NO. 13-317

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID J. LESAR,
Petitioners,

v.

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

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the civil-litigation defense. DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

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

This case is particularly important to DRI's members because class certification has become the most important decision point in securities-fraud litigation. Moreover, the Fifth Circuit's rule (which differs from the rule in the Third Circuit and the

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both parties have filed letters with the Clerk giving blanket consent to the filing of *amicus* briefs.

Second Circuit) skews the class-certification balance so far to the plaintiffs' side that defendants will have little or no effective opportunity to rebut the presumption of reliance or to defeat class certification. And once a class is certified, securities-fraud suits almost invariably settle, instead of proceeding to decision on the merits. This imbalance threatens to convert federal securities laws into insurance for investors. The Court should reverse the Fifth Circuit to restore the proper balance.

INTRODUCTION AND SUMMARY OF ARGUMENTS

The presumption of reliance that this Court first approved in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), is a judicial modification of the law that would otherwise control the class-certification question for securities-fraud suits. Without that accommodation, class certification would often be impossible. An important part of that accommodation is that the defendant can rebut the presumption of reliance. The Court specifically stated that proof that the alleged misrepresentation did not affect the stock price would sever the link between the alleged misrepresentation and the stock price, and thereby rebut the presumption.

The Fifth Circuit, while acknowledging that the presumption can be rebutted, held that defendants must wait until summary judgment or trial to show that the alleged misrepresentation did not affect the stock price. This approach is inconsistent with the nature of the presumption itself because it permits plaintiffs to obtain the benefits of class certification

without having to address the cornerstone of the presumption that makes class certification possible. It makes little sense to tell defendants that they must wait until after a class is certified and they are faced with the peril of the aggregated claims before they can put on evidence to defeat class certification. Moreover, because of the extreme pressure created by the aggregation of claims, it is unlikely that many (if any) defendants will take that risk. Instead, the overwhelming majority of cases will settle before the merits are reached.

This Court should, therefore, reverse the Fifth Circuit, and, at a minimum, hold that defendants can raise a lack of price impact at the class-certification stage to rebut the presumption of reliance.

ARGUMENTS

A. The *Basic* presumption of reliance is supposed to be rebuttable, not conclusive.

(1) The presumption of reliance is a judge-made accommodation for securities-fraud suits.

Putative class actions cannot be certified under Federal Rule of Civil Procedure 23(b)(3) if individual issues predominate over issues common to the class. FED. R. CIV. P. 23(b); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). In other words, certification is appropriate under Rule 23(b) only where the claims of the class members are "sufficiently cohesive to warrant adjudication by

representation." *Amchem Prods.*, 521 U.S. at 623. Where there are key issues that cannot be resolved on a class-wide basis, certification is not permissible. *Id.* at 624-25 (finding certification of a class of persons exposed to asbestos would be improper because there were too many individualized issues).

In securities-fraud cases under Rule 10b-5 (which must satisfy Rule 23(b)), the fact that reliance is an essential element of the claim would generally make class certification impossible. Proof of reliance would require proof that each class member was aware of the allegedly fraudulent statements and that the class member decided to buy or sell the stock based on the statement. *E.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988). Because individual issues of reliance on the allegedly fraudulent statements would predominate over other issues, class certification would not be proper. *Id.*

To avoid this problem, securities-fraud plaintiffs typically seek to invoke the rebuttable presumption of reliance[2] that this Court first recognized in *Basic*. The presumption substitutes for proof of individual reliance, allowing reliance to be tried on a class-wide

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

basis and preventing individual issues of reliance from predominating. *Id.* at 242-43.

In approving the presumption of reliance, this Court acknowledged that it was an accommodation for securities-fraud cases. The Court noted that the presumption was a solution to "balancing the substantive requirement of proof of reliance in securities cases against the procedural prerequisite" of Rule 23. *Id.* at 242. Another part of the Court's justification was that Rule 10b-5's reliance requirement needed to reflect the realities of the modern securities market. *Id.* 243-44. Finally, the Court noted that presumptions accommodate issues of fairness, probability, and judicial economy. *Id.* at 245. In short, the presumption of reliance is a judge-made accommodation that enables securities-fraud cases to proceed as class actions.[3]

(2) Price impact is at the heart of the presumption of reliance.

