

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ERICA P. JOHN FUND, INC., fka :

4 ARCHDIOCESE OF MILWAUKEE :

5 SUPPORTING FUND, INC., : No. 09-1403

6 Petitioner :

7 v. :

8 HALLIBURTON CO., ET AL. :

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10 Washington, D.C.

11 Monday, April 25, 2011

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:02 a.m.

16 APPEARANCES:

17 DAVID BOIES, ESQ., Armonk, New York; on behalf of
18 Petitioner.

19 NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting Petitioner.

23 DAVID STERLING, ESQ., Houston, Texas; on behalf of
24 Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-1403, Erica P. John Fund
5 v. Halliburton Company.

6 Mr. Boies.

7 ORAL ARGUMENT OF DAVID BOIES

8 ON BEHALF OF THE PETITIONER

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

11 The district court below found, and it is
12 not disputed here, that the plaintiff fulfilled all of
13 the requirements of Rule 23(a) for class certification.
14 The district court also found, and the court of appeals
15 affirmed, that the plaintiffs demonstrated all of the
16 requirements for class certification under 23(b)(3)
17 except for the Fifth Circuit's loss causation
18 requirement. The court below recognized that whether or
19 not there was an efficient market was not disputed. It
20 was conceded that we have an efficient market here.
21 There were no challenges --

22 CHIEF JUSTICE ROBERTS: Mr. Boies, if could
23 I just stop you there.

24 MR. BOIES: Certainly.

25 CHIEF JUSTICE ROBERTS: What if that had

1 been disputed? Is that something that can be disputed
2 at the certification stage?

3 MR. BOIES: Yes, Your Honor.

4 The --

5 JUSTICE KAGAN: Mr. Boies, what's the
6 difference then? Why could that be disputed at the
7 certification stage, but not the question of price
8 impact?

9 MR. BOIES: Because the issue of efficient
10 market goes to the presumption of reliance, and if the
11 court holds at the certification stage that there is no
12 efficient market, then the basis for presuming
13 class-wide reliance is impacted. And so you can have a
14 situation in which the common issues do not predominate
15 over the individualized issues. That cannot happen with
16 respect to loss causation because, as Respondent
17 concedes here, loss causation is a common issue.

18 JUSTICE KAGAN: Well, how about materiality?
19 Could you rebut materiality at the certification stage?

20 MR. BOIES: No, Your Honor, we don't think
21 you can rebut materiality at the -- at the certification
22 stage. I would note that under the Fifth Circuit rule,
23 loss causation is in addition to materiality.

24 JUSTICE KAGAN: Well, now I'm a little
25 confused, because the efficient market and materiality

1 are all part of the prima facie case triggering the
2 Basic presumption. So, why couldn't you rebut one part
3 of that case but not another part of that case?

4 MR. BOIES: Because the issue of materiality
5 is something that goes to a class-wide common issue.
6 The issue of reliance can go to whether or not issues
7 predominate or not. Rule 23(b)(3) talks about whether
8 common issues predominate or not. That's the issue at
9 class certification stage. The merits issue is not
10 implicated at class certification --

11 JUSTICE ALITO: But common reliance --

12 MR. BOIES: -- under Rule 23 --

13 JUSTICE ALITO: -- can be rebutted at the --
14 common reliance can be rebutted at the certification
15 stage?

16 MR. BOIES: Excuse me, Your Honor?

17 JUSTICE ALITO: The Basic presumption can be
18 -- can the Basic presumption be rebutted at the
19 certification stage?

20 MR. BOIES: The Basic presumption of
21 reliance, yes, Your Honor. For example, if you were to
22 take a situation in which you -- not present here, but
23 where you disputed whether or not the market was
24 efficient or not, that is something that could be
25 decided at the class certification stage.

1 JUSTICE ALITO: Can it be rebutted by proof
2 other than proof generally disproving the efficiency of
3 the market?

4 MR. BOIES: We believe under the Court's
5 decision in Basic that that is something that is
6 reserved for trial, that -- that rebuttal.

7 JUSTICE ALITO: And what is that based on,
8 the footnote in Basic?

9 MR. BOIES: Yes. Yes, Your Honor.

10 JUSTICE ALITO: Well, that's pretty thin,
11 isn't it? It's a -- it's dictum in a footnote in an
12 opinion issued at a time when conditional class
13 certification was permitted. Do you have anything else
14 to support that?

15 MR. BOIES: I don't from this Court, Your
16 Honor.

17 JUSTICE ALITO: Do you have anything in the
18 rule to support that?

19 MR. BOIES: Anything in the rule?

20 JUSTICE ALITO: Yes.

21 MR. BOIES: Well, I think the -- I think
22 what the rule does is it talks about whether issues of
23 common issue predominate over individualized issue. And
24 since this is something that would be at the class
25 certification stage, not creating individualized issues,

1 we would think that is something that's reserved for
2 trial.

3 JUSTICE GINSBURG: Mr. Boies, how would it
4 work in your view of the case? That is, you say that
5 the loss, what's been called loss causation, is not
6 something to be decided at the certification stage, but
7 at the trial or summary judgment. Well, how -- how
8 would the plaintiff class prove loss causation? Given
9 the reliance hurdle that you have surmounted, now you're
10 in -- you have your class certified; how does the class
11 prove loss causation.

12 MR. BOIES: As -- as this Court indicated in
13 Dura, in order to prove loss causation, you must
14 demonstrate that you had either an increase in the
15 prices, and this -- this assumes that you are concealing
16 negative information; the reverse would be true if you
17 were concealing positive information -- an increase at
18 the time that the concealment took place or a decline
19 when the actual facts were revealed.

20 And it would be required at summary judgment
21 by a summary judgment standard, and at trial by a trial
22 standard, and at the pleading stage by a pleading
23 standard, for the plaintiff to make out that case. In
24 other words, there are three times loss causation is
25 tested: Pleadings, summary judgment, and trial. The

1 question is whether a fourth test should be interposed
2 at the class certification stage.

3 JUSTICE SOTOMAYOR: Counsel, doesn't a lack
4 of response to a disclosure -- couldn't it be in some
5 situations reflective of an inefficient market?

6 MR. BOIES: Yes, Your Honor, I think it
7 could. I think that you -- you could very well have a
8 situation in which if you demonstrated a lack of
9 response, that could impact the issue of efficiency; and
10 I think that would be an issue that-- that in a proper
11 case where unlike this one it was presented --

12 JUSTICE SOTOMAYOR: Why is it? Why is this
13 case -- why can't you pigeonhole this case into that
14 argument, which, it appears what your -- what the
15 Respondents have done is move away from the loss
16 causation proof and gone to the issue of whether they
17 rebutted reliance or not.

