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No. 09-1403

IN THE

Supreme Court of the United States

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

v.

HALLIBURTON CO. ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

ROBB L. VOYLES
JESSICA B. PULLIAM
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, Texas 75201
(214) 953-6500

DONALD E. GODWIN
GODWIN RONQUILLO P.C.
1201 Elm St.
Dallas, Texas 75270
(214) 939-4400

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

R. ALAN YORK
GODWIN RONQUILLO P.C.
1331 Lamar St.
Houston, Texas 77010
(713) 595-8300

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of class certification where the evidence showed that the alleged misrepresentations had no impact on the company's stock price.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Halliburton Company states that it is a publicly held company, which has no parent company.

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Eugene Gressman et al, *Supreme Court Practice* (9th ed. 2007) 16

Patricia Groot, *Fraud on the Market Gets a Mini-Trial*, 58 Duke L.J. 1143 (2009) 15

Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wisc. L. Rev. 151 (2009) 13-14

Jamie A. Levitt & Michael Gerard, *Loss Causation at Class Certification: Illusory Circuit Split*, N.Y.L.J. 4 (Nov. 5, 2008) 11

Jonathan R. Macey et al., *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 Stan. L. Rev. 1059 (1990) 23

John A. MacKerron, *The Price Integrity Cause of Action under Rule 10b-5*, 69 Or. L. Rev. 177 (1990) 15

Russell Robinson, Comment, *Fraud-on-the-Market Theory and Thinly-Traded Securities under Rule 10b-5: How Does a Court Decide if a Stock Market is Efficient?*, 25 Wake Forest L. Rev. 223 (1990) 15

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Erica P. John Fund, Inc. (the Fund) alleges that the decision below diverges from a 2008 decision of "the Second Circuit and [recent decisions from] district courts in seven other circuits" with respect to whether a plaintiff must prove loss causation to obtain certification of a securities-fraud class action. Pet. 12. The division of authority alleged by the Fund is illusory. Contrary to the Fund's claims, the Second Circuit—like the Fifth Circuit—considers evidence of loss causation at the class-certification stage. Any distinction between the circuits

is merely procedural. The circuits' substantive approaches are indistinguishable.

This case illustrates the illusory nature of the alleged split. The evidence below showed no link between the alleged misrepresentations and any effect on the price of Halliburton's stock. Even the Fund does not dispute that the preponderance of the evidence showed the absence of loss causation. Respondents would therefore prevail under the Second Circuit's approach, which denies class certification when the evidence shows that loss causation is lacking. As such, this case presents a poor vehicle for review because the outcome would be the same regardless of the approach used.

Finally, even if there were a substantive divergence between the Second and Fifth circuit's approaches, such a shallow and recent split would not warrant this Court's review of an interlocutory decision denying class certification. As demonstrated by the Fund's petition, Pet. 15-17, lower courts across the Nation are just beginning to wrestle with this issue. Percolation is advisable to allow additional courts of appeals to consider the issues presented. Indeed, even the Fifth Circuit has not had occasion to consider the recent Second Circuit opinion relied upon by the Fund because the Fund declined to seek rehearing en banc. For all these reasons, the Court should deny the petition.

STATEMENT

I. BACKGROUND.

The Fund is lead plaintiff in this putative securities-fraud class action against Respondents Halliburton Company and its CEO David Lesar (collectively, Halliburton). Pet. App. 111-112. The Fund asserts three general categories of alleged misrepresentations. *Id.* at 124. These concern Halliburton's (1) potential liability in asbestos litigation; (2) accounting for revenue on fixed-

price construction contracts; and (3) potential benefits of a merger with Dresser Industries. *Id.* at 112-113. The Fund contends investors lost money when Halliburton's stock price dropped following the release of negative news. *Id.* at 113.

