No. 11-1085

In the Supreme Court of the United States

AMGEN INC., ET AL.,

Petitioners,

v.

CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS,

Respondent.

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

BRIEF OF FORMER SEC COMMISSIONERS AND OFFICIALS AND LAW AND FINANCE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are former Commissioners and officials of the United States Securities and Exchange Commission (SEC), as well as prominent law and finance professors whose fields of academic inquiry include securities regulation and litigation, class-action practice, and law and economics.[1] *Amici* have devoted substantial parts of their professional careers to drafting, implementing, and/or studying the federal securities laws, including how those laws should be interpreted to ensure the protection of investors and the promotion of efficiency, competition, and capital formation.

This brief reflects the consensus view of the *amici*, who believe that this Court should grant certiorari to resolve the conflict among the federal courts of appeals and to address the doctrinal inconsistencies created by the Ninth Circuit's decision below. Each individual *amicus* may not endorse every argument presented in this brief, however. The SEC Commissioners, officials, and professors joining this brief as *amici* are listed alphabetically below:

The Honorable Paul S. Atkins served as a Commissioner of the SEC from 2002 to 2008.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The consents of the parties to the submission of this brief are on file with the Clerk.

Brian G. Cartwright served as General Counsel of the SEC from 2006 to 2009.

The Honorable Charles C. Cox served as a Commissioner of the SEC from 1983 to 1989, and as Chief Economist of the SEC from 1982 to 1983.

Professor Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law, the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer at the University of Chicago Law School, and the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution.

The Honorable Joseph A. Grundfest is the William A. Franke Professor of Law and Business at Stanford Law School and served as a Commissioner of the SEC from 1985 to 1990. Professor Grundfest is also founder and principal investigator of the Stanford Securities Fraud Class Action Clearinghouse, an award winning website that tracks class action federal securities fraud activity. He is also founder and senior faculty at the Rock Center on Corporate Governance at Stanford University.

The Honorable Philip R. Lochner, Jr., served as a Commissioner of the SEC from 1990 through 1991.

The Honorable Aulana L. Peters served as a Commissioner of the SEC from 1984 through 1988.

Professor Kenneth E. Scott is the Ralph M. Parsons Professor of Law and Business Emeritus at Stanford Law School and Senior Research Fellow Emeritus at the Hoover Institute.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case strikes at the heart of this Court's holding in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). *Basic* recognized that in order to benefit from a presumption of class-wide reliance, a securities fraud plaintiff must show at the class certification stage that the essential predicates to the fraud-on-the-market theory have been satisfied. The crux of the fraud-on-the-market theory is that, in an efficient market, all public *material* information will be reflected in the price of a security. An investor who purchases a security relying on the integrity of its market price relies on any *material* misrepresentations that have been made to the market. If, however, the value of a security reacts to *immaterial* information, then by definition the market in that security is not efficient and *Basic*'s presumption of class-wide reliance does not apply. Materiality is thus a critical component of the very theory that makes class certification of Section 10(b) claims possible. *Basic* recognized that any showing that severs the link between an alleged misrepresentation and the market price of a security—including a showing that a misrepresentation was immaterial—rebuts the presumption of reliance and makes class certification improper. The Ninth Circuit failed to follow these important principles when it held that a Section 10(b) plaintiff need not demonstrate materiality in order to obtain class certification.

The Ninth Circuit's misunderstanding of *Basic* has significant implications. Securities class actions are almost always settled once a class is certified, because the risks to a defendant of going to trial are so substantial. In consequence, the materiality of an al-

leged misstatement will in practice never be tested, beyond the pleading requirements, unless it is tested as part of the Rule 23 inquiry. Plaintiffs' allegations of reliance therefore will never be tested either. The Ninth Circuit's decision unleashes the considerable *in terrorem* power of class certification to compel settlement of even questionable claims without any meaningful inquiry into materiality or reliance—though *Basic* establishes that these are critical issues at the class certification stage.

