No. 13-317

IN THE
Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

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

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

REPLY FOR PETITIONERS

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2506

WM. BRADFORD REYNOLDS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

DAVID D. STERLING
AARON M. STREETT
Counsel of Record
BENJAMIN A. GESLISON
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Petitioners

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

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REPLY FOR PETITIONERS

Nothing in the Fund's response prevents this Court from reconsidering *Basic* and conforming its holding to congressional intent, modern economics, and this Court's recent Rule 23 case law. Nor does the Fund justify ignoring the circuit split over price-impact rebuttal that the Court declined to reach the first time these parties were before it, and which *Amgen* left unresolved.

I. *BASIC* SHOULD BE OVERRULED OR MODIFIED

A. No "preservation" problem impedes reconsideration of *Basic*

1. Halliburton did not need to raise the validity of *Basic* with any lower court or in its response to the Fund's earlier petition to this Court. Br. in Opp. 25-30. The Fund cannot contradict this Court's repeated articu-

lation of the "traditional rule * * * that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)). Indeed, new arguments can even contradict old arguments, as in *Lebron* itself, where "Lebron did not raise this [new] point below; indeed, he expressly disavowed it in both the District Court and the Court of Appeals." *Id.* at 378. The Court readily permitted this "alternative argument," because it was "not a new claim * * * , but a new argument to support what has been his consistent claim," *id.* at 379.

With *Lebron* foreclosing its most direct path to urging denial, the Fund contends that Halliburton somehow has been litigating for years without making "any ***claim***" whatsoever. Br. in Opp. 29 (double emphasis in original). The Fund apparently believes that only plaintiffs have "claims" that can be supported by new arguments: "Here, the only claims in this case were brought by Plaintiff for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934." *Ibid.*

Unsurprisingly, no case supports the Fund's oddly constricted view of federal litigation. To the contrary, the *Lebron-Yee* line of cases makes clear that, for purposes of evaluating when new arguments are proper, both plaintiffs and defendants play by the same rules. *Yee*, for example, cites *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 78 n.2 (1988). The Court there addressed a defendant's ability to raise new arguments, describing Bankers Life's challenge to a punitive-damages award as a "federal claim it now urges us to resolve." *Id.* at 77. It suggested no distinction between plaintiffs and defendants; whether *any* party could pursue additional arguments depended on preservation of

that party's "federal question." *Id.* at 78 n.2. Accord *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001) (allowing defendant to raise a new argument in support of an "issue" that "was raised in the lower courts").

The "federal question" Halliburton has consistently pressed is that class certification is improper because individual issues predominate. That *Basic* should be overruled or modified is one of several arguments Halliburton has made to support that overarching federal claim. See *Citizens United* v. *FEC*, 558 U.S. 310, 329-331 (2010) (entertaining challenge to governing precedent, despite petitioner accepting precedent's validity below, because it was "a new argument to support what has been a consistent [First Amendment] claim").[1]

2. It follows that Halliburton was not required to ask the lower courts to overrule *Basic*. No lower court has any discretion to do so. See *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989). Unsurprisingly, *none* of the Fund's waiver cases faulted a party for failing to ask a lower court (or this Court in a previous

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[1] The Fund cites two 111-year-old cases holding that parties cannot relitigate "the *same questions*" in consecutive cases in this Court. Br. in Opp. 25-26 (quoting *United States* v. *Camou*, 184 U.S. 572, 574 (1902)) (emphasis added). But the "question" in *EPJ Fund* was whether plaintiffs must prove loss causation at class certification—a question Halliburton does not seek to relitigate. When the Fund brought its petition in *EPJ Fund*, the class had never been certified, and the "question" presented did not encompass all potential challenges to a hypothetical future certification. Thus, nothing prevents Halliburton from raising those challenges now. Likewise, this Court's reference in *EPJ Fund* to "arguments" Halliburton had "preserved" referred only to the "remand" to the "Court of Appeals," 131 S. Ct. at 2187. See Br. in Opp. 27. *EPJ Fund* did not constrain Halliburton from making new arguments against certification on remand to the district court, given the new legal landscape, much less to the Fifth Circuit or this Court in future appeals, as specifically allowed by *Lebron*.

appeal) to overrule Supreme Court precedent. After all, adding one sentence to a lower-court opinion summarily refusing to overrule *Basic* would hardly produce a better vehicle for this Court to resolve the question presented. Halliburton *did* raise *Basic*'s validity in its *en banc* petition below, following the serious misgivings recently expressed in *Amgen, Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). But it did not *need* to, and it properly presented that question in its petition here.

