2013 WL 4855972 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

HALLIBURTON CO. and David Lesar, Petitioners,

v.

ERICA P. JOHN FUND, INC., fka Archdiocese of Milwaukee Supporting Fund, Inc., Respondent.

No. 13- 317.
September 9, 2013.

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

Petition for a Writ of Certiorari

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***i** QUESTIONS PRESENTED

1. Whether this Court should overrule or substantially modify the holding of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), to the extent that it recognizes a presumption of classwide reliance derived from the fraud-on-the-market theory.

2. Whether, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant may rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.

***II PARTIES TO THE PROCEEDINGS BELOW**

Halliburton Company and David Lesar were the defendants in the district court, and the appellants in the court of appeals.

Erica P. John Fund, Inc. fka Archdiocese of Milwaukee Supporting Fund, Inc. was the plaintiff in the district court, and the appellee in the court of appeals.

***III CORPORATE DISCLOSURE STATEMENT**

Pursuant to this Court's Rule 29.6, Petitioner Halliburton Company states that it is a publicly held company, which has no parent company.

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CASES

***1** Petitioners Halliburton Company and David Lesar respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-22a), on remand from this Court, see *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), is reported at 718 F.3d 423. The court of appeals' denial of rehearing (App., *infra*, 23a-25a), and the opinion of the district court (*id.* at 26a-31a), are unreported. The court of appeals' previous opinion (*id.* at 32a-53a) is reported at 597 F.3d 330. The district court's previous opinion (App., *infra*, 54a-99a) is unreported.

*2 STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2013. The court denied rehearing *en banc* on June 11, 2013. This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at App., *infra*, 100a-107a.

PRELIMINARY STATEMENT

This case returns to the Court for the second time, presenting fundamental issues about the presumption of reliance created by a four-Justice majority in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). The presumption stemmed from the two-part economic theory that well-developed capital markets efficiently incorporate material information into a stock's market price and that investors, in turn, purchase stock in reliance on the market price to convey a company's true value. Under *Basic*, a putative class of investors need not prove that they actually relied in common on a misrepresentation in order to obtain class certification and prevail on the merits. Instead, they may invoke a classwide presumption of reliance based on the fiction that all investors relied on the misrepresentations when they purchased stock at a price distorted by the misrepresentations.

Basic's substitution of nascent economic theory for bedrock securities and class-action law was questionable from the start, as Justices White and O'Connor argued persuasively in dissent. Twenty-five years later, all doubt is gone; *Basic*'s, theoretical framework has been subjected to withering scholarly and empirical attack. Four Justices recognized as much in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). See *id.* at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., ***3** dissenting). *Basic*'s naïve understanding of market efficiency and its simplistic view that market prices rationally convey information are at war with economic reality. Unsurprisingly, the lower courts struggle to apply *Basic*'s fictions to the facts of cases before them.

As troubling, *Basic*'s legal reasoning conflicts with this Court's insistence that class-action plaintiffs prove *in fact* that common issues predominate over individual ones. *Basic* concedes that individual reliance issues in fact predominate in most securities-fraud class actions, yet it creates a fictional presumption of reliance to enable collective claims. No reason - certainly not *Basic*'s embattled economic theory - justifies exempting securities class actions from the requirements of Rule 23.

Accordingly, the Court should overrule *Basic* or at least substantially modify the threshold for invoking a presumption of reliance. Plaintiffs currently obtain class certification principally by showing that a defendant's stock traded in an “efficient market” - a showing readily made for NYSE-listed stocks. But scholarly consensus now teaches that even in such well-developed markets, stock prices do not efficiently incorporate all types of information at all times. Because the presumption of reliance posits that investors rely in common on misrepresentations by relying on a market price that was distorted by the misrepresentations, plaintiffs seeking class certification should at least be required to prove that the alleged misrepresentations *actually* distorted the market price. This approach would more closely align the presumption of reliance with economic reality and with a plaintiff's burden under Rule 23 to show that common issues in fact predominate.

The decision below illustrates the anomalies that have flowed from *Basic*. The court of appeals, despite having acknowledged that no Halliburton misrepresentation affected its stock price, affirmed class certification under ***4** *Basic*'s presumption of classwide reliance. Although *Basic* assures that defendants may rebut the presumption of reliance by showing the absence of price distortion, 485 U.S. at 248, the court below believed that it was prohibited from considering such evidence at the class-certification stage. This Court specifically reserved that precise question in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011), and the decision below deepens a circuit split on it. Even if the Court is not inclined to overrule *Basic*, it should nonetheless grant certiorari to clarify that price distortion - *Basic*'s "fundamental premise," *id.* at 2186 - may be rebutted at the class-certification stage.

STATEMENT

I. Background

Respondent Erica P. John Fund, Inc. (the Fund) is lead plaintiff in this securities-fraud class action against Petitioners Halliburton Company and its CEO David Lesar. App., *infra*, 2a. The Fund alleges three categories of misrepresentations. *Id.* at 3a. These concern Halliburton's (1) potential liability in asbestos litigation; (2) accounting for revenue on fixed-price construction contracts; and (3) potential benefits of a merger with Dresser Industries. *Ibid.* The Fund contends investors lost money when Halliburton's stock price dropped following the release of negative news that touched on one of more of the categories of misrepresentations. *Ibid.*

The Fund relies upon the judicially-created action that this Court fashioned from Section 10(b) of the Securities Exchange Act, 15 U.S.C. §78j(b), and from SEC Rule 10b-5, 17 C.F.R. §240.10b-5. See *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). To prevail on the merits, the Fund is required to prove the following elements: (1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a security; ***5** (4) reliance; (5) economic loss; and (6) loss causation, *i.e.*, that the misrepresentation caused the alleged loss. *Id.* at 341-342.

