

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMGEN INC., ET AL., :

4 Petitioners : No. 11-1085

5 v. :

6 CONNECTICUT RETIREMENT PLANS AND :

7 TRUST FUNDS. :

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9 Washington, D.C.

10 Monday, November 5, 2012

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:06 a.m.

15 APPEARANCES:

16 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
17 Petitioners.

18 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
19 Respondent.

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22 United States, as amicus curiae, supporting
23 Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 11-1085, Amgen, Incorporated, v. The Connecticut Retirement Plans and Trust Funds.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

Our case is about whether the claim of liability is, in a fundamental sense, class-wide or individual. The heart of a 10b-5 claim is I bought or sold in reliance on a misleading statement. The question at the class cert stage is whether each individual will have to prove his own reliance directly on the statement, or whether every -- he can prove indirectly reliance on the statement by showing that everybody relied on a distorted market price.

A market price will reflect a statement if and only if the statement is material and is made publicly on an efficient market. So, absent materiality, the market price cannot be presumed to reflect the statement in question. And the plaintiffs --

1 CHIEF JUSTICE ROBERTS: Why -- why is
2 that -- why is that the case? I would suppose, if
3 there's no materiality, that means that the effect on
4 the market price just happens to be zero.

5 MR. WAXMAN: That's exactly correct. And
6 the point here is --

7 CHIEF JUSTICE ROBERTS: Well, why isn't that
8 common to all parties?

9 MR. WAXMAN: Mr. Chief Justice, every one of
10 the four predicates to the fraud-on-the-market theory,
11 which is a shortcut that -- that excuses plaintiffs from
12 proving that I heard the statement and relied on it --
13 every one of those predicates is common.

14 Whether the market is efficient is common.
15 Whether the statement is public is common. Whether the
16 stocks were bought and sold during the period of market
17 distortion is common. And materiality is common.

18 The question is not whether --

19 JUSTICE SOTOMAYOR: So is the falsity of the
20 statement common as well?

21 MR. WAXMAN: The falsity of the statement is
22 common, but it is not a predicate to whether or not you
23 can prove reliance on a statement indirectly by relying
24 on the integrity of the market price because, in an
25 efficient market, material public statements, whether

1 they are true or false, will presumably move the market
2 price. And if you're trying to prove reliance on a
3 false --

4 JUSTICE SOTOMAYOR: Can -- can an individual
5 who has -- it has been deemed in -- in a cert
6 certification, that an issue is immaterial, could an
7 individual claimant ever prove it's material?

8 MR. WAXMAN: Sure. I'm not arguing --

9 JUSTICE SOTOMAYOR: On the
10 truth-on-the-market -- the truth-on-the-market defense,
11 which is the type of defense that you're raising here.

12 MR. WAXMAN: Yes. Either way. Let me
13 explain why.

14 There's no doubt that this Court's standard
15 for materiality, announced in TSC v. Northway and since
16 reiterated, is an objective standard. It doesn't depend
17 on who the relier was.

18 But the inability to prove to a certifying
19 judge that class-wide reliance can be -- that class-wide
20 reliance exists because the statement was material
21 doesn't preclude a plaintiff like Connecticut
22 Retirement, which has said it's going to proceed whether
23 there's a class or not, or any other member of the
24 class, from coming to court and saying, either, I
25 directly relied on this statement, and here's my proof

1 that it's material to the trier-of-fact, because the
2 decision that the judge makes at certification is not
3 binding on the trier-of-fact; or even to say, I relied
4 on the integrity of the market price, and I have proof
5 that the market price was affected because here are
6 three investors, they're all reasonable people, and they
7 say that it was relevant -- important to them in the
8 total mix of information involved.

9 JUSTICE SOTOMAYOR: I'm sorry --

10 JUSTICE KAGAN: Mr. Waxman, that's just to
11 say that a plaintiff can always relitigate the question
12 of materiality. But at the class certification stage,
13 isn't it correct that, if the Court holds that a
14 statement is immaterial, it's immaterial for all members
15 of the class, and the suit has to be dismissed? Isn't
16 that right?

17 MR. WAXMAN: The suit cannot -- that is, the
18 suit cannot proceed as a class action. Connecticut
19 Retirement or any --

20 JUSTICE KAGAN: It can't proceed as an
21 anything action, can it? I mean, the -- the remedy, if
22 you had thought that the -- the statement was
23 immaterial, is not to say, I won't approve a class. It
24 would be to say, the suit has no merit.

25 MR. WAXMAN: I -- I think that's wrong. I

1 think that's conceptually wrong, Justice Kagan, in the
2 sense that all that the class certification decision
3 says is that the putative class representative can sue
4 on his own behalf, but he can't drag everybody else into
5 the --

6 JUSTICE KAGAN: Well, do you mean to say
7 that a judge, who has just ruled that a statement is
8 immaterial, is going to keep the case in his court,
9 litigated by an individual plaintiff, even though he's
10 just ruled that the statement is immaterial?

11 MR. WAXMAN: Well, I want to -- I'd like to
12 come back to the question of why whether, even if
13 your -- the premise of your question is correct, it
14 doesn't matter for this case. But let me take one more
15 run at -- at your premise.

16 The next thing that would happen if I'm
17 right, presumably, and the case isn't over, the class
18 just isn't certified, is that defendant -- you know,
19 emboldened by the judge's rule, will file a motion for
20 summary judgment on the grounds that materiality -- the
21 element of the substantive offense, not materiality, the
22 predicate to class certification -- has just been
23 determined in favor of me. That is a very different
24 question for the Court.

25 Materiality, as this Court has said, is

1 fact-sensitive, and it involves a balancing of
2 credibility of witnesses or of expert opinions, and the
3 judge at the -- at the class cert stage, has to find
4 facts and has to make a ruling.

5 When it comes up on summary judgment, what
6 the -- if there is a dispute of material facts, what the
7 judge should do under the law is to say, look, I just
8 held that I didn't think it was material, but I resolved
9 disputed material facts, and that's for the jury, and
10 this case will go to the jury.

11 JUSTICE KAGAN: But you're saying that a
12 judge on a class certification stage can say, this is
13 immaterial, the statement is immaterial; therefore, this
14 can't proceed as a class action. But when a summary
15 judgment motion comes in, arguing the exact same thing,
16 the judge will say, oh, it's not immaterial after all,
17 or it's disputed enough, that the case can -- can
18 continue?

19 MR. WAXMAN: Well, in some cases if -- if
20 the alleged fact is -- you know, that Amgen's president
21 got a haircut at 10:30, the judge presumably can say
22 there are -- you know, this is immaterial as a matter of
23 law. But the vast majority of cases -- this is a
24 perfect example -- where they have statements that, in
25 the abstract, extracted from the total mix of

1 information, look pretty material. These are flagship
2 drugs.