18 MR. BOIES: The -- the problem is, as the
19 Fifth Circuit noted at page 335 of the F.3d report,
20 efficiency of this market was conceded below. In other
21 words, the Respondents conceded that this market was
22 efficient? So that issue -- that issue was not
23 presented, and the rebuttal issue was not -- was not
24 presented in this case.

25 JUSTICE SCALIA: Mr. -- Mr. Boies, you

1 talked about loss causation. The Respondents assert
2 that that's not what the Fifth Circuit was really doing,
3 that -- that really they're just trying to rebut the
4 presumption essentially of -- of Basic by -- by showing
5 that at the -- at the far end, there was -- there was
6 nothing that could justify the presumption.

7 Would you be satisfied if we just said that
8 we agree with you that the requirement to prove loss
9 causation is -- is no good, and sent it back to the
10 Fifth Circuit and then let the Fifth Circuit adopt the
11 theory that Respondents assert they have already
12 adopted? I mean, it's sort of a Pyrrhic victory, it
13 seems to me, if you haven't just disapproved loss
14 causation.

15 MR. BOIES: Well, it depends on how the
16 Fifth Circuit then construes reliance.

17 JUSTICE SCALIA: Well, they -- they would
18 construe it the way Respondents say they have already
19 construed it.

20 MR. BOIES: Your Honor, I think that if they
21 simply changed the wording and called loss causation
22 reliance, obviously it wouldn't make any difference.
23 But as this Court indicated in Basic, and just last
24 month in Matrixx, loss causation and reliance are two
25 distinct elements. And the reason that's important in

1 this particular context is that reliance can create a
2 situation where you have individualized issues
3 predominating over common issues.

4 Loss causation can't because, as Respondents
5 concede here, loss causation is a class-wide issue.
6 Either -- there either is loss causation or is not loss
7 causation. That, as this Court held in Dura, is an
8 element of the merits case. It is one that we must
9 prove at all three stages -- pleadings, summary
10 judgment, and trial. But it is not something that goes
11 to the Rule 23 standard.

12 JUSTICE SCALIA: I think what you've said is
13 that there's really no difference between loss causation
14 and what Respondents assert that the Fifth Circuit
15 found.

16 MR. BOIES: No, Your Honor. I did not mean
17 to say that. I think that there is a difference. I
18 think there's a -- I think there are -- there are two
19 differences. There's a difference between what
20 Respondents say and what the Fifth Circuit says. The
21 Fifth Circuit talks about loss causation, says it's in
22 addition to efficient market, does not talk about
23 reliance.

24 JUSTICE SCALIA: Right.

25 MR. BOIES: There's also a difference

1 between what Respondents say and what this Court has
2 said in Basic and Matrixx and the other cases, in terms
3 of what is required to prove for class certification.
4 What is required to prove for class certification under
5 Rule 23, unless and until Rule 23 is changed, is that
6 common issues predominate. Common issues will
7 predominate even with respect to what the Respondents
8 here argue because -- because what they argue, just like
9 loss causation, is a common issue.

10 JUSTICE SCALIA: Okay, but -- but you -- you
11 would want us to say that and not just say that loss
12 causation --

13 MR. BOIES: Yes. Yes, Your Honor. Yes,
14 Your Honor.

15 JUSTICE SOTOMAYOR: How do you see or what
16 difference do you see between their loss causation
17 evidence and an inefficient market? Could they --
18 assuming there was no stipulation in this case, do you
19 see any difference in -- in how they could use the fact
20 that other information affected the market and not this
21 one? Or is it your theory of the case that there is no
22 evidence that they could marshal to show that this is an
23 inefficient market?

24 MR. BOIES: I don't believe under this
25 Court's decision in Basic that, given the actual

1 objective facts that have been admitted -- it's a very
2 public market, very widespread distribution of
3 information, a lot of analysts are reporting on it -- I
4 don't believe that as a objective factual matter they
5 would be able ever to demonstrate that this was not an
6 efficient market.

7 If you had a much smaller market, indeed if
8 you -- if you had a market as the Court was considering
9 in Basic, which was a much smaller market, much less
10 public, much less analyst support, there may be areas in
11 which they -- they could rebut it. But I think, given
12 what we all know about the Halliburton stocks -- widely
13 traded, large number of shares traded, a lot of
14 analysts, a lot of public information -- I don't believe
15 under this Court's decision in Basic you could conclude
16 reasonably that that was not an efficient market.

17 JUSTICE ALITO: What do you say to -- to the
18 following argument, that there are some economists who
19 say that, even in a market that is generally efficient,
20 there can be instances in which the market does not
21 incorporate certain statements into the price of a
22 stock; and therefore even when it is demonstrated that
23 the market meets the test for efficiency that the lower
24 courts have settled upon in the wake of Basic, the
25 defendant in a -- in a class action where there is

1 reliance on the Basic presumption should be permitted at
2 the class certification stage to prove that the
3 allegedly fraudulent statements had no impact on price,
4 and by doing that destroy the theory that the class
5 relied on the statements, because they relied on the
6 price which incorporated the statements?

7 MR. BOIES: I -- I think, Your Honor, that
8 if you have a situation in which the proof is
9 class-wide, it is something that goes only to summary
10 judgment or trial. It does not go to the class
11 certification stage. With respect to the issue of
12 whether somebody is relying on an efficient market, that
13 is distinct from whether a particular statement was or
14 was not actionable.

15 In other words, the summary judgment issue,
16 the trial issue, is whether the particular statement was
17 actionable and that includes all of the things that the
18 court identifies. But those issues are going to be, if
19 there is an efficient market, class-wide issues. In
20 other words, it's not going to be the case that in a
21 particular instance a statement did not get into the
22 market will affect only one member of the class. It's
23 going to affect all members of the class. Because it is
24 something that is common all of the class members, Rule
25 23 says that is something for trial, not for class

1 certification.

2 JUSTICE KAGAN: Well, whether there's an
3 efficient market is also common to all members of the
4 class, so why would you make an exception for that?

5 MR. BOIES: Because if there's no efficient
6 market, then individualized issues are going to
7 predominate. That is, the test under Rule 23 is whether
8 individual issues or common issues are going to
9 predominate. If you destroy the efficient market theory
10 in a particular case, then individual issues of reliance
11 can predominate. However, that can't happen with
12 respect to loss causation or price distortion or any of
13 these other issues that are fundamental to the merits
14 and are common to the entire class, because if there's
15 no loss causation, there's no cause of action. As this
16 Court held in Dura, there must be loss causation. So if
17 there's no loss causation there aren't any individual
18 issues to adjudicate.