These issues, moreover, are treated differently in different parts of the country. The Ninth and Seventh Circuits hold that materiality is a merits question that is not to be considered when a court is deciding whether to certify a class action. The Second and Fifth Circuits hold that a plaintiff must demonstrate that the alleged misrepresentation is material before a class may be certified. And the Third Circuit, though it does not require a plaintiff affirmatively to demonstrate materiality at the Rule 23 stage, gives a defendant the opportunity to rebut the presumption of reliance, and thereby defeat class certification, by showing the lack of materiality.

The data shows that this three-way conflict affects the vast majority of federal securities fraud actions. The five circuits that have now decided whether materiality must be shown at the class certification stage account for some three quarters of all securities fraud class actions filed in the federal courts, measured either by number of suits or by the dollar value of the resulting settlement exposure.

This deep and persistent conflict invites forum shopping—both by plaintiffs seeking to avail themselves of the Ninth and Seventh Circuits' liberal approach to class certification of Section 10(b) claims,

and by defendants who would prefer to be in the Second, Third or Fifth Circuits. The weaker the plaintiffs' materiality argument, the greater the incentive of both parties to engage in strategic behavior that ultimately hinders the efficient administration of justice.

Amici urge this Court to grant certiorari to resolve this sharp difference of judicial opinion affecting one of the principal sources of class action litigation.

ARGUMENT

The questions presented by petitioners arise from a conflict among the federal courts of appeals. Five different circuits have expressed three different views regarding the requirement that plaintiffs demonstrate materiality as a precondition to class certification in a securities fraud class action that relies on the rebuttable presumption of reliance created by this court's decision in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). *Amici* present data in Part I demonstrating that this conflict implicates the large majority of federal securities fraud litigation activity and warrants this Court's attention because of the doctrinal and practical tensions that the circuit split creates in the administration of justice. We show in Part II that the Ninth Circuit's decision that plaintiffs need not demonstrate that a misstatement is material in order to obtain class certification of a Section 10(b) claim creates irreconcilable conflicts with this Court's precedents and threatens great harm by increasing the pressure on defendants to pay large settlements to resolve questionable claims. To resolve the clear conflict on an important issue involving suits under the federal securities laws, this

Court should grant certiorari. See Sup. Ct. Rule 10(a).

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE ROLE OF MATERIALITY AT THE CLASS CERTIFICATION STAGE OF SECTION 10(b) ACTIONS.

1. As petitioners have demonstrated and we will not repeat in detail, there is a deep and well-entrenched conflict among the federal courts of appeals as to how the materiality element of the Section 10(b) cause of action is to be treated at the class certification stage of litigation. That conflict has been exacerbated by the decision of the Ninth Circuit in this case.

The Ninth Circuit here, and the Seventh Circuit in *Schleicher* v. *Wendt*, 618 F.3d 679 (7th Cir. 2010), have squarely held that materiality is a merits question that is not to be considered when a court is determining whether to certify the case for class adjudication. In so holding, the Ninth Circuit acknowledged that it was rejecting the contrary positions of the Second and Fifth Circuits. Those circuits both hold that a plaintiff must demonstrate that the alleged misrepresentation is material before a class may be certified (and, concomitantly, that a defendant may rebut any such showing to defeat certification). See *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008); *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007). And the Third Circuit imposes no burden to show materiality on plaintiffs, but does give a defendant the opportunity to rebut the fraud-on-the-market presumption of reliance, and thereby defeat class certification, by demonstrating a lack of mate-

riality at the Rule 23 stage. See *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (3d Cir. 2011).

The First and Fourth Circuits also have stated, in *dicta*, that plaintiffs must demonstrate materiality at the class certification stage. See *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 7 n.11 (1st Cir. 2005); *Gariety* v. *Grant Thornton LLP*, 368 F.3d 356, 364 (4th Cir. 2004).

This circuit split—creating different standards for class certification of securities fraud claims in different parts of the country—has significant consequences. Disparate class certification standards are of great practical importance, for as we discuss in Part II, certification of a securities fraud class action essentially ensures that a case will be settled and the merits will never be adjudicated—a result that, with "vanishingly rare exception," is virtually guaranteed even if plaintiffs' claims are weak. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009). Class certification also sets in motion costly merits discovery and increases the potential for significant disruption to the defendant's business, thereby substantially increasing the value of the case in settlement. Of course, once a class is certified the need to settle with the entire class, rather than with those shareholders willing to bring an individual action, also increases the stakes for the defendant.