To obtain class-action status, the Fund must also satisfy Federal Rule of Civil Procedure 23(a) and one of the Rule 23(b) requirements. The Fund sought certification under Rule 23(b)(3), which requires a plaintiff to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members." The Fund was required to " affirmatively demonstrate *** compliance" with this requirement by "prov [ing] *** *in fact*" through "evidentiary proof" that common issues predominate. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

The Fund relied exclusively on this Court's opinion in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). In *Basic*, the Court recognized that under traditional principles of fraud and class certification, a securities-fraud plaintiff could rarely establish Rule 23(b)(3)'s predominance requirement. 485 U.S. at 230, 242; *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2185 (2011) ("*EPJ Fund*"). For if each member of the proposed class were required to prove that he actually relied on defendant's misrepresentations in purchasing stock, "individual issues" would "overwhel[m] the common ones." *Basic*, 485 U.S. at 242.

To remedy this perceived problem, the four-Justice majority [1] declared that a putative class-action plaintiff may obtain a "rebuttable presumption" of classwide reliance by invoking the "fraud-on-the-market" theory. ***6** *Id.* at 242, 247. That theory assumes that in an efficient, well-developed market all public information about a company is known to the market and reflected in the company's stock price. *Id.* at 246. The theory further posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Accordingly, "if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities." *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013).

To trigger the presumption of reliance at the class-certification stage, the plaintiff must show that (1) the misrepresentations were made publicly; (2) the defendant's shares were traded in an efficient market; and (3) the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 1198; *EPJ Fund*, 131 S. Ct. at 2185. These "threshold facts," *Basic*, 485 U.S. at 248, establish that the "investor presumptively relie[d] on [the] defendant's misrepresentation if that information [was] reflected in the market price of the stock at the time of the transaction." *EPJ Fund*, 131 S. Ct. at 2186 (quotation omitted).

Basic provides, however, that the defendant may "rebut the presumption of reliance" with "[a]ny 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." 485 U.S. at 248. As relevant here, the defendant may rebut the presumption by "show[ing] that the misrepresentation in fact did not lead to a distortion in price." *Ibid.* Such rebuttal breaks the "causal connection" because "the basis for finding that the fraud had been transmitted through [the] market price would be gone." *Ibid.* In other words, a misrepresentation that "does not affect market price ***7** *** cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Amgen*, 133 S. Ct. at 1195.

II. Proceedings Below

A. Initial proceedings in the district court

The Fund sought to certify a class of all purchasers of Halliburton stock between June 1999 and December 2001. At that time, the Fifth Circuit required a plaintiff to prove "loss causation" to invoke the fraud-on-the-market presumption of reliance. See *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267-269 (5th Cir. 2007). "Loss causation *** requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *EPJ Fund*, 131 S. Ct. at 2186.

The district court denied class certification because the Fund failed to establish loss causation. As part of its analysis, the district court observed that the Fund did "not point to *any* stock price increases resulting from positive misrepresentations." App., *infra*, 58a n.11.

B. The court of appeals' initial decision

The Fifth Circuit affirmed. It explained that to prove loss causation, the plaintiff must first show that the misrepresentations "actually moved the market." App., *infra*, 35a. For a plaintiff who relies solely on price declines following the release of negative news - as the Fund does - to make this showing, the evidence regarding the price decline must "raise an inference that the price was actually affected by earlier alleged misrepresentations." *Id.* at 37a. To raise that inference, the plaintiff must show that the price decline was caused by a "correction to a prior misleading statement." *Id.* at 36a. The court concluded that none of the misrepresentations or disclosures satisfied these tests and therefore the Fund failed to prove loss causation. *Id.* at 42a-53a.

***8** C. This Court's opinion

This Court granted the Fund's petition for certiorari. Halliburton conceded that a plaintiff need not prove loss causation - price impact *plus* a subsequent loss caused by the fraud - to invoke *Basic*'s presumption of classwide reliance. *EPJ Fund*, 131 S. Ct. at 2186. Halliburton argued instead that it had defeated class certification simply by showing the absence of "price impact" - *ie.*, that the alleged misrepresentation did not affect the market price of the stock in the first place. *Id.* at 2186-2187. Halliburton noted that *Basic* permits a rebuttal "show[ing] that the misrepresentation in fact did not lead to a distortion in price." 485 U.S. at 248. Thus, Halliburton contended, the lower courts properly denied certification because, in the course of their "loss causation" analysis, they concluded that the alleged misrepresentations did not affect the market price.

This Court vacated the denial of class certification, holding that a plaintiff need not show "loss causation" to invoke *Basic*'s presumption of classwide reliance. The Court explained that "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *EPJ Fund,* 131 S. Ct. at 2186.

The Court reaffirmed that "[u]nder *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if that 'information is reflected in [the] market price' of the stock* at the time of the relevant transaction." *Ibid.* (quoting *Basic,* 485 U.S. at 247) (emphasis added). While the *Basic* presumption focuses on price impact at the time of the transaction, "[l]oss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Ibid.* Consequently, an investor may have "purchased the stock at a distorted price, and thereby presumptively ***9** relied on the misrepresentation reflected in that price," yet "not be able to prove loss causation." *Ibid.* For these reasons, the court of appeals' loss-causation rule "contravene[d] *Basic*'s fundamental premise - that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *Ibid.* (emphasis added).

The Court acknowledged and summarized Halliburton's argument that it was entitled to rebut the presumption of reliance - and thereby defeat class certification - by showing an absence of "price impact." *Id.* at 2187. The Court declined to reach that issue, however, concluding only that "the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage." *Ibid.* The Court "d[id] not *** address any other question about *Basic*, its presumption, or how and when it may be rebutted." *Ibid.* The Court remanded so that Halliburton's price-impact argument could "be addressed in the first instance by the Court of Appeals." *Ibid.*

D. Proceedings on remand

1. The court of appeals remanded to the district court, see App., *infra*, 4a, which certified the class. The five-page certification order contained only one sentence implicitly rejecting Halliburton's argument that it could rebut the classwide presumption of reliance by showing the absence of price impact: "The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required." *Id.* at 30a.

