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No. 09-1403

IN THE

Supreme Court of the United States

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Petitioner,

v.

HALLIBURTON CO. ET AL.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.................. 2

ARGUMENT 5

I. THE FRAUD-ON-THE-MARKET THEORY OF RELIANCE DEPENDS ON DISTORTION OF THE MARKET BY AN ALLEGED MISSTATEMENT 5

A. *Basic* and the Rule of Indirect Reliance.................................. 5

B. In the Absence of Evidence that an Alleged Misrepresentation Distorted the Market Price, There Can Be No Indirect Reliance......................... 7

II. THE COURT OF APPEALS CORRECTLY REQUIRED PLAINTIFF TO DEMONSTRATE PRICE IMPACT BY A PREPONDERANCE OF THE EVIDENCE AS A PREREQUISITE TO CLASS CERTIFICATION.............. 11

A. The Price Impact Inquiry Must Be Resolved Before Certification of a Fraud-on-the-Market Class............. 12

B. The Court of Appeals Correctly Allocated the Initial Burden of Proof of Price Impact to Plaintiff 22

TABLE OF CONTENTS—Continued

Page

III. THE FRAUD-ON-THE-MARKET THEORY SHOULD NOT BE EXTENDED BEYOND ITS DOCTRINAL FOUNDATION 29

CONCLUSION 32

TABLE OF AUTHORITIES

CASES Page

Alaska Elec. Pension Fund v. *Flowserve Corp.*,
572 F.3d 221 (5th Cir. 2009) 21-22

Basic Inc. v. *Levinson*,
485 U.S. 224 (1988)......................... *passim*

Berks County Employees Ret. Fund v. *First Am. Corp.*,
734 F. Supp. 2d 533 (S.D.N.Y. 2010) 23-24

Blades v. *Monsanto Co.*,
400 F.3d 562 (8th Cir. 2005) 14

Briggs v. *Anderson*,
796 F.2d 1009 (8th Cir. 1986)................ 18

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 (1978).......................... 13, 19

Desai v. *Deutsche Bank Sec. Ltd.*,
573 F.3d 931 (9th Cir. 2009) 23

Dukes v. *Wal-Mart Stores, Inc.*,
603 F.3d 571 (9th Cir. 2010) 13

Eckstein v. *Balcor Film Invs.*,
8 F.3d 1121 (7th Cir 1993) 25

Freeman v. *Laventhol & Horwath*,
915 F.2d 193 (6th Cir. 1990) 23

Gariety v. *Grant Thornton, LLP*,
368 F.3d 356 (4th Cir. 2004) 14, 23

Gebhardt v. *ConAgra Foods, Inc.*,
335 F.3d 824 (8th Cir. 2003) 23, 27

Gen. Tel. Co. of the Sw. v. *Falcon*,
457 U.S. 147 (1982).......................... 13, 17

TABLE OF AUTHORITIES—Continued

Page

Hansberry v. *Lee*,
311 U.S. 32 (1940) 18

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) 25, 26

In re Credit Suisse-AOL Sec. Litig.,
465 F. Supp. 2d 34 (D. Mass. 2006) 31

In re DVI, Inc. Sec. Litig.,
Nos. 08-8033, 08-8045, 2011 WL 1125926
(3d Cir. Mar. 29, 2011) 11, 26

In re Enron Corp. Sec. Derivative & ERISA Litig.,
529 F. Supp. 2d 644 (S.D. Tex. 2006) 31

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008) 14

In re Initial Public Offering Sec. Litig.,
471 F.3d 24 (2d Cir. 2006) 14

In re PolyMedica Corp. Sec. Litig.,
432 F.3d 1 (1st Cir. 2005) 14, 23, 24-25

In re Salomon Analyst Metromedia Litig.,
544 F.3d 474 (2d Cir. 2008) 11, 23, 31

Jones v. *Harris Assocs. L.P.*,
130 S. Ct. 1418 (2010) 1-2

Litwin v. *Blackstone Group, L.P.*,
No. 09-4426-cv, 2011 WL 447050
(2d Cir. Feb. 10, 2011) 27

Matrixx Initiatives, Inc. v. *Siracusano*,
79 U.S.L.W. 4187 (U.S. Mar. 22, 2011) 1, 27

TABLE OF AUTHORITIES—Continued

Page

Merck & Co. v. *Reynolds*,
130 S. Ct. 1784 (2010) 1

Morrison v. *Nat'l Austl. Bank, Ltd.*,
130 S. Ct. 2869 (2010) 1

Nathenson v. *Zonagen Inc.*,
267 F.3d 400 (5th Cir. 2001) 28, 31-32

Newton v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
259 F.3d 154 (3d Cir. 2001) 19

No. 84 Employer-Teamster Joint Council Pension Trust Fund v. *Am. W. Holding Corp.*,
320 F.3d 920 (9th Cir. 2003) 9

O'Brien v. *Sky Chefs, Inc.*,
670 F.2d 864 (9th Cir. 1982) 18

Oran v. *Stafford*,
226 F.3d 275 (3d Cir. 2000) 25-26

Ortiz v. *Fireboard Corp.*,
527 U.S. 815 (1999) 18

Oscar Private Equity Invs. v. *Allegiance Telecom, Inc.*,
487 F.3d 261 (5th Cir. 2007) 4, 5, 11, 20

Peil v. *Speiser*,
806 F.2d 1154 (3d Cir. 1986) 6-7

Schlanger v. *Four-Phase Sys. Inc.*,
555 F. Supp. 535 (S.D.N.Y. 1982) 7

Schleicher v. *Wendt*,
618 F.3d 679 (7th Cir. 2010) 11, 19, 24

TABLE OF AUTHORITIES—Continued

Page

Siracusano v. *Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009) 27

Stastny v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980) 18

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008)........................... 29

Teamsters Local 445 Freight Div. Pension Fund v. *Bombardier Inc.*, 546 F.3d 196 (2d Cir. 2008) 14, 20

Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)........................... 21

TSC Indus., Inc. v. *Northway, Inc.*, 426 U.S. 438 (1976)....................... 10, 24, 25

Vallario v. *Vandehey*, 554 F.3d 1259 (10th Cir. 2009) 14-15

West v. *Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002) 14

Williams v. *Mohawk Indus., Inc.*, 568 F.3d 1350 (11th Cir. 2009) 15

REGULATION

17 C.F.R. § 240.10b-5 .... *passim*

RULE AND RELATED MATERIALS

Fed. R. Civ. P. 23.............................. *passim*

Fed. R. Civ. P. 23(c)(1) 2003 Advisory Committee Note 21

TABLE OF AUTHORITIES—Continued

Page

Fed. R. Civ. P. 23(f) 1998 Advisory Committee Note 19

H.R. Rep. No. 73-1383 (1934) 24

MISCELLANEOUS

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).. 19-20

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TABLE OF AUTHORITIES—Continued

Page

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Henry J. Friendly, *Federal Jurisdiction: A General View* (1973).......................... 19

Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851 (1992).................................... 8

Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121 (1999) 19

Joseph M. McLaughlin, *McLaughlin on Class Actions* (7th ed. 2011) 13, 17

James Wm. Moore, *Moore's Federal Practice* (3d ed. 2011)........................ 21

Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 Bus. Law. 317 (2007)..................................26

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the United States regional member of the Global Financial Markets Association.