A securities-fraud plaintiff bringing a claim under Section 10(b) of the Securities Exchange Act and Rule 10b-5 must prove the following elements: (1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation, i.e., that the misrepresentation caused the alleged loss. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

A securities-fraud plaintiff must also satisfy the requisites of Rule 23 to obtain class-action status. That rule permits class certification only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the lead plaintiff are typical of those of the class; and (4) the lead plaintiff will adequately protect class interests. Fed. R. Civ. P. 23(a). Petitioner here sought certification under Rule 23(b)(3), which requires a plaintiff to prove that "the questions of law or fact common to class members predominate over any questions affecting only individual members." A plaintiff must establish each of the Rule 23 requirements by a preponderance of the evidence. *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 267-269 (5th Cir. 2007).

In *Basic Inc.* v. *Levinson*, this Court recognized that a plaintiff could not establish Rule 23's predominance requirement in a securities class action if each member of the proposed class were required to prove individual reliance. 485 U.S. 224, 242 (1988). Consequently, this

Court held that a putative class-action plaintiff may obtain a "rebuttable presumption" of class-wide reliance by invoking the "fraud-on-the-market" theory. The fraud-on-the-market theory assumes that in an efficient, well-developed market all public information about a company is known to the market and is reflected in the company's stock price. *Id.* at 246. The theory therefore posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247.

To trigger the fraud-on-the-market presumption of reliance, the plaintiff must show that (1) the defendant made public material misrepresentations; (2) the defendant's shares were traded in an efficient market; and (3) the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed. *Basic*, 485 U.S. at 248 & n.27. Such a showing establishes the "threshold facts" for a rebuttable presumption that the entire class relied on the integrity of the price set by the market. *Id.* at 248. A defendant, however, may rebut the proof giving rise to the presumption or make "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Ibid.*

II. PROCEEDINGS BELOW.

The district court denied the Fund's request for class certification, and the Court of Appeals for the Fifth Circuit affirmed. Pet. App. 111-136. Drawing on *Basic*, the court of appeals concluded that the district court properly refused class certification because the Fund is not entitled to the fraud-on-the-market presumption.

The court of appeals evaluated *Basic*'s application to cases where the plaintiff contends its losses derive not through increases in the stock price following alleged

misrepresentations, as in *Basic*, but instead through a decline in the stock price following alleged corrective disclosures. Pet. App. 115-118. In other words, the court of appeals considered when a proposed class is entitled to the fraud-on-the-market presumption where the plaintiff contends only that the company's stock price dropped following the release of negative information. *Ibid.* Particularly concerning to the court of appeals were situations where the negative news on its face does not correct the prior alleged misrepresentation or where the negative news contains non-culpable or industry-wide negative information. *Id.* at 116-120.

The court of appeals reiterated its previous holding in *Oscar Private Equity*, 487 F.3d at 269, that the touchstone for applying the fraud-on-the-market presumption is whether the alleged misrepresentation actually inflated the company's stock price. Pet. App. 112, 115; see *Basic*, 485 U.S. at 247 ("[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price"). Thus, to be entitled to the presumption of reliance, a plaintiff must do more than simply allege a misrepresentation and show a price decline following a subsequent disclosure of negative information. Instead, the plaintiff must show that the alleged misrepresentations "actually moved the market." Pet. App. 115. To do that in a case involving alleged corrective disclosures, a plaintiff must "prove that its loss resulted directly because of the correction to a prior misleading statement." Pet. App. 117. Without such proof, "there would be no inference raised that the original, allegedly false statement caused an inflation in the stock price to begin with." *Ibid.* Quoting its earlier decision, the court of appeals explained that this showing of loss causation must be made "at the class certification stage by a preponderance of all admissible evidence." Pet. App. 115.