The Fifth Circuit improperly concluded that price impact is not an "element of the fraud-on-the-market theory." Pet. App. 13a. But a proper understanding of the presumption of reliance reveals that price impact (or lack thereof) is the very heart of the presumption and the underlying hypothesis about capital markets.

The presumption of reliance recognized in *Basic*

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[3] The dissent in *Basic* pointed out that the effect of the majority's approach was to change the understanding of reliance for securities-fraud suits. *Id.* at 253-54 (White, J., dissenting).

is founded on the "efficient capital markets" hypothesis. That hypothesis posits that, in an efficient market, the stock price reflects all publicly available information. *Id* at 241-42. Under the efficient capital markets hypothesis, therefore, market participants can be said to *indirectly* rely on publicly available information (even if they are unaware of it) because they make decisions to buy or sell based on the market price. *Id.* at 244.[4]

The heart of the hypothesis is that the stock price is impacted by (*i.e.*, reflects) the alleged misrepresentations. *Id*. Under the hypothesis, the market price is the method by which the market communicates with the investor. *Id.* at 244. Accordingly, it is price impact that allows a presumption that market participants are indirectly relying on publicly available information.

Therefore, if the stock price is not, in fact, affected by the alleged misrepresentation, then the hypothesis underlying the presumption of reliance must fail. And if the hypothesis fails, then there is no basis for a presumption that market participants relied on the statements when making decisions to buy or to sell. *Id.* at 248 (noting that any showing that severs the link between the alleged misrepresentation and the stock price rebuts the presumption of reliance).

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[4] The validity of this hypothesis has come under attack from many quarters. DRI shares the concerns about the continued validity of the hypothesis that have been expressed by Petitioner. (Brief for Petitioners at 14-22.)

(3) The presumption must be rebuttable to avoid converting the securities laws into a broad insurance scheme for investors.

The Court recognized this limitation on the presumption in *Basic* itself; the majority opinion refers to the presumption as "rebuttable" at least ten times. *Id.* at 226, 229, 242, 245, 248, 249 n.28 & n.29, 250. In fact, the majority included the fact that the presumption is rebuttable in its summary list of holdings. *Id.* at 250. The fact that the presumption is rebuttable appears to have been essential to the Court's acceptance of it.

The Court held that the presumption could be rebutted by "*any showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff or his decision to trade at a fair market price." *Id.* (emphasis added). Significantly, the Court expressly recognized that the presumption could be rebutted by:

- evidence that the alleged misrepresentation did not affect the market price;
- evidence that the truth entered the market and dissipated the effect of the misrepresentation; and
- evidence that the plaintiffs acted without relying on the integrity of the market.

Id. at 248-49.

The dissent also points out the importance of the opportunity to rebut the presumption. While disagreeing with the majority's decision to accept the presumption, the dissent did give the majority credit for rejecting a "nonrebuttable presumption." *Id.* at 252 (White, J., dissenting). The dissent notes that such a rule would "effectively convert Rule 10b-5 into 'a scheme of investors insurance.'" *Id.* (internal citations omitted); *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (noting that the securities laws should not be an insurance scheme for investors).

In sum, the *Basic* presumption must be rebuttable. And price impact is central to the *Basic* presumption, such that absence of price impact undermines any justification for applying the presumption. The only issue, then, is when a defendant may use lack of price impact to rebut the presumption. For the reasons set out below, the Fifth Circuit's rule is inconsistent with both the rationale for the presumption and the "on-the-ground" realities of securities-fraud litigation. Therefore, this Court should reject the Fifth Circuit's approach.

B. By delaying rebuttal, the Fifth Circuit's rule makes the presumption effectively irrebuttable.

Although *Basic* is clear that the presumption must be rebuttable, it does not address *when* the presumption may be rebutted. It stands to reason that if the presumption is rebuttable (which it must be), it must be rebuttable at the time that it is employed by courts to satisfy the requirements of

Rule 23(b). As discussed above, without the presumption, class certification would often be impossible. And allowing plaintiffs to invoke the presumption to obtain class certification without allowing defendants a similar full opportunity to rebut the presumption to avoid class certification is unreasonable.

The Fifth Circuit held that defendants can attempt to rebut some elements of the presumption of reliance at the class-certification stage, such as market efficiency, the publicity of the alleged misrepresentations, and trade timing. Pet. App. 13a. But they cannot raise the lack of price impact. Pet. App. 19a.