2. The implications of this circuit split are not merely doctrinal, and are susceptible of precise empirical quantification. In particular, as demonstrated in Table 1 set forth in the appendix, the two circuits (the Second and Fifth) that have held that plaintiffs must make an adequate showing of materiality at the class certification stage in order to benefit from

Basic's rebuttable presumption of reliance account for 38 percent of all securities fraud class action litigation cases brought from January 1, 1996 (the effective date of the Private Securities Litigation Reform Act of 1995) through year-end of 2011. These same two circuits account for 49 percent of the settlements of federal class action securities fraud litigation filed during that same time period. Thus, measured by the dollar value of settlement exposure, the federal circuits are split roughly in half.[2] Approximately half of the historic value of federal class action securities fraud litigation is now subject to a requirement that plaintiffs make an adequate showing of materiality. Meanwhile, another half is subject to a weaker standard, or is litigated in a circuit that has no formal holding addressing the question.

The circuits holding that materiality is not to be considered during the class certification stage, the Seventh and the Ninth, account for 27 percent of the cases filed and 16 percent of the dollar value of settlements. The Third Circuit, which takes the intermediate position allowing defendants to rebut materiality without requiring that plaintiffs make a showing of materiality, accounts for 8 percent of filings and 10 percent of the dollar value of settlements.

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[2] If the two circuits that have, in *dicta*, expressed support for the requirement that plaintiffs make a showing (the First and the Fourth) are included within the category of circuits requiring a showing of materiality as a precondition to class certification, then the percentage of cases filed subject to this requirement increases to 46 percent and the percentage of the dollar value of settlements subject to this requirement increases to 60 percent.

Only 19 percent of cases representing 14 percent of the dollar value of settlements were filed in circuits that have not expressed a view, in holdings or in *dicta*, regarding the circuit split implicated by the decision below. Over time, unless this split is resolved by this Court, each of these circuits will, perforce, be required to stake out a position that can only exacerbate the practical significance of this circuit conflict.

These statistics demonstrate that the conflict among the circuits that petitioners ask this Court to resolve is a serious one. Indeed, it has the potential to affect the outcome of a substantial proportion of all the class actions that are filed in the federal courts. See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1539-1540 (2006) (constituting almost half of all class actions in federal courts, securities fraud class actions are "the 800-pound gorilla that dominates and overshadows other forms of class actions" and "disproportionately claim[s] judicial time and attention"). Such a sharp division of judicial opinion, involving a statutory provision that is one of the principal sources of class action litigation in the Nation, and affecting such a high proportion of that litigation, cries out for resolution by this Court. See, *e.g.*, *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 340 (2005) (granting certiorari in a Section 10(b) case "[b]ecause the Ninth Circuit's views about loss causation differ from those of other Circuits").

3. So long as this circuit conflict remains unresolved by this Court, it invites forum shopping by securities fraud plaintiffs. Given the liberal venue provisions of the federal securities laws, plaintiffs'

counsel in most Section 10(b) suits can file in any circuit they choose. To be sure, most cases are today resolved by the courts in which corporate defendants are headquartered. See Matthew D. Cain & Stephen M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 41 Tables 9A & B (Jan. 2012).[3] But the continued persistence of such a dramatic split on a question of law that can have a profound effect on the value of a class action claim will predictably create an incentive for plaintiffs to gravitate to those circuits in which it is easier to obtain class certification.

Plaintiffs who doubt their ability to prove by a preponderance of the evidence that the misrepresentations they allege meet the legal standard of materiality will have particular reason to file in circuits where they will not have to prove materiality in order to generate the "hydraulic pressure on defendants to settle" that comes with class certification of their claims. *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001). Equally predictably, litigation over the appropriate venue of Section 10(b) suits will increase, as defendants seek to transfer suits filed in the Ninth and Seventh Circuits, invoking "the convenience of parties and witnesses" pursuant to 28 U.S.C. § 1404(a)—venue challenges that are especially likely if a defendant is headquartered in the Second, Third, or Fifth Circuit. A uniform national rule would address these concerns, leveling the playing field across the country, and promoting the efficient administration

[3] Unpublished working paper available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1984758.

of justice by eliminating a reason to engage in strategic forum shopping behavior.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *BASIC* AND WITH THIS COURT'S SECTION 10(b) AND CLASS ACTION JURISPRUDENCE.