3 On the other hand, the evidence we wanted to
4 introduce and the judge wouldn't hear because, in the
5 Ninth Circuit, the test is not proving facts, but simply
6 alleging them --

7 JUSTICE KAGAN: I guess the question,
8 Mr. Waxman, is if it is not immaterial as a matter of
9 law, at the summary judgment stage, how could a judge
10 possibly say it is material at the class certification
11 stage?

12 MR. WAXMAN: The judge at the class
13 certification stage is required to weigh competing
14 evidence and -- and render his or her best judgment. At
15 the summary judgment stage, a judge is precluded from
16 doing that.

17 JUSTICE KAGAN: So the class certification
18 stage becomes kind of a super merits inquiry?

19 MR. WAXMAN: No, not at all.

20 JUSTICE KAGAN: -- where the plaintiff has
21 to -- has to surmount a higher burden on the merits?

22 MR. WAXMAN: No, no, no. The -- the class
23 certification stage requires the moving party -- the
24 putative -- the -- the class representative who is
25 proposing to arrogate to himself and his method of proof

1 the fortunes of all the absent class members, whether
2 they are direct reliers or indirect reliers, tie their
3 fortunes to his fortune at trial. And the judge simply
4 has to say, is this a case in which reliance is a common
5 issue? That is the key through the certification gate
6 in 10b-5 cases.

7 JUSTICE GINSBURG: I thought we were talking
8 about, Mr. Waxman, the materiality of the alleged
9 misstatement, and I am really nonplussed by your answer
10 that, if the judge says it's immaterial, that doesn't
11 end it for everybody. Certainly, it should -- it ends
12 it for the class; you said that. Should it also end it
13 for the representative of the class to say, okay, now
14 I'm going to come back, and this statement, -this
15 finding of the immateriality doesn't bind me.

16 Of course, it's going to bind the class
17 representative. So if it's immaterial, the case ends.
18 And if it is material, then it is material to everybody
19 in the class.

20 MR. WAXMAN: Well, Justice Ginsburg, let's
21 take an easier case. Let's say I'm somebody who bought
22 Amgen during the relevant period, and they -- the judge
23 says -- you know, I've heard your -- I've considered
24 your event studies, and I think that this is --
25 information isn't material.

1 There is nothing whatsoever that precludes
2 me from bringing a suit and saying, here's my
3 evidence of -- I directly relied; here's my evidence of
4 materiality.

5 JUSTICE SOTOMAYOR: How could that be --

6 JUSTICE KENNEDY: Are you saying that
7 there -- are you saying that there is a difference
8 between materiality for the fraud-on-the-market theory
9 and for direct reliance or that there can be a
10 difference?

11 MR. WAXMAN: The -- the standard of --

12 JUSTICE KENNEDY: And that if there was
13 fraud on the market, that is a materiality question
14 addressed at the certification stage, but if the class
15 isn't certified, the investor can still show that he had
16 had direct reliance that was reasonable?

17 MR. WAXMAN: Yes.

18 JUSTICE KENNEDY: Am I -- am I right about
19 that? Or --

20 MR. WAXMAN: You are -- you are either right
21 or wrong, depending on how I understood you. Let me --

22 (Laughter.)

23 MR. WAXMAN: Let me start with you're right,
24 Justice Kennedy, you're absolutely right.

25 JUSTICE KENNEDY: Do the first part.

1 (Laughter.)

2 MR. WAXMAN: Okay. Materiality -- the quirk
3 of this case is that materiality is both -- as all my
4 friends on the other side agree, an essential predicate
5 of the fraud-on-the-market theory, that is the essential
6 predicate of the ability to prove indirect reliance on
7 the statement through an assertion that the market
8 price -- that the statement distorted the market price.

9 Everyone agrees that, if the statement isn't
10 material, it didn't distort the market price, and
11 therefore, reliance is an individualized issue for those
12 who actually heard and detrimentally relied on the
13 statement.

14 One of the elements that has to be proven in
15 a 10b-5 case is reliance, which is what we were talking
16 about on the class cert stage, and there, materiality is
17 a predicate for reliance. But even if reliance is
18 proven, materiality is also an element of a 10b-5(b)
19 cause of action, and the standard for materiality is the
20 same.

21 The real question in this case is what is
22 the purpose of Rule 23? If you think that the purpose
23 of Rule 23 is to postpone to the merits everything that
24 can be postponed without a risk of foreclosing valid
25 individual claims, we lose. But that's not the purpose.

1 The purpose is for a court to determine whether all of
2 the preconditions for forcing everyone into a class
3 action are present before you certify.

4 JUSTICE BREYER: Or you can take exactly
5 what you said and phrase it the opposite way.

6 MR. WAXMAN: But I wouldn't.

7 JUSTICE BREYER: I know you wouldn't, but I
8 suspect your opponents might. That if it's the purpose
9 of the certification stage to try out every element of
10 liability at that stage, rather than waiting for the
11 trial?

12 MR. WAXMAN: No.

13 JUSTICE BREYER: No, it's not. Good.

14 Now, once you say that, what you have said
15 is, you know, it could still be material for some
16 individual, even though there is no market reliance.
17 And similarly, a silence going (indicating), some odd
18 set of words or whatever it is, although it's not false
19 for almost anybody, for some particular person, it could
20 seem -- convey something false in some particular set of
21 circumstances.

22 So let's try out falsity at the
23 certification stage, too. In fact, let's try out
24 everything because we could always think of a few
25 examples where, despite the fact that -- you know, that

1 it's only a common issue 99 percent of the time, we can
2 dream up a situation where it's not a common issue.

3 MR. WAXMAN: Justice Breyer, the point of
4 class certification is not to pre-try the merits of the
5 case. What --

6 JUSTICE BREYER: No, but you are saying with
7 a cert -- class certification here, if there is no
8 materiality, there is no class; and you are repeatedly
9 faced with the question, you are absolutely right; in
10 fact, there is no case. And so then what you say is,
11 and indeed, I have a few instances here in which there
12 could be a case, and I would say, I bet if we are -- you
13 know, professorial enough, we could dream up a
14 hypothetical for anything, where there still is a case.

15 MR. WAXMAN: The point of the class
16 certification, as this Court explained in Amchem and
17 other cases, and as the Rules Advisory Committee notes,
18 is the question of whether there is class coherence in
19 the first place. It's not the merits issue. It's
20 whether it's fair for the class representative to impose
21 on the defendant the juggernaut of class action and on
22 the absent class members their fortunes in his or her
23 hands. And what --

24 JUSTICE KAGAN: Mr. Waxman, that is right,
25 and that's what we said in Wal-Mart recently, that the

1 question is a question of coherence; it's a question of
2 whether the class wins or loses together. And here, for
3 materiality, the class wins or loses together. If it's
4 material, it's material as to everybody. If it's not
5 material, it's not material as to everybody.

6 And that's just a function of the fact that
7 materiality, as we've repeatedly said, is an objective
8 test. It doesn't have anything to do with whether a
9 particular person finds it material. And where that's
10 the case, it seems to me that the Wal-Mart test, which
11 is -- is an issue central to the -- you know, when you
12 rule on the issue, do you rule on each of the claims in
13 one stroke? The answer to that is yes.

