

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HALLIBURTON CO., ET AL., :

4 Petitioners, : No. 13-317

5 v. :

6 ERICA P. JOHN FUND, INC., :

7 FKA ARCHDIOCESE OF MILWAUKEE :

8 SUPPORTING FUND, INC. :

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10 Washington, D.C.

11 Wednesday, March 5, 2014

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:17 a.m.

16 APPEARANCES:

17 AARON M. STREETT, ESQ., Houston, Texas; on behalf of

18 Petitioners.

19 DAVID BOIES, ESQ., Armonk, New York; on behalf of

20 Respondent.

21 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

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23 States, as amicus curiae, supporting Respondent.

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1 P R O C E E D I N G S

2 (10:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 13-317, Halliburton Company v. The
5 Erica P. John Fund.

6 Mr. Streett.

7 ORAL ARGUMENT OF AARON STREETT

8 ON BEHALF OF THE PETITIONERS

9 MR. STREETT: Mr. Chief Justice, and may it
10 please the Court:

11 Basic v. Levinson should be overruled
12 because it was wrong when it was decided and it is even
13 more clearly erroneous today. Basic substituted
14 economic theory for the bedrock common law requirement
15 of actual reliance that Congress embraced in the most
16 analogous express cause of action.

17 Basic's judicially created presumption
18 preserves an unjustified exemption from Rule 23 that
19 benefits only securities plaintiffs. Basic has proven
20 unworkable, has been undermined by later developments,
21 and has proven to have harmful consequences for
22 investors and companies alike.

23 The most direct course is to overrule Basic
24 altogether and require a showing of actual reliance.

25 JUSTICE GINSBURG: I believe that in Basic,

1 Justice Blackmun said that there is this economic
2 theory, but also the motivation for the Exchange Act and
3 probability and common sense would lead to this
4 presumption -- this rebuttable presumption. So he
5 wasn't relying strictly on an economic theory. I think
6 two or three times in the opinion, he tries to make that
7 plain.

8 MR. STREETT: Yes, Justice Ginsburg, but the
9 Court in Basic recognized that Section 18(a) was the
10 proper analog, but then it immediately turned to its own
11 notions of public policy and the best way to further
12 congressional policy, instead of asking what sort of
13 reliance does Section 18(a) require.

14 JUSTICE GINSBURG: Where is that, that it
15 says that 18(a) is the proper --

16 MR. STREETT: I believe --

17 JUSTICE GINSBURG: -- reference?

18 MR. STREETT: I believe it's on page 245
19 where the Court says, "We acknowledge the argument that
20 Section 18(a) is the proper analog, and we accept that
21 there is a reliance requirement under 10(b)."

22 But the Court then jumps to creating a
23 presumption of reliance, rather than asking what sort of
24 reliance Section 18(a) requires, which has always been
25 understood to be actual eyeball reliance.

1 JUSTICE KAGAN: Mr. Streett, that argument,
2 of course, is just an argument that Basic was wrong
3 in -- in -- in not focusing on -- on Section 18, and
4 that's contestable. One could say actually, they were
5 right not to focus on Section 18, Section 9 is the
6 closer analog.

7 But let's put that aside. Are you just
8 saying Basic is wrong, or are you saying that something
9 has changed since Basic? Because usually that's what we
10 look for when we decide whether to reverse a case,
11 something that makes the question fundamentally
12 different now than when we decided it. And that's
13 especially so in a case like this one where Congress has
14 had every opportunity, and has declined every
15 opportunity, to change Basic itself.

16 So what has changed, in your view?

17 MR. STREETT: We're saying both that it was
18 wrong when decided and that certain things have changed.
19 At least three things, Your Honor.

20 First of all, this Court has fundamentally
21 changed its approach to interpreting the Section 10(b)
22 cause of action. It's consistently construed it
23 narrowly, and Basic stands out like a sore thumb among
24 that jurisprudence.

25 Second, this Court has consistently held in

1 Comcast and Wal-Mart that there cannot be presumptions
2 of classwide issues; instead, classwide issues must be
3 proved in fact. The Court addressed plaintiff's experts
4 in those cases who purported to establish class --
5 classwide methodologies, and the Court tested those with
6 rigor to determine whether they proved, in fact, that
7 there were classwide issues.

8 And we're asking this Court to give the
9 Basic presumptions the same rigor that this Court gave
10 the expert reports in Comcast and Wal-Mart, at the very
11 least because those -- those expert reports only
12 generated one class action. And this has underlined
13 all --

14 JUSTICE KAGAN: What is your third?

15 MR. STREETT: Pardon?

16 JUSTICE KAGAN: You said three. What is
17 your third?

18 MR. STREETT: Yes. And my third is that the
19 economics have changed. The economic premises of Basic,
20 in particular, the premise that investors rely in common
21 on the integrity of the market price. The government
22 and the fund do not even contend, they don't even
23 contest that that's the case anymore. Many investors,
24 such as hedge fund rapid-fire volatility traders, index
25 fund investors, sophisticated value investors do not --

1 they have investment strategies that do not rely on the
2 integrity of the market price whatsoever. So that sort
3 of reliance is the quintessential individualized
4 issue --

5 JUSTICE KAGAN: So -- so you are not relying
6 anymore on the notion that the efficient markets
7 hypothesis has been undermined. That is not one of the
8 three points that you're making because, essentially, I
9 think you -- you admit this in your reply brief. You
10 just say Halliburton has never said that market prices
11 -- has never contested that market prices generally
12 respond to new material information.

13 So you are agreeing with that, that market
14 prices generally do respond to new material information.

15 MR. STREETT: Cited at that general --
16 general level, we don't disagree with it.

17 The problem is that we now know that a
18 binary yes-or-no approach to market efficiency like the
19 sentence you read tells us very little about whether a
20 particular misrepresentation distorted the market price.
21 So Basic has become inconsistent with its own premises.

22 JUSTICE KAGAN: Well, but we don't have that
23 kind of binary approach. What we allow plaintiffs to do
24 is to try to establish a presumption, which they do by
25 showing that a particular market is efficient, and then

1 we allow defendants to rebut that presumption.

2 So there's no binary on/off switch. It's
3 actually -- it's a presumption, but it's quite dependent
4 on the facts in a particular case as to whether there's
5 an exception to this general rule that market prices, in
6 fact, do generally respond to new material information.

7 MR. STREETT: It's -- it's binary in the
8 sense that the principal driver of class certification
9 is whether the market is efficient in a yes-or-no,
10 binary sense, and that's why we have raised our second
11 position, which is if the Court were inclined to keep
12 the presumption in some sense, it should at least place
13 the burden on the plaintiff to establish that the
14 misrepresentation actually distorted the market price,
15 or to give defendants the full right of rebuttal at the
16 class certification stage to establish the price was not
17 impacted.

18 JUSTICE ALITO: Do we know how often
19 defendants have been successful in rebutting the
20 presumption?

21 MR. STREETT: It is -- it is virtually
22 impossible. It's very unusual outside of the context of
23 the Second Circuit which allows rebuttal with respect to
24 price impact. Outside of that circuit, I think as one
25 of the amicus briefs said, they're as rare as hen's

1 teeth.