SIFMA regularly files *amicus curiae* briefs in cases that raise legal issues of vital concern to the participants in the securities industry. SIFMA has appeared before this Court as *amicus curiae* in many cases involving issues arising under the federal securities laws, most recently in *Matrixx Initiatives, Inc.* v. *Siracusano*, 79 U.S.L.W. 4187 (U.S. Mar. 22, 2011) (involving pleading standard for materiality in private securities fraud claim), *Morrison* v. *National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010) (extra-territorial application of anti-fraud provisions of federal securities laws), *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784 (2010) (statute of limitations for bringing private securities fraud claim), and *Jones* v. *Harris Associates L.P.*, 130 S. Ct. 1418 (2010) (breach of

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[1] The parties have filed blanket letters of consent for *amicus* briefs. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund its preparation or submission.

fiduciary duty under the Investment Company Act of 1940).

This case involves important issues regarding liability under the federal securities laws for misrepresentations in connection with public market transactions and the standards under which adjudication of private securities claims pursuant to the class action procedure is appropriate. These issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. Resolution of these issues could have a profound effect on SIFMA's members.

SUMMARY OF ARGUMENT

In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), this Court recognized the "fraud-on-the-market" theory of reliance in response to an impediment to class certification of private, open-market securities fraud cases under Rule 10b-5, 17 C.F.R. § 240.10b-5. In order to certify a class of plaintiffs seeking damages under Rule 23 of the Federal Rules of Civil Procedure, a district court must first find that issues common to the class predominate over individualized issues. The reliance element of fraud at common law, however, is a classic individual inquiry, involving the facts and circumstances of each plaintiff's decision to engage in a particular transaction. As the *Basic* Court recognized, "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." 485 U.S. at 242.

The fraud-on-the-market theory of indirect reliance, in which a plaintiff's reliance on the market's in-

tegrity substitutes for direct reliance on an alleged misrepresentation, allows the plaintiff to surmount an otherwise insurmountable hurdle to class certification. In so doing, the theory enables a potent form of litigation, in which small declines in share prices can translate into massive claims of aggregated damages to a shareholder class. The high social costs of such class actions, which are well recognized, have prompted repeated legislative efforts to curtail meritless private securities fraud cases and debate about the continued validity of the *Basic* decision. The same considerations mandate that if the *Basic* theory continues as a recognized judicial construct of market-wide reliance, that theory should be wielded carefully and with restraint. It is thus critical that a district court, before allowing a class of open-market investors to avail itself of the fraud-on-the-market theory, must be satisfied that the factual predicates for the application of the theory exist.

One such predicate is that the alleged misrepresentation must actually distort the price of the security at issue. Under the *Basic* paradigm, the public securities markets "rely" on a misrepresentation about a security by incorporating inaccurate information into the price of a security. In the absence of such market impact, it makes no sense to allow a plaintiff to satisfy the reliance element of securities fraud through reliance on the "integrity" of the market price. Proof of price impact is therefore essential to any fraud claim in which reliance is premised on a "fraud on the market."

As the Fifth Circuit correctly insisted, the district court should determine that price impact occurred—that the alleged misrepresentation "*actually moved*

the market," *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007)—prior to certifying a class. In the absence of price impact, there can be no indirect reliance on a misrepresentation through reliance on the market price. And in the absence of such indirect reliance, questions of individual reliance will predominate and render securities fraud claims unsuitable for resolution in a class action under Rule 23. The approach advocated by Petitioner and its *amici*—limiting the fraud-on-the-market inquiry at the class certification stage to the general efficiency of the market in question, and reserving for the merits the issue of whether the market price actually conveyed the particular misrepresentation alleged—represents an unwarranted extension of *Basic* that is incompatible with Rule 23.

The Fifth Circuit also correctly allocated the initial burden to plaintiff to provide evidence of price impact to support its invocation of the fraud-on-the-market theory. As the party invoking the presumption of indirect reliance, the plaintiff should bear the initial burden of establishing the applicability of rule. The Court's characterization in *Basic* of the rule as a rebuttable presumption does not preclude the Court from affirming the Fifth Circuit's approach as appropriate under Rule 23.

The expansion of *Basic* advocated by Petitioner and its *amici* is unwarranted not only as a matter of precedent, but also as a matter of sound judicial policy. *Basic* is grounded on an economic theory that more recent experience and scholarship have undermined. In light of the controversy attendant to the theory and the private securities fraud class actions it sanctioned, the Court should reject efforts by

securities plaintiffs to broaden the theory's practical reach, assuming that the theory has continuing vitality at all.

ARGUMENT

I. THE FRAUD-ON-THE-MARKET THEORY OF RELIANCE DEPENDS ON DISTORTION OF THE MARKET BY AN ALLEGED MISSTATEMENT.

It is not true, as Petitioner and its *amici* suggest, that the core holding of the decision under review represents a departure from this Court's precedent. Rather, the Fifth Circuit's rule that a class of shareholders may not be certified in a Rule 10b-5 case absent proof that an allegedly false statement "*actually moved* the market," *Oscar*, 487 F.3d at 265, follows inexorably from the "fraud-on-the-market" theory of reliance upon which certification depends. That theory is based upon the idea that an investor's reliance on a market price that has been distorted by a misrepresentation is equivalent to reliance on the misrepresentation. If the misrepresentation does not affect market price, it is not communicated to the plaintiff through the market, and there is no reliance.