2. The court of appeals granted leave to appeal. Just before oral argument, this Court issued its decision in *Amgen,* 133 S. Ct. 1184, holding that plaintiffs need not establish that misrepresentations were material to gain class certification via the presumption of reliance. Four Justices in ***10** *Amgen* signaled their willingness to reconsider the validity of *Basic*'s presumption of reliance. 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting).

The court of appeals affirmed the district court's order certifying the class. The court identified "[t]he pivotal question in this case [as] whether a defendant should be permitted to show the absence of price impact at the class certification stage *** to establish that common issues among class members do not predominate and that class certification is inappropriate." App., *infra*, 5a. The court acknowledged that *Amgen* prohibited consideration of materiality at the class-certification stage "because materiality is an element of every fraud claim" and thus "[t]he absence of materiality 'ends the case for one and for all.' " *Id.* at 17a (quoting *Amgen,* 133 S. Ct. at 1196). Consequently, a decision on materiality could never cause individual questions to predominate.

The court further recounted that *Amgen* requires certain fraud-on-the-market prerequisites to be considered at class certification, including market efficiency and whether the misrepresentation was made publicly. *Id.* at lla-12a (citing *Amgen,* 133 S.Ct. at 1198-1199). These issues are proper subjects for a class-certification inquiry because they are not Rule 10b-5 elements and thus "[a] plaintiff can fail to establish publicity [or] market efficiency *** and therefore lose the class-wide presumption of reliance, but still establish individual reliance and prove fraud." *Id.* at 12a (citing *Amgen,* 133 S. Ct. at 1198-1199).

The court of appeals conceded that price impact is not an element of a Rule 10b-5 claim, App., *infra*, 17a, but it nonetheless held that price impact is more analogous to materiality than it is to publicity and market efficiency. The court reasoned that

while price impact is not an element, "a plaintiff must nevertheless prevail on this fact in order to establish [the element of] loss causation." *Ibid.* ***11** Thus, according to the court, "if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action." *Id.* at 18a. Because the court of appeals believed that the absence of price impact would doom all individual claims, it concluded that price impact is not relevant to common-issue predominance and therefore is off-limits at class certification. *Ibid.* Consequently, the court of appeals refused to consider "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.ll.

3. Halliburton sought rehearing *en banc*, arguing that (1) the court erred in forbidding price-impact evidence at class certification, in conflict with the Second and Third Circuits; and (2) *Basic v. Levinson* should be overruled, as suggested by four Justices in *Amgen.* The court denied rehearing. App., *infra*, 23a-25a.

REASONS FOR GRANTING THE PETITION

Basic v. Levinson should be overruled. The *Basic* majority erred by substituting economic theory for law - and bad economic theory at that. In the years since *Basic*, scholars have roundly rejected its approach to market efficiency. Meanwhile, *Basic*'s legal framework has proven unworkable in the lower courts and inconsonant with this Court's recent decisions. Relying on an acknowledged fiction, *Basic* allows certification of internally disparate classes that would not be tolerated outside of the securities-fraud context. As a judge-made rule that generates no societal reliance interests, *Basic*'s presumption is ripe for reconsideration.

At a minimum, certiorari is warranted to resolve a circuit split regarding whether a defendant may defeat class certification by showing that alleged misrepresentations did not affect stock price. The Court specifically flagged ***12** this question when it last reviewed this case, and the circuit split has only deepened since. The price-impact issue is especially salient here, as the court of appeals previously found that none of Halliburton's alleged misrepresentations distorted the market price of its stock.

I. This Court Should Overrule *Basic v. Levinson*

No party in *Amgen* asked the Court to reconsider *Basic*. Four Justices nonetheless recognized that, in a case where a party does raise that argument, this Court may need to "to revisit *Basic*'s fraud-on-the-market presumption" because "[t]he *Basic* decision itself is questionable." *Amgen*, 133 S.Ct. at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting); *id.* at 1204 (Alito, J., concurring) ("reconsideration of the *Basic* presumption may be appropriate" because "more recent evidence suggests that the presumption may rest on a faulty economic premise"). [2]

This case provides the opportunity to decide whether *Basic* should be overruled. It should be, because *Basic*'s central economic premise - the efficient capital markets hypothesis - has been almost universally repudiated. *Basic*'s legal reasoning is as out of step with modernity as its economic theory. Its substitution of a judicially-created presumption for the traditional element of reliance vastly expanded a judicially-created cause of action. And its use of a presumption of common reliance to facilitate class actions is in grave tension with current Rule 23 case law that requires common-issue predominance to be proven, not presumed.

***13** A. *Basic* is premised on economic theory that is now roundly rejected

In creating its presumption of reliance, *Basic* invoked "considerations of fairness, public policy, and probability, as well as judicial economy," 485 U.S. at 245, and "common sense." *Id.* at 246. It trusted in the accuracy of then-"[r]ecent empirical studies," *id.* at 246 & n.24, to engraft the efficient capital markets hypothesis into federal securities law. Under that hypothesis, "the market price of shares traded on well-developed markets reflects all publicly available information, and hence any material misrepresentations." *Id.* at 246.

At the time, those "[r]ecent" studies justified at least some confidence in the hypothesis, and the Court noted "[c]ommentators['] general[] *** applau [se]" for lower courts' then-recent adoption of the fraud-on-the-market theory. *Id.* at 247 (citing two student notes and one law-review article). But the virtually universal conclusion after *Basic* has been that the Court prematurely adopted a nascent and unexplored theory, which has subsequently been discarded. When a decision proves "unworkable or *** badly reasoned, 'this Court has never felt constrained to follow precedent.' " *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). There is no reason to maintain the fictional presumption of reliance where it has been shown inconsistent with the considerations of probability, common sense, and judicial economy that motivated it.