As an initial matter, it is illogical to permit indicia of market efficiency to be contested at class-certification while barring evidence that goes to the heart of the presumption: price impact. As discussed above, without price impact, there is no basis for the presumption, regardless of whether the stock trades on an efficient market.

Moreover, requiring defendants to wait until summary-judgment or trial to address price impact effectively makes the presumption irrebuttable. This is true for two interrelated reasons. First, the only issues that the Fifth Circuit's rule permits to be addressed at class-certification are the easiest hurdles for plaintiffs. Second, once the class is certified, the probability of a resolution on the merits (either through summary judgment or trial) approaches zero because the overwhelming majority of cases settle before reaching the merits.

(1) The Fifth Circuit's approach reduces Rule 23 to a speed bump.

First, the Fifth Circuit's rule improperly turns Rule 23 into a speed bump rather than a hurdle. This Court has repeatedly reiterated that class-certification requirements must be strictly construed and rigorously analyzed. *E.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (requiring a "rigorous analysis" of the requirements of Rule 23). Unfortunately, this basic tenet of class-action procedure seems to be occasionally lost in securities-fraud cases. At least two commentators have recently pointed out the apparent disconnect between the rigorous analysis embodied in *Dukes* and *Comcast* and the deference granted to the presumption of reliance. Linda S. Mullenix, *Commentary: Class Action Cacophony at the Supreme Court,* NAT'L L.J., April 15, 2013, at 28; John C. Coffee, *"You Just Can't Get There From Here": A Primer on* Wal-Mart v. Dukes, 141 BNA Daily Labor Report I-1 (2011).[5]

The Fifth Circuit's rule artificially limits the inquiry at the class-certification stage to the issues that present the lowest burden, thereby preventing a rigorous analysis of whether class certification is proper. The Fifth Circuit permits only trade timing, publicity of the alleged misrepresentation, and market efficiency to be challenged by defendants at the

[5] *Available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/002.authcheckdam.pdf.

class-certification stage. Pet. App. 13a. This half-a-loaf approach implicitly recognizes that rebuttal must be available at the class-certification stage, but incorrectly prevents an inquiry into the heart of the presumption.

The elements of the presumption of reliance that the Fifth Circuit permits defendants to challenge are those that plaintiffs will have the easiest time satisfying. Trade timing and publicity relate to whether the alleged misrepresentations were made publicly and whether the stock trades at issue took place after the alleged misrepresentation and before the truth was revealed. *Basic*, 485 U.S. at 248 n.27.

These issues relate closely to elements of the claim that must be specifically pleaded to survive a motion to dismiss under the Private Securities Litigation Reform Act of 1995. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (noting that the PLSRA requires plaintiffs to specifically plead all elements of a securities-fraud claim). Therefore, if a case survives a motion to dismiss under the PSLRA[6], there will most likely be no issues related to trade timing or the publicity of the alleged misrepresentations.

Moreover, if the stock is traded on a national exchange, then market efficiency will not present much of an issue either. Many courts determine market efficiency by looking at factors identified in *Cammer v. Bloom*, 711 F. Supp. 1264, 1285-87

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

(D.N.J. 1989). These factors include average weekly trading volume, the number of analysts that follow the stock, the number of market makers, whether the company is entitled to file an S-3 registration statement, and the effect of the release of information on the price of the stock. *Id.*; *see also Hayes v. Gross,* 982 F.2d 104, 107 n.1 (3d Cir. 1992)*; Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.,* 546 F.3d 196, 204 n.11 (2d Cir. 2008)*; In re Xcelera.com Sec. Litig.,* 430 F.3d 503, 508 (1st Cir. 2005)*; Unger v. Amedisys Inc.,* 401 F.3d 316, 323 (5th Cir. 2005)*; Gariety v. Grant Thornton, LLP,* 368 F.3d 356, 368 (4th Cir. 2004)*; Binder v. Gillespie,* 184 F.3d 1059, 1064-65 (9th Cir. 1999) (all citing *Cammer* factors with approval).

But for a stock traded on a national exchange, market efficiency is basically presumed. *See, e.g.*, *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 693-94 (11th Cir. 2010) ("Securities traded on NASDAQ are often presumed to be traded on an efficient market."); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (noting that "securities traded in national secondary markets such as the New York Stock Exchange … are well suited for application of the fraud on the market theory").