2 And that is another development. Certainly
3 this Court in Basic thought the fact that the
4 presumption was rebuttable was an essential part of that
5 holding, and it now turns out the courts, especially the
6 court below in this case, have treated it as essentially
7 irrebuttable, even with respect to the fundamental
8 premise of Basic, which is price impact.

9 CHIEF JUSTICE ROBERTS: Could I ask you --

10 JUSTICE GINSBURG: Isn't the -- isn't the --
11 it's not a question of is it rebuttable. I thought that
12 that's already claimed from Basic. It's a question of
13 when. You're arguing that it should be rebuttable at
14 the class certification stage. The other side is
15 arguing, yeah, of course it's rebuttable, but that comes
16 in at the merits determination. It doesn't go to the
17 question whether there are individual issues that
18 predominate over class issues.

19 MR. STREETT: And we are not aware of a
20 single instance in which this Court allowed a
21 presumption to be invoked for the very purpose of one
22 stage of litigation, but held that the defendant's right
23 to rebut must be delayed to a later stage. And there
24 can be no doubt that Basic created the presumption of
25 reliance, among other reasons, for the very purpose of

1 allowing class certification of securities fraud cases.

2 CHIEF JUSTICE ROBERTS: I -- I understand
3 your friend on the other side to acknowledge that the
4 efficient market theory is not perfect, that there are
5 situations in which events are not reflected in the
6 market price.

7 I understand you to acknowledge that it's
8 accurate to some extent, but that the exceptions or
9 the -- the extent to which it's not accurate over --
10 override the extent to which it is. In other words,
11 you're each sort of dealing with at the -- at the -- if
12 not at the margins, you know, most of the time it's
13 efficient; you say too much of the time it's not.

14 How am I supposed to review the economic
15 literature and decide which of you is correct on that?

16 MR. STREETT: We don't think the Court needs
17 to do that. We think the Court should get out of the
18 business of reviewing economic literature and requiring
19 district judges to make this binary, yes-or-no market
20 efficient --

21 CHIEF JUSTICE ROBERTS: No, your submission
22 is that we should jettison the Basic test because
23 economists now believe that the efficient market theory
24 is not sufficient -- sufficiently accurate or true to
25 support it. So I thought -- I mean, you review a lot of

1 the economic literature in your briefs. I assume you
2 wanted me to look at it.

3 MR. STREETT: Of course, our principal
4 submission is that no economic theory should supplant
5 what Congress enacted in Section 18(a) in the most
6 analogous cause of action. The economic theory shows
7 that one of the basic premises is no longer even
8 defended. The second premise, that investors rely in
9 common on the integrity of the market price, is not even
10 defended by the government and the Fund. And with that
11 premise knocked out, there's no remaining shred of
12 transaction causation because you have no common
13 reliance even on the price as a transmitter of the
14 information. And in that instance, then fraud becomes
15 the quintessential individualized question.

16 I'd like to get -

17 JUSTICE KAGAN: Could you explain --

18 JUSTICE SOTOMAYOR: In a class action, how
19 do you prove loss causation without proving price
20 impact? I know that there are some individual cases
21 with individual misrepresentations that have a different
22 form of loss causation. But I'm talking exclusively
23 on a -- in a class. How do you prove loss -- proximate
24 cause or loss causation without proving price impact?

25 MR. STREETT: A class under fraud-on-the-
26 market theory could not do that. But the question under

1 Amgen is whether there would be individuals within the
2 class who could show that they actually heard and relied
3 upon the statement and --

4 JUSTICE SOTOMAYOR: Well, but that makes no
5 sense.

6 MR. STREETT: Well, let me --

7 JUSTICE SOTOMAYOR: Because if they relied
8 on their statement, then that's -- they have to prove
9 loss causation in the same way that the class does.
10 It's only if they're relying on a separate statement,
11 which isn't part of the class, that would entitle them
12 to a different calculation of loss causation.

13 MR. STREETT: A plaintiff within the class
14 could still establish loss causation without price
15 impact in the same way that a plaintiff in the class
16 could establish loss --

17 JUSTICE SOTOMAYOR: How?

18 MR. STREETT: By --

19 JUSTICE SOTOMAYOR: With the same
20 misstatement at issue?

21 MR. STREETT: By purchasing in reliance on
22 that misstatement at a price that was not on the New
23 York Stock Exchange.

24 JUSTICE GINSBURG: Then how is such a
25 plaintiff's claim typical of the class? You have -- you

1 admitted that the 23(a) factors are met, commonality and
2 typicality. Well, if one is a member of this class that
3 says, we didn't rely individually, but we did rely on
4 the marketplace as being -- as having integrity, if you
5 have someone to whom a direct representation was made,
6 that person is not a proper member of this class as a
7 discrete question, not one common to the class, not one
8 typical. The typical investor in a Basic class is
9 somebody who no representation was made to that person
10 directly.

11 MR. STREET: I'm relying on a case where
12 the misrepresentation was made in a way that's typical
13 to the class, but individual class members purchased off
14 of the exchange, and therefore they purchased at a
15 different price, perhaps, than what was on the exchange.

16 But I think the real point is that this
17 Court emphasized and held in Amgen that plaintiffs
18 could -- that plaintiffs did need to establish that the
19 market was efficient and that the statement was public.

20 JUSTICE BREYER: Can you -- can -- to take a
21 totally different case, just thinking of the
22 announcement of the opinion I had, is a contract case.
23 We'll say it's the treaty that we're talking about. And
24 a group of plaintiffs say: We, Your Honor, would like
25 to show that the way that Argentina treated us was

1 unfair under the treaty. All right. And the other side
2 says: Well, what we think it's fair; we don't think the
3 treaty covers this.

4 Now, what we have here is a common issue.
5 So we don't have to decide, to judge who's right. We've
6 just noticed it was common issue. And so they make
7 their case, at least prima facie, that they have a side
8 and the other side will rebut it on the merits.

9 Well, similarly, here, they're saying: We
10 don't have to show that the markets incorporate every
11 piece of information. We think they incorporate this
12 information, and it's a general rule, they do incorporate
13 most information.

14 The other side wants to show they didn't
15 incorporate this. That's fine. It's a common issue.
16 We'll decide it at the trial. All we're trying to say
17 is, is it a common issue, and it's not a red herring to
18 throw in whether the markets incorporate information
19 because normally they do, period. Now, what's wrong
20 with what I said?

21 MR. STREETT: Because market efficiency and
22 publicity are also common issues that this Court
23 required to be considered at the class certification
24 stage. And this Court required those issues to be
25 considered because they are predicates for price impact.

1 JUSTICE KAGAN: Now, we've required them to
2 be considered because --

3 JUSTICE SCALIA: It's certainly not the rule
4 -- it's certainly not the rule that every -- every issue
5 that is common has -- has to be decided at the
6 preliminary -- or I'm sorry, must be left to the merits.
7 I mean, as you point out, the very issue of whether the
8 market is efficient is something that could be decided
9 for everybody at the merits stage, right?

10 MR. STREETT: That's absolutely correct.
11 And the reason this Court allowed market efficiency and
12 publicity to be considered is because without those
13 predicates, there's no reason to presume that there's
14 price impact.