1. Academics have largely given up on *Basic*'s economic premises. Criticism began immediately, as "each formulation of the [efficient capital market hypothesis] *** c[a]me under sustained empirical and theoretical attack." Ayres, *Back to* Basics: *Regulating How Corporations Speak to the Market*, 77 Va. L. Rev. 945, 967 (1991). The consensus built over the decades, leading a preeminent scholar to recently (and understatedly) observe that "[d]oubts about the strength and pervasiveness ***14** of market efficiency are much greater today than they were in the mid 1980s." Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 175 (2009).

The reason for this development is practical and empirical. *Basic* posits that a well-developed market efficiently incorporates all public information and "transmits information to the investor in the processed form of a market price," such that "the value of the stock is worth the market price." 485 U.S. at 244 (quotation omitted). This efficient-market hypothesis showed early promise, but "empirical research became more specialized and sophisticated, and evidence of potential inefficiencies began to accumulate. *** There are now hundreds of papers documenting pricing anomalies, even for the most actively traded common stocks." Cornell, *Market Efficiency and Securities Litigation*, 6 Va. L. & Bus. Rev. 237, 243-244 (2001).

In other words, "[t]he fraud-on-the-market (FOTM) cause of action just doesn't work. At least that is the consensus view among academics respecting the primary class action vehicle under the federal securities laws." Bratton & Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 72 & n.1 (2011) (describing how even the views of *Basic*'s, academic proponents have evolved in recent years). The *Basic* presumption "seemed like a good idea at the time. But FOTM simply did not work in practice. The consensus to that effect is notable in itself because big-ticket causes of action tend to have squads of academic cheerleaders." *Id.* at 74.

Real-world experience has crippled the theoretical underpinnings of *Basic*. "Implicit in the notion of an efficient market - even a mechanically efficient market as courts understand the securities market to be - is the assumption that the market acts rationally." Fisher, ***15** *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 Emory L.J. 843, 898 (2005). But a "goodly section of academic thought now challenges" this core tenet of *Basic*, *id.* at 899, because too many recent events disprove it. "During the [1998-2001 technology] bubble, the market professionals imposed no such rationality, and in fact the market acted irrationally, with stock prices far away from fundamental values. These developments dissolved the link between the efficient market theory and the normative notions underlying 10b-5 elements." *Id.* at 847. The "economic crisis" of 2008 even further "undermine[d] 'efficient markets theory.' " Posner, *On the Receipt of the Ronald H. Coase Medal*, 12 Am. L. & Econ. Rev. 265, 278 (2010). See generally Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (2009) (discussing the state of efficient-market theory in the wake of 2008 crisis).

Basic's efficient-market theory depends heavily on "market professionals" who "generally consider most publicly announced material statements about companies, thereby affecting stock prices." 485 U.S. at 247 n.24. But "both the caselaw and economic literature" now reflect that market makers and stock analysts do not guarantee efficiency. *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 315 & nn.16-17 (5th Cir. 2005). Courts and scholars have found that "the number of market makers [does] not marginally contribute to distinguishing between efficient and inefficient firms." Barber et al., *The Fraud-on-the-Market Theory and Indicators of Common Stock's Efficiency*, 19 J. Corp. L. 285, 307 (1994); see *Unger v. Amedisys, Inc.*, 401 F.3d 316, 324 (5th Cir. 2005) (collecting cases). And the Internet bubble taught that analysts are often "behaviorally biased" by conflicts of interest and thus may "contribut[e] to market *ineffi* ***16** *ciency* by statistically biasing price changes." Fisher, *supra*, at 972 (emphasis added); *id.* at 967-972.

2. A central problem with *Basic* is that "efficiency is not a binary, yes or no question." Langevoort, *supra*, at 167. Asking whether or not a stock "trade[s] on an efficient market," *Basic*, 485 U.S. at 248 n.27, has almost no real meaning, because efficiency is rarely uniform even for a single stock. "A stock might trade efficiently some of the time, for some information types, but then trade inefficiently at other times, for other information types." Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen's *Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1484 (2013). "Information that is easy to understand and is trumpeted in the business media *** may be incorporated into market prices almost instantaneously." Stout, *The Mechanisms of Market Inefficiency*, 28 J. Corp. L. 635, 656 (2003). "But information that is 'public' but difficult to get hold of ***, complex[,] or requires a specialist's knowledge to comprehend may takes weeks or months to be fully incorporated into prices." *Ibid.* "Indeed it may never be incorporated at all." *Ibid.* Yet *Basic* relies upon an outdated binary conception of efficiency: "[I]f a market is shown to be efficient, courts may presume" investors' reliance on *all* "public, material misrepresentations regarding those securities," *Amgen*, 133 S. Ct. at 1192, without requiring plaintiffs to first prove that the market price actually incorporated the misrepresentations alleged in the case.

Even those scholars who may favor the result in *Basic* now repudiate *Basic*'s economic premise, precisely because efficiency is far from a binary question. See, *e.g.*, Black, *Behavioral Economics and Investor Protection*, 44 Loy. U. Chi. L.J. 1493, 1500 (2013). For instance, "the market did not react to publicly available information about the impact of a breakthrough in cancer research on a corporation until the New York Times wrote about it ***17** more than five months after the original release." *Ibid.* Similarly, Wall Street Journal reports on insider trades appear to quickly affect a stock's trading price, despite *days-earlier* disclosure of the same information by the SEC. See Chang & Suk, *Stock Prices and the Secondary Dissemination of Information*, 33 Fin. Rev. 115, 115-117 (1998). See also *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 263-271 (3d Cir. 2005) (similar example of Journal report affecting the price weeks after the information was publicly released in a complicated SEC filing). "Because the notion of information efficiency upon which the fraud-on-the-market presumption rests is crumbling under sustained academic scrutiny, the future of securities fraud class action litigation - dependent on this presumption - may be in jeopardy." Black, *supra*, at 1502.