19 If there are no more questions, I would save
20 the remainder of my time for rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Saharsky.

23 ORAL ARGUMENT OF NICOLE A. SAHARSKY,

24 ON BEHALF OF THE UNITED STATES,

25 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

1 MS. SAHARSKY: Mr. Chief Justice, and may it
2 please the Court:

3 The Fifth Circuit erred in requiring proof
4 of loss causation at class certification for three
5 reasons: First, it's conducting a merits inquiry that's
6 not tethered to the Rule 23 requirements; second, it's
7 taking a presumption and requiring plaintiffs to prove
8 it; and third, it's confusing the distinct elements of
9 reliance and loss causation.

10 Just to start in with some of the Court's
11 questions: First, Justice Scalia's: Does the court
12 require proof of loss causation? The Fifth Circuit
13 could not be more clear. It is not talking about
14 rebutting the presumption of reliance, giving the
15 defendants an opportunity to do that at class
16 certification. It is putting an affirmative burden on
17 plaintiffs that they have to meet in every single case,
18 even if the defendants do not come to court with any
19 evidence. And that is a very heavy burden, as the
20 district court in this case realized.

21 And just to make this as concrete as
22 possible, loss causation is the question at the end of
23 the day, whether the price decline that caused the
24 losses was sufficiently related to the earlier alleged
25 material misstatement and whether there was any other

1 cause that could have led to the price decline.

2 So if a plaintiff cannot come in and prove
3 loss causation, there could be many reasons for that.
4 It may be because the market is not efficient. It could
5 also be because there's no material misstatement. But
6 it could also be, as this Court recognized in *Dura*, that
7 there was a material misstatement, it did inflate the
8 stock price, but then other causes such as a bad economy
9 or other news about the company came along, and that's
10 what caused the stock price to drop. Justice --

11 JUSTICE SCALIA: But you acknowledged that
12 if the cause was the fact that the market was not
13 efficient, that could be raised at the certification
14 stage.

15 MS. SAHARSKY: Well, that's certainly what
16 the Court suggested in *Basic* and what the courts of
17 appeals have done, is to say that that's a threshold
18 showing that is sufficiently collateral to the merits
19 that it needs to be made, so that the presumption can be
20 invoked in the first instance.

21 But these ideas about rebutting the
22 presumption by showing that at the end of the day the
23 plaintiff can't prove its case, these are things, as Mr.
24 Boies said, that stand or fall on a class-wide basis.
25 And the real problem with the Fifth Circuit's decision

1 is that it did not tie its proof of loss causation to
2 the requirements of Rule 23. Everyone agrees here that
3 loss causation stands or falls on a class-wide basis.

4 JUSTICE KENNEDY: The rule isn't, I take it
5 -- or correct me if I'm wrong -- that simply because the
6 issue is on a class-wide basis, it can't be challenged
7 at the certification stage. We don't have a rule that's
8 that broad, do we? Or am I missing a point?

9 MS. SAHARSKY: Well, that's what Rule 23,
10 23(b)(3), which is the one at issue here -- the question
11 is do common issues predominate over individual ones.
12 What you're trying to answer is can this group of people
13 proceed together, not can this group of people make out
14 their case.

15 JUSTICE KENNEDY: But suppose there's no
16 demonstrated basis that that common issue exists?

17 MS. SAHARSKY: Then I think the plaintiff
18 should lose at the 12(b)(6) stage, and that is a stage
19 that has real bite after this Court's decision in Dura
20 and after the PSLRA. There are heightened pleading
21 requirements that apply. There are plaintiffs that will
22 lose at summary judgment on the issue of loss causation,
23 for example, because, A, either they don't allege a
24 price drop, B, they don't connect the price drop to the
25 earlier distortion of the market when there's a material

1 misstatement.

2 There can be many reasons that they lose at
3 that merits stage, but class certification is not a
4 merits stage, and the Fifth Circuit made it one because
5 of its own policy judgments about the effects of class
6 certification. And with all due respect to the Fifth
7 Circuit, it's just not that Court's judgment to make
8 that --

9 CHIEF JUSTICE ROBERTS: Class certification
10 is not a merits determination except with respect to
11 reliance? Except with respect to the fraud on the
12 market theory? That you can; that is a merits inquiry
13 and you can decide it at the class certification stage?

14 JUSTICE KENNEDY: And except, just to add to
15 the Chief Justice's question, an efficient market
16 theory?

17 MS. SAHARSKY: That's right. You're asking
18 is this theory going to be available to the plaintiffs
19 at trial, and the way that the plaintiffs show that the
20 theory is available to them is by establishing an
21 efficient market and saying that they traded within the
22 time period while the price was distorted. It's just
23 like establishing any other threshold inquiry that would
24 make evidence or a legal theory available at trial.

25 But the question the Court is supposed to be

1 asking at the 23, at the Rule 23 stage, the class
2 certification stage, is not can these people win on the
3 merits. And that's a question the Fifth Circuit was
4 asking. The question it's supposed to ask is can this
5 group of people proceed together.

6 JUSTICE ALITO: You seem to -- maybe I don't
7 understand your argument, but you and Mr. Boies seem to
8 be arguing that whether there is a common question --
9 that it is a common question whether there is a common
10 question, and therefore that has to wait until the
11 merits stage. Is that what you're saying?

12 MS. SAHARSKY: No, that's not what we're
13 saying. What we're saying is when common issues
14 predominate on the issue of reliance, and when the
15 Petitioners -- or when the plaintiffs invoke fraud on
16 the market and they show that there is an efficient
17 market, this Court said in Basic, they can all proceed
18 together because they are showing that the price -- that
19 the material misstatement was reflected in the stock
20 price. This is an impersonal market in which you rely
21 on the stock price. They all rely on it in the same
22 way.

23 JUSTICE ALITO: And if they show that the
24 statement was not incorporated in the price, in the
25 price, and they're not claiming that they relied, that

1 every member of the class actually relied on the
2 statement, they're all claiming they relied on the price
3 - if they show that the statement wasn't incorporated in
4 the price, then why doesn't reliance cease to be a
5 common issue and become a question of an individual
6 issue that would have to be proved by each, each member
7 of the class?

8 MS. SAHARSKY: Well, in that circumstance
9 reliance ceases to be and the case cannot be established
10 on the merits. They stand or fall together on the
11 merits. Their theory is the same for all of them.