15 JUSTICE KAGAN: Mr. Streett, there's a --
16 there's a real difference with respect to those issues
17 and I think that this was really what Amgen said. It
18 said that when you rule on those things, it essentially
19 splits up the class so that different members of the
20 class are left in very different positions; but that
21 when you rule on a question like materiality, which
22 leaves all members of the class in the exact same
23 position, either with a viable claim or with no claim,
24 and it doesn't split the class in the way that the
25 efficient markets theory do, that's the difference.

1 And here -- and this goes back to Justice
2 Sotomayor's question -- I just don't see how this splits
3 the class at all, because if you can't prove price
4 impact, you can't prove loss causation and everybody's
5 claims die.

6 MR. STREETT: Well, that same argument could
7 have been made against market efficiency or publicity.
8 If you don't have a public statement reaching the
9 market, there's no way the price could have been
10 impacted.

11 JUSTICE KAGAN: Well, I think that the --
12 that the difference is that even if you don't have
13 market efficiency and so you lose the ability to bring
14 the -- a claim with the fraud-on-the-market presumption,
15 you might still have an individual reliance claim.

16 MR. STREETT: Yes. And if the market price
17 was not distorted, you could still have an individual
18 reliance claim for exactly the same reasons. If the
19 market's not efficient or the statement is not public,
20 you are, by necessity, not going to have price impact.
21 So market efficiency and publicity are precisely,
22 exactly situated with respect to price impact.

23 And the result of disallowing price impact
24 evidence at the class certification stage, which this
25 Court said was Basic's fundamental premise, would mean

1 automatic class certification for all New York Stock
2 Exchange companies, because those companies trade in an
3 efficient market in the binary, yes-or-no sense that
4 Basic states. And that cannot be what this Court --

5 JUSTICE KENNEDY: Finish your sentence.

6 "And that cannot" --

7 MR. STREETT: Cannot be what this Court
8 intended in Basic when it created a rebuttable
9 presumption.

10 JUSTICE KENNEDY: Would you address briefly
11 the position taken by the law professors, I call it the
12 midway position, that says there should be an event
13 study. That might not take care of your first two
14 arguments of the narrow construction of 10(b)(5), and
15 the question of presumptions, but it does seem to me to
16 be a substantial answer to your economic analysis to
17 the -- to the challenge you make to the economic
18 premises of the Basic decision.

19 MR. STREETT: Yes. Our principal argument
20 is that the economic theories should not serve as a
21 stand-in for actual reliance. But if the Court were to
22 accept the continuing validity of the presumption in
23 some way, the law professors' position, which is also
24 our second question presented, at least makes Basic
25 consistent with its own premises. Because Basic's

1 premise is if a plaintiff buys at a price that is
2 distorted by the misrepresentation, he has relied upon
3 the misrepresentation. If we accept that as Basic's
4 premise, then it only makes sense to focus like a laser
5 on the only relevant question, whether the
6 misrepresentation distorted the market price.

7 JUSTICE KENNEDY: Am -- am I correct -- and
8 this would be more of a question for your friend
9 representing the Respondent. Am I correct that, even
10 under the -- the Basic framework, at the merits stage
11 there has to be something that looks very much like an
12 event study. Am I correct about that?

13 MR. STREETT: Yes. That's absolutely
14 correct, Your Honor.

15 JUSTICE KENNEDY: And so then the question
16 would be since you're going to have to have it anyway,
17 why not have it at the class certification stage.

18 MR. STREETT: Yes. And the Second Circuit
19 has correctly held that that must be proven at the class
20 certification stage because price impact is the glue
21 that holds common reliance together and the district
22 courts within that circuit have been very
23 successfully --

24 JUSTICE SOTOMAYOR: I don't see how this is
25 a midpoint. If you're going to require proof of price

1 impact, why not do away with market efficiency? The
2 whole premise of the other economic theory that you rely
3 on is that the market efficiency is irrelevant. Some
4 information impacts the market, whether efficient or
5 not, and some doesn't, whether efficient or not. I
6 think that's the basic economic argument the other
7 side's making, correct?

8 MR. STREETT: Yes, Your Honor.

9 JUSTICE SOTOMAYOR: So why bother with Basic
10 at all if we're going to do what you're suggesting --

11 MR. STREETT: We agree --

12 JUSTICE SOTOMAYOR: -- turn the -- turn the
13 class certification into a full-blown merits hearing on
14 whether loss causation has been proven?

15 MR. STREETT: It is not loss causation.
16 It's just whether the price was distorted at the time of
17 the misstatement and at the time the purchases were
18 made. Loss causation deals with the later price
19 declines after a corrective disclosure.

20 And we agree that it is a midpoint because
21 the question should be whether the market price was
22 distorted. We don't think looking at whether the market
23 is efficient as a whole, how many shares are trading,
24 how many analysts are following the stock is very
25 relevant or instructive. And, in fact, this would

1 remedy some of Basic's underinclusiveness and
2 overinclusiveness.

3 JUSTICE KENNEDY: Can you tell me, based on
4 your experience, compare the -- the cost, the extent of
5 time, the difficulty of showing under Basic the
6 efficient -- that there is an efficient market, and
7 compare and contrast that with undertaking an event
8 study. Is the latter much more costly, much more
9 time-consuming?

10 MR. STREETT: No, Your Honor. They're about
11 the same. And, in fact, plaintiffs are commonly using
12 event studies right now as part of their market
13 efficiency showing, because one of the factors courts
14 are requiring for market efficiency is showing a
15 reaction between price and unexpected corporate
16 information throughout the class period. So, in fact,
17 they're running these events studies for the entire
18 class period, where all our position would do is require
19 them to look at the alleged misrepresentations in the
20 case, that is to say what really matters, and look at
21 whether they distorted the market price as opposed to --

22 CHIEF JUSTICE ROBERTS: Well, how hard is it
23 to show that the New York Stock Exchange is an efficient
24 market?

25 MR. STREETT: Well, the courts look at

1 several factors. Now, admittedly, virtually all of the
2 time, those lead to a finding of yes, but --

3 CHIEF JUSTICE ROBERTS: So I would think the
4 event study they are talking about would be a lot more
5 difficult and laborious to demonstrate than market
6 efficiency in a typical case.

7 MR. STREETT: Well, just to take this case
8 for an example, the plaintiff's expert used an event
9 study of all of the unexpected corporate news throughout
10 the entire class period to prove market efficiency
11 because courts have said that's one important factor to
12 show market efficiency. We would just focus the event
13 study like a laser on the only thing that matters, to
14 show whether or not the misrepresentation distorted the
15 market price.

16 JUSTICE BREYER: What happens if the -- if
17 the plaintiffs say, Your Honor, I have 5,000 people
18 here, all of whom bought the stock on the New York Stock
19 Exchange between March 15 and April 15, and as far as
20 people who had other kinds of reliance, we'll bring a
21 separate case about them later. But everybody in this
22 case bought on the New York Stock Exchange and our
23 theory of this case is that the stock exchange did
24 absorb the information and the price went up and then
25 went down.

1 Now, what -- what reason is there for
2 purposes of certification to go beyond the efficient
3 market? Is it good enough? I mean, why not? They all
4 bought on the exchange. It's not an irrelevancy.
5 Everybody would have to say it's certainly relevant to
6 the case and they all have the issue in common.