A. *Basic* and the Rule of Indirect Reliance.

In *Basic*, the Court adopted a special rule, unique to the Rule 10b-5 context, allowing an investor to claim fraud without proof that the investor was aware of the defendant's false or misleading statements at the time of the transaction. Although the Court reaffirmed that, just as in an action for fraud at common law, "reliance is an element of a Rule 10b-5 cause of action," the Court modified the common-law reliance requirement for transactions occurring in "[t]he modern securities markets." *Id.* at 243-44.

The Court held that in an efficient market, in which the price of a security reflects all publicly available information, an investor's reliance on a public misstatement may be established *indirectly* through the misstatement's distortion of the market price. Under this "fraud-on-the-market" theory, as the name suggests, the *market* "relies" on a defendant's misstatements in establishing the market price, and investors in turn rely on the "integrity of the price set by the market." *Id.* at 245.

In *Basic*, the district court certified a class of plaintiff-shareholders under Federal Rule of Civil Procedure 23(b)(3), but acknowledged that it could not have done so without the fraud-on-the-market doctrine. *Id.* at 228 & n.5, 242. Rule 10b-5 plaintiffs, like all fraud plaintiffs, must prove they relied on a misstatement to their detriment. *Id.* at 242-43. "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* at 243. "[O]rdinarily," it requires a showing that the plaintiff "read or heard the false or misleading representations" and acted on them. 3B Harold S. Bloomenthal & Samuel Wolff, *Securities and Federal Corporate Law* § 13:25 (2d ed. 2010). Because such facts are particular to each plaintiff, individual issues in cases like *Basic* would "overwhelm[] the common ones." 485 U.S. at 242-43.

The fraud-on-the-market theory, which the Court adopted in *Basic*, provides a judicially created path to overcoming the bar on class certification of Rule 10b-5 claims. The theory rests on the "'hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.'" *Id.* at 241-42 (quoting *Peil* v. *Speiser*, 806

F.2d 1154, 1160-61 (3d Cir. 1986)). Consequently, if the "available material information" about a company includes material misrepresentations, the stock price will be distorted by the misleading information. *See id*. at 246. Thus, the theory 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 that price"—that is, on the notion that the price is *not* distorted by deliberate misinformation; after all, "'[w]ho would knowingly roll the dice in a crooked crap game?'" *Id.* at 246-47 (quoting *Schlanger* v. *Four-Phase Sys. Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).

As a result, under the fraud-on-the-market theory, a plaintiff need not show that she relied *directly* on allegedly false information by buying or selling securities based on that information. Rather, a plaintiff need only show that she relied *indirectly* on a material misrepresentation by buying or selling securities in "an impersonal, efficient market" for the securities at issue, where the misrepresentation was reflected in the market price. *See id.* at 248 & n.27 (internal quotation marks omitted). If the market price of a security is distorted by an alleged misrepresentation, "the reliance of individual plaintiffs on the integrity of the market price" serves as a surrogate for reliance on the misrepresentation itself. *Id.* at 247.

B. In the Absence of Evidence that an Alleged Misrepresentation Distorted the Market Price, There Can Be No Indirect Reliance.

The Court's opinion in *Basic*, by its express terms and by its logic, makes clear that an alleged misstatement's distortion of the market price of a security is an essential element of the fraud-on-the-

market theory. Simply put, a theory that draws an inference of investor reliance on a misstatement from investor reliance on the market price of the company's securities has no application unless the misstatement is, in fact, reflected in the market price.

The fraud-on-the-market theory adopted in *Basic* relieves a plaintiff of proving direct reliance on a defendant's material misrepresentation where the plaintiff relied on the "integrity of the market price" that reflected that misrepresentation. *Basic*, 485 U.S. at 247. The theory therefore depends on the notion that in an efficient market, "the dissemination of material misrepresentations . . . *affects the price of the stock*." *Id.* at 244-45 (emphasis added) (internal quotation marks omitted). Of course, the theory falls apart if a misrepresentation does not, in fact, affect the market price. In that case, reliance on the integrity of the market price is no substitute for reliance on a misrepresentation, because the misrepresentation has had no impact on the market price. An actual price impact is critical to the fraud-on-the-market theory's central concern: "whether the market as a whole was fooled." Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 903-05 (1992).

A simple syllogism illustrates the point. Under *Basic*, (a) an investor who buys or sells stock in an open and developed securities market does so in reliance on the integrity of the market price of the stock; (b) all material publicly available information—including any material misrepresentation—is reflected in the market price; and therefore, (c) the investor buys or sells stock in reliance on material misrep-

resentations. For the syllogism to hold, the misrepresentation must affect the market price of the stock; otherwise, step (b) fails and there can be no inference that the investor relied on the misrepresentation. *Cf. Basic*, 485 U.S. at 247 n.24 (the "presumption of reliance" requires a "belie[f] that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices"); *accord No. 84 Employer-Teamster Joint Council Pension Trust Fund* v. *Am. W. Holding Corp.*, 320 F.3d 920, 948 (9th Cir. 2003) ("[T]he fraud-on-the-market theory is premised on the fact that a misrepresentation has affected the stock's price incongruently to the stock's true 'value.'"). In the absence of price impact, therefore, a plaintiff cannot be deemed to have relied indirectly on a misstatement through reliance on the market price, because the alleged misstatement will not have been incorporated into that price.

As the Court in *Basic* recognized, the fraud-on-the-market theory hinges on the notion that an alleged misrepresentation was incorporated into the market price. Thus, the Court established two elements as prerequisites to the application of the theory, each serving to establish that an alleged misrepresentation would in fact distort the market price of the security at issue. First, the Court noted that the market for the security must be *efficient*, i.e., one in which public information is readily digested and immediately reflected in the price of the security. *See* 485 U.S. at 248 & n.27. Where the market is inefficient, prices may remain unaffected by material misstatements and the concept of indirect reliance will falter. Second, the Court stated that the alleged misrepresentation must be *material*, i.e., one that "'would have been viewed by the reasonable investor

as having significantly altered the "total mix" of information made available.'" *Id.* at 231-32 (quoting *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)). An immaterial misstatement, which by the Court's definition would not be significant to investors, could not support an inference of indirect reliance under the fraud-on-the-market theory because such a misstatement would not affect the market price.

Neither Petitioner nor any of its *amici* appear to dispute that price impact is a necessary component of the fraud-on-the-market theory of reliance.[2] Nor could they: as the Court held, any inference of indirect reliance under the theory ultimately turns on "the link between the alleged misrepresentation" and "the price received (or paid)" for the stock. *Id.* at 248. If the fraud has no impact on the market price of the stock, the link is "broken: the basis for finding that the fraud had been transmitted through market price would be gone." *Id.* There could be no clearer statement of the requirement of price impact to the fraud-on-the-market theory.