14 MR. WAXMAN: Justice Kagan, this Court has
15 explained more than once, and I am now quoting from
16 Amchem, that "class" -- "It is class cohesion and only
17 class cohesion that legitimizes representative action in
18 the first place." And that question, quote, "preexists
19 any settlement and therefore a fortiori any litigation."
20 Now --

21 JUSTICE KAGAN: Mr. Waxman, I was saying
22 that's right.

23 MR. WAXMAN: Okay.

24 JUSTICE KAGAN: There is class cohesion as
25 to materiality. People win or lose on materiality

1 together.

2 MR. WAXMAN: The -- there is class -- with
3 respect, there is class cohesion, investors cohere into
4 a class, only when the alleged misinformation was
5 significant enough to affect the price, thus enabling
6 the common claim of relying on the misinformation in the
7 same way. Letting a putative representative through the
8 certification gate, without showing that key, is like,
9 on a theory of no harm, no foul because we will all lose
10 together --

11 JUSTICE GINSBURG: Mr. Waxman --

12 MR. WAXMAN: -- is like letting --
13 Justice --

14 JUSTICE GINSBURG: Mr. Waxman, there is no
15 question about 23(a), right? The 23(a) prerequisites
16 have been satisfied.

17 MR. WAXMAN: Not challenged in this case.

18 JUSTICE GINSBURG: So the only thing is
19 (b)(3), that is that a question of law or fact common to
20 the class members predominates over questions affecting
21 only individual members. The question that predominates
22 is the question, were these representations material; if
23 they were material, then the certification is proper.
24 If they were immaterial, it's not. It's just -- I don't
25 understand why this isn't just a clear case of a

1 question common to the class; that is, the question of
2 materiality.

3 MR. WAXMAN: The answer, Justice Ginsburg,
4 is that the question at the class certification stage --
5 the predominance question is the reliance element, not
6 the materiality element.

7 Everyone agrees that materiality, like
8 falsity, like scienter, like loss causation, are all
9 common questions. As this Court explained in Basic and
10 reiterated last term in Halliburton, in 10b-5 actions,
11 the question at class certification is whether reliance
12 needs to be proven directly; that is, individually by
13 people who heard and acted in response; or whether the
14 shortcut that this Court authorized in Basic of allowing
15 indirect proof by proving that the statement caused a
16 distortion of the market, is the way to go.

17 There are two tracks, and it happens in this
18 case that materiality is both an element, which is
19 common, and a predicate to class-wide reliance.

20 Everyone agrees that there -- you can't rely as a class
21 on the -- the challenged misstatement, unless the
22 statement moved or had the capability of moving the
23 market price. And that's why the materiality is the
24 glue that holds --

25 JUSTICE SCALIA: Mr. Waxman, you have a

1 habit of not pausing between sentences. You pause in
2 the middle of the sentence, and you end a sentence and
3 go right on to the next. So I apologize for
4 interrupting, but --

5 MR. WAXMAN: Not at all.

6 JUSTICE SCALIA: -- but you leave me no
7 alternative.

8 (Laughter.)

9 MR. WAXMAN: It's the red light.

10 JUSTICE SCALIA: Yes, I understand.

11 MR. WAXMAN: The tyranny.

12 JUSTICE SCALIA: Is it not the case that one
13 of the other elements necessary for the
14 fraud-on-the-market theory would also be decided
15 conclusively for -- for future individual litigants,
16 namely, the efficiency of the market? A future litigant
17 will ordinarily claim, I either sold it at a depressed
18 price or bought it at an inflated price because of the
19 market's reaction to this particular fraudulent
20 statement.

21 MR. WAXMAN: Yes.

22 JUSTICE SCALIA: So -- so you can say the
23 same thing about the efficiency of the -- of the market
24 being determined in this preliminary question, as you
25 can say about -- about the -- the issue here.

1 MR. WAXMAN: That's absolutely right. And
2 the same is true for public statement. The way that the
3 government in responding --

4 JUSTICE KAGAN: What is that statement,
5 Mr. Waxman?

6 MR. WAXMAN: I'm sorry.

7 JUSTICE KAGAN: Because the difference is if
8 there is an insufficient market, the case goes forward,
9 and people have to prove individual reliance, and that
10 means that the class splits apart, and you don't get a
11 coherent class. So the function of -- of your winning
12 an argument either on publicity or on the efficient
13 market is that the class becomes incoherent, that
14 everybody then has to prove individual reliance.

15 But that's not what happens when you prove
16 immateriality. When you prove immateriality, the whole
17 class falls together because it's immaterial for
18 everybody.

19 MR. WAXMAN: That's not correct, and in any
20 event, that analysis -- that approach is, as I was
21 trying to say, is like letting the fruits justify the
22 search.

23 The question is -- at the time that class
24 certification is sought, the question is do common
25 issues predominate? And the question, in a securities

1 case, is, is reliance in fact -- to quote this Court's
2 opinion, "in fact, a common issue?"

3 You also have to -- to show that, in fact,
4 it's a common issue, you have to show that the market
5 reacted to the statement, whether it was true or false,
6 whether it was made with scienter or not, whether there
7 was loss causation or not, the market had to react, and
8 to do that, you need all three legs of a stool.

9 The statement has to be material because
10 immaterial statements don't move markets. If that --

11 JUSTICE GINSBURG: Mr. Waxman, the -- the
12 Basic opinion that started all this off, on page 242,
13 lists materiality as a common question. The materiality
14 of the misrepresentation, if any, is listed as a common
15 question, and that made perfect sense to me.

16 MR. WAXMAN: It makes perfect sense to me as
17 well, Justice Ginsburg, and I'm not being sarcastic.
18 Materiality is a common question. Just as are many of
19 the other elements of a 10b-5 action --

20 CHIEF JUSTICE ROBERTS: So at certification,
21 you just assume that materiality -- you don't have to
22 show it. If it's always a common question, you assume
23 it, in trying to weigh out the number of -- whether or
24 not common issues predominate or not.

25 MR. WAXMAN: Well, the question, Justice --

1 I mean, for -- if it worked for class certification,
2 that would be fine. The question is what the purported
3 class representative has to show to get through the
4 certification gate to transform an ordinary bilateral
5 dispute about, you made a false statement, I relied on
6 it, it caused me to lose money, into something entirely
7 different, a class of tens or hundreds of thousands of
8 people, all of whom are proceeding together, all of
9 their fortunes are married, and the defendant is faced
10 with the full class, what you have to show.

11 And you have to show that reliance is a
12 common issue, regardless of what you have to show down
13 the road.

14 JUSTICE GINSBURG: Mr. Waxman, you seem to
15 be setting out two determinations of materiality. You
16 say, in order to certify the class, you have to show
17 that the misrepresentation was material. And in order
18 to win on the merits, you certainly have to show that
19 the misrepresentation was material.

