NO. 13-317

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID J. LESAR,
Petitioners,

V.

ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND,
Respondent.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

TIMOTHY R. MCCORMICK
RICHARD B. PHILLIPS, JR.
MICHAEL W. STOCKHAM
THOMPSON & KNIGHT LLP
1722 Routh Street
Suite 1500
Dallas, Texas 75201
(214) 969-1700
timothy.mccormick@tklaw.com

MARY MASSARON ROSS*
PRESIDENT
DRI—THE VOICE OF THE DEFENSE BAR
55 West Monroe
Chicago, Illinois 60603
(312) 795-1101
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae

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* Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

DRI members have extensive experience litigating securities class actions and have first-hand experience with how rulings from this Court are applied "on the ground" in those cases. DRI filed a brief *amicus curiae* the first time that this case was in this Court.

This case is particularly important to DRI's members because the Fifth Circuit's rule (which differs from the rule in the Third Circuit and the Second Circuit) skews the class-certification balance so far to the plaintiffs' side that defendants will have little or no effective opportunity to rebut the pre-

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* provided timely notice of the intent to file this brief. Consent letters have been filed with the Clerk concurrently with this brief.

sumption of reliance or to defeat class certification.

INTRODUCTION AND SUMMARY OF ARGUMENTS

The first time that this case was in this Court, the issue was whether the Fifth Circuit properly required plaintiffs to prove "loss causation" at the class-certification stage. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011). During oral argument, Justice Scalia suggested that a victory by the plaintiffs on the issue of "loss causation" could be a Pyrrhic one because the Fifth Circuit could reach the same result (finding that a class should not be certified) on the ground that the alleged misrepresentations did not impact the price of Halliburton's stock. That notion makes perfect sense, because price impact is at the very heart of the presumption of reliance that this Court first approved in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). If the alleged misrepresentations did not impact the price of the stock, then there is no basis for the presumption of reliance to attach in the first instance. And in that case, the plaintiffs would fail to meet their burden under Rule 23 to prove in fact that class certification would be proper.

But on remand, the Fifth Circuit held that defendants are not entitled to raise a lack of price impact to rebut the presumption of reliance at the class-certification stage. Pet. App. 19a-20a. The Fifth Circuit reached this result through a misapplication of this Court's ruling in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds,* 133 S. Ct. 1184 (2013).

The Fifth Circuit's rule turns what was intended to be a *rebuttable* presumption of reliance into an effectively *irrebuttable* presumption. If a securities-fraud suit can survive a motion to dismiss, the Fifth Circuit's approach makes class certification almost a foregone conclusion. And once the class is certified, the sheer aggregation of claims exerts so much settlement pressure that most cases are settled without regard to the merits; they are settled because the defendants simply cannot risk the consequences of an adverse result, even if that adverse result is wrong on the merits. Said another way, otherwise innocent defendants might be forced to settle a case solely because a foreordained procedural result crushes them under the weight of possible liability.

Because of this perverse settlement incentive, the Fifth Circuit's rule raises the specter of strike suits that Congress has tried repeatedly to exorcise, first through the Private Securities Litigation Reform Act of 1995 ("PSLRA") and then through the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").

Moreover, the Fifth Circuit's *laissez-faire* approach to class certification appears to be unique to securities-fraud suits. Although this Court's class-action jurisprudence emphasizes rigorous analysis of Rule 23's requirements and concern for settlement pressure created by unduly permissive class certification, those concerns do not seem to inform decisions in the securities-fraud arena.

To ensure consistency in class-action jurisprudence and to give securities-fraud defendants a realistic opportunity to test the propriety of class

certification, this Court should grant Halliburton's petition and make clear that a defendant can seek to rebut the presumption of reliance at any time—including at the class-certification stage—with evidence that the alleged misrepresentations did not affect the stock price.