12 JUSTICE ALITO: Yeah, but the fact that they
13 would lose on the merits doesn't necessarily mean that
14 they are entitled to class certification.

15 MS. SAHARSKY: Right. They're entitled to
16 class certification if they have a common issue. And
17 what the Court said in Basic is that if they set out the
18 prerequisites for the fraud on the market, which the
19 court of appeals agreed were met in this case, that they
20 could proceed together. That threshold showing is
21 required.

22 Justice Kagan, I take your point that there
23 is -- that even the question of whether the market is
24 efficient is a common one, so perhaps one could
25 logically say: Well, they have a common issue on the

1 efficiency of the market; why should they even have to
2 show that at class certification? But this Court said
3 in Basic, and the courts of appeals have said, it's
4 reasonable in that case since it's so divorced from the
5 merits to require a threshold showing to even allow them
6 to invoke the presumption at the outset.

7 But that is very, very different from what
8 the Fifth Circuit said in this case. The Fifth Circuit
9 in this case said basically: Prove your whole case.
10 You don't just have to prove that there was a price
11 decrease; you have to prove that there was an initial
12 material misstatement, that it distorted the stock
13 price, that it led to a price decrease and that the
14 price decrease can't be, can't be shown by any other
15 superseding cause. It's essentially, as the Seventh
16 Circuit said --

17 JUSTICE SCALIA: Can you -- can you do this
18 in reverse? I mean, suppose the class comes in and,
19 instead of proving at the outset that the market's an
20 efficient market and allege a misrepresentation, they
21 come in at the back end and they say: When that
22 statement that we assert was a misrepresentation was
23 corrected, the price of stock went down and we lost
24 money.

25 Now, it seems to me you would have to argue,

1 well, that's a good allegation if it's an efficient
2 market, which is a common question, right?

3 MS. SAHARSKY: Right.

4 JUSTICE SCALIA: So they can certify under
5 Rule 23 by using the back end. Instead of proving the
6 efficient market, they can prove that there was a
7 statement correcting the alleged misrepresentation, the
8 price of stock went down, right, and they can certify
9 the class?

10 MS. SAHARSKY: No. The Court said --

11 JUSTICE SCALIA: Why not? It would be -- it
12 would be a common question whether the market's
13 efficient or not.

14 MS. SAHARSKY: This Court said in Basic that
15 in order to establish the presumption that you need to
16 show the efficiency of the market, the trading during
17 the relevant time period. I agree with you that --

18 JUSTICE SCALIA: They're not relying on that
19 assumption. They -- they come in and show that there
20 was a correction of what we alleged was a misstatement
21 and the market went down. That's all that they allege.
22 And of course, that proves anything only if there's an
23 efficient market. But that will be a common question to
24 the whole class, so we'll, we'll -- we'll save that for
25 later.

1 MS. SAHARSKY: Well, with respect, just
2 alleging that the market went down would not be enough
3 to show that there was an initial price distortion
4 because of the company's material misstatement. Stock
5 prices can go down for any number of reasons. There's a
6 significant linkage that's required between the initial
7 material misstatement and the eventual loss.

8 JUSTICE SCALIA: Well, but they assert that.
9 They assert that the reason it went down was because of
10 the initial misstatement.

11 MS. SAHARSKY: Certainly in the courts of
12 appeals now, that's not the way the plaintiffs proceed.
13 The way they proceed is on the Basic theory.

14 JUSTICE SCALIA: I understand that. I'm
15 just saying that seems to me it's a crazy way to run a
16 railroad.

17 MS. SAHARSKY: I don't think that that's --

18 JUSTICE SCALIA: If you can allege what's
19 upfront, you can allege what's -- what's in the back,
20 and what's upfront becomes a common question, so you
21 certify the whole class.

22 MS. SAHARSKY: With respect, Your Honor, I
23 mean, if you -- if you would like to -- if you would
24 like to expand even beyond Basic and allow class
25 certification. But the courts of appeals have used

1 Basic for 20 years, Congress is well aware of it and has
2 not seen fit to change it. This is the way that these
3 cases proceed.

4 This Court at the time of Basic recognized
5 that every court of appeals had thought that it made
6 sense to proceed in that way, using the fraud on the
7 market theory. This is well established. And just to
8 be clear, Respondents never suggested in this case that
9 Basic should be revisited. This is not an issue that
10 the courts below considered. This is not an issue that
11 was fully briefed, and it's not something that we think
12 should be considered.

13 The problem in this case is that the Fifth
14 Circuit took it upon itself to tighten the Rule 23
15 requirements. It was not satisfied with the rules as
16 they exist, and it took the class certification stage
17 and turned it into a merits inquiry stage. They
18 required plaintiffs to prove almost their entire case at
19 this stage of the litigation, and that just wasn't
20 right, because the class certification stage -- can I
21 finish this -- is about whether plaintiffs can proceed
22 as a group together, as the Court in Amchem said they
23 often can in securities fraud actions. The judgment
24 should be reversed.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Sterling.

2 ORAL ARGUMENT OF DAVID STERLING

3 ON BEHALF OF THE RESPONDENTS

4 MR. STERLING: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 Basic recognized that, absent the class-wide
7 presumption of fraud on the market reliance, individual
8 issues of reliance predominate, as they do in any other
9 fraud context. Consequently, when a district court,
10 after the rigorous analysis required by Rule 23, finds
11 that the presumption is unavailable or rebutted,
12 reliance ceases to be a class-wide issue.

13 JUSTICE SOTOMAYOR: I -- I -- when -- what
14 in the Fifth Circuit's decision puts this inquiry into
15 the reliance prong and where did you argue it this way
16 below?

17 MR. STERLING: We argued it below based upon
18 the premise in Basic that the presumption is rebutted
19 when there is proof --

20 JUSTICE SOTOMAYOR: Could you --

21 MR. STERLING: -- that the market price did
22 not distort --

23 JUSTICE SOTOMAYOR: Could you give me a
24 place in the record where you actually said that, as
25 opposed to relying on Oscar to argue that the Fifth

1 Circuit was right in addressing as a merits question
2 whether the plaintiff had proven loss causation?

3 MR. STERLING: It was not addressed as a
4 merits question, Justice Sotomayor. It was addressed,
5 as Oscar said, as a prerequisite for finding reliance in
6 order to certify the class.

7 JUSTICE SOTOMAYOR: So you're not defending
8 the rationale of the Fifth Circuit now? You're --
9 you're sort of backing yourself into the reliance
10 element?