20 How do those two findings of materiality
21 differ? How does the finding that you say must be made
22 at the certification stage differ from the finding that
23 must be made at the trial?

24 MR. WAXMAN: They differ temporally, they
25 differ functionally, and they differ in terms of who

1 decides it and with what level of finality. They differ
2 temporally because the first question is, is this
3 case going to -- which of two tracks is this case going
4 to proceed?

5 Is it going to proceed as a -- as a direct
6 reliance case -- I heard the statement, and I relied on
7 it -- or is it going to proceed on a theory on behalf of
8 everybody that whether -- the people who relied on it,
9 the people who heard it or who didn't hear it, on a
10 theory that the -- we rely on the integrity of the
11 market, and the integrity of the market was impaired if
12 the statement was false.

13 In any event, there was a price effect. And
14 there isn't a price effect if the statement wasn't
15 material and made publicly into an efficient market.

16 JUSTICE GINSBURG: But I still -- what --
17 what does "material" mean at the trial level, what does
18 "material" mean at the certification level?

19 MR. WAXMAN: Material means, at both, as
20 this Court said, that there is a substantial likelihood
21 that the information would have been viewed by a
22 reasonable investor as having significantly altered the
23 total mix of information available. That is the test.

24 JUSTICE GINSBURG: So it's the same
25 question. It has to be -- if it's established at the

1 certification stage, it has to be established again at
2 trial?

3 MR. WAXMAN: That's correct. Just like the
4 market efficiency and the public statement and the
5 market timing. Every one of those predicates has to be
6 proven to the jury's satisfaction at trial. All of them
7 are exactly the same in that respect.

8 May I reserve the balance of my time?

9 CHIEF JUSTICE ROBERTS: Yes, you may.

10 Mr. Frederick.

11 ORAL ARGUMENT OF DAVID C. FREDERICK

12 ON BEHALF OF THE RESPONDENT

13 MR. FREDERICK: Thank you,

14 Mr. Chief Justice, and may it please the Court:

15 The class certification process determines
16 whether the case can generate common answers for all
17 class members. So for three reasons --

18 JUSTICE SOTOMAYOR: Why don't you answer the
19 question that was asked earlier, if Basic set forth a
20 presumption, and are you disputing that, at the class
21 certification stage, a defendant can prove that the
22 market is inefficient?

23 MR. FREDERICK: Yes.

24 JUSTICE SOTOMAYOR: So why shouldn't we hold
25 Basic to its position that all of its presumptions can

1 be rebutted as well, not just efficiency? Why do we set
2 out efficiency as the one issue that can be rebutted?

3 MR. FREDERICK: There is a lot to said about
4 Basic, and let me just start the ball rolling by making
5 these observations. First, Basic did not try to
6 distinguish between the requisites of Rule 23 and the
7 substantive component of the fraud-on-the-market theory.
8 And that's important because, in that case, the court
9 remanded for a redetermination of materiality, but it
10 upheld the class certification order.

11 So in the context of Basic, the court seemed
12 to be thinking there was a difference between what
13 needed to be proved for class certification and what
14 would need to be proved on the merits of the case.

15 Now, the second thing to be said is that
16 Basic needs to be read against the backdrop of Rule 23
17 and especially this Court's recent decision in
18 Wal-Mart v. Dukes. Because materiality always generates
19 a common answer for all class members, it is the
20 quintessential common issue that does not splinter the
21 class or cause it to be noncohesive for purposes of
22 understanding predominance.

23 JUSTICE KENNEDY: Doesn't -- doesn't that
24 assume that the efficient market theory is always
25 relevant to materiality? And there might be instances

1 in which there is subjective reliance, which we inquire
2 into, that is objectively reasonable, but that does not
3 involve a fraud on the market?

4 MR. FREDERICK: Only in a hypothetical case,
5 Justice Kennedy. And this is the absolute most
6 important point that I can try to make today. In a
7 fraud-on-the-market case, the idea of reliance -- the
8 only theory of reliance that is being advanced is
9 indirect reliance on the integrity of the market. There
10 is no other theory of reliance.

11 Why do we know that in this case? For two
12 reasons: First, the Connecticut Retirement System could
13 not be the class representative, if it did not meet the
14 typicality requirement of Rule 23(a), which the district
15 court found -- this is on page 25A of the petition
16 appendix -- and has not been challenged subsequently.

17 But why doesn't Connecticut have a direct
18 reliance theory? We know they don't because they have a
19 fiduciary duty to their investors to apply whatever
20 theory they have of securities fraud. So we know in
21 this case -- and this is, by far, clear in the
22 run-of-the-mine fraud-on-the-market case, that the class
23 representative will only establish reliance indirectly,
24 by showing that the integrity of the market was
25 impaired.

1 And so their construct is an entirely
2 hypothetical and theoretical one. It simply does not
3 arise in the real world of fraud-on-the-market cases.

4 JUSTICE SCALIA: Mr. Frederick, you -- you
5 say that -- you know, it's a flukey hypothetical
6 where -- where the -- the issue here would -- would come
7 up again in a different context in an individual suit.
8 Let -- let me give you a -- a case that's -- that's not
9 flukey and hypothetical. That is, it is usually the
10 case that -- that people who are allegedly defrauded in
11 stocks rely upon the fact that they bought it at an --
12 at an inflated price or sold it at a depressed price.
13 Both of those questions depend upon the efficiency of
14 the market.

15 If the market is not efficient, a question
16 that has to be decided for the class certification case,
17 the individual investor is not going to be able to say,
18 you know, that's -- that's why I got cheated, because
19 the market reflected this false statement, and I paid
20 more money for the stock than I should have. That --
21 that is not a flukey hypothetical. That is what will
22 happen in most individual cases. And yet, that question
23 of the efficiency of the market has to be decided at the
24 class certification stage.

25 MR. FREDERICK: Right, precisely because we

1 have to know are all the investors standing in the same
2 position. If the market is efficient and it is
3 absorbing information into the price, all investors will
4 have the same question with respect to materiality.

5 JUSTICE SCALIA: You could say the same
6 about materiality. If it's immaterial, it isn't
7 reflected in -- in the market.

8 MR. FREDERICK: They all lose on the merits,
9 if there is no materiality. The question about
10 efficiency, Justice Scalia, and the reason why it is
11 advanced at class certification is because it serves a
12 gatekeeping role in determining whether all the
13 investors can show indirect reliance on the market. If
14 the -- if the stock is thinly traded, there are no
15 public analysts, there are no stock reports given about
16 it, and no one knows exactly why is the price being
17 determined, that creates exactly the kind of individual
18 issues that would predominate in a securities fraud
19 case.

20 JUSTICE SCALIA: So -- so the difference you
21 assert is that, with respect to the issue here, it will
22 be an issue in all individual cases; whereas with regard
23 to the efficiency of the market, it will only be an
24 issue in -- what, 95 percent of -- of the individual
25 cases?