The court of appeals spelled out some specific corollaries which ensure that the alleged fraud is the cause of the allegedly inflated market price and resulting stock-price decline. First, plaintiffs must "show that a loss occurred from the decline in stock price because the truth made its way into the marketplace, rather than for some other reason, such as a result of changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other factors independent of the fraud." Pet. App. 117. Similarly, "if a company releases multiple items of negative information on the same day, the plaintiff must establish a reasonable likelihood that a subsequent decline in stock price is due to the revelation of the truth of the earlier misstatement rather than to the release of the unrelated negative information." *Id.* at 117-118. Nor may a plaintiff rely on the release of "confirmatory information"—information that repeats facts already known to the market and thus already reflected in the stock price. *Id.* at 119. In sum, "a subsequent disclosure that does not correct and reveal the truth of the previously misleading statement" is not a sufficient basis for certifying a class under the fraud-on-the-market presumption. *Id.* at 118 (citing *Alaska Elec. Pension Fund* v. *Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (O'Connor, J.)).

Applying the foregoing test, the court of appeals held that the Fund failed to show that any of Halliburton's alleged misrepresentations inflated the company's stock price. Pet. App. 123-136. The Fund's own analysis showed that Halliburton's stock never increased following any of the alleged misrepresentations; thus, the Fund relied "only on stock price decreases following allegedly corrective disclosures by Halliburton." Pet. App. 116. The court concluded, however, that the evidence failed to show that any disclosure followed by a

stock-price decline was corrective; i.e., revealed the falsity of any of Halliburton's alleged misrepresentations. It was "not enough merely to show that the market declined after a statement reporting negative news." *Ibid.* Rather, the evidence had to show that the decline in price following a disclosure "raise[d] an inference that the price was actually affected by earlier alleged misrepresentations." *Id.* at 117. The Fund could not make this showing and, therefore, could not demonstrate that any misrepresentation actually moved the market in the first place. Thus, the Fund could not invoke the fraud-on-the-market presumption of class-wide reliance as required to obtain class certification under Rule 23.

The Fund did not seek rehearing en banc. Instead, it filed this petition.

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVISION OF AUTHORITY AMONG THE CIRCUITS WITH RESPECT TO THE CONSIDERATION OF LOSS CAUSATION AT THE CLASS CERTIFICATION STAGE.

The Fund argues that the decision below conflicts with the decision in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), and with the decisions of "district courts in seven other circuits." See Pet. 12-18. The alleged conflict with the Second Circuit is illusory, and the Fund's extensive reliance on district-court cases strikingly manifests that this issue is not yet ripe for the Court's review.

A. The Second Circuit Considers Loss Causation in Deciding Class Certification.

The Fund argues that the Second Circuit "squarely rejected" the Fifth Circuit's approach in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008). See Pet. 12-14. That is simply not so. The Second Circuit's decision in *In re Salomon* mentions the Fifth

Circuit's decision in *Oscar Private Equity* only once, and as discussed below, it does so *favorably*. Not surprisingly, then, *In re Salomon* produces more harmony with the decision below than disharmony. Indeed, the Second Circuit's approach is substantively indistinguishable from the Fifth Circuit's and will produce identical results in virtually all cases, including the present case.

In *In re Salomon*, the court of appeals *vacated* the district court's decision certifying a class. 544 F.3d at 486. The court emphatically agreed with the Fifth Circuit that the absence of loss causation would doom class certification by eliminating the class-wide presumption of reliance. *Id.* at 485-486. The court squarely rejected the Fund's position here that evidence of loss causation may not be considered at the class-certification stage. *Ibid.* And the Second Circuit was unconcerned that assessing loss causation would force the district court to consider a requirement that "is identical to an issue on the merits." *Id.* at 484; accord *ibid.* (rejecting district court's refusal to "weigh merits-related evidence" on loss causation). The court instead endorsed the Fifth Circuit's holding that loss-causation evidence is properly considered in determining whether a class can be certified. *Id.* at 485 (citing and quoting *Oscar Private Equity* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 270 (5th Cir. 2007)).