7 MR. STREETT: Yes --

8 JUSTICE BREYER: Why go into the event
9 study? Why?

10 MR. STREETT: Because even in a generically
11 efficient market in a binary sense, misrepresentations
12 may not distort the market price. As both lower courts
13 have --

14 JUSTICE BREYER: Of course that's true.
15 Indeed, that's the defense. The defense is, well, Your
16 Honor, here it didn't. And the plaintiffs say, you're
17 right; we think it did, but if he's right and it didn't,
18 he wins. But you have to concede if they're right, you
19 win.

20 So why is that -- I don't understand why
21 that is an appropriate issue. I can -- I don't
22 understand still. Maybe it's the same. Why is that an
23 appropriate issue at the certification stage?

24 MR. STREETT: For precisely the same reasons
25 that common issues of market efficiency and publicity

1 are essential at the class certification stage.

2 JUSTICE SCALIA: How many -- how many of
3 these cases -- what percentage of these cases continue
4 once there has been class certification? Do you have
5 any idea?

6 MR. STREETT: Very few. Once there's been
7 class --

8 JUSTICE SCALIA: Very few. Once you get the
9 class certified, the case is over, right?

10 MR. STREETT: Yes. And less than one-third
11 of 1 percent actually go to a verdict.

12 JUSTICE BREYER: I -- I see that and I
13 understand that. But that still strikes me as a
14 different legal issue, and your answer is, well, we
15 decide other things at the class certification stage.
16 Now, I might put in parentheses: Which don't belong
17 there.

18 So if -- why are we deciding any of -- why,
19 in other words? I still have my question, why?

20 MR. STREETT: Because if market efficiency
21 and publicity were not considered at the class
22 certification stage, then the plaintiff would just have
23 to plead an efficient market and would immediately go,
24 you know, to collect \$200 and pass go and get right to
25 class certification. That cannot be what Basic meant

1 when it said the presumption of reliance depends on
2 plaintiffs relying in common on a misrepresentation that
3 distorted the market price.

4 And I would just point out that the
5 government and the Fund have conceded that price impact
6 evidence can be considered at the class certification
7 stage.

8 JUSTICE ALITO: Can I ask you a question
9 about these event studies to which you referred? How
10 accurately can they distinguish between the effect of
11 the -- the effect on price of the facts contained in a
12 disclosure and an irrational reaction by the market, at
13 least temporarily, to the facts contained in the
14 disclosure?

15 MR. STREETT: Event studies are very
16 effective at making that sort of determination. In
17 fact, in this particular case, the expert testified that
18 she had done that sort of separation of effects before,
19 but she was not asked to do so in this case. And that's
20 at JA410 to 411. And the law professors and others have
21 explained in great detail how the event studies work.

22 But in any event, that's a proper burden to
23 place on the plaintiff because they are the ones that
24 are invoking this powerful presumption to bypass the
25 requirement of common actual reliance. They are the

1 ones who should have to show that it's the
2 misrepresentation that distorted the market price and
3 not some other irrational reaction.

4 But I wanted to mention that at page 26 of
5 the government's brief and page 53 of the Fund's brief,
6 they concede that price impact evidence should come in
7 at class certification, but they want to make it only
8 one factor in determining whether the markets were
9 efficient. Well, why would you spend all of your time
10 looking at market efficiency and looking at price impact
11 as only one factor, instead of looking at the thing that
12 actually matters, whether the price was distorted.

13 And if I could reserve the balance of my
14 time, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Boies.

17 ORAL ARGUMENT OF DAVID BOIES
18 ON BEHALF OF THE RESPONDENT

19 MR. BOIES: Mr. Chief Justice, and may it
20 please the Court:

21 I want to begin by emphasizing, as this
22 Court did in Basic, that the premise of the Basic
23 decision was not economic theory; it was commerce. This
24 Court said the premise was Congress's premise. And I
25 think that when this Court decided the Amgen case, it

1 said that the fraud-on-the-market presumption was a
2 substantive doctrine of Federal securities law.

3 This is something that has been embedded in
4 the law. It has been ratified by Congress in the PSLRA
5 and in SLUSA. It is something that Congress has
6 legislated assuming that this was the law.

7 For example, in SLUSA, what Congress did, as
8 this Court is aware of from last month's decision, is
9 that it moved securities class actions out of State
10 courts and into Federal courts. It said you can't bring
11 class actions under State law.

12 JUSTICE ALITO: What do you make of
13 Section -- what do you make of Section 203 of the PSLRA,
14 which says that "Nothing in this Act or the amendments
15 made by this Act shall be deemed to create or ratify any
16 implied private right of action"? Do you think that was
17 a ratification of Basic?

18 MR. BOIES: Well, Your Honor, what this
19 Court said in Amgen afterwards is that what the -- what
20 Congress did was it did ratify the private cause of
21 action. And whether that was right or wrong, that is
22 what this Court held in Amgen just a year or so ago.

23 JUSTICE SCALIA: Did we refer to Section
24 203 --

25 MR. BOIES: You did not.

1 JUSTICE SCALIA: -- in connection with that
2 dictum?

3 MR. BOIES: I do not -- I do not believe
4 that you did, Your Honor.

5 JUSTICE SCALIA: I think maybe we didn't
6 know about it, as the parties here seemingly did not
7 know about it. I don't think it was cited in the
8 briefs.

9 MR. BOIES: But whether or not you conclude
10 that that was ratified or not, Your Honor, I think
11 what -- what you must conclude is that when Congress
12 acted both with respect to the PSLRA and even more so
13 with respect to SLUSA, it acted on the assumption that
14 they were legislating on the backdrop of the
15 fraud-on-the-market theory. The SLUSA -- the SLUSA
16 decision -- the SLUSA legislation makes no sense without
17 the fraud on the market.

18 JUSTICE SCALIA: Of course. But -- but to
19 act on the assumption that the courts are going to do
20 what they've been doing is quite different from
21 approving what the courts have been doing. As I
22 understand the history of these things, there was one
23 side that wanted to overrule Basic and the other side
24 that wanted to endorse Basic, and they did neither one.
25 They simply enacted a law that assumed that the courts

1 were going to continue Basic. I don't see that that
2 is -- is necessarily a ratification of it. It's just an
3 acknowledgment of reality.

4 MR. BOIES: I think, obviously, the Court
5 will decide. But I think that when you look at what
6 Congress has done, and they have legislated based on the
7 assumption of what the law is and they have made a
8 decision that, as I think the Court recognizes, would
9 never have been made in SLUSA if -- if they did not --
10 if Congress did not believe that the fraud-on-the-market
11 theory existed.

12 JUSTICE SOTOMAYOR: Mr. Boies, I don't know
13 that I fully understood your point in your brief as to
14 why proving price impact was so difficult. Is it equal
15 to proving market efficiency? Is it less burdensome,
16 more burdensome? Why can't it be done at the class
17 certification stage?

18 MR. BOIES: Sure.

19 JUSTICE SOTOMAYOR: And the question I asked
20 your adversary: If we believe price impact is
21 necessary, why keep Basic if we're going to put it in a
22 class certification?

23 MR. BOIES: Let me answer in the context of
24 this particular case. In this particular case,
25 Halliburton repeatedly said to analysts that their

1 insurance and other reserves were adequate to cover any
2 asbestos exposure. Those assertions proved to be not
3 accurate. The day that it was clear that they were not
4 accurate, December 7, 2001, the stock price dropped
5 42 percent. There were no confounding factors. Their
6 expert says December 7th was all about asbestos.