3. Nor does Halliburton's concession that its "stock trades in an efficient market," Br. in Opp. 23, bar this Court from reconsidering *Basic*. As with any large, NYSE-traded company, it would have been futile for Halliburton to contest that its stock meets *Basic*'s binary, yes-or-no market-efficiency test. Halliburton does not seek to relitigate that question. Instead, Halliburton challenges the validity of retaining a classwide-reliance presumption triggered by a universally condemned binary market-efficiency test.

Modern economics teaches that *some* markets are *somewhat* efficient *some* of the time with respect to *some* information. With no confidence that a given misrepresentation was reflected in the market price, it makes scant sense to presume that investors relied upon that misrepresentation just because the purchased stock trades in a well-developed market. See Pet. 16-17. This speculative presumption of common reliance issues cannot satisfy this Court's Rule 23 cases. Nor should it be allowed to substitute for the traditional eyeball-reliance requirement imposed by the common law and analogous federal securities statutes.

Thus, Halliburton proposes that the *Basic* presumption be overruled altogether or replaced with a presumption triggered by a showing that the alleged misrepresentations actually distorted the market price. Hallibur-

ton's concession that its stock meets the flawed binary test for market efficiency cannot prevent Halliburton from challenging whether that very test is an adequate foundation for the legal edifice built upon it, much less from raising other arguments for why the *Basic* presumption should be overruled.

4. *Amgen* does not support the Fund's vehicle argument. In *Amgen*, no party asked the Court to revisit *Basic*. 133 S. Ct. at 1193 n.2. The Court declined to entertain concerns about the non-binary nature of market efficiency because Amgen "never clearly explain[ed] how this research on *market efficiency* bolsters its argument that courts should require precertification proof of *materiality*." *Id.* at 1197 n.6. Thus, after reviewing Amgen's concession of market efficiency, the Court "f[ou]nd nothing in the cited research that would support requiring precertification proof of materiality in this case." *Ibid.* Halliburton, by contrast, has squarely questioned *Basic*'s continuing vitality on multiple grounds, including that the presumption should no longer be based upon an outdated binary conception of market efficiency.

B. None of the Fund's other arguments presents any meaningful challenge to certiorari

1. Although the Fund feels obliged to defend *Basic*, it dodges the economic consensus by counterfactually claiming that *Basic* "based its adoption of the fraud-on-the-market presumption * * * primarily on congressional policy." Br. in Opp. 36-37. But *Basic*'s (and the Fund's) gauzy invocations of congressional "policy" cannot hide its marked departure from statutory text and legislative history, or its inconsistency with this Court's otherwise-customary reluctance to expand the judicially inferred 10b-5 cause of action. As Justice White's dissent, the petition, and the Former SEC Commissioners' *amicus* brief all demonstrate, the four-Justice *Basic* majority improperly substituted nascent economic theory for tra-

ditional legal analysis. While that theory was "characterized [before *Basic*] as having 'more solid empirical evidence supporting it . . . [than any] other proposition in economics,'" Bernard et al., Challenges to the Efficient Market Hypothesis: Limits to the Applicability of Fraud-on-the-Market Theory, 73 Neb. L. Rev. 781, 782 (1994) (citation omitted), it now faces widespread criticism. Because neither congressional intent nor economic consensus supports *Basic*'s core holding—and because *Basic*'s presumption of classwide reliance conflicts with this Court's recent class-action decisions—*Basic* is ripe for reconsideration.

The Fund ultimately does not contest the economic analysis described by Halliburton. See Pet. 13-18. Instead, the Fund simply asserts that "the semi-efficient market hypothesis continues to enjoy widespread support among economists." Br. in Opp. 37. Halliburton need not dispute that limited statement to observe, as many scholars have, that there is no economic basis to treat markets in particular securities in a binary fashion, as either "efficient" or "inefficient." See Pet. 16-17. Nor is there any legal basis to derive a classwide presumption of reliance from such a flimsy premise, without at least inquiring into whether the market price was actually distorted. Yet this is how *Basic* is applied, and the Fund neither denies nor defends it.