11 MR. STERLING: We are not defending all of
12 the language in Oscar, clearly, but the basic test in
13 the Fifth Circuit, as our case made clear on pages 116a
14 and 119a of the petition appendix, is not loss
15 causation; it's price impact, because Basic says at page
16 248 any showing that severs the link between the
17 misrepresentation and the stock price defeats the
18 presumption. Basic makes clear on that same page that a
19 showing that the stock price was not distorted by the
20 misrepresentation defeats the presumption.

21 JUSTICE KAGAN: But, Mr. Sterling, if I
22 think -- if I disagree with you and I think that Oscar
23 said that loss causation needs to be shown at the
24 certification stage, you agree that that is not a
25 correct statement of the law; is that correct?

1 MR. STERLING: We do agree with that,
2 Justice Kagan. But our opinion made clear that it's not
3 loss causation as this Court knows it in Dura; the test
4 is simply price impact. And the Fifth Circuit
5 recognized -- and the Fund recognized this below on page
6 551a of the Joint Appendix -- their only burden under
7 the Fifth Circuit caselaw was to show price impact, and
8 they could show it either of two ways. Their papers
9 show this, page 116 and 119a of the joint appendix.

10 They can show price inflation upon a
11 misrepresentation, which, as this Court made clear in
12 Dura, is not synonymous with loss causation. Or failing
13 that -- and they could not show that here because their
14 own proof showed that none of the alleged
15 misrepresentations moved the market. So, the
16 alternative way to show price impact is simply to show a
17 price decline following a corrective disclosure.

18 And while that showing is similar to loss
19 causation, it's an easier, less rigorous showing of loss
20 causation, because under the price impact test at the
21 Fifth Circuit, all the plaintiff need show is that it's
22 reasonable to infer that some portion of the decline was
23 attributable to the revelation of the truth.

24 JUSTICE KAGAN: Mr. Sterling, I wasn't sure
25 what argument you were making in your brief. One

1 possible argument you could be making is that the
2 plaintiffs have to show a price impact. Another
3 possible argument you could be making is that you have
4 to have the opportunity to rebut the plaintiff's use of
5 the Basic presumption by yourself showing that there was
6 no price impact. And you seemed often to be saying the
7 first, even though I would think that the second is the
8 most you can make as a -- as a plausible argument.

9 MR. STERLING: If we suggested the first,
10 Justice Kagan, I apologize because we did not intend to.
11 Basic puts the initial burden on the defendant to show
12 the absence of price impact, showing that the presumed
13 fact does not exist.

14 Once that threshold showing is made, the
15 burden remains on the plaintiff under Rule 301 and Rule
16 23 to show by a preponderance of the evidence that the
17 market price was in fact, distorted.

18 JUSTICE SCALIA: But -- but why do you --

19 JUSTICE GINSBURG: The way the Fifth Circuit
20 wrote the decision, the Fifth Circuit seems to be
21 saying: Plaintiffs, you didn't show an initially false
22 representation; and you, you plaintiff, didn't show a --
23 a corrective statement that caused a price drop. As I
24 read the Fifth Circuit's decision, it says: Plaintiff,
25 you failed to prove one of the two things that you would

1 have to prove.

2 And you say: No, they really put the burden
3 on -- on defendants, Fifth Circuit put the burden on
4 defendant and found that defendant had met it instead of
5 the other way around?

6 MR. STERLING: We agree, Your Honor, that
7 the Fifth Circuit put the initial burden of production
8 on the plaintiff and that's contrary to Basic. We -- we
9 agree with that. However, in terms of the Fifth
10 Circuit's language that I believe Your Honor's referring
11 to, that is when the Fifth Circuit was discussing the
12 alleged corrective disclosures.

13 Because the plaintiff could not show that
14 any of the alleged misrepresentations moved the market,
15 they had to rely upon what they claimed were corrective
16 disclosures. That was the only way they could show
17 price impact.

18 The Fifth Circuit, at various times, looked
19 at each of the alleged corrective disclosures and said
20 that's not a corrective disclosure because it doesn't
21 reveal the truth in any way; it's bad news, but it's
22 non-culpable bad news. It doesn't in any way suggest
23 that Halliburton said something during the class period
24 that was false.

25 JUSTICE BREYER: Can I -- I'm trying this

1 question out. Try to give me your best answer. If I
2 don't have it clear enough, just forgive it and go on to
3 another. As I'm understanding this case with Basic, the
4 idea is there is a presumption. Somebody lies and says
5 there's an oil well I found oil in. A lot of people buy
6 on the stock market. It turns out there was no oil, and
7 a lot of people say they lost money. All right.

8 The point of the stock market presumption is
9 to say: Smith, you're a typical plaintiff and this
10 presumption is going to help you by the following.
11 We're going to say what happened to the typical person
12 on the stock market during that period happened to you,
13 and there are a lot of people who bought and sold on the
14 stock market. And that's why efficient markets is
15 needed to show at the certification stage, because if
16 there weren't certification -- if that isn't shown, the
17 whole thing falls apart.

18 But what you're just saying on terms of
19 whether the revelation lowered the price has nothing to
20 do with the question of what happened to the typical
21 person, Smith, happened to you, nothing to do with it.
22 It has to do with whether anybody was hurt. Now, that
23 has nothing to do with the certification stage. That's
24 the win or lose stage.

25 Now, that's how I'm understanding it at the

1 moment. So what's wrong with the way I understand it?

2 MR. STERLING: Justice Breyer, the -- the
3 problem is, we're back to reliance. Basic exists --
4 Basic creates a presumption as an exception to the long
5 understood rule that fraud cases were not appropriate
6 vehicles for class actions because each individual would
7 have to say, Mr. Smith in your hypothetical, I read
8 Halliburton's statement and I relied upon it.

9 Basic said, because that's so impractical
10 cases would never be certified, we're going to say we're
11 going to assume the entire market is like Mr. Smith, and
12 Mr. Smith relies on the integrity of the stock price
13 when the stock price is distorted by the
14 misrepresentation. But if the stock price was not in
15 fact distorted by the misrepresentation, it makes no
16 sense to say everybody relied on the misrepresentation
17 through its effect on the stock price.

18 JUSTICE SCALIA: Which means you would lose.
19 I -- I mean, which means that the plaintiff would lose.
20 But it doesn't mean that there is not a common issue,
21 that the -- that the latter question, whether in fact
22 the market was affected or not is, is not a common
23 question. Rule 23 only requires that -- that there be a
24 common question.