1 MR. FREDERICK: No, the question is: Does
2 efficiency serve as a means of determining are all the
3 investors similarly situated? Are they a cohesive
4 class? If the market is not efficient -- and mind you,
5 they -- they conceded this question in their answer and
6 they did not challenge the expert that was put into this
7 report on the question of efficiency, so that question's
8 really not in this case.

9 But in the case that you're hypothesizing,
10 Justice Scalia, efficiency serves the gatekeeping
11 function of determining are all the investors similarly
12 situated, so that indirect reliance can be a -- a method
13 of showing that predicate for a common answer to be
14 determined at trial.

15 JUSTICE SOTOMAYOR: Could we --

16 MR. FREDERICK: Publicity serves the same
17 function.

18 JUSTICE SOTOMAYOR: Could we get a
19 hypothetical that I actually think could occur, which is
20 not a truth-on-the-market defense, but a known truth to
21 the individual person seeking certification. So that is
22 it's immaterial to that person because they were told
23 this information by someone and still trading. Would
24 that defense be available at certification?

25 MR. FREDERICK: I think it -- where it gets

1 appropriately done is the adequacy and typicality prongs
2 of Rule 23(a) because that person has a different
3 factual basis for attempting to assert a securities
4 fraud, and that person is not typical of the class and
5 so therefore would not meet the typicality requirement
6 of 23(a).

7 Now, it is possible, certainly, that in
8 other cases, there might be investors out there who do
9 have a direct reliance theory, but they are protected by
10 Rule 23 in a couple of ways. One is they can bring
11 their own case, and they can say, I directly relied on
12 Amgen's misstatements and the false things that they
13 said about their flagship products, and I, therefore,
14 have my own 10b-5 case. Or if the class is certified
15 and they think they have a direct reliance theory, they
16 can opt out of the class.

17 JUSTICE BREYER: This is true, but I'm --
18 I'm -- I'm trying to work out what, as I understand it
19 now, Mr. Waxman's point is -- is basically this:
20 That -- that why do we use an efficient market theory?
21 We use it because if the market is efficient and the
22 statement is public, then someone who bought over the
23 market is buying in a -- in a world that reflects the
24 false statement. I mean, that's -- so he -- there was
25 sufficient reliance indirectly.

1 All right. So I think his point is, yes, I
2 can see materiality is something that's relevant to
3 everybody. Of course, it is, a common issue in the
4 case. But also, it is a feature of materiality that, if
5 it wasn't material, then our theory of market
6 reliance -- market -- efficient markets goes out the
7 window because you can have all the efficiency in the
8 world, all the publicity in the world, but still, where
9 something to a reasonable stockbroker is irrelevant, his
10 reaction is "who cares?" And therefore, although there
11 could be special cases, the efficient market theory
12 plays no role.

13 Now, I think that's what his theory is, if I
14 understand it. And -- and I don't hope it is, if I've
15 got it -- I mean, I hope I got it right. But -- but if
16 that -- so what's your direct answer to that?

17 MR. FREDERICK: My direct answer to that is
18 that materiality still serves as a common answer. All
19 the investors are going to lose if it is not a material
20 misstatement that has any effect, and they will win or
21 they will have the potential to win if it is a
22 material --

23 JUSTICE KENNEDY: Well, that -- that --

24 JUSTICE SCALIA: The issue -- the issue is
25 not whether -- whether it's a common question or not.

1 MR. FREDERICK: Well --

2 JUSTICE SCALIA: The issue is whether
3 there's any reason to believe that the -- that the
4 market reflects reality.

5 MR. FREDERICK: Right.

6 JUSTICE SCALIA: That's the issue.

7 MR. FREDERICK: But, Justice Scalia, I think
8 that the issue that you want to decide or you think that
9 you want to decide is what constitutes the efficiency of
10 the market, and that is a hotly litigated issue in many
11 securities cases. It just happens not to be at issue in
12 this one.

13 And so the question of -- you know, you've
14 got a Fortune 200 company, with 1.1 billion shares
15 outstanding, 9 million traded a day during the class
16 period, I mean, this is a hugely efficient market for
17 the stock that is at issue before you.

18 JUSTICE BREYER: All right. So you're
19 saying, in this kind of case, the -- the materiality or
20 not is not likely to be specially sufficient --
21 specially significant. In fact, you are going to decide
22 if it is a common issue, and there is no reason to
23 import that common issue into the preliminary finding,
24 even if what I just parroted, we hope, is true.

25 MR. FREDERICK: Right. What you're ending

1 up doing, Justice Breyer, is you are front loading. You
2 are having a mini trial on the merits because the
3 materiality question here goes into what did the
4 executives think and mean when they were making certain
5 statements about clinical trials for their drug. What
6 was --

7 JUSTICE KENNEDY: You -- you are saying
8 that, if everyone loses, if it's not material, that's a
9 common issue, and therefore, the trial court at the
10 certification stage does not have to determine it.

11 MR. FREDERICK: No, what I'm saying is that
12 it is -- because it is a common question, it is not one
13 to be decided at class certification. Just like
14 falsity --

15 JUSTICE KENNEDY: I'm not sure how that's
16 different from what I said. But in other -- in other
17 words, you are saying that market efficiency is just
18 presumed, and everybody wins or everybody loses, and so
19 you can have a class action, even though the trial judge
20 is convinced that there is no adequate common market
21 theory to support the common -- the common injury.

22 MR. FREDERICK: That's not our position.
23 Our position is that efficiency and publicity are
24 gate-keeping functions to determine whether or not the
25 answer for indirect reliance on the market is a common

1 question.

2 JUSTICE GINSBURG: Mr. Frederick, you say --
3 you say, you point out, quite rightly, that the
4 efficiency of the market was conceded -- was conceded
5 below.

6 MR. FREDERICK: Yes.

7 JUSTICE GINSBURG: It was not challenged.
8 Except that now, in -- in Amgen's brief, there is a
9 suggestion that the efficiency of the market is a more
10 sophisticated question. And it's not my note -- binary,
11 I think is what they said -- it isn't that it's either
12 efficient or it's not efficient; it depends on other
13 factors.

14 MR. FREDERICK: It's a new concoction they
15 have not argued before this stage of the briefing in
16 this case, and it's wrong because all investors will
17 rise or fall, based on whether or not those statements
18 that may have some subsidiary materiality effect are
19 going to be able to show that there was some consequence
20 to the market. And that is that why -- that is why it
21 is still a common question, even if there are the
22 subsidiary inefficiencies --

23 JUSTICE BREYER: Right. So if I've got
24 this, your answer -- which I am trying to follow it;
25 don't tell me I'm right if I'm not -- that, with

1 efficiency of the market, that's not a traditional
2 element of a tort --

3 MR. FREDERICK: Correct.

4 JUSTICE BREYER: -- that is something
5 special to get into this theory.

6 MR. FREDERICK: That's correct.

7 JUSTICE BREYER: The publicity of the
8 matter, that is not traditionally a common element of
9 the tort. That is something special to get into this
10 theory.