The Fund notes that two scholars, while critical of *Basic*'s economic analysis, personally support continuing to apply *Basic*'s presumption for public-policy reasons. See Br. in Opp. 24 n.5. But it favors Halliburton, not the Fund, that scholars supporting expansive liability regimes nonetheless candidly attack *Basic*'s economic foundations; it is akin to an admission against interest. See Pet. 16. This Court may use scholarship to inform itself, but need not adopt the political views of the scholar.

2. The Fund spends less than two pages disputing Halliburton's alternative view that *Basic* should be amended to require plaintiffs to prove price impact before invoking the presumption of classwide reliance. Such a modification would not impermissibly require plaintiffs to prove that they "would prevail on the merits in establishing reliance" at the class-certification stage. Br. in Opp. 40. Halliburton's proposal would simply ensure that there is a distorted market price which *could* plausibly serve as a stand-in for *common* reliance on the misrepresentation. Without that showing, individual plaintiffs could still prevail on the merits by proving that they were aware of, and actually relied on, the misrepresentation. Halliburton's approach accords with *Amgen*'s insistence that plaintiffs prove publicity and market efficiency before class certification. See Pet. 27-30.

The fact that a plaintiff might choose to prove price impact by pointing to price declines following corrective disclosures, Br. in Opp. 40-41, hardly means that requiring proof of price impact is barred by *EPJ Fund*'s holding that a plaintiff cannot be required before certification to prove the distinct element of "loss causation." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011) ("[L]oss causation is a familiar and distinct concept in securities law; it is not price impact."). Nor is Halliburton's acceptance that *Basic*, as *currently* written, treats price-impact as a rebuttal issue inconsistent with asking that the Court modify *Basic* to bring it into line with recent case law that places the initial Rule 23(b)(3) burden squarely on the plaintiff. See Br. in Opp. 40.

3. The Fund relies heavily on *stare decisis*. See Br. in Opp. 34-36. It simply declares that a decision creating a judicially mandated presumption (that is in practice virtually irrebuttable), layered on top of a judicially implied cause of action, is just as entitled to *stare decisis* as any decision construing a statute's text. Br. in Opp. 33,

35. Halliburton has emphasized that, because *Basic*'s presumption is wholly a creature of the judiciary and partially procedural in nature, the judiciary has a responsibility to correct its own work and not just leave it to Congress to act. Pet. 25.

That argument draws strong support from this Court's decisions interpreting the Sherman Act. Because that statute delegates broad, common-law power to the judiciary, the Court more readily revisits its Sherman Act precedents. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act."); *id.* at 20-22 (overruling 29-year-old precedent and citing several overrulings of Sherman Act decisions); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899-900 (2007) (overruling century-old precedent in part because "respected authorities in the economics literature suggest the *per se* rule is inappropriate"). The Court's common-law exegesis of the 10b-5 cause of action justifies a similarly relaxed mode of *stare decisis*. See *Musick, Peeler & Garrett* v. *Emps. Ins. of Wausau*, 508 U.S. 286, 292 (1993) (noting that "[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes").

The Fund mistakenly asserts that Halliburton's petition relied solely on "constitutional" cases, where *stare decisis* concerns are lessened. Br. in Opp. 35. In fact, in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), the Court overruled the judicially-created "order of battle" for addressing qualified-immunity claims not because it was tangentially related to the Constitution, but because it had been "questioned by Members of the Court in later decisions," "departure would not upset expectations," and "experience has pointed up the precedent's shortcomings." *Id.*

at 233, 235. The Court explained that "judge made rule[s]" do not "implicate the general presumption that legislative changes should be left to Congress" because "any change should come from this Court, not Congress." *Id.* at 233-234. That guidance applies with full force here.

4. The Fund goes too far in proclaiming that this Court and Congress have "endorsed" *Basic*'s presumption of reliance. This Court has never before considered a challenge to the continuing validity of *Basic*'s presumption. Nor has the Court confronted the growing tension between *Basic*'s presumption of common reliance with the Rule 23 requirement that common-issue predominance be proven, not presumed—a tension the Fund barely mentions. Compare Pet. 21-23 with Br. in Opp. 28.

It similarly "'does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it,'" because it is "'"impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation."'" *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (citations omitted). Congressional inaction cannot justify judicial refusal to reexamine judge-made causes of action or judicially-created presumptions.