7 Now, we have a dispute as to what their --
8 their news that was revealed on December 7th was
9 expected or unexpected. They said it was unexpected.
10 They were caught unaware. We said they knew it all the
11 time and we've got some documents that indicate that.
12 But whether we are right or they are right, that is
13 clearly a merits decision. That's clearly not a class
14 certification issue.

15 JUSTICE KENNEDY: But why -- why couldn't
16 that same showing be made under the law professors'
17 theory of an event study at the certification stage?

18 MR. BOIES: You could, Your Honor, and with
19 respect to December 7th, I think that would not be so
20 difficult. But there are nine dates, and with respect
21 to five of those nine dates when there was news
22 revealed, they claim confounding factors.

23 So what you have to do is you have to
24 separate out the confounding factors, the allegedly
25 confounding factors, with respect to each one of those

1 dates, and you've got to do a detailed event study. And
2 in addition --

3 JUSTICE KENNEDY: For each -- for each one
4 of -- of --

5 MR. BOIES: For each -- for each day --

6 JUSTICE KENNEDY: Oh, each day.

7 MR. BOIES: -- you've got to look at what
8 the confounding factors are and you have to try to
9 separate them. That's very complicated. It takes a lot
10 of time. It's very expensive. It's a lot of expert
11 testimony. It is why these things, for example, at the
12 summary judgment stage, are very complicated.

13 Now, an event study that demonstrates the
14 efficiency of the market is far simpler. Halliburton
15 conceded the efficiency of this market. This is not a
16 case in which there is any doubt about the efficiency of
17 the market. Halliburton has repeatedly conceded the
18 efficiency of this market.

19 And I think that when you are trying to
20 prove market efficiency, all you have to do is
21 demonstrate that the basic premise that generally
22 markets take into account -- well-developed markets take
23 into account publicly available news, and you can do
24 that relatively simply. Trying to separate out all of
25 the factors that you need to separate out in order to

1 determine whether a culpable misrepresentation was the
2 cause of a price change and how much of that price
3 change was due to that culpable information is very
4 complicated.

5 JUSTICE KENNEDY: But even if Basic did not
6 rely on economic theory, and there is a dispute on
7 that -- I think the opinion is not quite clear on that
8 one way or the other -- if later economic theories show
9 that the market doesn't react in the way Basic assumed
10 it automatically did, then certainly Congress would not
11 wish to foreclose the Court from considering that new
12 evidence if it was a strong, clear and convincing, et
13 cetera.

14 MR. BOIES: Well, first -- first, Your
15 Honor, I would -- I'd say three things about that.
16 First, I would say that Basic's premise is not an
17 economic theory. It's not a premise of economic theory.
18 It is a premise of Congress. That's what Basic held,
19 and I think correctly held, that the -- the whole
20 premise of the securities laws is that when you make
21 fraudulent misrepresentations, you make them public, it
22 affects the market price.

23 The second thing is there hasn't been
24 anything that has changed since Basic that makes Basic
25 less applicable.

1 JUSTICE ALITO: But, Mr. Boies, to say that
2 false representation affects the market price is quite
3 different from saying that it affects the market price
4 almost immediately, and it's hard to see how the Basic
5 theory can be sustained unless it does affect the market
6 price almost immediately in what Basic described as an
7 efficient market. Isn't that true? Why should someone
8 who purchased the stock on the day, shortly, you know,
9 an hour or two after the disclosure, be entitled to
10 recovery if in that particular market there is some lag
11 time in incorporating the new information?

12 MR. BOIES: I think -- I think Your Honor is
13 right that if there is lag time in a particular market,
14 somebody who has purchased immediately after the
15 misrepresentation would not be entitled to recover.
16 However, in this case and in most cases that isn't an
17 issue, because in most cases what the class-action
18 period is, is something that gives all of the
19 misrepresentations full-time to permeate into the
20 market.

21 So it is theoretically possible that you
22 could have a market where there is a lag time.
23 Although, I will say that since Basic was decided that
24 lag time has gotten shorter and shorter. Whatever --
25 whatever the truth is about how efficient markets were,

1 they are massively more efficient today than they were
2 in 1988. In 1988, people were still sitting home
3 reading Barron's to try to figure out what was happening
4 in the stock market. Today you have realtime
5 information. You have all sorts of ways of
6 communicating information. People -- people strive to
7 be able to trade in a second faster --

8 JUSTICE KENNEDY: But the Petitioners say
9 that this has produced a whole new genre of investors
10 that are quite different from the fellow that's sitting
11 at home reading the Wall Street Journal.

12 MR. BOIES: But all of those --

13 JUSTICE KENNEDY: And your theory doesn't
14 seem to take that into account.

15 MR. BOIES: It does, Your Honor, because all
16 of those people rely on the integrity of the market.
17 They talk about these high-frequency traders that trade
18 in and out. Well, if they trade in and out during a
19 day, most of them will not be affected by this because
20 they will have gone in and come out with the
21 misrepresentation intact. It's only when somebody buys
22 when the price is inflated or artificially depressed and
23 then sells after the corrected disclosure that there is
24 damage. These people are all buying and selling based
25 on the integrity of the market price. In fact, when you

1 talk about these trading programs, those trading
2 programs, even more than the Barron's reader at home, is
3 relying on the integrity of the market price because
4 that's all they have to rely on.

5 If you think about it, if you went to one of
6 these people with these trading programs and said,
7 you're going to trade on this stock, would you trade on
8 the stock if you knew that it was artificially inflated,
9 of course they wouldn't. Everybody who buys assumes
10 that that market price is -- is fraud-free. And --

11 JUSTICE KENNEDY: Well, you're saying that
12 the events -- that the law professors' event study
13 theory is flawed, then?

14 MR. BOIES: No. You can have event studies,
15 and one of the things that an event study does is it
16 attempts to determine whether or not a particular price
17 movement was related to a particular piece of
18 information. That will tell you whether that price
19 movement is related to something that is culpable or not
20 culpable.

21 JUSTICE ALITO: I didn't understand what you
22 just said. Are you saying there are not categories of
23 investors who might say to themselves, You know what?
24 There is a possibility that the price of this stock on
25 this particular day might be artificially inflated by

1 some statement that was made in the past that isn't
2 true, but I'm going to buy it anyway because I still
3 think it's either -- it's undervalued or because there
4 are some other statistics regarding the market that tell
5 me that this price is going to go up.

6 You tell me that there are -- there are not
7 large categories of investors who think that way?

8 MR. BOIES: I think there are not large
9 categories of investors that think that way, and I think
10 there is absolutely no empirical evidence at all that
11 there are large categories of investors that think that
12 way.

13 Could there be somebody who says, I know
14 this is fraudulent, but I think I can buy; I know it's
15 in -- I know it's artificially inflated, but I think I
16 can buy and ride it up and I can get out before the
17 market knows that there is an artificial inflation.
18 There might be somebody like that, and that's why Basic
19 provides for a rebuttable presumption. You can --

20 JUSTICE GINSBURG: May I ask you about the
21 rebuttable presumption, Mr. Boies? You agree that the
22 Basic is a presumption and that it can be rebutted, but
23 you say that's a question for the merits.