Because *Basic* subjects litigants to "the misleading notion of binary efficiency," Cornell, *supra*, at 250, it is both under- and overinclusive. If a stock typically does not efficiently incorporate information or trades in an underdeveloped market, defendants who made specific misrepresentations that affected the stock price immediately may escape class certification and even substantial liability. See, *e.g.*, *Bell*, *422* F.3d at 316 & n.18 (rejecting class certification because price decline following alleged corrective disclosure was insufficient to prove market efficiency); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 364 n.*, 368 (4th Cir. 2004) (similar). But if a stock trades on a market that is generally efficient (or at least well-developed), that mere fact says nothing about whether it was efficient with respect to a particular misrepresentation - whether the market in fact incorporated the information or not. "[T]reating market efficiency in a binary manner," unsurprisingly, "often makes case law irreconcilable with the actual behavior of the markets." Cornell, *supra*, at 255. Such a clumsy tool, based on an economic fallacy, should not retain this Court's imprimatur.

***18** 3. Scholarship and experience have borne out Justice White's prescient dissent (joined by Justice O'Connor), not the reasoning of the four Justices in the *Basic* majority:

[T]he fraud-on-the-market theory is a mere babe. Yet today, the Court embraces this theory with the sweeping confidence usually reserved for more mature legal doctrines. In so doing, I fear that the Court's decision may have many adverse, unintended effects as it is applied and interpreted in the years to come.

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For while the economists' theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are - in the end - nothing more than theories which may or may not prove accurate upon further consideration.

Basic, 485 U.S. at 250-251, 254.

Beyond his discomfort with adopting *any* unproven theory into law, Justice White presaged what scholars later would say. "If investors really believed that stock prices reflected a stock's Value,' many sellers would never sell, and many buyers never buy." *Id.* at 256. Given the scholarly consensus undercutting *Basic*'s brand of efficient-market theory, the presumption should no longer be regarded as an adequate proxy for the actual reliance that fraud claims traditionally require.

At the least, the presumption should be refashioned to require affirmative proof that the market price was distorted by the particular misrepresentations at issue. It makes scant sense to certify enormous "fraud-on-the-market" class actions based on disproven notions of general ***19** efficiency without inquiring whether the market was actually defrauded by the alleged misrepresentations. [3]

B. Because of *Basic*'s faulty foundation, federal courts have struggled to apply it, and state courts have refused to adopt it

Basic's inapt approach to market efficiency is matched by its threat to judicial efficiency. Justice White warned that "[c]onfusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic*, 485 U.S. at 252. We have seen that occur in this instance.

1. Courts have struggled to apply *Basic*. Because *Basic*'s binary approach to market efficiency is unsound and not susceptible to principled application, there has inevitably been a "high level of inconsistency in the courts regarding what makes a market sufficiently efficient to trigger the fraud-on-the-market presumption." Rapp, *supra*, at 1484.

Federal courts often use the well-known *Cammer* factors to assess market efficiency, [4] but those factors are ***20** themselves indeterminate and frequently correlated with each other. Courts cannot help but arrive at "a massive hodgepodge of *** outcomes." Ferillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 102 (2004). "*Basic*'s obfuscation about the role of efficiency sent the [lower] courts off on a long journey without a particularly good compass." Langevoort, *supra*, at 167.

As Judge Scirica recently lamented, the *Basic* majority's "inject[ion] [of] nascent economic theory into legal doctrine" has, as Justice White's dissent predicted, led to " '[c]onfusion and contradiction in court rulings.' " *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 632-633 (3d Cir. 2011) (quoting *Basic*, 485 U.S. at 252). A decision that has so thoroughly "defied consistent application by the lower courts" is not worth preserving. *Payne*, 501 U.S. at 830.

2. The actions of state courts - which are not bound by *Basic* - speak as loudly as the confusion emanating from federal courts. Twelve years after Basic was decided, "*no state court* with the authority to consider whether *Basic* is persuasive has chosen to apply it" under state law. *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1198 (N.J. 2000) (emphasis added). That is because "the persuasiveness of [*Basic*'s] intellectual underpinning, the Efficient Capital Market Hypothesis," has been found wanting. *Ibid.* State courts have concluded that "[a]s more time has passed, and there has been greater opportunity to examine and test market efficiency, the hypothesis has shown greater weakness." *Ibid.*

So far as petitioners know, no states since 2000 have bucked the uniform trend of rejecting *Basic*'s analysis. Indeed, states have continued to disavow *Basic*. See, *e.g.*, *Manzo v. Rite Aid Corp.*, No. Civ. A18451-NC, 2002 WL 31926606, at *4 (Del. Ch. Dec. 19, 2002) ("plaintiff cannot rely on a presumption of reliance based on a type of ***21** 'fraud on the market' theory because the [Delaware] Supreme Court has determined that Delaware does not recognize such a claim"), aff d, 825 A.2d 239 (Del. 2003).

C. *Basic*'s "presumption" that common issues of reliance predominate is inconsistent with this Court's recent class-certification jurisprudence

The case for overruling *Basic* goes beyond its substitution of now-discredited economic theory for the once-indispensable reliance element of a fraud claim. The application of *Basic*'s presumption of reliance to facilitate class actions coexists uncomfortably with this Court's recent, more rigorous approach to class certification.

Even before Basic, this Court admonished that "actual, *not presumed*, conformance with [Rule 23] remains *** indispensable." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). By allowing courts to presume common reliance, the Court departed from this principle in *Basic*, and the conflict has only become starker since.

In *Wal-Mart Stores, Inc. v. Dukes*, for example, this Court emphasized that plaintiffs must "affirmatively demonstrate *** compliance" with Rule 23, and thereby "prove *** *in fact*" that *common* issues predominate before a district court may certify a class. 131 S. Ct. 2541, 2551 (2011). The Court reiterated these principles in *Comcast Corp. v. Behrend*, holding that certification is improper when proponents do not actually "satisfy" the predominance requirement with "evidentiary proof." 133 S.Ct. 1426, 1432 (2013).