1. A misrepresented or omitted fact is material if there is a "substantial likelihood" that it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); accord *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1318 (2011). When this Court in *Basic* adopted this definition of materiality for Section 10(b) claims, "[t]he paradigm of a fraud on the market litigation [was] a class action brought by purchasers of stock alleging that over a period of time the stock prices were artificially inflated due to material misstatements contained in publicly available corporate documents." Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. REV. 435, 435-437 (1984) (cited in *Basic*, 485 U.S. at 247 n.26). *Basic* itself involved a claim that a corporation had misled investors—artificially depressing the price of its stock by making false representations about the material question of whether there was a plan for the corporation to be acquired.

The materiality of the alleged misrepresentations was essential to *Basic*'s holding that reliance on misrepresentations may be presumed under the fraud-on-the-market theory when the market is efficient. Indeed, the Court's explanation that considerations of "common sense and probability" support a

presumption of reliance makes sense only when plaintiffs have traded shares "after the issuance of a materially misleading statement by the corporation." 485 U.S. at 226, 246. Were a stock price moved by a misstatement of *immaterial* fact that did not affect the issuer's fundamental value—or were it not moved by a material misstatement—neither "common sense" nor "probability" would support a presumption of reliance: the market in that stock would by definition be inefficient. See, *e.g.*, ANDREI SHLEIFER, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE 5 (2000) (a key prediction of efficient market theory is that "prices should not move without any news about the value of the security"); Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 509 (2006) ("The definition of immaterial information * * * is that it is already known or * * * does not have a statistically significant effect on stock price in an efficient market").

"Reliance by the plaintiff upon the defendant's deceptive acts * * * ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge Inv. Partners* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008), quoting *Basic*, 485 U.S. at 243. Reliance may be presumed under the fraud-on-the-market theory only when the misrepresentation "is reflected in the market price of the security," because only then can it "be assumed that an investor who buys or sells stock at the market price relies upon the statement." *Ibid.* Unless a misstatement is *material*, "the basis for finding that the fraud had been transmitted through market price would be gone." *Basic*, 485 U.S. at 248.

Indeed, *Basic* makes it crystal clear that "[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, will be sufficient to rebut the presumption of reliance." 485 U.S. at 248. As an example of such a showing, this Court explained in *Basic* that "if petitioners could show that the 'market makers' were privy to the truth * * * 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." *Ibid.* But that is precisely the showing that the Ninth Circuit now prevents any defendant from making at the class certification stage in any class action securities fraud litigation.

Basic also explains that "if, despite * * * allegedly fraudulent attempt[s] to manipulate market price, news * * * credibly entered the market and dissipated the effects of the misstatements, those who traded * * * after the corrective statements would have no direct or indirect connection with the fraud." 485 U.S. at 248. Here too, the Ninth Circuit's holding would preclude a defendant from making the very showing contemplated by this Court as a means of rebutting the presumption of reliance.

That the materiality of an alleged misstatement is a key element in supporting the presumption of reliance at the merits stage of a Section 10(b) suit logically means that it is a key element at the class certification stage as well. As the drafters of Rule 23 explained, the "critical need" at the class certification stage is to determine "the nature of the issues that actually will be presented at trial"—"how the case

will be tried." Fed. R. Civ. P. 23, Cmte. Notes to the 2003 Amendments. As *Basic* establishes, a Section 10(b) case can *only* be tried in a class action format if the presumption of reliance is applicable. Otherwise, individual issues of reliance will predominate over common issues and Rule 23(b)(3) will not be satisfied. See *Basic*, 485 U.S. at 242 (the need for "proof of individualized reliance from each member of the proposed class" would have "prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones"); see also *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) ("[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance"). If a representation is not material, there is no reason to think that all members of the trading community relied on it, or indeed that any of them did, and their reliance is not a common issue that binds together their claims.