11 MR. FREDERICK: Correct.

12 JUSTICE BREYER: With materiality, it is a
13 common element of the tort always; it is traditionally
14 there; it will be litigated, so there is no special
15 reason to or desirability in or need for litigating at
16 the outset.

17 MR. FREDERICK: That's correct. And
18 Congress recognized that there were issues concerning
19 these various elements. And that's why, in 1995, when
20 it enacted the PSLRA, it addressed scienter by imposing
21 a heightened pleading requirement and loss causation,
22 but it was asked to address materiality and reliance and
23 it chose not to.

24 The first bill that was proposed would have
25 dealt with Basic, and the -- and the Congress voted that

1 down, and instead --

2 JUSTICE SCALIA: But there is -- there is a
3 reason for deciding it earlier, and the reason is the --
4 the enormous pressure to settle once the class is
5 certified. In most cases, that's the end of the
6 lawsuit. There's -- there's automatically a settlement.

7 Now, one way of -- of certifying the class
8 is to show, well, you know, it's an efficient market,
9 and you can presume that everybody in the class relied
10 on the market. But that's only true if -- if the -- the
11 statement was material to the market. If it was
12 immaterial to the market, that isn't true. And you
13 should not proceed any further, and you should not begin
14 this -- this class action which, in -- in most cases, is
15 simply the preliminary to a settlement. There is a good
16 reason for deciding it sooner.

17 MR. FREDERICK: Well, Justice Scalia, you
18 would consign district court judges to having many
19 trials on the merits because the fact that materiality
20 is such a highly contextual inquiry --

21 JUSTICE KENNEDY: Well, you have the -- you
22 have the burden of justifying class certification --

23 MR. FREDERICK: True.

24 JUSTICE KENNEDY: -- is that not correct?

25 MR. FREDERICK: That's correct.

1 JUSTICE KENNEDY: All right. Now, suppose
2 there is some real question of whether or not the causal
3 chain hasn't been broken, the causal chain between the
4 misstatement and the movement in price. Don't you have
5 to prove the integrity of the causal chain?

6 MR. FREDERICK: Yes.

7 JUSTICE KENNEDY: At the certification
8 stage?

9 MR. FREDERICK: Yes, but that's where
10 efficiency comes in, Justice Kennedy, and that's why,
11 when efficiency is contested at the class certification
12 stage, what comes in are proofs of does information end
13 up having an effect? And economists do event studies to
14 try to show the general level at which information will
15 be absorbed into the market price. That's where that
16 issue gets contested. It does not get contested on the
17 question of materiality because materiality looks at the
18 total mix of information that would be relevant to an
19 investor, not --

20 JUSTICE KENNEDY: You say it's material even
21 though there is no cause in fact? I don't understand
22 that.

23 MR. FREDERICK: What I'm saying is that the
24 efficiency question goes into the individual stock's
25 ability to absorb information, both material and

1 nonmaterial information.

2 Now, the question on the merits, for which
3 all investors will either rise or fall together, is was
4 this company's misrepresentation a material one to the
5 reasonable investor? And that's why all investors are
6 going to have this same answer because it's the same
7 objective inquiry.

8 The question that you -- you and
9 Justice Scalia are positing about the efficiency of the
10 market is one on which there are disagreements among the
11 lower courts as to how to challenge and how to deal with
12 that question, but they do not do it on the basis of
13 materiality.

14 Judge Easterbrook had a very sound opinion
15 in the Schleicher case, in which he goes through and he
16 explains that, when there is a fraud on the market case,
17 the notion of indirect reliance, where efficiency is
18 established, really evolves -- devolves down to the core
19 merits question of materiality. And that is a common
20 question that -- in which all of the investors are going
21 to rise together.

22 But I do want to end by saying that, when
23 Congress looked at this question, it decided not to deal
24 with this question of efficiency or materiality. It was
25 faced with a specter of 300 lawsuits being filed per

1 year that were securities fraud cases, in 1995, where a
2 93 percent settlement rate was occurring, an average
3 settlement of nearly \$9 million.

4 In -- in 2011, the statistics showed that
5 what Congress did was successful in achieving the
6 purpose Congress attained. In the year 2011, there were
7 188 class actions filed; 50 percent of them were
8 dismissed, mostly on the high-end pleading standards
9 that Congress had enacted in the PSLRA.

10 So it's not really for this Court's province
11 to be imposing policy judgments about what additional
12 requirements ought to be put on 23(b)(3); Congress made
13 that judgment. And these proceedings that have gone
14 along in -- in this way, were perfectly sound by -- with
15 the district court and the court of appeals.

16 If the Court has no further questions?

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Sherry.

19 ORAL ARGUMENT OF MELISSA ARBUS SHERRY

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE RESPONDENT

22 MS. SHERRY: Mr. Chief Justice and may it
23 please the Court:

24 I would like to start by going back to the
25 language of Rule 23 and, in particular, the predominance

1 requirement. The only question is whether common issues
2 predominate over individual issues.

3 As several of the justices have recognized,
4 materiality is an objective inquiry, at least to a
5 common answer, and that common answer unites the class,
6 rather than divides it. If materiality is shown, the
7 class members can proceed together on the
8 fraud-on-the-market theory. But --

9 JUSTICE SOTOMAYOR: But as Justice Scalia
10 pointed out earlier, so is efficiency or nonefficiency.

11 MS. SHERRY: And the difference --

12 JUSTICE SOTOMAYOR: So that -- that
13 differentiation, articulating it that way, doesn't move
14 the ball.

15 MS. SHERRY: I would disagree with that
16 because the difference is with efficiency and with
17 publicity. If the -- depending on the common answer,
18 the class may divide. It may fragment because, even if
19 the market is inefficient, individual class members can
20 make out claims of direct reliance. You can rely on an
21 inefficient market and prevail. You can rely on
22 nonpublic statements --

23 JUSTICE SCALIA: What's the difference
24 between 100 percent and 95 percent? I mean, most of the
25 other claims in -- in stock cases are going to be based

1 on what -- what the market price was when the person
2 bought or sold. So -- you know, 95 percent instead of
3 100 percent, that's -- that's the basic difference?

4 MS. SHERRY: The -- the purpose of the class
5 certification stage with respect to predominance is to
6 weigh the common issues against individual issues. And
7 with respect to market efficiency -- excuse me -- market
8 efficiency and publicity, those are two matters that --
9 that either bind the class together or divide them. To
10 the extent the market is inefficient or to the extent
11 the statements are not public, they are not all getting
12 the information from the same source.

13 JUSTICE BREYER: There are preconditions --
14 there are preconditions, not related to the merits, that
15 do, in fact, justify the use of a special reliance
16 theory. Now, I've said that; of course, so is
17 materiality.

