demonstrates that litigation costs make it very difficult for the party that loses the class certification decision to continue with the litigation – with the result that erroneous certification decisions are

often effectively unreviewable. In light of that concern, *amici* urge the Court to use this opportunity to adopt clear rules that will encourage district judges to grant class certification motions only after they have determined that all the requirements of Rule 23 have been satisfied.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASE LAW REGARDING THE PRESUMPTION OF RELIANCE

Respondent asserts the right to sue Amgen not only on its own behalf but also as a representative of the thousands of others who purchased Amgen stock during a three-year period beginning in April 2004. FRCP 23 imposes numerous requirements on those seeking to maintain such a representative action, including (under the circumstances of this case) a judicial finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members." FRCP 23(b)(3). Certification of a class is appropriate only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *General Tel. Co. Southwest v. Falcon,* 457 U.S. 147, 161 (1982)).

To prevail in a securities fraud action, a plaintiff must demonstrate, among other things, that he *relied* on the defendant's misrepresentation. *Dura Pharms. v. Broudo*, 544 U.S. 336, 341-42 (2005). Thus, to meet Rule 23(b)(3)'s predominance requirement, a plaintiff needs to demonstrate that reliance can be established

on a class-wide basis, because if reliance can only be established on a plaintiff-by-plaintiff basis, questions of law or fact common to class members could never be deemed to "predominate" over questions affecting only individual members. *Basic*, 485 U.S. at 242. In sum, whether Respondent is entitled to a presumption of reliance is very much a Rule 23(b)(3) class certification issue, because Respondent cannot meet the "predominance" requirement (and thus is not entitled to certification) unless it is afforded that presumption.

A. *Basic* and *Erica P. John Fund* Indicate That Evidence Rebutting the Presumption of Reliance Is Not Premature at the Class Certification Stage

The Court's 1988 decision in *Basic* endorsed the "general validity" of the fraud-on-the-market theory and held that, under appropriate circumstances, the theory supports recognition of a presumption of reliance in securities fraud cases. 485 U.S. at 242. The Court described the theory as follows:

> The fraud on the market theory is based on the hypothesis that, in an open and developed market, the price of a company's stock is determined by the available information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a

> case is no less significant than in a case of direct reliance on misrepresentations.

Id. at 241-42 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

The Court determined that: (1) "it is not inappropriate to apply a presumption of reliance supported by the fraud-on-the-market theory"; (2) that presumption is "rebuttable"; and (3) the district court's initial certification of the class "was appropriate when made but is subject on remand to such adjustment, if any, as developing circumstances demand." *Id.* at 250. Although the Court upheld the trial court's class certification decision, nothing in the Court's summation of its holdings suggested that a defendant's efforts to rebut the presumption of reliance are premature at the class certification stage.

Indeed, numerous passages in the decision point in the opposite direction. For example, *Basic* on several occasions (and in connection with its ruling that the presumption of reliance was rebuttable) emphasized that a class certification order is subject to revision at all times prior to final judgment. *See, e.g., id.*. at 250 (class certification is subject on remand to adjustments "as developing circumstances demand"). Those passages indicate that the Court contemplated that defendants should *not* be required to wait for trial before attempting to rebut the presumption of reliance.

In contrast, the Ninth Circuit held that it is "premature" for a defendant, at the class certification stage, to seek to rebut the presumption of reliance (and

thus to demonstrate a lack of predominance) by introducing evidence that the allegedly misleading statements were not material (and thus were not relied on by the market). Pet. App. 12a-13a. Rather, the Ninth Circuit held, such rebuttal evidence may only be presented at trial. *Id.* That holding is in significant tension with the passages from *Basic* cited above.

The Ninth Circuit's rejection of Amgen's efforts to raise a truth-on-the-market defense is particularly problematic. While conceding that a truth-on-the-market defense negates a stock fraud claim by demonstrating that the market was fully aware of Amgen's financial condition and thus that market price was unaffected by any misrepresentation, the appeals court concluded that such evidence is merely "a method of refuting an alleged misrepresentation's materiality" and may not be introduced to defeat class certification. *Id.* at 13a. But properly understood, the truth-on-the-market theory is both a defense on the merits *and* an appropriate basis for rebutting the presumption of reliance (and thus relevant in determining whether the Rule 23 requirements have been met). The theory postulates that a misrepresentation cannot have a fraudulent effect on a stock's value after information contrary to the misrepresentation becomes known to an efficient market. It posits that the market will not rely on a defendant's allegedly misleading information if the "truth" is widely disseminated during the class period and is thus known to the market. *See, e.g., Ganino v. Citizens Utility Co.,* 228 F.3d 154, 167 (2d Cir. 2000).