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[2] *See*, *e.g.*, Pet. Br. at 41 ("plaintiffs cannot recover for misrepresentations that did not affect the market price"); Br. of U.S. at 21 ("The gravamen of the fraud-on-the-market theory is that . . . any public material misstatements bearing on the stock's value will presumptively affect the amount that any investor pays for shares during the period that the market is misled."); Br. of Fin. Economists at 7 ("the market can be 'fooled' by public, material misrepresentations, such that the false information is reflected in the market price for the company's securities"); Br. of Law Profs. at 7 ("In proving that a well-developed and open market exists, investors establish a mechanism by which misstatements are shown to generate distortions in market prices.").

II. THE COURT OF APPEALS CORRECTLY REQUIRED PLAINTIFF TO DEMONSTRATE PRICE IMPACT BY A PREPONDERANCE OF THE EVIDENCE AS A PREREQUISITE TO CLASS CERTIFICATION.

Although *Basic* demonstrates that price impact is necessary to application of the fraud-on-the-market theory, the Court did not discuss the relationship between price impact and the elements of fraud, or clearly establish the procedural framework under which the inquiry into price impact should be conducted. This ambiguity has resulted in divergent approaches to class certification of private Rule 10b-5 cases in the Courts of Appeals. The Fifth Circuit in the case under review required the plaintiff to establish proof of price impact prior to class certification. The Second and Third Circuits also consider proof of price impact at the class certification stage, but in the context of the defendant's rebuttal of the *Basic* presumption of reliance. *In re Salomon Analyst Metromedia Litig.* ("*In re Salomon*"), 544 F.3d 474, 485 (2d Cir. 2008); *In re DVI*, *Inc. Sec. Litig.*, Nos. 08-8033, 08-8045 ("*In re DVI*"), 2011 WL 1125926, at *8 (3d Cir. Mar. 29, 2011). The Seventh Circuit, meanwhile, apparently has concluded that the price impact inquiry should be reserved for trial (although the court was not clear whether the inquiry should be considered part of loss causation, materiality, rebuttal of the *Basic* presumption, or some other analysis). *Schleicher* v. *Wendt*, 618 F.3d 679, 685 (7th Cir. 2010).

The Fifth Circuit's approach is correct.[3] It is distinguished by two critical requirements: (1) determina-

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[3] By referring to the doctrine of "loss causation," the Fifth Circuit in *Oscar* unnecessarily implied that certification would be improper in cases in which a plaintiff can demonstrate that a

tion of price impact *prior to* certification of a class based on the fraud-on-the-market theory and (2) allocation of the initial burden of proof of price impact to the plaintiff, as the party invoking the fraud-on-the-market rule of indirect reliance. These two requirements are essential to reconciling *Basic* with Rule 23 and maintaining appropriate limits on the powerful modification of the reliance requirement that the Court adopted in *Basic*.

A. The Price Impact Inquiry Must Be Resolved Before Certification of a Fraud-on-the-Market Class.

As explained in *Basic*, the fraud-on-the-market theory allows certification of an otherwise uncertifiable class in which, absent the rule of indirect reliance, individualized reliance issues would predominate. It follows that certification of a class of plaintiffs claiming securities fraud based on public-market transactions is improper when the theory is inapplicable. In the Rule 10b-5 context, therefore, applicability of *Basic*'s rule of indirect reliance is as much a prerequisite to class certification as any of the expressly enumerated requirements of Rule 23. Because a district court must find that all Rule 23 requirements are satisfied prior to certifying a class, it is incumbent upon the district court to determine

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misstatement affected market price at the time it was made, but, because of subsequent events or other intervening causes (e.g., disclosures of negative news unrelated to the misstatement), the plaintiff is not entitled to recover the particular losses the plaintiff claims. In the decision below, the Fifth Circuit clarified that a plaintiff need only show that the misrepresentation affected market price in the first instance. *See* Resp. Br. at 18.

that the fraud-on-the-market theory is applicable before it may certify a class of public-market traders.

1. This Court has held that Rule 23 requires "rigorous analysis" to ensure that class certification is appropriate. *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982); *see also* Fed. R. Civ. P. 23(b)(3) (district court must "find[]" that "questions of law or fact common to class members predominate"). The Court has long recognized that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978) (internal quotation marks omitted).

The Courts of Appeals have uniformly interpreted Rule 23 and this Court's precedent to preclude a district court from certifying a class based solely on the plaintiff's allegations. Instead, plaintiffs must demonstrate by a preponderance of the evidence that they have established the necessary predicates to certification, regardless of whether class certification issues overlap with the merits. As a leading treatise explains: "Consensus is rapidly emerging among the United States Courts of Appeal" that courts must "consider evidence, resolve factual disputes that are relevant to Rule 23's criteria, and make determinations under a preponderance of the evidence standard as to satisfaction of those criteria even if those determinations overlap with merits issues." 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 3:12 (7th ed. 2011). In the words of a recent Ninth Circuit opinion, "[t]he core holding" across the Circuits on these points "is essentially unanimous." *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 583 (9th Cir.), *cert. granted in part*, 131 S. Ct. 795 (2010).

For example, in *In re Initial Public Offering Securities Litigation* ("*In re IPO*"), the Second Circuit held that "a district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as 'some showing' for satisfying each requirement will not suffice." 471 F.3d 24, 27 (2d Cir. 2006); *see also Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) ("Although we did not use the words 'preponderance of the evidence' in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard . . . ."). All other Courts of Appeals to have considered the issue—nearly all other Circuits—are in accord.[4]

[4] *See*, *e.g.*, *In re PolyMedica Corp. Sec. Litig.* ("*In re PolyMedica*"), 432 F.3d 1, 5-6 (1st Cir. 2005) ("a district court is not limited to the allegations raised in the complaint, and should instead make whatever legal and factual inquiries are necessary to an informed determination of the certification issues"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) ("[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence"); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits"); *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) ("A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits."); *Blades* v. *Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case"); *Vallario* v. *Vandehey*, 554 F.3d 1259, 1266-67 (10th Cir. 2009) ("District courts ensure Rule 23's provisions are satisfied by conducting a rigorous analysis, addressing the rule's requirements through findings, regardless of whether these findings necessarily overlap with issues on the merits." (internal quota-

2. Neither Petitioner nor the Government quarrel with the consensus view that issues necessary to the Rule 23 inquiry must be determined by the district court, using a preponderance of the evidence standard, prior to certification.[5] Nor do they dispute that price impact is essential to the fraud-on-the-market theory.[6] Because all parties also agree that application of the theory is required in order to avoid individualized reliance issues that would render class treatment of securities fraud claims improper, the fact that price impact is a necessary element of the theory would seem to dictate that price impact must be established prior to class certification by a preponderance of the evidence.