18 MS. SHERRY: But --

19 JUSTICE BREYER: But materiality, unlike the
20 other two, is part of the element of the basic case,
21 where it is a common issue in this case -- and in
22 most -- to everybody.

23 MS. SHERRY: And that is exactly right. And
24 the difference is --

25 JUSTICE BREYER: Is that exactly right?

1 Because I am getting the -- facing the problem a few
2 minutes from now, somebody is going to say, well, why is
3 that exactly right? I mean, it is a precondition.

4 MS. SHERRY: I am going to say it's exactly
5 right because the confusion here is that materiality in
6 a fraud-on-the-market case serves two purposes. It is a
7 predicate to the fraud-on-the-market theory, but it is
8 also an independent, separate element. And what
9 Petitioners would have this Court do is isolate the two
10 inquiries when they're really the same question.

11 It is asking the same question that leads to
12 the same answer, and it's one that unites the class.
13 There's -- Petitioners phrase the question as whether
14 reliance --

15 JUSTICE SCALIA: If you have the same
16 question, then maybe we shouldn't have this
17 fraud-on-the-market theory because the whole purpose of
18 it is -- is to -- to assume that -- that the whole class
19 was -- was damaged and relied -- because you can rely on
20 an efficient market. But you can only rely on an
21 efficient market where there has been a material
22 misrepresentation.

23 So maybe we should overrule Basic because it
24 was certainly based upon a theory that -- that simply
25 collapses once you remove the materiality element.

1 MS. SHERRY: The fraud-on-the-market theory,
2 however, is a substantive theory. It's not a procedural
3 doctrine. To be sure, one of the practical consequences
4 is it allows classes to be certified, but it's a means
5 of proving reliance in an impersonal market in which
6 investors trade today.

7 What the Court did in Basic was adapt the
8 direct reliance concept which envisioned face-to-face
9 transactions to the impersonal market. And so with
10 respect to actually proving a fraud on the market,
11 you're absolutely right, but what we're talking about
12 here is not whether a fraud on the market can be proven;
13 we're talking about whether common issues predominate
14 over individual issues.

15 And Petitioners still fail to point to any
16 individual issues that would come into play in a case
17 where materiality is not able to be shown. None would
18 because materiality would kill the case for all.

19 JUSTICE SCALIA: Materiality is a common
20 issue. Reliance is only a common issue if you accept
21 the fraud-on-the-market theory. That's the problem.
22 And you are using the one, which is a common issue, to
23 leapfrog into the second, to make the -- the efficiency
24 of the market reasoning something that it isn't.

25 MS. SHERRY: With all due respect, the two

1 really do collapse into one. Once you've proven that
2 the market is efficient and once you've proven that the
3 statements are public, you're asking the same question.
4 You can call it reliance, or you can call it
5 materiality.

6 JUSTICE KENNEDY: Well, that then -- that
7 imparts the question of 24 years of economic
8 scholarship -- I think that's how long it's been since
9 Basic was decided -- has shown that the -- the efficient
10 market theory is -- is really -- really an
11 overgeneralization. It could be much more subtle than
12 that and so you have an advanced theory. But you want
13 us to ignore that.

14 MS. SHERRY: No, I -- a couple responses to
15 that. The first one is the one that my colleague made,
16 which is that market efficiency isn't disputed here. It
17 was conceded in the answer at paragraph 199. And not
18 only is it not -- is it not contested here, Petitioners
19 actually -- actually embrace an efficient market, in
20 order to pursue their truth-on-the-market defense.

21 And so my first response would be that's not
22 something to be addressed in this case. And my second
23 response is Basic didn't adopt any particular economic
24 model of market efficiency. If you look at footnote 24
25 of Basic, if you look at footnote 28 of Basic, the Court

1 makes very clear that it's not adopting an economic
2 theory, as far as how quickly or completely the
3 information is incorporated into the market price.

4 Instead, it was looking at congressional
5 intent, it was looking at difficulties in direct proof,
6 and it was looking at common sense to reach a result and
7 again to adapt a reliance theory that was premised on
8 face-to-face transactions to the impersonal market that
9 exists today.

10 And so, again, I wouldn't consider market
11 efficiency in this case. It's not presented. To the
12 extent there's questions about how the determinations
13 should be made in terms of levels of generality, that's
14 something that the lower courts can decide.

15 Today, all we're talking about is the
16 materiality component and, again, focusing on whether or
17 not common issues predominate over individual issues.
18 It's a comparative inquiry. It requires comparing
19 common issues on the one hand and individual issues on
20 the other. And Petitioners have not identified any
21 individual issues that will actually come into play as
22 the case is litigated.

23 The -- going to the -- some of the policy
24 concerns that were raised, I'd make a couple points.
25 One is the one that my colleague made. Congress

1 addressed those policy concerns in the PSLRA, in SLUSA,
2 and it chose to address them through different means.

3 The second point I would make is the same
4 argument could be made with respect to the other
5 elements of the securities fraud cause of action. If
6 the argument is you should have to prove it at class
7 certification because, otherwise, the case is going to
8 settle, you could say the same thing with respect to
9 scienter, with respect to falsity, with respect to loss
10 causation, which this Court in Erica John, of course,
11 said did not have to be proven at the class
12 certification stage. So in short, it proves too much.

13 The third response is that there are
14 countervailing policy concerns, and there are
15 countervailing concerns that are actually tethered to
16 Rule 23 in terms of efficiency.

17 Excuse me. Petitioners --

18 CHIEF JUSTICE ROBERTS: Do you -- do you
19 agree that you have to show materiality to rely on the
20 fraud-on-the-market theory to establish reliance?

21 MS. SHERRY: As a substantive matter on the
22 merits, yes. It is a predicate.

23 CHIEF JUSTICE ROBERTS: I -- I don't
24 understand why that is. If you're trying to show
25 reliance, and you show that it's an efficient market,

1 and that the information was -- was public, doesn't that
2 show reliance without regard to whether the statement's
3 material or not?

4 MS. SHERRY: I think, in terms of
5 transaction causation, what you're -- and reliance is
6 referred to as transaction causation -- what you're
7 trying to show is whether or not the information
8 affected or distorted the market price. And in order to
9 show price distortion, it does require that the
10 information be material. And so we accept that in terms
11 of the fraud-on-the-market theory --

12 JUSTICE SCALIA: Or, to put it differently,
13 an efficient market is a market that takes account of
14 material factors, right?

15 MS. SHERRY: I -- I would say it's --

16 JUSTICE SCALIA: It's not an efficient
17 market if it's -- you know -- it's -- who knows, random?
18 It takes account of material factors.

19 MS. SHERRY: I would make a minor quibble on
20 that. I would say that the market takes account of all
21 public information, but it only -- it only moves based
22 on material information, so that's exactly right. And
23 so our issue is not with the predicates for the
24 fraud-on-the-market theory.