In *Wal-Mart*, the Court considered "statistical evidence about pay and promotional disparities" and sociological testimony that Wal-Mart's culture "was vulnerable to gender discrimination." 131 S. Ct. at 2549 (quotation marks omitted); *id.* at 2553-2556. But the Court concluded that this evidence did not establish that Wal-Mart ***22** in fact had a common policy of discrimination that similarly affected all class members.

Likewise, in *Comcast*, this Court held that the lower court erred in refusing to address "whether the methodology" that allegedly established predominance of common issues " '[was] a just and reasonable inference or speculative.' " *Comcast*, 133 S. Ct. at 1433. The Court rejected an analytical framework by which "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Ibid.* The Court explained that "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Ibid.*

Basic's approach to class certification could not be more different. *Basic* openly acknowledges that without a "presumption" of classwide reliance, individualized issues would in fact predominate. 485 U.S. at 242. Yet it allows courts to presume predominance in the face of these facts. And the presumption is at best a "speculative" and "arbitrary" stand-in for real common reliance, not a methodology capable of demonstrating that common reliance questions in fact predominate. If expert testimony and economic models are insufficient to show that common issues truly predominate, a bare presumption that all agree is unrelated to *actual* common reliance cannot coexist with Rule 23. At the very least, *Basic*'s outdated economic theory should undergo the searching scrutiny given to the methodologies proffered to establish predominance in *Wal-Mart* and *Comcast.* [5]

Under *Basic*, putative plaintiff classes bringing Rule 10b-5 claims are given special solicitude available to no ***23** one else - immunity from the very Rule 23 principles articulated in cases like *Wal-Mart* and *Comcast*. That shortcut was perhaps understandable when *Basic* was decided - a time when many courts did not require plaintiffs to establish "in fact" that Rule 23's requisites were satisfied. See Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1266 & n.54 (2002) (collecting cases "requiring a certification analysis focused on allegations rather than evidence"). But this anomaly should not survive after *Wal-Mart* and *Comcast*. "*[S]tare decisis* cannot possibly be controlling when *** the decision in question has *** [had] its underpinnings eroded *** by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

D. This case presents an ideal vehicle for the Court to reconsider *Basic*

1. The particulars of this case present an especially clear path to revisiting *Basic*.[6] It implicates a key reason that the economic basis of *Basic*'s presumption is unsound - that binary "market efficiency" of the defendant's stock is the key driver for class certification. *Of course* the "market" for Halliburton stock, which trades ***24** heavily on the NYSE, is "efficient" under *Basic*'s binary test for market efficiency. Langevoort, *supra*, at 173 (noting that "[f]or large-cap stocks, there is seldom any debate over [efficiency]" at class certification). But, as described above, this hardly means that any *particular* misrepresentation will be efficiently incorporated into Halliburton's stock price. Indeed, the court of appeals' previous opinion found no evidence that Halliburton's alleged misrepresentations moved the market price. App., *infra*, 35a, 37a, 42a-53a. Without price impact, there is no reason to presume classwide reliance on the misrepresentations by relying on the market price, because nothing establishes that the misrepresentations *were even reflected* in that price. This case illustrates *Basic*'s misplaced trust in general market efficiency as the foundation for a presumption of reliance, and this Court should abandon it now.

At the very least, *Basic* should be modified to require plaintiffs to prove price impact in order to invoke the presumption in the first instance. This approach would be more consistent with Rule 23's requirement that plaintiffs must establish common-issue predominance. It would acknowledge the scholarly consensus that general market efficiency does not mean that all types of misrepresentations are efficiently incorporated into market price at all times. And it would refocus *Basic* on whether there is a plausible case for presumed reliance on misrepresentations via reliance on a distorted market price.

2. *Stare decisis* considerations support overruling *Basic* without further delay. "Where a decision has been questioned by Members of the Court in later decisions" - as *Basic* was questioned by four Justices in *Amgen* - "and [has] defied consistent application by the lower courts, these factors weigh in favor of reconsideration." *Pearson v. Callahan*, 555 U.S. 223, 235 (2009) (quotation omitted). While *stare decisis* may counsel reluctance to ***25** revisit errant constructions of statutes, it does not weigh against correcting errant economic analysis injected into the *corpus juris* to replace traditional legal principles. Indeed, "judge made" rules do not "implicate the general presumption that legislative changes should be left to Congress" because "any change should come from this Court, not Congress." *Id.* at 233-234.

Basic is uniquely unsuited to *stare decisis* deference. *Basic* used a judicially-created presumption to expand a judicially-created cause of action. Such innovation is for Congress, not the judiciary, as this Court's more recent precedents explain. See, *e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-165 (2008). This was, in fact, one of Justice White's chief complaints in *Basic*. See 485 U.S. at 254, 256-257.

All of the *stare decisis* factors favor overruling. See *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (listing factors). Experience has taught that *Basic*'s economic theory is unrealistic and its legal rubric unworkable. The decision was poorly reasoned, signed by only four Justices, and of relatively recent vintage. It "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Gaudin*, 515 U.S. at 521. Nor are reliance interests at stake, for *Basic* does not "serve as a guide to lawful behavior," *ibid.*, and *stare decisis* concerns are at their nadir "in cases *** involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828.

The Court should act now to "bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quotation omitted).

***26 II. The Decision Below Deepens A Circuit Split Over Whether Price-Impact Evidence May Defeat Class Certification**

The decision below precludes price-impact evidence at the class-certification stage. This contravenes both *Basic* and *Amgen*. It also deepens a circuit split.

A. Even under *Basic*, price-impact evidence belongs at the class-certification stage

Even if this Court ultimately declines to overrule or substantially modify *Basic*, certiorari is independently warranted to ensure that *Basic* at least remains tethered to its "fundamental premise - that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added). Flowing directly from that premise, *Basic* guarantees that defendants may "rebut the presumption of reliance" by "show[ing] that the misrepresentation in fact did not lead to a distortion in price." 485 U.S. at 248.