25 MR. STERLING: But Justice Scalia, Basic

1 sets forth a special rule. Basic is an exception to the
2 long-understood rule about the nonsusceptibility in
3 class actions to class treatment of fraud cases. Basic
4 says it's not just enough to allege the operative facts,
5 and we will presume reliance. Basic says you have to
6 plead and prove them, and all of those operative facts
7 are subject to common proof. The efficient market: the
8 efficient market applies to everybody, it's common
9 proof. Everybody recognizes, everybody agrees, Mr.
10 Boies said so today, and the government said so today:
11 if the market -- if the district court does not find
12 that the market -- that the market for the stock is
13 efficient at the class certification stage, you can't
14 certify, because it's not reasonable to infer then that
15 the misrepresentation was translated into the stock
16 price.

17 Materiality is another requirement under
18 Basic. It's a threshold condition. Again, common
19 proof. All the courts except for the Seventh Circuit
20 agree materiality must be proven at the class
21 certification level. Same thing for whether the
22 misrepresentation was public. If it was not publicly
23 made, it's not reasonable to infer that it had an impact
24 on the stock price.

25 All of these operative facts are subject to

1 common proof. But Basic says unless those facts are
2 proven at the class certification stage, the presumption
3 of class-wide reliance doesn't apply and individual
4 issues of reliance predominate.

5 The same must be true for rebuttal proof.
6 Basic says eight times that the presumption is
7 rebuttable, and it makes no sense at all to rely upon
8 these indirect or surrogate, circumstantial proof of
9 whether the misrepresentation moved the market. That's
10 all these are -- materiality, whether it was publicly
11 made, whether the market was efficient. These are all
12 just surrogates of whether it is reasonable to believe
13 or to infer that the stock price was in fact distorted
14 by the misrepresentation.

15 JUSTICE SOTOMAYOR: Well, could you explain
16 to me why in this case it's not reasonable to believe,
17 meaning assuming the truth, that there was falsity in
18 the statements made, those alleged --

19 MR. STERLING: Because -- I'm sorry.

20 JUSTICE SOTOMAYOR: Assuming truth to those
21 statements, why wouldn't a market react to corrective
22 measures? Because what I see is a difference between
23 saying it's an inefficient market or that the statements
24 had no price impact for some other merits-related
25 reason. But why does that tie to an inefficient market

1 at all?

2 MR. STERLING: Well, again, general market
3 efficiency is just a proxy or a surrogate for whether
4 it's reasonable to think the conditions exist for the
5 stock price to be affected by a misrepresentation.

6 JUSTICE SOTOMAYOR: So tell me why on its
7 face, with the false statements alleged here, why would
8 it be unreasonable to conclude that the market wouldn't
9 respond to them?

10 MR. STERLING: One reason is because the
11 market deemed the information to be immaterial, the
12 market didn't care about it, the market didn't react to
13 it. Another reason could be that, while a market is
14 generally efficient, a market was inefficient for this
15 type of information. I --

16 JUSTICE SOTOMAYOR: Well, but you conceded
17 efficiency below, so you've sort of given up that
18 argument.

19 MR. STERLING: We conceded efficiency below
20 because, candidly, their own proof showed that none of
21 the misrepresentations moved the market. And what we
22 have here is not circumstantial proof of general market
23 efficiency or materiality or whether the statement was
24 public; here there was direct proof that none of these
25 misrepresentations moved the market, and that is the

1 whole premise of the Basic class-wide presumption of
2 reliance.

3 Basic itself says if the stock price was not
4 distorted by the misrepresentation, you can't say the
5 entire class relied upon the misrepresentation to the
6 stock price. And that's exactly what we have here. It
7 is the DNA proof, and it makes no sense for district
8 courts to be certifying class actions based upon this
9 indirect or circumstantial proof while ignoring the
10 direct proof of the absence of price impact.

11 And in effect what they're asking this Court
12 to do is to extend Basic. Basic itself is a judicially
13 created presumption designed to make a judicially
14 created cause of action easier to be maintained as a
15 class action.

16 Now, it was one thing for courts decades ago
17 to imply a private cause of action under 10(b) and it
18 was another thing for this Court to create a rebuttable
19 presumption of reliance in Basic in order to make it
20 easier to maintain these cases as class actions. But it
21 would do violence to Stoneridge's admonition that the
22 10b cause of action ought not be further expanded to
23 make that rebuttable presumption of reliance
24 irrebuttable at the class certification stage.

25 JUSTICE GINSBURG: But your -- your argument

1 seems to say, to -- to get a class certified you have to
2 virtually prove your case on the merits. You -- you
3 leave almost nothing over. I mean, if you've won the
4 class action certification on your basis and you've
5 shown the material misleading and the price dropped as a
6 consequence, the efficient market first -- you've shown
7 all that, what else is left on the merits? You win on
8 the merits if you win certification.

9 MR. STERLING: Justice Ginsburg, that --
10 that is not our position. Our position is in order to
11 get the class-wide presumption of reliance, it's the
12 plaintiff's burden to plead and prove upfront as
13 threshold facts, a public misrepresentation that was
14 material made in an efficient market. However, the
15 defendant has the right at the class certification stage
16 to rebut that presumption by any showing, to quote
17 Basic, "that severs the length between the
18 misrepresentation and the stock price." When that
19 threshold showing is made, the burden is back on the
20 plaintiff to demonstrate the necessary linkage.

21 It's not a finding on the merits. A
22 determination at the class certification stage is simply
23 one of whether the Rule 23(b) predominance requirement
24 is met and whether the class can appropriately proceed
25 as a class, as opposed to in the traditional individual

1 fashion, and that finding is not binding on the ultimate
2 finder of fact.

3 JUSTICE KAGAN: Mr. Sterling, maybe this is
4 just to repeat Justice Ginsburg's question, but what
5 else is there? I mean, what would not be proper to
6 introduce in the way that you're talking about at the
7 certification stage?

8 MR. STERLING: Falsity, scienter, actual
9 proof of loss causation, and damages.

10 JUSTICE KAGAN: The Fifth Circuit suggested
11 that scienter could come in at the -- at the
12 certification stage. You're disclaiming that?

13 MR. STERLING: Footnote 35 of the Fifth
14 Circuit opinion makes clear that it is not requiring
15 scienter. The Fifth Circuit says, in response -- in
16 analyzing what is or is not a corrective disclosure, it
17 says it has to do something that suggests that a
18 statement was made that is potentially actionable was
19 false. Otherwise it's not a revelation of the truth.
20 And all that is, again, is a second way under the Fifth
21 Circuit's test of showing whether there is the necessary
22 price impact to justify certifying a class, or
23 alternatively to determine that individual issues of
24 reliance predominate.