Accordingly, the Fifth Circuit's rule prevents a full, rigorous analysis of the propriety of class certification. By prohibiting defendants from challenging price impact, the Fifth Circuit has prohibited an inquiry into the heart of the presumption. The practical effect of the Fifth Circuit's refusal to consider price impact at class-certification is that a securities-fraud suit that survives a motion to dismiss will be

certified as a class action as a matter of course, and any required rigorous analysis is transformed into a perfunctory, ministerial act.

(2) The settlement pressure created by class certification ensures that price impact will almost never be addressed.

Second, securities-fraud cases almost invariably settle if class certification is granted. The high settlement rate is not the result of probabilities of success on the merits of the claims, but on the effect of aggregating of thousands of individual claims. This massive claim aggregation creates an overwhelming pressure to settle, regardless of the merits of the case. The sheer volume of claims and total possible damages amount make any attempt to resolve the claims on the merits untenable from the defendant's perspective.

This *in terrorem* effect of class certification has been repeatedly recognized by courts, including this Court. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). As this Court has observed, the aggregation of claims creates a nearly irresistible pressure to settle:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk

> of "in terrorem" settlements that class actions entail … .

Id. (internal citations omitted). That effect is particularly severe in securities-fraud cases, which could involve millions of outstanding shares. And the aggregation of these claims makes it unlikely that any defendant will ever have the opportunity to rebut the presumption of reliance with price-impact evidence.

Moreover, the Court should be aware that these settlement pressures are not limited to large corporate entities. Some securities-fraud suits are brought against individual officers or directors who are on their own because, for example, the entity has filed for bankruptcy protection. For example, in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, the defendants were two individuals who were officers of a bankrupt corporation. 487 F.3d 261, 263 (5th Cir. 2007). And these defendants were individually facing millions of dollars in potential liability. *Id.* at 266-67. Although most individual defendants may not face the same type of liability, they still feel pressure to settle. In settlement, individual defendants do not typically admit any liability and usually pay nothing out of pocket because of indemnity agreements with the entity. But an adverse trial result includes the very real possibility that indemnification rights could be cut off, leaving the individual defendants subject to personal damages awards.

Therefore, the ability to raise price-impact evidence at the summary-judgment stage or at trial is largely illusory. The settlement pressure created

by class certification effectively removes the defendant's ability to raise the lack of price impact. It also means that the Fifth Circuit's rule will allow plaintiffs to obtain the benefits of class certification (including the likelihood of settlement) without ever having to address the fact that the alleged misrepresentation did not actually impact the stock price. This Court should not condone such a result.

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

The Fifth Circuit's application of the judge-made presumption of reliance is also inconsistent with the policies expressly adopted by Congress in its securities-fraud statutes. Congress has repeatedly expressed concern about securities "strike suits"—meritless nuisance filings that result in "extortionate settlements," chill disclosures from issuers, and deter qualified individuals from serving on boards of directors. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

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

When the PSLRA caused plaintiffs to bring suits

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

The Fifth Circuit's rule flies in the face of Congress's expressed concerns about strike suits and intent to stop them. Rather than require rigorous compliance with the prerequisites of Rule 23, the Fifth Circuit's rule makes the Rule 23 bar virtually nonexistent. Now, as discussed above, surviving a motion to dismiss not only means access to discovery, it means the case will likely be certified as a class action and settled because the effect of aggregated claims will bring to bear settlement pressures that even the most innocent defendants cannot withstand.[7]

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[7] Respondents may suggest that this Court should defer to the fact that Congress has not modified the *Basic* presumption. Reliance on Congressional inaction is particularly dangerous. *See, e.g., Rapanos v. U.S.*, 547 U.S. 715, 750 (2006) (noting that inaction could be explained by Congressional belief that the courts would address any potential issues); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction … .") (internal quotations and citations omitted). But if the Fifth Circuit's rule stands, then plaintiffs will frequently be able to extract such settlements

D. *Amgen* does not require a different result.

The Fifth Circuit found (and the Respondent will likely argue) that rebuttal of price impact is not permissible in light of this Court's opinion in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds,* 133 S. Ct. 1184 (2013). The Fifth Circuit acknowledged that *Amgen* does not address price-impact evidence. Pet. App. 16a. But the court found that the reasoning in *Amgen* regarding evidence of materiality precludes consideration of price-impact evidence. Pet. App. 19a. But there are key differences between materiality and price impact that the Fifth Circuit did not consider. Moreover, the Fifth Circuit's rule ignores a basic rule of class-action jurisprudence: rigorous analysis of class-certification issues cannot be deferred simply because those issues overlap with the ultimate merits of the dispute. Therefore, the Fifth Circuit erred in concluding that *Amgen* does not permit consideration of price impact at the class-certification stage.