II. A POST-*AMGEN* CIRCUIT SPLIT PERSISTS OVER PRICE-IMPACT REBUTTAL

Apart from reconsidering *Basic*, an important circuit split independently merits this Court's review. The Fund cannot dispute that the Second and Third Circuit cases cited by Halliburton allow defendants to rebut the presumption before certification by showing the absence of price impact, while the Seventh and (now) Fifth Circuits do not. The Fund claims instead that *Amgen* "resolved" the split. Br. in Opp. 21.

1. *Amgen* simply does not address the "price impact" issue this Court specifically reserved in *EPJ Fund*, 131 S. Ct. at 2186-2187, or the pre-existing circuit split on that issue. Rather, the Court strictly limited its analysis and holding to the distinct concept of materiality—whether the misrepresentation significantly altered the total mix of information about the stock. Amgen did not present evidence pertaining to market price, and the Court did not resolve the price-impact issue *sub silentio*.

Indeed, *Amgen*'s rationale supports allowing price-impact rebuttal. The Fund defends the court of appeals' reasoning that price impact, like materiality, is a class-wide showing, the absence of which supposedly causes all claims to fail on the merits. But, like the court of appeals, the Fund has no response to Halliburton's demonstration that price impact is identical for Rule 23 purposes to publicity and market efficiency—factors that must be considered at the class-certification stage under *Amgen*. See Pet. 28-29. One need not conjure up "fantastic scenarios," Br. in Opp. 18, to imagine an individual shareholder who cannot show price impact or publicity yet can prevail on the merits of a 10b-5 claim; courts have already identified them. See *Amici* Br. of Chamber of Commerce et al. 22-23 (citing cases). That is why this Court allowed pre-certification consideration of publicity. *Amgen*, 133 S. Ct. at 1199. The same reasoning compels considering price impact.

2. The Fund incorrectly contends that "there is no meaningful difference" between Halliburton's price-impact evidence and evidence pertaining to loss causation. Br. in Opp. 20, 40-41. But this Court easily distinguished between Halliburton's "price impact" argument, which it declined to reach, and the Fifth Circuit's "loss causation" requirement, which the Court rejected. *EPJ Fund*, 131 S. Ct. at 2186-2187. Moreover, the court of appeals did not refuse to allow Halliburton's rebuttal evidence on

the ground that it was loss-causation evidence barred by *EPJ Fund*; it held as a matter of law that "price impact" rebuttal is not permitted at class certification because it is a classwide showing which allegedly causes all claims to fail on the merits. Pet. App. 17a-19a. That holding is wrong, and squarely conflicts with Second and Third Circuit precedents, and with the rationale of *Amgen*.

The Second and Third Circuits' allowance of price-impact rebuttal remains good law in those important jurisdictions.[2] The split is therefore enduring and, as *amici* explain, consequential. If defendants are deprived of the ability to rebut *Basic*'s "fundamental premise" of price distortion (*EPJ Fund*, 131 S. Ct. at 2186) at class certification, the once-rebuttable presumption of reliance will be impregnable. Class certification will be virtually automatic in any case brought against an NYSE-listed company that survives a motion to dismiss. And the promise of rebuttal at summary judgment or trial will be illusory for defendants who will be forced to settle. That result cannot be reconciled with Rule 23, the Securities Exchange Act, or *Basic* itself.

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[2] The Fund misleadingly states that "district courts in the Second Circuit have recognized that *In re Salomon* is no longer controlling precedent." Br. in Opp. 22. But the cited cases merely recognize that *Amgen* overruled *Salomon*'s requirement that plaintiffs prove materiality to obtain class certification; they say nothing about *Salomon*'s distinct holding that defendants may defeat class certification by showing the absence of price impact. See *GAMCO Investors, Inc.* v. *Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 n.76 (S.D.N.Y. 2013) ("Until recently, plaintiffs in this Circuit also had to show materiality in order to proceed with a class action on a fraud on the market theory. * * * [*Amgen*] holds that proof of materiality is not a precondition to class certification."); *In re Citigroup Inc. Sec. Litig.*, __ F. Supp. 2d __, 2013 WL 3942951, at *28 n.1 (S.D.N.Y. Aug. 1, 2013) ("The U.S. Supreme Court has since held that securities fraud plaintiffs need not prove that the misrepresentations are material at the class certification stage.").

Respectfully submitted.

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2506

WM. BRADFORD REYNOLDS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

DAVID D. STERLING
AARON M. STREETT
Counsel of Record
BENJAMIN A. GESLISON
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Petitioners

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