24 What difference does it make at what stage
25 the rebuttal is allowed? What practical difference does

1 it make if the inquiry is made at the certification
2 stage rather than the merits stage?

3 MR. BOIES: I think it makes -- it makes two
4 differences, Your Honor. One is it would inevitably put
5 off the class certification stage because now you would
6 have to have a discovery on issues that are ordinarily
7 considered to be merits issues. The way an action now
8 works is that you will have just very limited class
9 certification discovery and you won't get to the full
10 merits discovery until you get past class certification.

11 Now, a lot of cases fail class
12 certification. The idea that the class certification is
13 not a -- a important step is simply wrong. A lot of
14 cases fail class certification.

15 But once you have passed class
16 certification, now you go into merits discovery. If you
17 were going to decide these issues that are ordinarily
18 today decided at the merits stage, you would have to
19 delay class certification until you'd had that merits
20 discovery.

21 CHIEF JUSTICE ROBERTS: You don't dispute --
22 I'm sorry -- you don't dispute though, that you usually
23 don't get to the merits stage once the classes have been
24 certified, do you?

25 MR. BOIES: That -- that is true, Your

1 Honor, but a lot of that is because there are summary
2 judgment motions. Remember, you have -- you have three
3 merit stages already: A pleading stage, which under the
4 PSLRA, under this Court's decision in Dura, is a real
5 obstacle; second, you have summary judgment; and then
6 third, you have the trial. More than half of all
7 securities class actions, summary judgment is granted in
8 whole or in part, 37 percent wholly, another 25 percent
9 in part. So the summary judgments --

10 CHIEF JUSTICE ROBERTS: Where -- where is
11 certification in that timeline?

12 MR. BOIES: It goes -- it goes both ways.
13 Generally, you have summary judgment after class
14 certification.

15 CHIEF JUSTICE ROBERTS: Right.

16 MR. BOIES: You could have summary judgment
17 at the class certification stage. I mean, for example,
18 if you wanted to move in a particular case, if you
19 wanted to move price impact or materiality or any issue
20 into an earlier time frame, there's nothing that
21 prevents a defendant from making a motion for summary
22 judgment on that issue. And, in fact, if -- if there's
23 any doubt about that, this Court could easily clarify
24 that. That would allow you to have class certification
25 in a temporal way at the same time that you were dealing

1 with the merits.

2 But -- but the issue on the merits is that
3 if you don't have a discovery, you can't decide these
4 issues, obviously. And second, the cost and expense at
5 the class action certification stage and the time delay
6 would increase enormously, because now you would have to
7 have these detailed event studies not just to prove
8 efficiency of the market -- which was conceded here, and
9 if it hadn't been conceded, we could have demonstrated
10 it -- you also have to show what the impact was of the
11 particular culp -- allegedly culpable misrepresentation
12 and disclosure.

13 And, for example, in -- in the -- in the
14 case that -- that we have here, with respect to eight of
15 the nine disclosure dates, we would -- we would have a
16 detailed disagreement and detailed expert reports and
17 expert testimony that would go to what was the price
18 impact, what was the damage in this particular case.

19 JUSTICE SCALIA: Mr. Boies, you've said
20 that -- that a lot of class certification motions are
21 denied. I had thought that your friend said that that
22 is very rare except in the Second Circuit.

23 MR. BOIES: Well --

24 JUSTICE SCALIA: Did I hear that wrong,
25 or --

1 MR. BOIES: -- I mostly --

2 JUSTICE SCALIA: -- is he wrong?

3 MR. BOIES: Well, I think he's wrong. My
4 personal experience is mostly with the Second Circuit in
5 cases like the Deutsche Bank case. But the Deutsche
6 Bank case did not relate to rebutting on the basis
7 of price impact. In the Deutsche Bank case, Judge
8 Forest held that there was not an efficient market.

9 JUSTICE KENNEDY: Well, my question along
10 the same lines is: If the misrepresentation is
11 established, from that category of cases, are there many
12 that are still not certified? Because that would be
13 inconsistent with your whole theory that the market is
14 almost always efficient.

15 MR. BOIES: Well, you know, we don't argue
16 that the market is -- is always efficient, Your Honor.
17 There is a lot of litigation about whether particular
18 markets are efficient, less so with respect to New York
19 Stock Exchange markets, more with respect to NASDAQ and
20 other markets, but there is a lot of litigation as to
21 whether particular markets are or are not efficient.

22 And, indeed, we went to the expense in this
23 particular case of doing an event study because we were
24 concerned that they would challenge the efficiency of
25 the market. They didn't, but because they could and

1 because that was a normal kind of thing for a defendant
2 to do --

3 JUSTICE SOTOMAYOR: I thought --

4 MR. BOIES: -- we did that.

5 JUSTICE SOTOMAYOR: I thought there were two
6 questions, and I don't know that you've really answered
7 the two. I thought your colleague was talking about
8 less than 1 percent, whatever the figure was, is of
9 cases that were certified as classes, how many go to
10 trial. You said something different, which is that not
11 every class is certified.

12 Do you have a percentage for the amount --
13 the number -- for that number?

14 MR. BOIES: I don't have -- I don't have a
15 percentage of the classes that are not certified, Your
16 Honor. But Your Honor is completely correct, that what
17 he was talking about was the number of these cases that
18 actually go to trial. As I say, more than half of them,
19 a summary judgment is granted in whole or in part. A
20 very large number of them are now wiped out at the
21 pleading stage as well. So the idea that there are not
22 significant merits filters that prevent cases from going
23 to trial is simply wrong, both at the pleading stage and
24 at the summary judgment stage.

25 And the question really is: Are you going

1 to have a fourth --

2 JUSTICE SOTOMAYOR: Do you know any article
3 that talks about that -- those numbers?

4 MR. BOIES: I -- I don't, Your Honor. I
5 apologize.

6 JUSTICE SCALIA: Mr. Boise, you and I both
7 agree that the PSLRA assumes Basic. Now, we differ on,
8 you know, what that means, but it does assume it.
9 What -- and -- and so those provisions would -- would
10 sort of be useless if Basic were entirely overruled.

11 What if we adopted the professors' -- what,
12 Basic writ small, if -- if we adopted their approach,
13 would those provisions of the PSLRA still be effective?

14 MR. BOIES: I think -- I think the
15 provisions of the PSLRA would still be effective, Your
16 Honor. I think with respect to SLUSA, it's a somewhat
17 different issue. I think that -- I think if you -- if
18 you adopted those -- those provisions with respect to
19 what's proposed, the PSLRA still would make sense, but I
20 don't think SLUSA would.

21 JUSTICE SCALIA: All right.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. BOIES: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Stewart.

25 ORAL ARGUMENT OF MALCOLM L. STEWART

1 ON BEHALF OF UNITED STATES

2 AS AMICUS CURIAE, SUPPORTING RESPONDENT

3 MR. STEWART: Mr. Chief Justice, and may it
4 please the Court:

5 I'd like to begin by addressing two of the
6 respects in which the Petitioners' counsel argued that
7 circumstances have changed since this Court's decision
8 in Basic. And the first -- one of these was that
9 investors have adopted new strategies that, in his view,
10 don't rely on the integrity of the market price. And I
11 think it's certainly true that investors have devised a
12 wide array of strategies in an effort to beat the
13 market, but it's hard to imagine one that would render
14 irrelevant evidence that the market price had been
15 distorted by fraud.