In re Salomon holds that a plaintiff need not initially prove that the alleged misrepresentations had a measurable effect on market price in order to satisfy *Basic*'s threshold requirements for invoking the fraud-on-the-market presumption. 544 F.3d at 482-483. However, the Second Circuit made clear that the defendant may rebut the presumption by introducing evidence tending to show the absence of loss causation. *Id.* at 483-484. The court quoted *Basic*'s holding that

"*[a]ny showing* that severs the link between the alleged misrepresentation and . . . the price . . . will be sufficient to rebut the presumption of reliance." *Ibid.* (quoting *Basic*, 485 U.S. at 248 (emphasis added)). Thus, a defendant may rebut the presumption by "showing that there was no price impact" from the misrepresentation. *Id.* at 483; see also *ibid.* (defendant may rebut the presumption by "show[ing] that the misrepresentation in fact did not lead to a distortion of price"); *id.* at 484 ("defendants are allowed to rebut the presumption . . . by showing . . . the absence of a price impact"). The Second Circuit left no doubt that the defendant could make this loss-causation showing "prior to class certification," *id.* at 484, turning back plaintiff's arguments to the contrary. *Id.* at 484-485. "The *Basic* Court explained that successful rebuttal defeats certification by defeating the Rule 23(b)(3) predominance requirement." *Id.* at 485 (citing *Basic*, 485 U.S. at 249 n.29). The Second Circuit therefore remanded so that defendants could attempt to rebut the presumption of reliance. *Id.* at 486.

In sum, there is very little difference between the approaches of the Second and Fifth circuits. Both consider evidence of loss causation at class certification, and both require that plaintiffs prove each of the Rule 23 requirements for class certification by a preponderance of the evidence. Any procedural divergence between the circuits is unlikely to make a substantive difference. That may be inferred from the relatively light burden that a defendant bears in rebutting *Basic*'s presumption of reliance. This Court has declared that "*[a]ny showing* that severs the link between the alleged misrepresentation and . . . the price . . . will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added)). The Second Circuit seems to agree, requiring only that a defendant "*submi[t] evidence* to show that the misrepresentations did not

affect market price." *In re Salomon*, 544 F.3d at 485 (emphasis added). At all times, moreover, the ultimate burden of persuasion remains with the plaintiffs, for it is plaintiffs who must establish each of the Rule 23 requirements. *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) (plaintiffs must satisfy Rule 23 by a "preponderance of the evidence"). Thus, *In re Salomon* explained that "[i]f defendants attempt to make a rebuttal . . . . the district judge must receive enough evidence . . . to be satisfied that each Rule 23 requirement has been met." *Id.* at 486; accord *Lapin* v. *Goldman Sachs & Co.*, No. 04 Civ. 2236, 2008 WL 4600994, at *2 (S.D.N.Y. Oct. 15, 2008) (explaining that under *In re Salomon* "the burden is on the plaintiff, and if the defendants contest the facts, the Court must engage in fact finding").[1]

It is doubtful that putative classes will be any easier to certify under the Second Circuit's procedure than under the Fifth Circuit's. After all, regardless of when or how the burden shifts, if the preponderance of evidence demonstrates the absence of loss causation, a class may not be certified. Commentators have recognized that the lower courts' slight procedural differences do not a circuit split make. "Ultimately, with both plaintiffs and defendants presenting evidence on the issue of loss causation at the class certification stage, and the courts

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[1] Cf. *Tex. Dept. of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252-254 (1981) (although plaintiff may invoke a rebuttable presumption that he suffered from discriminatory acts, the defendant may rebut the presumption by any admissible evidence of non-discriminatory motive, and the "ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff"); Fed. R. Evid. 301 ("a presumption imposes . . . the burden of going forward with evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof*") (emphasis added).

applying the preponderance of the evidence standard to all admissible evidence, *it is likely there will be little difference between class certification in the Fifth and Second circuits.*" Jamie A. Levitt & Michael Gerard, *Loss Causation at Class Certification: Illusory Circuit Split*, N.Y.L.J. 4, 6 (Nov. 5, 2008) (emphasis added). The Fund itself seemed to agree in the court below. Although it spent several pages of its briefing arguing that the Fifth Circuit's approach is "[i]nconsistent [w]ith . . . the [p]recedent from [o]ther [c]ircuits," the Fund never cited the Second Circuit's decision in *In re Salomon*. See Appellant's CA5 Brief at 32-35 (filed May 4, 2009); Appellant's CA5 Reply Brief at 8-9 (filed June 30, 2009).[2]