Indeed, *Basic* listed truth-on-the-market as one of the theories a securities law defendant may employ to

rebut the presumption of reliance in a fraud-on-the-market case:

> Any showing that severs 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, will be sufficient to rebut the presumption of reliance. For example, if petitioners could show that the "market makers" were privy to the truth about [the alleged misrepresentations] and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone.

Basic, 485 U.S. at 248.

It would have made little sense for the Court to discuss truth-on-the-market in connection with efforts "to rebut the presumption of reliance" if it really contemplated (as the Ninth Circuit held) that any such rebuttal must be delayed until trial. If a securities law defendant must await trial for a rebuttal opportunity, any trial victory would be of limited value – because a holding that rejects the presumption of reliance would result in decertification of the class for failure to meet Rule 23(b)(3)'s predominance requirement, not in a class-wide victory on the merits.

In concluding that materiality is not properly considered at class certification proceedings, the appeals court relied in substantial part on its conclusion that a

"no materiality" finding would defeat the claims of *every* shareholder. Pet. App. 8a. That conclusion is demonstrably mistaken. Even if the market as a whole did not rely on the alleged misrepresentations, it is entirely conceivable that individual shareholders did so; for example, they might have been unwilling to purchase shares at the market price but for their belief in the truth of misrepresentations. If such shareholders can establish loss, there is no reason why they should not be permitted to proceed with their securities fraud claims on an individual basis. Indeed, in its most recent decision regarding fraud-on-the-market claims, the Court explicitly contemplated the propriety of such individual suits:

> Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) cause of action. . . . The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction, *e.g.,* purchasing common stock – based on that specific representation. In that situation, the plaintiff plainly would have relied on the company's deceptive conduct.

Erica P. John Fund, 131 S. Ct. at 2184-85.

It would be unfair to shareholders who actually relied on the alleged misrepresentation to force them to be bound by a fraud-on-the-market class action, if there is serious doubt that "the market" also relied on the misrepresentation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). By allowing

rebuttal evidence regarding materiality to be introduced at the class certification stage, courts can protect individual shareholders who might otherwise have their rights cut off if a class were certified in a fraud-on-the-market case in which "the market" did not deem the misrepresentations to be material (in which case, the class is headed to eventual defeat).

The appeals court cited *Erica P. John Fund* in support of its contention that a plaintiff need make *only two* showings (an efficient market and public misrepresentations) to be entitled to class certification. Pet. App. 11a. The court's interpretation of the holding of *Erica P. John Fund* is questionable; that decision actually cuts in favor of Amgen's position. This Court stated that securities fraud plaintiffs must make *at least three* showings in order to obtain class certification:

> It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption. It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that *the relevant transaction took place "between the time the misrepresentations were made and the time the truth was revealed."*

Erica P. John Fund, 131 S. Ct. at 2185 (quoting *Basic*,

485 U.S. at 248 n.27) (emphasis added).[2] Accordingly, the case establishes that a key factor in determining whether the plaintiff is entitled to a presumption of reliance is "the time the truth was revealed." That is the precise issue on which Amgen has sought to be permitted to introduce rebuttal evidence; its consistent position has been that "the time that the truth was revealed" was on or before the dates on which it made its alleged misrepresentations. The panel's determination that Amgen was not permitted to introduce its rebuttal evidence at the class certification stage directly conflicts with *Erica P. John Fund*. Review is warranted to resolve that conflict.

B. The Decision Below Conflicts With *Wal-Mart's* Admonition That Courts Should Not Avoid Addressing Issues Relevant to Class Certification Simply Because They Are Also Merits-Based Issues

The Ninth Circuit held that for purposes of class certification, Rule 23 requires only that a plaintiff

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[2] Footnote 27 of *Basic* sets forth the requirements that a plaintiff must meet in order to invoke the presumption of reliance and does so in a manner that is highly favorable to defendants opposing class certification. In an effort to explain away Footnote 27, the Ninth Circuit argued that the *Basic* footnote was merely reciting the requirements listed by the court whose judgment was under review (the Sixth Circuit). Pet. App. 11a. But by citing directly to Footnote 27 in support of the proposition that there are at least three well-established requirements that must be met to invoke the presumption of reliance, *Erica P. John Fund* undercuts the Ninth Circuit's contention that Footnote 27 sets forth the position of the Sixth Circuit, not that of the Supreme Court.

adequately plead materiality; it need not introduce supporting evidence. Pet. App. 2a ("As for the element of materiality, the plaintiff must plausibly allege – but need not prove at this juncture - that the claimed misrepresentation was material.").