Nevertheless, Petitioner and its *amici* advocate an interpretation of *Basic* that would postpone resolution of the price impact inquiry until summary judgment or trial. *See* Pet. Br. at 35, 45-46 ("the proper time to rebut the presumption of reliance . . . is at *trial*"); Br. of U.S. at 16-19 & n.3 ("factual determinations regarding price distortion" should be reserved for trial). Thus, Petitioner and the Government suggest that where a plaintiff's claim is based

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tion marks and citations omitted)); *Williams* v. *Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir. 2009) ("it is appropriate to consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied" (internal quotation marks omitted)).

[5] *See* Pet. Br. at 48 ("Trial courts must make a rigorous determination of whether the Fed. R. Civ. P. 23 prerequisites are satisfied."); Br. of U.S. at 10 n.1 ("The courts that have addressed the question have held that facts relevant to whether the Rule 23 requirements have been met must be established by a preponderance of the evidence.").

[6] *See supra* note 2.

on public misstatements and open market transactions, the only threshold requirement to invoking the theory at the class certification stage is market efficiency. Pet. Br. at 32, 45 ("plaintiffs may establish reliance on a class-wide basis and satisfy the predominance requirement of Rule 23 by establishing that the stock traded on an efficient market"); Br. of U.S. at 11 (plaintiffs are required to show only "that the company's shares were traded in an efficient market"). *See also* Br. of Law Profs. at 14 ("If investors meet the burden of proving that a particular market is sufficiently efficient, then *Basic* creates a rebuttable presumption that the reliance element of a 10b-5 claim is satisfied."). The thrust of this argument is that because price impact is subject to class-wide proof and relevant to the elements of the Rule 10b-5 claim as well as elements of the fraud-on-the-market theory, it should be presumed at the class certification stage and tested on the merits. Br. of U.S. at 7, 17-18.

This logic is doubly flawed. First, it overstates the *Basic* "presumption." The Court in *Basic* held that *reliance*—not price impact—could be presumed (and proved) indirectly through evidence of an efficient market and a material misrepresentation. The Court did not hold that a misrepresentation's distortion of the market price could be presumed from a mere showing of efficiency. To the contrary, the Court held that the presumption of indirect reliance would be negated by "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff." 485 U.S. at 248. Market efficiency, while necessary to the fraud-on-the-market theory, is not sufficient. Efficient markets have been assumed to account for all public information, but not all public information affects the

price of a security traded in an efficient market. In the absence of a price distortion, there is no basis for finding that a plaintiff relied on the misrepresentation by relying on the market price.[7]

Second, dispensing with a showing of price impact at the class certification stage would undermine the sound judicial administration of Rule 10b-5 claims. If the district court were to certify a class under the fraud-on-the-market theory without a showing of price impact, and the plaintiff failed to prove price impact at trial, that failure would not necessarily dispose of the claims of the class. A class can be decertified whenever it becomes apparent that class treatment is inappropriate, including at the end of trial.[8] Because the failure to prove price impact would defeat the fraud-on-the-market theory—and

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[7] The Government recognizes the need for a "market-distortion inquiry," but argues that "so long as [it] turns on factual or legal issues that are common to the members of the class, class certification is appropriate regardless of the perceived likelihood at that early stage that the plaintiffs will be able to establish reliance on the merits." Br. of U.S. at 17. That reasoning is flawed. Efficiency of the market, which all parties agree is a factual predicate to class certification in a fraud-on-the-market case, is also subject to common proof—indeed the same or similar proof that can establish price impact. A finding of efficiency, too, could conceivably be deferred to a later stage of the litigation. But deferral would be improper because—like price impact—market efficiency is a foundational fact upon which the *Basic* theory of indirect reliance rests.

[8] *See* Fed. R. Civ. P. 23(c)(1)(C); *Falcon*, 457 U.S. at 160 ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); 1 *McLaughlin on Class Actions* § 3:6 ("Prior to entry of final judgment, . . . the district court has an unflagging obligation to intervene at any time—even during trial—if it becomes apparent that certification is inappropriate.").

thus preclude class treatment—courts could interpret Rule 23 as requiring post-trial decertification, rather than entry of judgment against the class on the merits. Indeed, concerns for the due process rights of absent class members, the importance of which this Court has repeatedly emphasized,[9] may lead courts to decertify the class even if insufficient proof of price impact could also be deemed fatal to the merits of the claim at issue.[10]

3. Even if district courts would generally enter judgment against the class upon failure of proof of price impact on the merits, that failure of proof would also mean that certification was inappropriate in the first place. And there is simply no reason why the

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[9] *See*, *e.g.*, *Ortiz* v. *Fireboard Corp.*, 527 U.S. 815, 845-48 (1999) (interpreting Rule 23(b)(1)(B) narrowly in light of "the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party'" (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940))).

[10] *See, e.g.*, *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 n.13 (4th Cir. 1980) ("Though a mere withdrawal of certification may be thought unfair to the party opposing the class after a full trial has revealed an underlying failure of proof on the merits of the class claim as alleged," this is the result dictated "by due process concerns for the putative class members."); *accord Briggs* v. *Anderson*, 796 F.2d 1009, 1019, 1029 (8th Cir. 1986) (where plaintiffs failed to establish class-wide employment discrimination at trial, claim would be dismissed without prejudice due to court's "reluctance to bind potential class members"); *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (decertification, which "avoided any *res judicata* effect against the class," was preferable to entry of summary judgment where plaintiffs' conduct of litigation suggested "inadequate representation" of class interests), *overruled on other grounds by Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987).

plaintiff should be given a free pass on price impact until the merits stage, as the Seventh Circuit's decision in *Schleicher* contemplates. *See Schleicher*, 618 F.3d at 685 ("It is possible to certify a class under Rule 23(b)(3) even though all statements turn out to have only trivial effects on stock prices.").