At the very least, it is unclear that there will be any real-world impact flowing from any minor differences

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[2] A later Second Circuit decision confirms that the absence of loss causation defeats class certification within the Second Circuit. See *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2009). *In re Flag Telecom* does *not* "cit[e] approvingly the district court cases in the Second Circuit rejecting *Oscar*," as the Fund contends. Pet. 14 n.7. Rather, as the Fund concedes, the court was asked to "reject the approach taken by the Fifth Circuit Court of Appeals in [*Oscar*]," but declined to do so because the issue of "loss causation in the context of the Rule 23(b)(3) predominance requirement . . . . is not before us here." *In re Flag Telecom*, 574 F.3d at 39. However, the court of appeals did require plaintiffs to prove loss causation in order to satisfy Rule 23's adequacy and typicality requirements with respect to a subset of the defined class—so-called "in and out traders." *Id.* at 39-40. After a detailed analysis of loss causation reminiscent of the decision below, *id.* at 40-41, the court "conclude[d] that Plaintiffs have not put forth sufficient evidence on which the in-and-out traders could establish loss causation, and they therefore must be excluded from the certified class." *Id.* at 41. *In re Flag Telecom* thus confirms two important points: (1) the Second Circuit has *not* rejected the Fifth Circuit's approach to loss causation; and (2) plaintiffs in the Second Circuit bear the ultimate burden of proof with respect to merits issues—including loss causation—that overlap with Rule 23's class-certification requirements.

between the Second and Fifth circuits. All we have so far is one Second Circuit decision *vacating* class certification. That uncertainty counsels further percolation. See, *infra*, at 14-15. And the certainty that the present case would come out the same way under either circuit's approach militates strongly against review. See, *infra*, at 16-22.

B. No Other Court of Appeals Disagrees with the Decision Below.

Citing decisions from the First, Third, and Ninth circuits, the Fund asserts that the decision below is in "considerable tension" with the holdings of other courts of appeals. Pet. 15. As the Fund's formulation betrays, there is in fact no real division of authority. The Fund's own parenthetical descriptions of the First and Ninth circuits' decisions reveal only general statements that a plaintiff must prove an efficient market in order to trigger *Basic*'s fraud-on-the-market presumption. *Ibid.* (citing *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 7 (1st Cir. 2005); *Binder* v. *Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999)). These decisions do not address whether loss causation is relevant to class certification.[3]

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[3] In *In re Polymedica*, the First Circuit *vacated* the district court's order certifying a class because the plaintiff failed to establish "market efficiency," and thus could not invoke the fraud-on-the-market presumption. On remand, the district court denied class certification, holding that *In re Polymedica*'s requirement of market efficiency "erects a significant hurdle" for plaintiffs. *In re Polymedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 272 (D. Mass. 2006). The court found that plaintiffs fell short of establishing the "most important" factor in the market-efficiency test—"a cause-and-effect relationship over time between unexpected corporate events or financial releases and an immediate response in stock price." *Id.* at 265. Thus, it appears that the First Circuit's market-efficiency requirement imposes a similar burden as the Fifth Circuit's loss-causation requirement. See also *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512 & n.10, 513 (1st Cir. 2005) (affirming class certification

Moreover, they predate both *Oscar Private Equity* and *In re Salomon*, and therefore had no occasion to confront whether the Second and Fifth circuits are correct to consider proof of loss causation before certifying a class.