25 And allowing the defendants to rebut the

1 presumption of reliance at the class certification stage
2 is consistent with this Court's class action case law
3 and with Rule 23. This Court has consistently said that
4 the Rule 23 requirements are not to be presumed, they're
5 not to be assumed, they have to be found. Actual
6 conformance is the test.

7 JUSTICE GINSBURG: The only requirement
8 we're talking about is (b)(3) because it's -- it's not
9 argued and the district court found that all of the
10 23(a) requirements were satisfied. That's not the
11 particular --

12 MR. STERLING: Correct Your Honor. But
13 23(b)(3) requires a court to make a finding that
14 predominance exists. And the 2003 amendments to the --
15 to Rule 23 make clear that a court should not certify a
16 class unless and until it is satisfied that all of the
17 Rule 23 requirements are met; and it makes no sense to
18 say that a court is going to conduct this rigorous
19 analysis and make the Rule 23(b)(3) findings without
20 considering the defendant's rebuttal proof of whether,
21 in fact, there was price impact, because Basic itself
22 says if there is no price impact, the presumption falls
23 away, individual issues of reliance predominate, and the
24 class cannot be certified.

25 JUSTICE KAGAN: On your rebuttal proof

1 point, you said just now that all you had to do was come
2 forward with some evidence, but that the burden remains
3 on the plaintiff. Is that -- what kind of evidence do
4 you think you have to come forward with in order to flip
5 the burden back to the plaintiff?

6 MR. STERLING: Well, under Basic, it's any
7 showing that severs the link, and here it was proof --
8 we had our own expert that demonstrated that, again kind
9 of harping on their expert -- none of the
10 misrepresentations inflated the stock price --

11 JUSTICE KAGAN: So you're saying you can put
12 an expert on the stand and the expert will say there was
13 no price impact, and then the plaintiffs have to make
14 the case that there, in fact, was a -- a price impact at
15 the certification stage, that the plaintiffs have to
16 prove that by a preponderance?

17 MR. STERLING: Correct, Your Honor.

18 JUSTICE KAGAN: Once you put a expert on the
19 -- on the stand.

20 MR. STERLING: Under Rule 301, the
21 presumption does not shift the ultimate burden of proof.
22 It stays on the party that -- that bears it. That is
23 consistent with Rule 23 as well, which puts the burden
24 on the plaintiff, to prove all of the Rule 23 elements
25 exist.

1 JUSTICE KAGAN: Well, that does suggest that
2 the Basic presumption isn't worth much in your world.
3 That you put an expert on the stand, and the Basic
4 presumption falls away, and the plaintiffs have to
5 actually prove their case at that very early stage that
6 there was no price impact.

7 MR. STERLING: We agree, Your Honor, that
8 they have to show price impact, but that's not a hard
9 burden to show. If any of their 22 -- they allege that
10 we made misrepresentations that were false on 22 days
11 during the class period. All they had to do was show
12 one day during that class period statistically
13 significant price movement, and they're in. Or all they
14 had to show was any of the alleged -- I've forgotten how
15 many -- corrective disclosures during the class period.
16 Any one day, if there was a -- a meaningful price
17 movement that a court could infer was related to the
18 revelation of truth, that's all they need to show. But
19 they couldn't show that.

20 CHIEF JUSTICE ROBERTS: Counsel, I suppose
21 if you prevail and a defendant tries to establish at the
22 certification stage that there's no loss causation and
23 loses, then that's law of the case and you've missed the
24 three opportunities that Mr. Boies was willing to give
25 you at the pleading stage, summary judgment, and the

1 merits. That issue is out of the case if you lose,
2 right?

3 MR. STERLING: No, Your Honor, because the
4 finding at the class certification stage is not binding
5 upon the ultimate fact finder. So if the -- if the
6 Court determines by a preponderance of the evidence that
7 reliance is not there, if the Court -- if the case goes
8 to trial and an individual plaintiff brings his or her
9 own case based upon subjective reliance, that the
10 Court's determination that the class certification stage
11 is not binding on the jury.

12 CHIEF JUSTICE ROBERTS: What if there's
13 no -- no new evidence? One of the objections to your
14 theory is you don't have discovery at the certification
15 stage. What if you have no new evidence to put on at
16 later stages?

17 MR. STERLING: It's possible that the jury
18 would agree with the judge who made the determination at
19 the class certification hearing, it's possible that the
20 judge -- that the jury might not. But the discovery
21 issue, Your Honor, is a complete red herring, because
22 Rule 23 makes clear that the district court has ample
23 discretion at the class certification stage to allow
24 discovery into the merits to the extent that they are
25 relevant to the class certification issue.

1 And more importantly here, the Fund never
2 asked for discovery. In fact, when the Fund filed its
3 motion for class certification on page 139A of the joint
4 appendix, the Fund said no discovery is needed to
5 resolve this motion except for expert discovery. The
6 Fund never asked for discovery at the district court
7 level, the Fund never asked for discovery at the Fifth
8 Circuit. The only time they've ever hinted that they
9 wanted discovery related to the class certification
10 issue was at this Court.

11 JUSTICE SCALIA: I thought that the whole
12 reason you -- you say that the class certification stage
13 is so significant is precisely because once the class is
14 certified, there will be immense discovery on the merits
15 of the case, which will be so expensive for defendants
16 that they're inclined to throw in the towel. Now you're
17 telling us that you -- you want to move discovery up to
18 the class certification stage?

19 MR. STERLING: Justice Scalia, that was not
20 my point, and I apologize if -- if it came out that way.

21 JUSTICE SCALIA: I -- I -- I'm sure it
22 wasn't your point, but --

23 (Laughter.)

24 MR. STERLING: All -- all -- all I was --
25 all I suggesting that if a plaintiff were to say, you

1 know, Your Honor, to the district court, we think we --
2 we can't -- we should not have the class certification
3 hearing yet because we need some discovery on point A,
4 B, C, which did not happen here, the district court can
5 say fine or can say I don't think you need it. But the
6 premise of your question is certainly correct. The
7 grant of class certification is a seminal event in a
8 10b-5 case. It has huge repercussions for the
9 defendant.

10 CHIEF JUSTICE ROBERTS: No, no, no. You --
11 on page 13 of your brief you say one of the objections
12 to it -- to your opponents or your friends' view is that
13 it would just postpone the defendant's ability to rebut
14 the presumption, result in countless classes being
15 certified with the certain knowledge that they would
16 have to be decertified later. Well, if it's so certain,
17 then there's no in terrorem effect.