Deferring judicial inquiry into price impact unfairly reduces the showing required to obtain class certification and, as a result, enlarges the problem of "blackmail settlements" induced by a small probability of an immense judgment. *Cf.* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). A decision to certify a class exerts enormous and undue settlement pressure on a defendant, even one with a meritorious defense.[11] This problem is especially acute in private securities cases. Research shows that if putative class securities lawsuits survive dismissal and a large class is certified, the risks to a defendant are so enormous that even weak cases usually settle.[12] The consequences of proceeding to

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[11] *See, e.g.*, *Coopers & Lybrand*, 437 U.S. at 476 ("[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense"); Fed. R. Civ. P. 23(f) 1998 Advisory Committee 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."); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("certifying the class may place unwarranted or hydraulic pressure to settle on defendants").

[12] *See* Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121, 156 (1999) ("Generally, we find that the merits do not have much, if any, explanatory power on settlement size."); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43

summary judgment or trial include a risk of massive, if not ruinous, monetary liability, as well as heavy costs to conduct document and deposition discovery and to engage experts. These factors weigh in favor of requiring judicial inquiry into price impact at the class certification stage, rather than deferring the issue to a later stage that often will never come.

4. Petitioner's concerns about the unfairness of requiring proof of price impact at the class certification stage ring hollow. First, there is no legitimate complaint about lack of discovery. *See* Pet. Br. at 52-56 (arguing that "plaintiffs need merits discovery"). For one thing, the proof needed to establish the requisite price impact is found in public documents readily available to any plaintiff. *See Oscar*, 487 F.3d at 267 ("[the proof] demanded by the fraud-on-the-market regimen . . . is drawn from public data and public filings"). Indeed, the same type of proof typically used to show price impact at summary judgment or trial, an event study, is also frequently used at class certification to prove market efficiency—an element of the fraud-on-the-market theory that Petitioner concedes must be established prior to certification. *See*, *e.g.*, *Teamsters Local 445*, 546 F.3d at 207-08 ("[a]n event study that correlates the disclosures of unanticipated, material information about a security with corresponding fluctuations in price" supports a finding of market efficiency). *See also* Br. of Fin. Economists at 18 ("courts should primarily rely on an event study as the most direct evidence of market efficiency."). For another thing, where discovery is necessary to resolve a factual issue upon

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Stan. L. Rev. 497, 523 (1991) (concluding that "the merits did not affect the settlement amounts").

which class certification depends, district courts routinely grant it.[13]

Second, there is no merit to Petitioner's argument that consideration of price impact at the class certification stage interferes with the Seventh Amendment rights of Rule 10b-5 plaintiffs. *See* Pet. Br. at 62-64. Plaintiffs have no Seventh Amendment right to have a jury determine whether class certification is appropriate. *Cf. Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) ("[i]n numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment"). Petitioner does not challenge the general rule that factual determinations necessary to Rule 23 findings must be made by the court using a preponderance of the evidence standard. Price impact is such a factual determination, and is not different in any relevant way from market efficiency or any other prerequisite for invoking the fraud-on-the-market theory. Moreover, as the Fifth Circuit explained in *Alaska Electrical Pension Fund* v. *Flowserve Corp.*—a per curiam opinion joined by Justice O'Connor—"[t]he denial of class certification does not prevent a plaintiff from proceeding individually," and the "the court's determination for class certification purposes may be revised (or wholly rejected) by the ultimate fact-finder." 572 F.3d 221, 229 (5th Cir. 2009) (internal

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[13] *See* 5 James Wm. Moore, *Moore's Federal Practice* § 23.85 (3d ed. 2011) ("[t]ypically, district courts will allow discovery relevant to determining whether the requirements" of Rule 23 are satisfied); *see also* Fed. R. Civ. P. 23(c)(1) 2003 Advisory Committee Note ("it is appropriate to conduct controlled discovery . . . limited to those aspects relevant to making the certification decision on an informed basis").

quotation marks omitted). Thus, the Fifth Circuit's rule does not deprive plaintiffs of the right to present meritorious claims to a jury; it simply eliminates the ability to present those claims on behalf of a class—a privilege the Seventh Amendment does not protect.

A determination of the fact of price impact, therefore, should not be deferred until after class certification. Rather, where a putative class seeks the benefit of *Basic* in order to satisfy the Rule 23 requirements, the class may not be certified in the absence of affirmative proof of each factual predicate to the fraud-on-the-market theory of reliance, including price impact.

B. The Court of Appeals Correctly Allocated the Initial Burden of Proof of Price Impact to Plaintiff.

Although *Basic* leaves little room for doubt that the price impact inquiry must be resolved at the class certification stage, its discussion of a "rebuttable presumption" of reliance raises legitimate questions about the allocation of the burden of proof of price impact. The Fifth Circuit held that a plaintiff seeking class certification under the fraud-on-the-market theory bears the initial burden of establishing that the alleged misrepresentation actually moved the market. Petitioner argues that "the Fifth Circuit's ruling negates the presumption established by this Court in *Basic* without requiring any contrary showing by defendants." Pet. Br. at 32. To be sure, the *Basic* Court referred to the ability of defendants to "rebut the presumption of reliance" through "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff." 485 U.S. at 249; *see also id.* (defendants may "show that the misrepresentation in fact

did not lead to a distortion of price"). Although this discussion is in tension with the Fifth Circuit's approach, *see In re Salomon*, 544 F.3d at 483, 485, allocation of the initial burden of proof of price impact to plaintiff is appropriate.

1. Allocating the initial burden of proof of price impact to the plaintiff is consistent with the sensible view that, in the fraud-on-the-market context, price impact is a surrogate for materiality. *Basic* requires a plaintiff to establish certain "threshold facts" to invoke the fraud-on-the-market theory in the first instance. 485 U.S. at 248. Among other things, a plaintiff "must allege and prove" that the defendant's "misrepresentations were *material*." *Id.* at 248 n.27 (emphasis added). As noted above, the requirement that the alleged misstatement be material is an essential component of the fraud-on-the-market theory. An efficient market will react only to significant information; information that the market deems immaterial will be disregarded. Thus, a theory of reliance based on a misstatement's influence on the market must take into account the materiality of the alleged misstatement. Other courts applying *Basic* have consistently recognized materiality as a threshold requirement to invoking the fraud-on-the-market theory.[14]

[14] *See*, *e.g.*, *In re PolyMedica*, 432 F.3d at 8 n.11 ("plaintiff must prove . . . that the misrepresentations were material" (internal quotation marks omitted)); *In re Salomon*, 544 F.3d at 481 (same requirement); *Gariety*, 368 F.3d at 364 (same); *Freeman* v. *Laventhol & Horwath*, 915 F.2d 193, 197-98 (6th Cir. 1990) (same); *Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824, 831 (8th Cir. 2003) (same); *Desai* v. *Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940 (9th Cir. 2009) (same); *see also Berks County Employees Ret. Fund* v. *First Am. Corp.*, 734 F. Supp. 2d 533, 539-41 (S.D.N.Y. 2010) (denying class certification where