2. The position of the Seventh and Ninth Circuits that no inquiry into materiality need be made at the class certification stage is also at odds with this Court's recent decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). The Court made clear in *Wal-Mart* that class certification is proper only if the plaintiff "affirmatively demonstrate[s] his compliance with [Rule 23]—that is, he must be prepared to prove" that common issues will predominate at trial, and therefore "to prove," in a Section 10(b) case, that the presumption of reliance will apply. *Id.* at 2551. Accordingly, because materiality *must* be shown before the fraud-on-the-market presumption applies to make reliance a common issue, it also *must* be shown at the Rule 23 stage before a class may be certified.

That materiality is both a merits and a class certification issue is of no moment. "Frequently," this Court has observed, the "'rigorous analysis'" essential at the class certification stage "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped," "[n]or is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters" is "a familiar feature of litigation." *Id.* at 2551-2552.

Indeed, this Court in *Wal-Mart* described the fraud-on-the-market theory of reliance as "the most common example of considering a merits question at the Rule 23 stage." 131 S. Ct. at 2552 n.6. It observed that Section 10(b) plaintiffs "seeking [Rule] 23(b)(3) certification must prove that their shares were traded on an efficient market" in order to "invoke [the fraud-on-the-market] presumption," "an issue they will surely have to prove *again* at trial in order to make out their case on the merits." *Ibid.*

3. The *practical* effect of stripping materiality out of the equation at the class certification stage, as the Ninth and Seventh Circuits have done, would be to "[a]llo[w] plaintiffs to circumvent the reliance requirement" altogether and thereby to "disregard the careful limits on 10b-5 recovery mandated by [this Court's] earlier cases." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994). That is because class actions seeking substantial damages are almost always settled, with the result that the materiality of an alleged misstatement, if not tested at the Rule 23 stage, will never be tested at all beyond the pleading requirements.

It is well understood that, if a class is certified in a securities fraud case, the risks of trial to the defen-

dant are so significant that settlement is usually the defendant's only option. *E.g.*, Fed. R. Civ. P. 23(f), 1998 Cmte. Note ("An order granting certification" may "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). This Court has recognized that "[e]ven weak cases brought under [Rule 10b-5] may have substantial settlement value." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 80 (2006). The "*in terrorem*" prospect of "extensive discovery," "disruption of normal business activities," and the risk of a potentially massive adverse jury verdict gives even an insubstantial claim "a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-743 (1975). And these large settlements are "'payable in the last analysis by innocent investors'"—the defendant company's current shareholders. *Id.* at 739, quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968).

No one doubts that "'blackmail settlements,'" "induced by a small probability of an immense judgment," are a serious problem with the class action device in large securities fraud cases. *In re Rhone-Poulenc Rohrer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995), quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973); see THOMAS E. WILLGING, ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 179, Tables 39 & 40 (Federal Judicial Center 1996). The costs and risks of litigation make the merits of such claims largely irrelevant. *E.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV.

497, 516-517 (1991); Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727, 742-743 (1995). Once a class is certified the risks of the suit are magnified and settlement becomes the predictable outcome.

Securities fraud actions are not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause"—*i.e.*, losses caused by misrepresentations of *material* fact. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005), citing *Basic*, 485 U.S. at 252. But taking materiality out of the equation at the class certification stage means in practice that materiality need only be adequately pled, never proved, even though it is an essential ingredient of the presumption needed to establish reliance on a common, class-wide basis. Courts must "be especially alert" to prevent this sort of "class-action harassment." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979).

This Court has often taken account of the "practical consequences" of different approaches to the Section 10(b) private cause of action. *Stoneridge*, 552 U.S. at 163; see *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1104-1105 (1991). These adverse consequences of the Ninth Circuit's ruling strongly suggest that its decision misinterprets Section 10(b) and Rule 23.

4. Insisting that materiality be shown at the class certification stage would serve both of Congress's "twin goals" of "curb[ing] frivolous, lawyer-driven litigation" and "preserving investors' ability to recover on meritorious claims." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Insisting that materiality be shown before settlement pressure is ratcheted up significantly by the certifi-

cation of a class action will provide a disincentive to the filing of questionable claims over nonmaterial statements. At the same time, the requirement for making such a showing in accordance with *Basic* would not impose a material burden on any plaintiff with a clearly meritorious claim.