If Halliburton successfully rebutted the presumption of classwide reliance in this way, the Fund should not have obtained class certification, for the class could not presumptively rely in common on misrepresentations by purchasing at a market price unaffected by the misrepresentations. Instead, individual class members would have to prove that they actually relied on the misrepresentations despite there being no effect on price. This would ineluctably cause individual issues to predominate. Yet both lower courts forbade Halliburton from introducing price-distortion evidence at the class-certification stage - the very procedural juncture that motivated this Court's creation of the rebuttable presumption in *Basic*. See 485 U.S. at 230 ("We granted certiorari *** to determine whether the courts below properly applied a presumption of reliance in certifying the class."); *id.* at 242.

***27 B. *Amgen*'s rationale compels allowing price-impact evidence at certification**

Amgen reaffirms that a misrepresentation that "does not affect market price *** cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity," 133 S. Ct. at 1195. Nonetheless, the court of appeals thought that *Amgen*'s reasoning precludes consideration of price-impact evidence at the class-certification stage. To the contrary, *Amgen* requires courts to consider the fraud-on-the-market predicates of publicity and market efficiency that, like price impact, are not "elements" of a securities-fraud claim. Logically, price-impact evidence must also be considered pre-certification.

1. In *Amgen*, the Court declined to require proof (or allow rebuttal) of "materiality" at the class-certification stage because "there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating." [7] 133 S. Ct. at 1196; *id.* at 1203-1204. This is so "because materiality is an essential element of a Rule 10b-5 claim." *Id.* at 1196. "[A] failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Ibid.* The Court emphasized *four* more times ***28** that materiality is irrelevant to class certification because materiality is an "element" of a Rule 10b-5 claim. [8] *Id.* at 1191, 1196, 1197, 1199.

The Court contrasted materiality with other fraud-on-the-market requirements that *must* be addressed at class certification: "that the alleged misrepresentations were publicly known" and "that the stock traded in an efficient market." *Id.* at 1198. The Court explained the critical difference: "[U]nlike materiality, market efficiency and publicity are *not indispensable elements of a Rule 10b-5 claim.* Thus, where the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption." *Id.* at 1199 (emphasis added). But individual plaintiffs could establish actual reliance without resort to the presumption. *Ibid.* "Individualized reliance issues would predominate in such a lawsuit. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action." *Ibid.*

2. The court of appeals erred by concluding that price impact is more analogous for Rule 23 purposes to materiality than to publicity and market efficiency. As with publicity and market efficiency, the absence of price impact would mean that "a plaintiff cannot invoke the fraud on the market presumption." *Amgen*, 133 S. Ct. at 1199; see *Basic*, 485 U.S. at 248. And, as with publicity and market efficiency, price impact is "not [an] indispensable elemen[t] of a Rule 10b-5 claim." *Amgen*, 133 S. Ct. at 1199.

***29** Conceding these points, App., *infra*, 15a, 17a, the court of appeals nonetheless reasoned that price-impact evidence may not be considered at certification because a successful price-impact rebuttal would defeat the Rule 10b-5 element of loss

causation. *Id.* at 17a-18a. But that does not distinguish price impact from publicity. If alleged misrepresentations are nonpublic, by definition those misrepresentations could not cause loss through a decline in the market price. See *EPJ Fund*, 131 S. Ct. at 2185 (observing that if a misrepresentation is not public, "how would the market take [the misrepresentation] into account?"). Consequently, the fact that price impact is necessary to proving loss causation in a fraud-on-the-market case cannot be the basis for excluding such evidence at class certification.

Indeed, *Amgen*'s rationale for allowing publicity evidence at certification requires permitting price-impact evidence as well. The Court explained that in a case involving non-public misrepresentations - which cannot proceed under the presumption of reliance - an individual plaintiff "can, however, attempt to establish reliance through the traditional mode of demonstrating that she was personally aware of [the defendant's] statement and engaged in a relevant transaction … based on that specific misrepresentation." *Amgen*, 131 S. Ct. at 1199 (quotation omitted). That statement is equally true in a case where the defendant shows that the misrepresentations did not distort the market price. Therefore, the absence of price impact - like publicity - is a proper subject for the class-certification stage.

3. Finally, the court of appeals mistakenly perceived that it had to intuit the specific "reason" for which Halliburton proffered price-impact evidence. App., *infra*, 13a-15a & n.7, 18a-19a n.10. The court based this understanding on its belief that "*Amgen* determined that defendants are not permitted to use evidence of no price ***30** impact to rebut materiality *** at class certification." *Id.* at 18a-19a n.10; accord *id.* at 14a. *Amgen* does not state, much less hold, any such thing. The *Amgen* defendant did not proffer price-impact evidence; it presented a "truth-on-the-market" rebuttal to show that the misrepresentations would not have been "material" to the objective investor. 133 S. Ct. at 1203. *Amgen* simply does not address whether or how price-impact data may be considered at class certification.

The court of appeals' approach transforms *Basic*'s "fundamental premise" of price distortion, *EPJ Fund*, 131 S. Ct. at 2186, into a mere conduit for proving either materiality (impermissible, according to the court of appeals) or market efficiency or publicity (permissible, one supposes). See App., *infra*, 13a-15a & n.7, 18a-19a n.10. This gets it exactly backwards: price distortion is the glue that enables common reliance on misrepresentations via reliance on the market price. Materiality, publicity, and market efficiency are merely factors that affect whether the price will be distorted by a given misrepresentation. See *Amgen*, 133 S.Ct. at 1199. Price-impact evidence is always relevant to class certification because it is the "fundamental premise" of the presumption of reliance, but unlike materiality, it is not a securities-fraud element. The court of appeals' fractured approach to determining the permissibility of price-impact evidence highlights the disarray caused by *Basic*'s presumption of reliance and its tension with core class-action principles.