In *Basic*, the Court defined material information as that which a "'reasonable shareholder would consider . . . important.'" *Id.* at 231 (quoting *TSC*, 426 U.S. at 449); *see also id.* at 234 ("[t]he role of the materiality requirement is . . . to filter out essentially useless information that a reasonable investor would not consider significant"). Although the Court did not further define the term, or examine its relationship to price impact in the context of market-based transactions, subsequent experience by the lower courts in fraud-on-the-market cases suggests an important refinement. In an impersonal, efficient market, prices are set by the trading of market participants attempting to capitalize on information affecting a company's value.[15] In such circumstances, the

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plaintiff had "not demonstrated that defendants' alleged misstatements and omissions were material" and thus "could not avail itself of . . . the fraud-on-the-market doctrine"). The Seventh Circuit in *Schleicher* v. *Wendt* argues that such cases "misread[] *Basic*" by interpreting footnote 27 of that opinion as this Court's statement of the prerequisites for invoking the fraud-on-the-market theory, whereas the Court was merely reporting what the Sixth Circuit had required. *See* 618 F.3d at 687 (citing *Basic*, 485 U.S. at 248 n.27). It is the *Schleicher* view, however, that is mistaken. In footnote 27 of *Basic*, this Court did more than note the elements required by the Sixth Circuit; it commented that two of the elements—one of which was materiality—"may collapse into one," an evaluative comment that indicates the Sixth Circuit's analysis was otherwise appropriate.

[15] *See, e.g.*, *Basic*, 485 U.S. at 246 ("'The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [*sic*] about a situation where the market price reflects as nearly as possible a just price.'" (quoting H.R. Rep. No. 73-1383, at 11 (1934) (bracketed text in *Basic*))); *In re PolyMedica*, 432 F.3d at 9 (in efficient markets, "arbitrageurs immediately attempt to profit from [new] information . . . , thereby causing

inquiries into materiality and price impact converge: the market, standing in for the hypothetical "reasonable investor," determines whether information is material by reacting upward, downward, or not at all. Evidence that a given piece of information either did or did not move the price thus answers the question posed by the materiality inquiry: it shows whether the market considered the information important. Put another way, in the absence of price impact, the misstatement cannot be said to have substantively altered the relevant "'total mix' of information," *see TSC*, 426 U.S. at 449, and cannot support a claim that investors relied indirectly, through market price, on the alleged misstatement.

Based on this insight, the Third Circuit has "fashioned a special rule for measuring materiality in the context of an efficient securities market." *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.). The rule originated in *In re Burlington Coat Factory Securities Litigation*, where the Third Circuit recognized that in an efficient market, reasonable investors are, "in effect, the market" itself. 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.). Thus, "to the extent that information is not important to reasonable investors, it follows that its release will have a negligible effect on the stock price." *Id*. "As a result, when a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period

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the stock to move to a price which reflects the latest public information concerning the stock, where it is no longer possible to generate profits"); *Eckstein* v. *Balcor Film Invs.*, 8 F.3d 1121, 1129 (7th Cir 1993) ("Competition among savvy investors leads to a price that impounds all available information, even knowledge that is difficult to articulate.").

immediately following disclosure, of the price of the firm's stock." *Oran*, 226 F.3d at 282. The Third Circuit observed that "if a company's disclosure of information has no effect on stock prices, 'it follows that the information disclosed . . . was immaterial as a matter of law.'" *Id.* (quoting *Burlington*, 114 F.3d at 1425).[16]

The Third Circuit's rule substitutes the actual, observable workings of an efficient securities market—as typically measured by well-accepted statistical methods in event studies—for a judicial guess as to what a hypothetical reasonable investor might or might not find important. It thus promotes even-handed application of an analysis that otherwise "lies much in the eye of the beholder."[17] The "market reaction to corporate disclosure is often clearly superior to other available evidence of materiality" and "will likely provide the most compelling evidence of the information's materiality."[18] Rather than resorting to subjective measures of materiality—which result in subjective and unpredictable

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[16] Because the Third Circuit does not view materiality as a prerequisite to a plaintiff's invocation of the fraud-on-the-market theory, that court has held that a defendant may rebut the presumption of reliance by showing that an alleged misstatement was immaterial, which in the Third Circuit means that the alleged misstatement did not affect the market price. *See In re DVI,* 2011 WL 1125926, at *7-8. However, as *Basic* dictates, and most other Circuits have recognized, it is plaintiffs who bear the burden of establishing that a misrepresentation was material before they may invoke the fraud-on-the-market theory. *See supra* note 14.

[17] Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 Bus. Law. 317, 355 (2007).

[18] *Id.* at 325-26, 356.

outcomes[19]—in fraud-on-the-market cases it makes sense to determine materiality by reference to objective, reliable evidence of what the market deems important.[20]

In light of the advantages of defining materiality in the fraud-on-the-market context to include only information with a demonstrated impact on market price, the Court should take this opportunity to clarify the *Basic* definition accordingly. Such a definition is consistent with the fraud-on-the-market theory and the approach in *Basic* of adapting Rule 10b-5 requirements as appropriate to take into

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[19] *See, e.g.*, *Litwin* v. *Blackstone Group, L.P.*, No. 09-4426-cv, 2011 WL 447050, at *10 (2d Cir. Feb. 10, 2011) (alleged misstatements were material because the court deemed them significant at a business segment level despite accounting for less than 5 percent of the registrant's total revenues); *Gebhardt*, 335 F.3d at 827-30 (corporate defendant's earnings misstatements could be material even though "the amount of earnings misrepresented was merely 0.4 per cent[] of [its] total revenues during the years in question" and "the problem was mostly one of having the money attributed to the wrong year, as opposed to not having ever made the money at all").

[20] Under the approach advocated here, the difficult and industry-specific issue addressed in *Matrixx Initiatives, Inc.* v. *Siracusano*, 79 U.S.L.W. 4187 (U.S. Mar. 22, 2011), *aff'g* 585 F.3d 1167 (9th Cir. 2009)—whether a plaintiff alleging fraud based on a drug company's failure to disclose the possibility of a drug's adverse side effects must allege that the side effects are supported by statistically significant data—could have been avoided. An approach to materiality based on the *market*'s determination of the importance of the side-effect information, as reflected by price movements, apparently would have yielded the same conclusion of materiality reached by the Court. *Id.* at 4189 (noting that stock price "plummeted" following national television segment about possible side effects); *see also* 585 F.3d at 1174 (stock fell 23.8% in one day).

account the realities of the "modern securities markets." 485 U.S. at 243.