16 For example, a particular investor might
17 think there are particular types of information that the
18 market doesn't react to quickly enough, and if I'm
19 following that information in realtime and I can trade
20 before the market catches on, then I can make money; I
21 can buy low and sell high. Now, that strategy is
22 certainly going to be undermined if there is other
23 information bearing on the market price, the falsity of
24 which that investor is not aware of that caused the
25 market price to be inflated.

1 Now, I'd -- would agree with you, Justice
2 Alito, that in theory, there could be an investor who
3 says in a particular circumstance, I think the gain that
4 I can make by taking advantage of the new information to
5 which the market price has not yet reacted will more
6 than counterbalance the loss I will suffer when the
7 truth about the unrelated information comes to light.
8 That could happen, but even for an investor of that
9 sort, the distortion wouldn't be irrelevant. It would
10 just be a factor that could be counteractive.

11 And the other thing I would say about the
12 efficiency of the market is that even an investor who is
13 attempting to make money by being the first to take
14 advantage of new information is relying, in essence, on
15 the ultimate ability and tendency of the market to
16 incorporate the information; that is, an investor who
17 thinks that a stock is currently undervalued based on
18 the information he has presumably thinks that in time,
19 the -- the stock will no longer be undervalued, the
20 market will come to appreciate the significance of the
21 new information. That would be the basis for his
22 anticipating that the stock price will rise. And so
23 even that strategy is dependent in a fundamental way on
24 the propensity of new information to -- to change the
25 market price.

1 The second thing I wanted to respond to was
2 Petitioners' assertion that Basic is out of keeping with
3 this Court's more recent decisions regarding the
4 requirements of Rule 23. And I think that in fact, with
5 -- at least with respect to the interaction between the
6 merits and Rule 23, the court in Basic did precisely
7 what this Court's decisions in Wal-Mart and Comcast tell
8 courts they ought to do; that is, the Court in Basic was
9 ruling on an appeal from a class certification decision,
10 and it was confronted with two competing visions of what
11 the reliance requirement of the Section 10(b) action
12 should comprise.

13 One of them was the defendant's view that to
14 establish reliance, a plaintiff had to show that he or
15 she actually read the relevant disclosure and took it
16 into account in making a trading decision. The other
17 vision of reliance was the fraud-on-the-market
18 presumption that the -- the court ultimately adopted.
19 And the court in Basic recognized that it had to decide
20 this merits question at the class certification stage
21 because the answer to that question would control
22 whether the reliance element was susceptible of common
23 proof.

24 CHIEF JUSTICE ROBERTS: Counsel?

25 MR. STEWART: If the -- I'm sorry.

1 CHIEF JUSTICE ROBERTS: Sorry to interrupt
2 your train of thought, but were the feasibility and
3 prevalence of event studies something that was around
4 when Basic was decided?

5 MR. STEWART: I don't know exactly what
6 mode. I believe that event studies in some form were
7 used to establish both the efficiency of the market and
8 the potential impact of the misstatement on the price.
9 I don't know the extent to which their sophistication
10 matched the sophistication of event studies today. I
11 would tend to assume that they were much less
12 sophisticated than they are now.

13 JUSTICE ALITO: Could you explain how the
14 requirement that Basic imposed of proving publicity at
15 the certification stage is consistent with the Court's
16 theory in Amgen?

17 MR. STEWART: I think the -- the theory in
18 Amgen is that in order to decide whether something has
19 to be proved at the class certification stage, you ask
20 first, is it susceptible of common proof; and second, if
21 the class is certified and the -- the statement or the
22 fact is ultimately disproved down the road, is the
23 effect going to be that the class splinters or that all
24 plaintiffs lose in common? And the Court's theory in
25 Amgen, the rationale for saying that publicity had to be

1 proved at the class certification stage, was that if it
2 were proved down the road that the statement was not
3 made publicly, some plaintiffs might still have good
4 claims because they would have heard and relied upon the
5 information even though it wasn't communicated to the
6 public, and therefore the effect of disproof of
7 publicity would not be to cause all class members to
8 lose, it would be to cause the class to splinter.

9 JUSTICE ALITO: Do you think that's a
10 realistic -- that that is something that's likely to
11 happen in other than extremely rare cases?

12 MR. STEWART: Well, there -- there are
13 certainly plenty of securities fraud cases over the
14 years that involved private misrepresentations made
15 one-on-one by a broker, a salesperson, et cetera. I
16 take your point that in terms of practical significance
17 it is the case that the recoveries in the large class
18 actions dwarf the ones in individual suits.

19 JUSTICE BREYER: Yes, that's -- that's
20 what's nagging at me that I don't fully understand. It
21 may be elementary, but if we had a case where all the
22 plaintiffs had, in fact, and every one in the class had
23 bought on the New York Stock Exchange at such and such a
24 period, then I guess in principle neither would be
25 appropriate for the classification stage --

1 certification stage.

2 MR. STEWART: I'm sorry?

3 JUSTICE BREYER: Neither would be
4 appropriate for the certification stage. You wouldn't
5 have to prove efficient markets; all you would have to
6 do is allege them; because, after all, if they do exist
7 then the reliance element is proved subject to rebuttal;
8 and if the rebuttal wins, it's not. And that's not a
9 question if it's all in common, it's all in common.
10 That's -- that's the conceptual point I haven't quite
11 understood.

12 MR. STEWART: Well, at least to the
13 efficiency of the market, it wouldn't -- it wouldn't be
14 the case that disproof of efficiency would defeat the
15 claim of every class member.

16 JUSTICE BREYER: Why not?

17 MR. STEWART: Because a particular class
18 member, even without showing an efficient market, could
19 show that he or she personally --

20 JUSTICE BREYER: If we had a class, they all
21 conceded that they bought it on the market at the same
22 time, had no information, then it would go to the later
23 stage?

24 MR. STEWART: If the class were defined in
25 that manner, as people who had no such information, then

1 -- then the class wouldn't splinter.

2 JUSTICE KAGAN: Mr. Stewart, can I just --
3 can I ask a more general question? You're representing
4 the SEC here, the principal regulators of the securities
5 markets and the securities industry. So if -- I guess
6 it's a two-part question. If Basic were overruled, what
7 is -- what is the view as to what -- how that would
8 affect the securities industry and how it would affect
9 individual decision making with respect to securities?
10 And same question for, if the law professors' position
11 was adopted.

12 MR. STEWART: Well, let me take the first
13 part first, because I think in part it illustrates an
14 important aspect of this case that tends to get lost.
15 We are arguing about this as though it's procedure, but
16 really what is fundamentally at issue is what is the
17 class of, what is the category of investors who would
18 have a potentially valid Section 10(b)(5) action. That
19 is, the Petitioners' view is the only people who could
20 be proper plaintiffs in a Section -- in a private
21 Section 10(b) suit, whether a class action or an
22 individual action, are people who personally read,
23 reviewed, subjectively took account of the false
24 information.