That holding directly conflicts with this Court's *Wal-Mart* decision. *Wal-Mart* held:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.

Wal-Mart, 131 S. Ct. at 2551 (emphasis in original).

The Ninth Circuit based its decision not to require proof of materiality at the class certification stage on the fact that "materiality is an elements of the *merits* of their securities fraud claim." Pet. App. 8a (emphasis in original). The appeals court reasoned that because materiality was (in its view) a common question of fact and could be determined on a class-wide basis, its resolution should await a trial on the merits:

> [T]he plaintiffs cannot fail to prove materiality yet still have a viable claim for which they would need to prove reliance individually. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). If the misrepresentations turn out to be material, then the fraud-on-the-market presumption makes the reliance issue common to the class,

> and class treatment is appropriate. But 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.

Id. at 8a-9a (citing *Wal-Mart*).

The Ninth Circuit's analysis is based on a misreading of *Wal-Mart* and indeed directly conflicts with that decision. *Wal-Mart* repeatedly emphasized that trial courts should *not* shy away from delving into issues that touch on the merits of the lawsuit, when doing so is necessary to determine whether class certification is appropriate under Rule 23. The Court explained that trial courts should engage in a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been satisfied, and added:

> Frequently the "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." . . . Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.

Wal-Mart, 131 S. Ct. at 2551-52 (quoting *Falcon*, 459 U.S. at 160).

Moreover, the Ninth Circuit's position (that resolution of any issue that can be decided on a class-wide basis should be deferred until trial, even when the issue is relevant to class certification) has little to recommend it. It may sometimes be true that a defendant who rebuts the presumption of reliance defeats the plaintiffs' claims on the merits. But if, as the Ninth Circuit would surely concede, such a rebuttal also defeats a claim for class certification by demonstrating the absence of the predominance required by Rule 23(b)(3), what possible grounds would there be for allowing class certification to proceed? It is illogical to suggest that a court should make it easier for a plaintiff to win certification in those situations in which the defendant may have evidence demonstrating that the entire securities fraud claim is meritless.

In sum, review is warranted to resolve the conflict between the decision below and *Wal-Mart* with respect to the propriety of resolving merits-based issues in connection with class certification motions.

C. The Decision Below Conflicts With *Basic* Regarding Evidence Needed to Establish the Starting and End Dates for the Class Period

Truth-on-the-market rebuttal evidence is particularly relevant in determining appropriate starting and end dates for the class period. The trial court included within the certified class all those who

purchased Amgen stock between April 2004 and May 2007. Amgen asserts that the "truth" regarding its two biologics had entered the market by April 2004 and continued to enter the market throughout the extraordinarily lengthy three-year class period certified in this case. By denying Amgen an opportunity to submit its rebuttal evidence, both Ninth Circuit and the district court deprived themselves of crucial evidence regarding the dates, if any, on which the misleading information was affecting share prices and the dates when the "truth" effectively counterbalanced the misleading information. *See, e.g., In re Federal Nat. Mortg. Ass'n Securities, Derivatives, and "ERISA" Litigation*, 247 F.R.D. 32, 38 (D.D.C. 2008) ("whether the fraud-on-the-market presumption applies as a matter of law is essential for determining the duration of the class period").

The appeals court held that the only evidence relevant to the class certification issue is whether the market for the stock was efficient and whether the alleged misrepresentations were public. But unless a trial court agrees to hear all evidence regarding when and if the "truth" reached the market, it cannot possibly make an informed decisions regarding when the class period ought to begin and end. For example, if Amgen's excluded evidence would have shown that truth-on-the-market had eliminated the misrepresentation's effects on market price by May 2004, there can be no justification for certifying a class that runs until May 2007 simply because the plaintiff has *alleged* (but has not been asked to prove) that not until the latter date was the market fully aware of the truth. Similarly, if Amgen's evidence would have shown

that the truth was revealed by April 2004 (*i.e.,* the same date on which Respondent alleges that the misrepresentations were first made), then there can be no justification for establishing any class period – that is, class certification should be denied. By mandating exclusion of all rebuttal evidence regarding when the truth entered the market, the decision below deprives district courts of all meaningful guidance for determining an appropriate class period.