2. Even if the Court reads *Basic* not to impose any obligation on a plaintiff to introduce evidence of price impact before invoking the presumption of reliance, there is good reason for the Court to amplify that *Basic* requires such proof.

The linchpin of the fraud-on-the-market theory is that investors are harmed when they buy stock in reliance on the integrity of a market price distorted by misrepresentations. When a misstatement has no effect on the market price, the integrity of the price remains unblemished, and investors cannot be said to have indirectly relied on the alleged misstatement. *See, e.g.*, *Nathenson* v. *Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) ("If the market price was not *actually* affected by the statement, reliance on the market price does not of *itself* become reliance on the statement.") In light of the centrality of price impact to the theory of indirect reliance, it is fair and appropriate that the party seeking to avail itself of that theory should carry the initial burden of presenting evidence of price impact.

Plaintiffs, after all, are the ones seeking the benefits of the fraud-on-the-market theory—and the benefits are hard to overstate. As described above, the fraud-on-the-market theory rewrote the common law of reliance in plaintiffs' favor. At common law, plaintiffs had the burden of showing direct reliance on a misstatement through individual proof. Under the fraud-on-the-market theory, plaintiffs enjoy an inference of indirect reliance that is triggered by common proof—making it possible to bring Rule 10b-5 class actions that wield enormous settlement pressure. In exchange for such advantages, it is

hardly asking too much for plaintiffs to show that the fraud-on-the-market theory applies to their case with evidence that the alleged misstatement moved the market.

III. THE FRAUD-ON-THE-MARKET THEORY SHOULD NOT BE EXTENDED BEYOND ITS DOCTRINAL FOUNDATION.

For the reasons explained above, the approach Petitioner advocates—permitting certification of a class of Rule 10b-5 claimants under the fraud-on-the-market theory without proof of price impact—represents a substantial departure from *Basic* and a relaxation of the requirements for invoking the fraud-on-the-market doctrine. In addition to being unwarranted by this Court's precedent, such a liberalization would exacerbate the problems posed by the theory and the uniquely powerful form of litigation it enables in conjunction with the implied private right of action under Rule 10b-5. Such expansion of the role of the theory is unwarranted in light of two decades' experience with *Basic*.[21]

Though it may have been supported by empirical studies that were "[r]ecent" when *Basic* was decided, *see* 485 U.S. at 246 & n.24, the efficient capital markets hypothesis on which *Basic* rested is no longer sound. Since that 1988 decision, a flood of "theoretical and empirical research that raises severe questions" about the hypothesis has all but washed

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[21] This Court has recently expressed reluctance to further expand the Rule 10b-5 cause of action in another context. *See, e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.").

away its central premise, which no longer appears warranted. Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 Or. L. Rev. 175, 224 (2010).[22] And another pillar of *Basic*'s fraud-on-the-market theory—the assumption that most purchasers and sellers rely on a stock's price as an intrinsic reflection of its value (*see* 485 U.S. at 246-47)—has been undermined by experience. Recent research suggests that large numbers of traders (including momentum traders, program traders, and day traders) employ strategies that reflect little reliance, or no reliance whatever, on price as a measure of value.[23] At a minimum, the growing data casting doubt on the validity of the fraud-on-the-market theory counsel against watering down the showing required to obtain class certification using that theory.

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[22] *See also, e.g.*, Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 Del. J. Corp. L. 455, 471 (2006) ("The growing academic literature documenting violations of the efficient market hypothesis, along with the accumulated research on 'irrationality' of some investors, should prompt scholars, practitioners and regulators to examine the implications of these developments on securities law in general, and on the unchallenged applicability of fraud-on-the-market theory in particular."); Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Markets Hypothesis*, 62 Geo. Wash. L. Rev. 546, 608 (1994) (recommending that "legal scholars and policy-makers focus more closely on recent developments in mathematics and physics that call into question even the weak form" of the hypothesis).

[23] *See, e.g.*, Jill E. Fisch, *The Overstated Promise of Corporate Governance*, 77 U. Chi. L. Rev. 923, 955-56 (2010) (momentum trading); SEC Office of Compliance Inspections & Examinations, *Special Study: Report of Examinations of Day-Trading Broker-Dealers* (2000), *at* http://www.sec.gov/news/studies/daytrading.htm (day trading).

Absent a ruling by this Court emphasizing that the fraud-on-the-market theory must remain tethered to its original justifications, lower courts will likely continue to apply the theory in new and potentially unwarranted contexts. For example, although *Basic* applied the fraud-on-the-market theory only to the alleged misstatements of an issuer, as all of the prior appellate-court fraud-on-the-market cases had done, *see* Brief for the SEC as Amicus Curiae at 21 n.24, *Basic Inc.* v. *Levinson* (No. 86-279) lower courts have applied the theory in cases alleging misstatements by research analysts rather than issuers. *See, e.g.*, *In re Salomon*, 544 F.3d at 481; *In re Credit Suisse-AOL Sec. Litig.*, 465 F. Supp. 2d 34, 54 (D. Mass. 2006); *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 529 F. Supp. 2d 644, 740-42 (S.D. Tex. 2006). The courts have done so despite good reason to believe that analyst statements often will have no impact on the market price.[24] Such unwarranted expansion of the fraud-on-the-market theory would be effectively curtailed by a ruling from this Court that the theory "may not be the basis for recovery in respect to an alleged misrepresentation which does not affect the market price of the security in question." *Nathenson*, 267 F.3d at 415.

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[24] *See, e.g.*, Qi Chen et al., *The Applicability of the Fraud on the Market Presumption to Analysts' Forecasts*, at 30 (Duke Univ. Fuqua Sch. of Business Faculty Research Paper No. FRPS06-226, 2005), *at* http://faculty.fuqua.duke.edu/~qc2/bio/Research/FOTM.pdf (empirical study concluding that "most analysts, and most analysts' forecasts, have no material influence on share values"); Ambitabh Dugar & Siva Nathan, *Analysts' Research Reports: Caveat Emptor*, 5 J. Investing 13, 17 (1996) ("the market reaction to [analysts'] favorably biased reports is insignificant").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 31, 2011