18 MR. STERLING: Just when -- that's assuming
19 that the defendant has the wherewithal to stick it out
20 through it all, but the sheer grant of class
21 certification which aggregates hundreds, tens,
22 thousands -- tens of thousands of these claims together
23 in one big case makes every one of these cases, in
24 effect, a company case, and it puts huge settlement
25 pressure on the defendant.

1 I mean, in -- in this case Halliburton had
2 440 million shares of stock outstanding during the class
3 period. The class period lasts 2 1/2 years. It's easy
4 to do the math and say that had this class been
5 certified, there would have been huge pressure upon
6 Halliburton to settle.

7 JUSTICE BREYER: Does your rule apply in all
8 fraud cases? That is, a thousand farmers say,
9 Mr. Jackson was our common buying agent, and the
10 defendant lied to Mr. Jackson, and he relied on the lie.
11 It is a common issue whether he relied on the lie or he
12 didn't rely on the lie. I can understand somebody
13 saying at the certification stage they have to see
14 whether he's really a common agent. But let's imagine
15 that's assumed. The only question left is, did he rely
16 or not rely?

17 Is that a question for the merits or is that
18 a question for the common -- for the --

19 MR. STERLING: Basic is really an exception
20 that applies only --

21 JUSTICE BREYER: So you're saying in the
22 case that I just gave you reliance is for the merits?

23 MR. STERLING: Correct, Your Honor.

24 JUSTICE BREYER: Whether he really relied or
25 didn't rely, the common agent is for the merits?

1 MR. STERLING: But you couldn't have --

2 JUSTICE BREYER: Is that -- is that your
3 answer is?

4 MR. STERLING: No, Your Honor. You couldn't
5 have a case in that situation because reliance is an
6 individual issue.

7 JUSTICE BREYER: No. A thousand people say
8 Mr. Jackson is our common buying agent, and the
9 defendant lied to this common buying agent, and he
10 represented us. Relied on that. I'm asking if you that
11 issue of reliance in an appropriate case is for the
12 certification stage?

13 MR. STERLING: Yes, Your Honor, because --

14 JUSTICE BREYER: Yes.

15 MR. STERLING: -- you still have everybody
16 having to say Mr. Jackson is my agent. That's --

17 JUSTICE BREYER: And they also have to prove
18 there is a lie?

19 MR. STERLING: Right. And that's a -- but
20 the individualized question of reliance is simply, is
21 Mr. Jackson your agent or not? Because of that there is
22 no common issue that -- that predominates on reliance.

23 JUSTICE BREYER: Okay.

24 MR. STERLING: If there are no further
25 questions, we would ask that the judgment below be

1 affirmed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Sterling.

4 Mr. Boies, you have 5 minutes remaining.

5 REBUTTAL ARGUMENT OF DAVID BOIES
6 ON BEHALF OF THE PETITIONER

7 MR. BOIES: Thank you, Your Honor. Thank
8 you, Mr. Chief Justice.

9 Let me respond to Mr. Sterling's statement
10 that all we had to do was show one statistically
11 significant price movement. As the Court is aware from
12 the briefing, on December 7th of 2001, the Halliburton
13 put out a release that indicated that their prior
14 statements that their asbestos reserves were -- were
15 adequate were not -- were not true. The stock dropped
16 42 percent, more than 42 percent. The actual drop was
17 42.4.

18 Expert witnesses calculated that the
19 company's specific drop was slightly larger than that
20 because the market was generally going up that day. But
21 it was a dramatic drop.

22 Their own expert, as is indicated in the
23 briefing, agreed that there wasn't anything else
24 happening that day other than asbestos news, and so --

25 CHIEF JUSTICE ROBERTS: So you win, so you

1 win at the certification stage or at the pleading stage,
2 whatever. So why is it such a big deal to you here?

3 MR. BOIES: Because under the -- the Fifth
4 Circuit rule, I understand that counsel disavows the
5 actual language of the Fifth Circuit rule, but it was
6 that language that the district court relied on in
7 failing to certify the class. And with -- with -- with
8 respect to the Fifth Circuit test, what the Fifth
9 Circuit says is that because the announcement on
10 December 7th did not specifically reference the prior
11 announcements, it cannot be considered a correction of
12 those prior announcements.

13 Indeed, the court, the Fifth Circuit goes
14 even further, and this is at page 338 of the F. Supp.
15 opinion. It says, quote: The district court must
16 decide whether the corrective disclosure more probably
17 than not shows that the original estimates or
18 predictions were designed to defraud.

19 So what the Fifth Circuit is doing is it's
20 bringing, even the defrauding aspect, not just the
21 falsity aspect, but the defrauding aspect right into the
22 class certification stage.

23 And I think Justice Scalia's question was
24 exactly on point with respect to discovery, because
25 either they're going to make these merits decisions

1 without discovery or you're going to have all of the
2 discovery before you have the class certification. It's
3 got to be one or the other. And in either case what is
4 happening is you're converting what Rule 23 says is an
5 issue as to whether common issues predominate into an
6 issue as to what is the strength of the merits claim
7 that the plaintiff has, and while it is true, reliance
8 is part of the merits claim.

9 The reason reliance is different is because
10 reliance, if it -- if there is no reliance, if there's
11 no efficient market, then reliance can make individual
12 issues predominate, but when the only issue is not a
13 step issue like efficient market, but is a direct merits
14 issue, there isn't any way that you can make individual
15 issues predominate regardless of how you decide it; and
16 loss causation and price distortion are both those kind
17 of common issues; and counsel says he doesn't defend
18 the -- the actual loss causation statements of the -- of
19 the -- of the Fifth Circuit, and what I would ask is
20 whether the Court, if the Court does decide to send it
21 back, that the Court look at what the right standard is
22 for the court below to be applying when it deals with
23 class certification.

24 And I would urge the Court that when you
25 have pleadings, summary judgment, and trial tests for

1 merits questions, then you don't need another merits
2 test on -- at the class certification stage, even if
3 Rule 23 permitted it, which we don't think it does.
4 What Rule 23 is designed to do is simply say are
5 individual issues or common issues going to predominate?
6 And all of the class have the same loss causation, have
7 the same price distortion issues.

8 If the Court has no more questions, that
9 completes my argument.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel,
11 counsel. The case is submitted.

12 (Whereupon, at 10:58 a.m., the case in the
13 above-entitled matter was submitted.)
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