ARGUMENTS

A. The Fifth Circuit's rule effectively makes the *Basic* presumption irrebuttable.

Reliance is an essential element of every securities-fraud case. *E.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). But actual reliance is so subjective and individualized that proving it for each member of a putative class can cause individual issues to predominate, precluding class certification. *Basic*, 485 U.S. at 243. Therefore, most securities-fraud plaintiffs seek to invoke a rebuttable presumption of reliance that this Court first approved in *Basic*. *Id*. at 250.[2]

The presumption is based on the hypothesis

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[2] This rebuttable presumption of reliance is sometimes referred to as the "fraud-on-the-market presumption." *E.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 199-200 (2d Cir. 2008); *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1158 (6th Cir. 1994); Pet. App. 7a. But this phrase is a misnomer, because it suggests that the presumption at issue relates to the impact of the alleged misrepresentations on the market. A better short-hand reference is "presumption of reliance" because it more accurately describes what has to be presumed in order to make the requisite causal connection.

that, in an efficient market, the price of a stock reflects all material, publicly available information about the stock. *Id.* at 241-42. Thus, according to the hypothesis, if the stock is traded in an efficient market, it can be presumed that market participants indirectly relied on all material, publicly available information when making decisions to buy or sell. *Id.* This presumption of reliance can then be substituted for evidence of individual reliance, and common issues will predominate over individual issues. *Id.*; *see also* FED. R. CIV. P. 23(b)(3). This rebuttable presumption is therefore a judge-made accommodation—an evidentiary place-holder—that permits securities-fraud plaintiffs to meet the factual burdens necessary to satisfy the standards of Rule 23.

But this accommodation was never intended to be an automatic ticket to class-certification. It is, after all, a *rebuttable* presumption. And as part of its evidentiary review of the class-certification order in *Basic*, this Court recognized that the presumption could be rebutted by "*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." 485 U.S. at 248 (emphasis added). The Court went on to provide examples of the types of evidence that could sever the link:

- evidence that the alleged misrepresentation did not affect the market price;
- evidence that the truth entered the market and dissipated the effect of the misrepresentation; and

- evidence that the plaintiffs acted without relying on the integrity of the market.

Id. at 248-49.

It is significant that the first example of rebuttal evidence is the lack of impact on the stock price and the second example potentially relates to price impact. Price impact is at the very heart of the presumption. If the alleged misrepresentations did not influence or distort the stock price, then there is no basis to presume that the misrepresentations affected decisions to buy or sell. And if there is no basis to make that assumption, then each individual plaintiff will have to offer proof of actual reliance (*i.e.* evidence that each class member knew of and acted based on the alleged misrepresentation). In that case, individual issues of reliance would predominate, and class certification would be improper. *See id.* at 243. Thus, without price impact, there is no justification to permit plaintiffs to obtain class certification.

By refusing to consider lack of price impact at the class-certification stage, the Fifth Circuit has adopted a rule that essentially eliminates the predominance requirement for securities-fraud cases involving nationally traded securities. The Fifth Circuit held that only trade timing, publicity of the alleged misrepresentation, and market efficiency can be challenged at class-certification. Pet. App. 13a. If the case survives a motion to dismiss under the

PSLRA[3], there will most likely be no issues related to trade timing or the publicity of the alleged misrepresentations. And if the stock is traded on a national exchange, then market efficiency will not present much of an issue either. *See, e.g.*, *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 693-94 (11th Cir. 2010) ("Securities traded on NASDAQ are often presumed to be traded on an efficient market."); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (noting that "securities traded in national secondary markets such as the New York Stock Exchange … are well suited for application of the fraud on the market theory"). Accordingly, the practical effect of the Fifth Circuit's refusal to consider price impact at class-certification is that a securities-fraud suit that survives a motion to dismiss will be certified as a class action as a matter of course, and any required rigorous analysis is transformed into a perfunctory, ministerial act.

Further, it is well-established that a securities-fraud suit certified as a class action will almost certainly be settled before any consideration of the merits. This *in terrorem* effect of class certification has been repeatedly recognized by courts, including this Court. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). As this Court has observed, the aggregation of claims creates a nearly irresistible pressure to settle:

> [W]hen damages allegedly owed to tens

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[3] Pub. L. 104-67, 109 Stat. 737 (December 22, 1995) (codified in scattered sections of Title 15 and Title 18 of the United States Code).

> of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail … .

Id. (internal citations omitted). And because of this *in terrorem* effect, delaying rebuttal of the *Basic* presumption to summary judgment or trial means that there will be no rebuttal.

It is also important to understand that this *in terrorem* effect is not limited to large, deep-pocketed corporate defendants. For example, in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, the defendants were two individuals who were officers of a bankrupt corporation. 487 F.3d 261, 263 (5th Cir. 2007). And these defendants were individually facing millions of dollars in potential liability. *Id.* at 266-67.

Taken together, these realities mean that, under the Fifth Circuit's rule, any securities-fraud suit involving nationally traded securities that can survive a motion to dismiss will be certified as a class, and then be settled, and the merits will never be reached. Therefore, by delaying defendants' best chance to rebut the *Basic* presumption until summary judgment or trial, the Fifth Circuit has in effect converted what was supposed to be a rebuttable presumption into an irrebuttable presumption.