In contrast, throughout its *Basic* decision, the Court exhibited a keen awareness of the need to limit the class period to the dates during which the defendant's misstatements were distorting market price. *See, e.g.,* 485 U.S. at 249 (the presumption of reliance is rebutted, and thus class certification is inappropriate, with respect to those who traded the defendant's shares after truthful information "credibly entered the market" and "dissipated the effects of the misstatements."). Indeed, the Court expressed skepticism that a "well-developed, efficient and information-hungry market" could remain misinformed – and thus mis-appraise the value of the defendant's stock – throughout a 14-month class period as a result of a small number of statements by the defendant. *Id.* at 249 n.29. Respondent asks the federal courts to believe that the market mis-appraised Amgen stock throughout a class period that was almost three times as long (37 months). In conflict with *Basic*, the decision below prevents Amgen from introducing evidence designed to show that the class period is excessive because the market knew "the truth" for some or all of that period. Review is warranted in order to address that conflict.

II. REVIEW IS PARTICULARLY IMPORTANT BECAUSE CLASS CERTIFICATION DECISIONS ARE OFTEN OUTCOME-DETERMINATIVE

Empirical research demonstrates the crucial role that class certification decisions play in the outcome of high-stakes class action lawsuits. Litigation costs make it very difficult for the party that loses the class certification decision to continue with the litigation – with the result that erroneous certification decisions are often effectively unreviewable. In light of that concern, *amici* respectfully urge the Court to grant review for the purpose of adopting clear rules that will encourage district judges to certify plaintiff classes only after they have determined that all the requirements of Rule 23 have been satisfied.

As numerous courts have recognized, companies that face a large certified class and hence enormous potential damages are "under intense pressure to settle" *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 867 (1995). Unless they want to "roll the dice," they must settle, often without regard to the merits of the plaintiffs' claims *Id.* Such settlements can in many instances legitimately be deemed "blackmail settlements." H. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

Securities fraud class action litigation presents particular problems for defendants because they are especially prone to asymmetrical discovery costs: though plaintiffs possess few relevant documents subject to discovery, they can routinely demand that millions of pages of documents be produced by the defendants. J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 548-49, 571 (Feb. 1991). Moreover, because securities fraud cases often require the attention and participation of senior corporate executives, defendants in such actions can face costly and debilitating disruptions of their business activities. R. Bone & D. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1299 (Feb. 2002). Driven largely by litigation costs, "the vast majority of certified [securities fraud] class actions settle, most soon after certification." *Id.* at 1291.

The tendency of securities fraud class actions to settle without any relation to the underlying merits of the suits undermines the aim of the federal securities laws: to deter securities fraud or manipulation. But economists doubt that those laws can achieve their purpose given the consensus view that there is little correlation between being named in a securities fraud lawsuit and the incidence of fraud. *See, e.g.*, M. Johnson, *et al.,* In re Silicon Graphics Inc.: *Shareholders Wealth Effects Resulting from the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. CAL. L. REV. 773, 782 (May 2000).

Congress has recognized the problem and has adopted legislation designed to curb abusive securities

law class actions. The Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, adopted numerous reform measures, including a provision that imposed strict pleading requirements upon "any private action" arising from the Securities Exchange Act. *See* 15 U.S.C. § 78u-4(b). Congress enacted the PSLRA "as a check against abusive litigation by private parties." *Tellabs, Inc. v. Makor Issue & Rights, Ltd.*, 551 U.S. 308, 313 (2007). It recognized that "[p]rivate securities fraud actions, . . . if not adequately controlled, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Id.* *See* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (evidence of abuse included "routine filing of lawsuits . . . whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of [the defendants]," and "abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized [defendants] to settle"). As acknowledged by the Court, "Proponents of the [PSLRA] argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

Review is warranted to determine whether federal courts, by certifying securities law class actions without regarding to whether the defendants' alleged misrepresentations were material and thereby affected the market, are encouraging the sorts of abuses that the PSLRA sought to discourage.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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