(1) Price impact is not the same as materiality.

The Fifth Circuit reasoned that price impact need not be addressed at the class-certification stage for the same reasons that materiality need not be addressed. Pet. App. 16a-19a. But there are key dif-

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simply by surviving a motion to dismiss. Moreover, Congress cannot possibly have acquiesced to the Fifth Circuit's approach, because no court had held that price impact cannot be addressed at the class-certification stage at the time PSLRA and SLUSA were adopted.

ferences between price impact and materiality, and these differences reveal why this Court's approach to materiality in *Amgen* should not control the approach to price impact.

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

Second, unlike materiality, the issue of price impact is essential to whether Rule 23(b)'s requirements can be met. *See id.* at 1195 n.4. As discussed above, price impact is the heart of the entire presumption. If the stock price does not reflect the alleged misrepresentation, then "there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price, and hence no grounding for any contention

that investors indirectly relied on those misrepresentations through their reliance on the integrity of the market price." *Id.* at 1199. Therefore, if the defendant can sever the link between the alleged misrepresentation and the price of the stock by showing a lack of price impact, there is no justification for certifying a class.

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

Because of these key differences between materiality and price impact, the Fifth Circuit incorrectly concluded that the rationale of *Amgen* should determine whether price impact can be considered at the class-certification stage.

(2) Courts should not defer class-certification issues just because they overlap with the ultimate merits.

The Fifth Circuit refusal to consider price impact also runs afoul of this Court's repeated instruction that rigorous analysis cannot be avoided simply because the inquiry overlaps with the merits. *E.g.*,

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (holding that proper analysis of Rule 23(b) will "frequently" overlap with the merits); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."). This Court's opinion in *Amgen* did not overrule that instruction. To the contrary, the Court recognized that inquiry into the merits is proper to the extent that it is relevant to determining whether the requirements of Rule 23 have been met. *Amgen*, 133 S. Ct. at 1195.

The Fifth Circuit held that proving lack of price impact would require proving lack of loss causation. Pet. App. 17a-18a. And because this relates directly to the ultimate merits, the Fifth Circuit concluded that consideration of price impact is not proper at the class-certification stage. *Id.* But this approach misconstrues *Amgen*.

It is true that this Court in *Amgen* rejected consideration of materiality in part because such consideration would be too deep an inquiry into the merits of the case. *Amgen*, 133 S. Ct at 1195-96. But the Court's concerns about materiality are simply not present in the inquiry into price impact. As discussed above, price impact is central to the presumption of reliance in a way that materiality is not. If the alleged misrepresentation affected the stock price, then there is an arguable basis for presuming reliance, even if the statement is later shown to be immaterial. In that instance, a class can be certified based on the presumption, and materiality can be addressed on a class-wide basis. Conversely, if the

alleged misrepresentation did not have any price impact, then there is no reason to presume any reliance and, consequently, no basis to certify a class.

The Fifth Circuit's analysis drifted into the irrelevant realm of the possible motivations for Halliburton to try to disprove price impact. Pet. App. 13a-14a. But this reasoning misses the point. Without price impact, there is no basis for the presumption in the first place and therefore no basis to find that Rule 23 is satisfied. The fact that lack of price impact may also relate to other issues should not prevent its consideration in the context of the requirements of Rule 23.

In sum, this Court has been clear that rigorous analysis of the requirements of Rule 23 cannot be avoided just because the issues happen to overlap with the merits. In *Amgen* the Court concluded that inquiry into materiality was not necessary to determine whether the requirements of Rule 23 were met. But price impact is different. Without price impact, the very heart of the hypothesis underlying the presumption of reliance fails. Without that underlying hypothesis, there is no basis to presume that market participants indirectly relied on the stock price. And without that presumption, individual issues of reliance must predominate over common issues and a class cannot be certified. Therefore, defendants should not have to wait until summary judgment or trial to disprove price impact and defeat class certification.

CONCLUSION

DRI—The Voice of the Defense Bar respectfully requests that the Court reverse the Fifth Circuit's judgment and, at a minimum, hold that defendants can raise the lack of price impact to rebut the presumption of reliance at the class-certification stage.

Respectfully submitted,

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