To suggest that market efficiency *can* be challenged at class-certification, but that price impact—the cornerstone of the theory itself—*cannot* be simply makes no sense from a legal or logical standpoint. This Court should make clear that because price impact is central to the justification for the *Basic* presumption, defendants should be able to use it to sever the link between the alleged misrepresentation and the stock price at the class-certification stage. Plaintiffs should not be permitted to benefit from the *in terrorem* effect of class certification without having to respond to defendants' evidence that goes to the very heart of the presumption on which the plaintiffs rely to meet the requirements of Rule 23(b).

B. This Court's *Amgen* decision does not compel the result reached by the Fifth Circuit.

The Fifth Circuit rejected Halliburton's arguments about rebuttal because the court interpreted this Court's decision in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), to bar rebuttal based on lack of price impact. Pet. App. 19a-20a. But *Amgen* does not compel the Fifth Circuit's result.

As an initial matter, the question in *Amgen* was whether a plaintiff must prove materiality at the class-certification stage to invoke *Basic*'s presumption of reliance. *Amgen*, 133 S. Ct. at 1191. As the Fifth Circuit recognized, price impact is not the same as materiality, so the holding in *Amgen* is not directly on point. Pet. App. 13a-14a. But the Fifth

Circuit concluded that the reasoning in *Amgen* prevents defendants from seeking to disprove price impact at the class-certification stage. *Id.* 19a-20a.

For at least three reasons, *Amgen* should not be stretched to prevent defendants from attacking the central premise of the *Basic* presumption at class certification. *First*, this Court in *Amgen* emphasized that requiring a plaintiff to prove materiality at the class-certification stage would be requiring it to "prove that it will win the fray." 133 S. Ct. at 1191. But in seeking to rebut the presumption with evidence that the alleged misrepresentations did not affect the stock price, defendants are not seeking to prove or disprove the ultimate merits of the case. They are seeking to show that the plaintiffs are not entitled to invoke the presumption of reliance to support their request for class certification. And if reliance cannot be proven on a class-wide basis, then a class action is not the best way to adjudicate the claims. *See id.* ("But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'").

Second, the existence of price impact is central to the application of the presumption of reliance in a way that materiality is not. The entire presumption turns on price impact. If the stock price does not reflect the alleged misrepresentation, then "there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price, and hence no grounding for any contention that investors indirectly relied on those

misrepresentations through their reliance on the integrity of the market price." *Id.* at 1199. Therefore, unlike materiality, the issue of price impact is essential to whether Rule 23(b)'s requirements can be met. *See id.* at 1195 n.4.

Third, unlike a failure of materiality, a failure of price impact does not necessarily eliminate the possibility of actual reliance. *Id.* at 1199. As this Court observed, if the alleged misrepresentations are not material, then none of the plaintiffs could have relied on them. But if the stock price does not reflect the impact of the alleged misrepresentations, it does not mean that no one relied on them in making a decision to buy or sell. Instead, it means that each plaintiff will have to prove that he or she actually relied on the alleged misrepresentations. And that proof will mean that individual issues will predominate over common ones.

Therefore, *Amgen* does not compel the conclusion that defendants cannot rebut the presumption of reliance at the class-certification stage with evidence of lack of price impact.

C. The Fifth Circuit's rule is inconsistent with expressed Congressional policy regarding securities-fraud class actions.

The Fifth Circuit's application of the judge-made presumption of reliance is also inconsistent with the policies expressly adopted by Congress in its securities-fraud statutes. Congress has repeatedly expressed concern about securities "strike suits"—meritless nuisance filings that result in "extortionate settlements," chill disclosures from issuers, and

deter qualified individuals from serving on boards of directors. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

To deter such suits, Congress first enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The purpose of the PSLRA was to raise pleading standards as a check on strike suits. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 313 (2007) (PSLRA was adopted "[a]s a check against abusive litigation by private parties"); *Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.,* 368 F.3d 86, 98 (2d Cir. 2004) ("The PSLRA was intended to curtail 'strike suits' … .").

When the PSLRA caused plaintiffs to bring suits in state court rather than attempt to clear the PSLRA's hurdles, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA was intended to stop the shift from federal to state court to ensure that the standards of the PSLRA were not frustrated. *See Dabit*, 547 U.S. at 82; Remarks of Representative Boehner, 144 CONG. REC. E1384-85 (July 22, 1998) ("This bill [SLUSA] would prevent strike suit lawyers from abusing convenient state law … .").