25 And the view on the other side, the view

1 under -- under Basic, is that any person who bought
2 stock at the inflated price on the market, a price
3 inflated by fraud, and subsequently lost money as a
4 result when the truth was made known, any such person
5 would have a remedy; and if Basic were overruled, if
6 people were told, if you buy without doing this sort of
7 research into primary sources, you will have no
8 potential recovery at the end of the day, I don't know
9 that the SEC has a defined view about exactly what the
10 consequences would be, but certainly the consequences
11 are potentially dramatic.

12 You have an amicus brief filed by
13 institutional investors, many of whom rely on indexing
14 strategies, and they try to save management fees by not
15 doing all the research into the primary sources, by
16 allowing the market to do most of the work, and then
17 buying stocks that are broadly representative of the
18 market. And they've at least --

19 JUSTICE SCALIA: If the -- if the SEC brings
20 a fraud action, can it -- can it rely on the -- on the
21 market theory, fraud-on-the-market theory?

22 MR. STEWART: Well, the SEC would have no --
23 wouldn't and would have no need to do so, because
24 reliance wouldn't be an element of the SEC's cause of
25 action. The SEC would have to establish that there was

1 a violation, but it wouldn't have to establish that it
2 or any individual investor relied; and so the
3 institutional investors at least have represented to the
4 Court that their investment strategies will need to
5 change if they have to choose between saving money by
6 relying on indexing strategies and having available
7 potential avenues for recovery if it turns out --

8 JUSTICE KENNEDY: Can you get to part two of
9 Justice Kagan's question, which is what is your view of
10 the -- of the consequences if we adopt the law
11 professors' view?

12 MR. STEWART: I understand the law
13 professors, that there were a few law professors'
14 briefs. And I understand the one you're referring to to
15 be the one that basically advocated a shift away from
16 analyzing the general efficiency of the market and
17 focusing only on the effect or lack of effect on the --
18 the particular stock. I don't think that the
19 consequences would be nearly so dramatic. In fact if
20 anything, that would be a net gain to plaintiffs,
21 because plaintiffs already have to prove price impact at
22 the end of the day.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Streett, you have 5 minutes remaining.

25 REBUTTAL ARGUMENT OF AARON M. STREETT

1 ON BEHALF OF THE PETITIONERS

2 MR. STREETT: Thank you. I'd like to start
3 with one statistical matter that was -- that was raised
4 by Justice Sotomayor. The most recent studies by NERA
5 and Stanford show that 75 percent of class certification
6 motions are granted in securities cases; and that number
7 is much, much higher with respect to New York Stock
8 Exchange companies that essentially have no way to
9 dispute market efficiency.

10 Now, I want to turn to the argument that --
11 that Basic --

12 JUSTICE GINSBURG: How many of those drop
13 out at the summary judgment stage?

14 MR. STREETT: Only 7 percent even make it to
15 the summary judgment stage, Your Honor. So out of
16 those, I think Mr. Boies is correct that maybe half are
17 granted and half are denied. But only 7 percent even
18 make it to that stage, because once the case gets passed
19 class certification, as this Court has recognized time
20 and again, there is an in terrorem effect that requires
21 defendants to settle even meritless claims.

22 Basic did not look to what Congress
23 intended. Congress did not even have a private cause of
24 action in Section 10(b), and the most analogous cause of
25 action for somebody who purchased in the aftermarket

1 context required a showing of actual reliance. So the
2 idea that this was somehow based on interpreting the
3 statute is nonsensical.

4 JUSTICE GINSBURG: Whatever it might have
5 been at the beginning, given the most recent
6 legislation, Congress took a look at the 10(b)(5) action
7 and it made a lot of changes. It made pleading
8 requirements. It's difficult to say that this --
9 Congress would have legislated all these constraints if
10 it thought there was no action to begin with.

11 MR. STREETT: The PSLRA includes securities
12 actions under both the 1993 and 1934 Act. It's not just
13 limited to 10(b)(5). So to Justice Scalia's point,
14 there is actually not a single provision of the PSLRA
15 that would be rendered inoperable.

16 Congress did take a look at it, Your Honor,
17 that's absolutely correct. It shows it thought about
18 embracing Basic and it thought about overruling Basic;
19 and it chose to do neither. When Congress wanted to
20 codify one of the judicially created elements of the
21 10(b)(5) cause of action, it did so expressly.

22 JUSTICE BREYER: What is to prevent now a
23 defendant from going in after the efficient market is
24 shown, and saying, well, we have our event study; and
25 our event study shows that this particular piece of

1 information had no impact, and therefore they are not
2 going to be able to prove reliance by just relying upon
3 efficient markets; and therefore don't certify the
4 class. Why couldn't you do that right now under Basic?

5 MR. STREETT: That is what we are asking
6 this Court to hold under our --

7 JUSTICE BREYER: Well, is there anything --
8 is there any court that said, no, you can't do that; we
9 forbid you even though it says in Basic that you're
10 allowed to rebut?

11 MR. STREETT: Yes, Your Honor, that's
12 precisely what the Fifth Circuit held in this case,
13 relying on Amgen to prohibit us from putting on our own
14 price impact evidence; and it acknowledged that there
15 was no price impact in this case. But it said: We have
16 to turn a blind eye to that fact.

17 And to Justice Breyer's point, I think
18 Justice Breyer is exactly correct, that market
19 efficiency, publicity and price impact are all in
20 precisely the same boat. They are all common issues,
21 and if one of those is missing, you do not have loss
22 causation if the class is limited to the exchange.

23 But I don't think this Court should do away
24 with market efficiency, publicity, and I think it should
25 allow price impact at the class certification stage.

1 Otherwise the fraud-on-the-market presumption is reduced
2 to a pleading requirement, not -- not something that
3 must be established at the class certification stage, as
4 Wal-Mart requires.

5 JUSTICE SOTOMAYOR: So your preference would
6 be to make the plaintiff bear the burden or just for
7 defendants to be able to rebut the price impact --

8 MR. STREETT: It would be most consistent
9 with Rule --

10 JUSTICE SOTOMAYOR: -- at a class
11 certification?

12 MR. STREETT: It -- it would be most
13 consistent with Rule 23 to place that burden on the
14 plaintiff because it's the plaintiff's duty to show that
15 common issues of reliance predominate. And the way the
16 plaintiff gets there is by showing that the plaintiffs
17 relied on, in common, on the misrepresentation at the
18 time it distorted the market price.

19 Congress recognized that the presumption was
20 created by this Court essentially sitting as a common
21 law court. Congress chose to remain silent, which
22 leaves the issue with this Court, where it began, to
23 consider under traditional principles of stare decisis,
24 in light of intervening developments, whether it should
25 be overruled.

1 The -- and it should be overruled for one
2 additional reason that we haven't gotten to this
3 morning, which is that the Basic-generated regime of
4 class actions is harming the very investors that it's
5 supposed to help. It is the small investors and the
6 shareholders that are paying these judgments out of
7 their own pocket, often to other shareholders, with a
8 huge cut for both sides' lawyers and insurance costs.

9 The Basic regime of class actions is a huge
10 net loss for shareholder wealth. And it's frequently
11 the small investors who bought before the class period
12 and held all the way through who are paying the judgment
13 because they hold at the time of the settlement, whereas
14 it's the large institutional frequency traders who
15 bought and sold many times during the class period that
16 are getting the money but are not having to pay any
17 because they don't hold at the end of the class period.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:18 a.m., the case in the
21 above-entitled matter was submitted.)

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