In particular, in order to prevail in an action for damages under Section 10(b), the plaintiff will have to demonstrate, at a minimum, "that the price on the date of purchase was inflated because of the misrepresentation." *Dura*, 544 U.S. at 342. This showing can generally be made with expert economic analysis —the same sort of event studies that plaintiffs' experts will in any event have to conduct in order to satisfy other requirements for showing at the class certification stage that the market in defendant's stock was efficient and that the fraud-on-the-market presumption is warranted. Indeed, in order to prevail on the merits plaintiffs will have to prove much more, including that the alleged misrepresentation proximately caused the alleged loss. *Id.* at 342-346. The requirement that plaintiff demonstrate materiality at the class certification stage therefore does not add to the ultimate burden imposed on the plaintiff class: it changes only the timing of the necessary showing, in a modest fashion consistent with this Court's direction in *Basic*. The incremental burden on plaintiffs in showing materiality to satisfy Rule 23 is thus insignificant compared to the settlement pressure imposed on a defendant once a class is certified.

Postponing the materiality inquiry to a merits stage that in the vast majority of securities fraud cases will never take place "ultimately result[s] in more harm than good." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 n.33 (1976). Requiring proof of ma-

teriality to obtain class certification comports with this Court's preference that deficiencies should "'be exposed at the point of minimum expenditure of time and money by the parties and the court,'" before litigation burdens and risks "push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007), quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1216, at 233-234 (3d ed. 2004). It comports too with this Court's insistence that it is "indispensible" that all of Rule 23's requirements for class certification be subjected to "rigorous analysis." *Wal-Mart*, 131 S. Ct. at 2551; *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 160-161 (1982).

The Ninth Circuit's failure to follow these precedents, to pay more than lip service to *Basic*, or to heed this Court's repeated warnings that caution is needed in cases involving the judicially implied private right of action under Section 10(b) warrant this Court's immediate intervention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE 1

CIRCUIT POSITIONS	Class Action Securities Fraud Litigation Activity : 1/1/96–12/31/11			
	Cases Filed		Settlements	
	Number	Percent	Dollar [millions]	Percent
Plaintiffs Must Show Materiality				
Second Circuit[1]	1,111	33%	19,294.5	33%
Fifth Circuit[2]	199	6%	9,850.3	17%
Total	1,310	38%	29,114.8	49%
Defendant May Rebut Materiality Even if Plaintiff Makes No Showing				
Third Circuit[3]	259	8%	6,035.7	10%
Total	259	8%	6,035.7	10%

CIRCUIT POSITIONS	Class Action Securities Fraud Litigation Activity : 1/1/96–12/31/11			
	Cases Filed		Settlements	
	Number	Percent	Dollar [millions]	Percent
Materiality Is Not Considered				
Seventh Circuit[4]	148	4%	1,547.4	3%
Ninth Circuit[5]	769	23%	7,648.0	13%
Total	917	27%	9,195.4	16%
Dicta: Plaintiffs Must Show Materiality				
First Circuit[6]	158	5%	4,701.1	8%
Fourth Circuit[7]	108	3%	1,947.8	3%
Total	266	8%	6,648.9	11%

Cont'd

CIRCUIT POSITIONS	Class Action Securities Fraud Litigation Activity : 1/1/96–12/31/11			
	Cases Filed		Settlements	
	Number	Percent	Dollar [millions]	Percent
No Position				
Sixth Circuit	149	4%	2,598.2	4%
Eighth Circuit	118	3%	2,256.2	4%
Tenth Circuit	98	3%	1,178.9	2%
Eleventh Circuit	279	8%	2,191.0	4%
D.C. Circuit	19	1%	93.6	0%
Total	663	19%	8,317.9	14%
TOTAL	3,406	100%	59,342.6	100%

Notes:

[1] *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008).
[2] *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007), abrogated on other grounds by *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011).
[3] *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 631 (3d Cir. 2011).
[4] *Schleicher* v. *Wendt*, 618 F.3d 679, 685 (7th Cir. 2010).
[5] *Connecticut Retirement Plans & Trust Funds* v. *Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011).
[6] *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 7, 11 (1st Cir. 2005).
[7] *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 364 (4th Cir. 2004).