The Fifth Circuit's rule flies in the face of Congress's expressed concerns about strike suits and intent to stop them. Rather than require rigorous compliance with the prerequisites of Rule 23, the Fifth Circuit's rule makes the Rule 23 bar virtually nonexistent. Now, as discussed above, surviving a motion to dismiss not only means access to discovery, it means the case will likely be certified as a class action and settled because the effect of

aggregated claims will bring to bear settlement pressures that even the most innocent defendants cannot withstand.

Respondents may suggest that Congress has failed to act to curtail the *Basic* presumption and that this Court should defer to that lack of action. But because *Basic* says that this judge-made presumption is rebuttable and because other courts have held that price impact can be addressed at the class-certification stage, it is dangerous to read too much in to Congress's inaction. *See, e.g., Rapanos v. U.S.*, 547 U.S. 715, 750 (2006); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). It is just as likely that Congress has not acted to curtail the *Basic* presumption because, until the Fifth Circuit made the presumption effectively irrebuttable, Congress believed that it would not lead to extortionate settlements. *See Rapanos*, 547 U.S. at 750 (noting that inaction could be explained by Congressional belief that the courts would address any potential issues); *Central Bank*, 511 U.S. at 187 ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction … .") (internal quotations and citations omitted). But if the Fifth Circuit's rule stands, then plaintiffs will frequently be able to extract such settlements simply by surviving a motion to dismiss.

D. The Fifth Circuit's rule is inconsistent with this Court's general class-action jurisprudence.

The Fifth Circuit's rule also appears to make securities-fraud cases unique among class-actions. This Court has repeatedly reiterated that class-certification requirements must be strictly construed and rigorously analyzed. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (requiring a "rigorous analysis" of the requirements of Rule 23). Moreover, the claim aggregation inherent in class actions creates an *in terrorem* effect on defendant's that courts should not ignore. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). Finally, a rigorous inquiry into the prerequisites of Rule 23 is required even though that inquiry may also overlap with the merits of the claim. *Dukes*, 131 S. Ct. at 2551-52.

In contrast, the Fifth Circuit's rule here actually prevents a rigorous inquiry into the requirements of Rule 23. By prohibiting defendants from challenging price impact, the Fifth Circuit has prohibited a complete inquiry into whether the heart of the presumption of reliance has been satisfied. In fact, the Fifth Circuit's rule permits class certification in the face of evidence that there cannot be class-wide reliance because the alleged misrepresentations did not impact the stock price.

Finally, the Fifth Circuit's overbroad reading of *Amgen* results in a failure to consider price impact because the inquiry also overlaps with the merits of the claim. As discussed above, price impact and materiality affect reliance in different ways. Without

price impact, there can be no presumption of reliance, but individualized reliance may still be possible. The fact that the inquiry into price impact (which is central to the presumption of reliance) may also overlap with the merits should not be the basis of allowing plaintiffs to obtain class certification without meeting the requirements of Rule 23.

CONCLUSION

This Court should grant the petition for a writ of certiorari because the Fifth Circuit's rule turns what was supposed to be a rebuttable presumption into an irrebuttable presumption that virtually guarantees class certification. The promise of the ability to raise price impact at summary-judgment or trial is illusory because the aggregation of claims that results from class certification puts nearly irresistible pressure on defendants to settle.

The Fifth Circuit's rule effectively replaces stringent class-certification requirements with an artificially low bar that applies only to securities-fraud suits. It is a virtual certainty that a securities case based on nationally traded securities will be certified as a class. This effect is contrary to both Congressional policy related to securities-fraud suits and recent decisions of this Court requiring rigorous application of the class-certification standards.

For these reasons, DRI—The Voice of the Defense Bar urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

TIMOTHY R. MCCORMICK
RICHARD B. PHILLIPS, JR.
MICHAEL W. STOCKHAM
THOMPSON & KNIGHT LLP
1722 Routh Street
Suite 1500
Dallas, TX 75201
(214) 969-1700
timothy.mccormick@tklaw.com

MARY MASSARON ROSS*
PRESIDENT
DRI—THE VOICE OF THE DEFENSE BAR
55 West Monroe
Chicago, Illinois 60603
(312) 795-1101
mmassaron@plunkettcooney.com

Counsel for Amicus Curiae

October 11, 2013

* Counsel of Record