25 Our issue is with Petitioners equating the

1 predicates from the fraud-on-the-market theory with the
2 actual prerequisites of Rule 23. And this Court made it
3 very clear, in Shady Grove, that the only question at
4 the Rule 23 stage is whether the prerequisites have been
5 met. The only one that we're talking about here is
6 predominance. It's a comparative inquiry between common
7 issues and individual issues.

8 And if I can quickly go back to my point
9 about countervailing policy concerns, as Petitioners
10 acknowledge, a determination of the class certification
11 stage is not binding on anybody -- in that case on the
12 ultimate fact-finder, or in any other case.

13 And so the problem with Petitioners'
14 position is that it would require relitigation of the
15 materiality question at the merits stage to the extent
16 the class is certified or, if it's not, in every other
17 case that is brought on the same issue. That doesn't
18 serve the efficiency purposes that underlie Rule 23.

19 The -- in terms of absent class members, he
20 suggests that absent class members would somehow be
21 prejudiced, but as Your Honor, Justice Kagan, pointed
22 out, the only prejudice is that they wouldn't be able to
23 relitigate the very same issue. That is protected by
24 allowing opt out. That is protected by Rule 23's
25 adequacy of representation requirement.

1 And so that's already sufficiently
2 protected. The most efficient course is to actually
3 focus on common issues. Materiality is a common issue.
4 It will result in the same answer for all. The class
5 rises or falls together. And class certification is not
6 about only certifying meritorious cases.

7 In 1966, when the current version of Rule
8 23(b)(3) was adopted, it was an innovation. It was a
9 change from the spurious class actions, where it was a
10 one-way ratchet, where only the defendant was bound. In
11 the current version of Rule 23(b)(3), you want to
12 certify class actions that are both meritorious and
13 those that are not, so that it reaches a binding
14 judgment.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Waxman, you have 5 minutes.

17 REBUTTAL ARGUMENT OF SETH P. WAXMAN

18 ON BEHALF OF THE PETITIONERS

19 MR. WAXMAN: Thank you, Mr. Chief Justice.

20 The advisory committee notes to the very
21 amendment that Ms. Sherry was referring to states,
22 quote, "A fraud case may be unsuited for treatment as a
23 class action if there was a material variation in the
24 kinds or degrees of reliance by the persons to whom they
25 were addressed."

1 That is this case. The anomaly of our -- my
2 friend's position is they concede that materiality is a
3 predicate for class reliance. They agree that, unless
4 the statement is material, however efficient the market,
5 however loudly the statement was published, there is no
6 detrimental reliance on the integrity of the market
7 price.

8 Reliance can only be approved -- and,
9 Justice Breyer, this goes to your traditional paradigm
10 case -- in the paradigm case, reliance was proven by the
11 fact that you heard the statement and you did something
12 in reliance on it, to your detriment.

13 The innovation of Basic, and the notion that
14 Basic didn't say anything about class certification
15 under Rule 23 is astonishing, given the fact that the
16 whole reason that the question of the
17 fraud-on-the-market theory was presented, was the
18 inquiry about whether there could be -- whether the
19 traditional bilateral method of proving detrimental
20 reliance on a statement could be aggregated into a
21 ginormous class by allowing everyone to say, well, we
22 relied on the integrity of the market price and a
23 material misstatement -- a material statement affected
24 that price.

25 They said, "could have" --

1 JUSTICE BREYER: Traditionally, how did that
2 work? How did that work traditionally? No class, okay?
3 Joe -- Farmer Jones comes in, you have to show it's
4 false? You have to show it's material. And then you
5 show the reliance that he did something on that basis.

6 MR. WAXMAN: Right. Those --

7 JUSTICE BREYER: So the materiality was not
8 part of reliance. Materiality was an element that was
9 always proved, and then you went on to show reliance.

10 MR. WAXMAN: Exactly right. And what the
11 Court in Basic could have said, Justice Breyer, was,
12 forget the fraud-on-the-market theory; we are going to
13 absolve -- we are going to say that, for 10b-5 actions,
14 you don't have to prove reliance directly on the
15 statement.

16 We are going to allow you to -- we -- we
17 posit that investors rely in common on the integrity of
18 the market price; and if you can demonstrate to us that
19 a challenged statement moved the market -- if there was
20 market effect, we will allow you to proceed as a class;
21 because then the common answer to the common question,
22 how are you going to prove reliance, is we are going to
23 prove it all the same way because investors rely on the
24 integrity of the market price.

25 Now, the Court in Basic --

1 JUSTICE GINSBURG: It sounds like you are
2 saying you have to win on the merits of the materiality
3 question in order to get the class certified.

4 MR. WAXMAN: You have to prove that there --
5 the Court explained correctly in Basic, and this -- this
6 actually goes to -- anticipates my next point, Justice
7 Ginsburg, the Court in Basic didn't say, well, we're
8 going to allow you to --

9 JUSTICE SCALIA: Excuse me.

10 MR. WAXMAN: -- we're going to allow you
11 to --

12 JUSTICE SCALIA: You -- you don't have to
13 prove it to get the class certified. You only have to
14 prove it to get the class certified with the benefit of
15 the fraud-on-the-market theory.

16 MR. WAXMAN: Correct.

17 JUSTICE SCALIA: Which is a shortcut to
18 getting the class certified, right?

19 MR. WAXMAN: Yes.

20 JUSTICE SCALIA: So this is just a condition
21 to the shortcut.

22 MR. WAXMAN: Yes. And in fact, it's a
23 shortcut to a shortcut. What the Court in Basic could
24 have said is, if you want to proceed as a class, you
25 prove to the Court that reliance is common by showing

1 that the market misstatement affected the market price.
2 But the Court in Basic went further in the direction of
3 class plaintiffs and said, you don't have to prove that
4 directly.

5 All you have to prove -- we will allow that
6 to be presumed, if you can demonstrate, without
7 effective rebuttal, four things: the statement was of a
8 type that the market would care about; the statement was
9 made publicly in an efficient market; and the trading
10 occurred during the period between the misstatement and
11 the correction --

12 JUSTICE BREYER: And the reason that we want
13 to prove it upfront in the 23, rather than wait till the
14 merits, where it will be argued anyway in exactly the
15 same way -- the reason that we want to do it first is,
16 since it's going to be there anyway and going to be
17 litigated anyway, unlike publicity, unlike efficiency,
18 but the reason we take this one and run it upfront is?
19 And it can't be the answer we should litigate everything
20 before we litigate anything.

21 MR. WAXMAN: Of course not.

22 JUSTICE BREYER: Okay. So -- so what's the
23 answer?

24 MR. WAXMAN: The answer is that this is
25 the -- that the point of Rule 23 is to say, you get to

1 use this very useful and powerful device if you have the
2 key to the gate. And the key to the gate is showing
3 that the answer to the question, will reliance be proven
4 commonly -- not lost commonly, but proven commonly --
5 is, in fact, yes.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 12:06 p.m., the case in the
10 above-entitled matter was submitted.)

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