C. The decision below conflicts with decisions of the Second and Third Circuits

The court of appeals held that "price impact evidence does not bear on the question of common question predominance, and is thus appropriately considered only on the merits after the class has been certified." App., *infra*, 19a. That decision deepens a circuit split over whether defendants may prevent class certification by ***31** showing that alleged misrepresentations did not distort the market price. If the Fund had brought its lawsuit in the Second or Third Circuit, Halliburton would have been entitled to rebut the presumption of reliance at the class-certification stage with price-impact evidence.

1. In *In re Salomon Analyst Metromedia Litigation*, the Second Circuit held that a defendant is "allowed to rebut the presumption, prior to class certification, by showing *** the absence of a price impact" 544 F.3d 474, 484 (2d Cir. 2008); *id.* at 483. The court explained that "successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement." *Id.* at 485. Because the district court had refused to allow price-impact evidence, the Second Circuit vacated the class-certification order and remanded for consideration of whether "the market price was *** affected by the alleged misstatements." *Id.* at 485-486.

The Third Circuit "agree[s] with the Second Circuit." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011). That court likewise held that "a defendant's successful rebuttal demonstrating that misleading material statements or corrective disclosures

did not affect the market price of the security defeats the presumption of reliance for the entire class, thereby defeating the Rule 23(b) predominance requirement." *Ibid.* [9]

The Seventh Circuit, by contrast, agrees with the decision below that price impact may not be considered at class certification. *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). The court rejected the defendants' argument that "before certifying a class, a court must determine ***32** whether false statements materially affected the price." *Ibid.* The Seventh Circuit reasoned that price impact is a "questio[n] on the merits" that could not be considered at class certification. *Ibid.*

2. Halliburton flagged this division of authority in its merits brief the first time this case reached the Court. See Br. of Resps., No. 09-1403, at 17, 29-30. The Court likewise identified the "price impact" issue but declined to address it at that time. *EPJ Fund*, 131 S. Ct. at 2187. Now that the issue is squarely presented, disagreement among the circuits should not be allowed to persist on such a central question of securities and class-action law.

This case presents a strong vehicle for resolving the split. The court of appeals' previous opinion found that the evidence did not "raise an inference that the price was actually affected by [the] alleged misrepresentations." App., *infra*, 37a, 42a-53a. The decision now under review also acknowledged "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11. Consequently, the court of appeals' holding that "price impact evidence *** is not appropriately considered at class certification," *ibid.*, was outcome-determinative. If these facts were presented in the Second or Third Circuits, the class could not have been certified.

CONCLUSION

The petition for writ of certiorari should be granted.

Footnotes

1 Only Justices Brennan, Marshall, and Stevens joined Justice Blackmun's opinion creating the presumption of reliance. Justices White and O'Connor dissented. Chief Justice Rehnquist and Justices Scalia and Kennedy did not participate. *Basic*, 485 U.S. at 225.

2 Indeed, all nine Justices recognize the instability in *Basic*'s theoretical foundation. The *Amgen* majority acknowledged "modern economic research tending to show that market efficiency is not 'a binary, yes or no question,' but instead operates differently depending on the information at issue." 133 S. Ct. at 1197-1198 n.6 (citation and internal quotation marks omitted).

3 *EPJ Fund* hints at making price impact a threshold showing for the presumption. 131 S. Ct. at 2186 ("Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if that information is reflected in [the] market price* of the stock at the time of the relevant transaction.") (emphasis added). Scholars concur. See Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 899 (1992) ("[t]he only important question is whether the price was distorted," not "determining what is or is not a truly efficient market"); Macey et al., *Lessons From Financial Economics: Materiality, Reliance, and Extending the Reach of Basic v. Levinson*, 77 Va. L. Rev. 1017, 1018 (1991) ("[W]hat determines whether investors were justified in relying on the integrity of the market price is not the efficiency of the relevant market but rather whether a misstatement distorted the price of the affected security.")

4 See *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

5 The distance from traditional Rule 23 principles is even greater still under the decision below: If courts turn a blind eye to price-impact evidence, there is no basis even to *presume* that investors commonly relied on the misrepresentation by relying on the market price.

6 In their petition for rehearing *en banc*, Petitioners argued that *Basic* should be overruled, noting the recent indication in *Amgen* that Basic was subject to reconsideration. Pet. for Reh'g *En Banc* 14-15 (filed May 24, 2013). Even that step was not a necessary prerequisite to this Court's review, because overruling or substantially modifying *Basic* is "not a new claim *** but a new argument to support what has been [Petitioners'] consistent claim," namely that class certification should be denied. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Accord *Citizens United v. FEC*, 558 U.S. 310, 330-331 (2010) (allowing direct challenge to this Court's precedents that petitioner had disclaimed below because it was a "new argument" in support of petitioner's consistent First Amendment "claim"). This Court retains the authority to overrule a precedent that underlies a claim rather than "assuming a premise *** that is itself in doubt." *Id.* at 331.

7 *Amgen*'s holding is carefully limited to materiality, a concept distinct from the price-impact issue this Court reserved in *EPJ Fund.* Materiality "is satisfied when there is a substantial likelihood that the disclosure *** would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc. v. Siracusano,* 131 S. Ct. 1309, 1318 (2011) (quotation omitted). Price impact, by contrast, involves not the content of the misstatement, but whether the alleged misrepresentation distorted the stock's market price. *EPJ Fund,* 131 S. Ct. at 2187 (" 'Price impact' simply refers to the effect of a misrepresentation on a stock price.").

8 The Court also observed that materiality is an "objective" question that "can be proved through evidence common to the class." *Amgen,* 133 S. Ct. at 1195. This factor was not determinative because the Court recognized that other equally objective, common requirements must be considered at the class-certification stage, such as market efficiency and publicity. *Id* at 1199.

9 *Amgen* disapproved of the Second and Third Circuits' holdings that "materiality" may be considered at class certification, 133 S. Ct. at 1194, but did not address those circuits' independent holdings that a defendant may defeat class certification by showing the absence of price impact.

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