The Third Circuit case cited by the Fund, if anything, *supports* the Fifth Circuit's approach in the decision below. See Pet. 15 (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997)). There, then-Judge Alito declared for the court that "[i]n the context of an 'efficient' market, the concept of materiality translates into information that alters the price of the firm's stock." *In re Burlington*, 114 F.3d at 1425. While *In re Burlington* decided an appeal of a 12(b)(6) motion to dismiss, its reasoning strongly suggests that the Third Circuit agrees with the Fifth Circuit's requirement to show a price impact in order to apply *Basic*'s fraud-on-the-market presumption.[4] Indeed, the Third Circuit later held that class certification was inappropriate where "plaintiffs' claims do not involve an omission or misrepresentation that affected the value of a security in an efficient market. Therefore, a presumption of reliance based on this theory would be inappropriate." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 175-176 (3d Cir. 2001). These decisions have led one recent commentator to remark that the Third Circuit's approach to materiality is simply "*Oscar* in another guise." Donald C. Langevoort, *Basic at Twenty:*

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because plaintiffs presented "a sophisticated event study" showing that Xcelera stock "reacted strongly . . . to new information concerning the company (including . . . disclosures at issue in this case")).

[4] See also *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) (holding that "if a company's disclosure of information has no effect on stock prices, it follows that the information disclosed . . . was immaterial as a matter of law") (quotation omitted).

Rethinking Fraud on the Market, 2009 Wisc. L. Rev. 151, 190 (2009).

C. Prudential Considerations Counsel against Certiorari.

In addition to the lack of tension between the substantive approaches of the Second Circuit and the decision below, prudential considerations also strongly counsel against wading into this shallow and inconsequential (alleged) split. To begin with, the Fund's alleged split involves only one court of appeals on either side. It is less than two years old. And the Second Circuit's decision *agrees* with the decision below that loss causation is relevant at the class-certification stage. Any disagreement is merely procedural. In practice, it seems unlikely that the Second Circuit's approach will differ at all from that of the Fifth Circuit. See, *supra*, at 7-12. Indeed, in this very case, the outcome would be the same regardless of whether the Second or Fifth circuit's precedent applied. See, *infra*, at 16-22.

All of this suggests that further percolation is warranted. Moreover, as the Fund's citation of district-court decisions from the last two years demonstrates, the lower courts are just beginning to confront this issue. Analysis by additional courts of appeals would greatly aid this Court if it eventually wishes to address this issue. Time will also reveal whether the Second and Fifth circuits' approaches diverge in any meaningful way. Likewise, it is quite possible that either the Second Circuit or the Fifth Circuit would take a case en banc and agree with the other circuit's approach. The Fifth Circuit did not have that opportunity in the present case because the Fund declined to seek rehearing en banc to give the Fifth Circuit a chance to consider the Second Circuit's decision in *In re Salomon*. Thus, time may well dissolve any circuit tension altogether, reveal it to be immaterial, or at the very least, provide additional, in-depth analysis

of the question presented by appellate judges throughout the Nation.

The absence of need for immediate intervention by this Court is confirmed by both the nature of the issue presented and its procedural posture. In *Basic*, this Court intentionally declined to embrace any particular variant of the fraud-on-the-market theory. 485 U.S. at 242, 247-248 & nn. 24, 28; see *In re Polymedica Corp.*, 432 F.3d at 12 (referencing this Court's "disclaimer that it was not adopting any particular economic theory in applying the fraud-on-the-market presumption of reliance"). Other than placing the initial burden on the plaintiff to show material misrepresentations and market efficiency, and allowing defendants to rebut the presumption, this Court did not "set forth any" specific procedural or substantive "rules with respect to [lower courts'] application" of the fraud-on-the-market presumption. John A. MacKerron, *The Price Integrity Cause of Action under Rule 10b-5*, 69 Or. L. Rev. 177, 197 (1990). Consequently, courts and commentators alike have perceived that "*Basic* essentially allows each of the circuits room to develop its own fraud-on-the-market rules." *Nathenson* v. *Zonagen*, 267 F.3d 400, 414 (5th Cir. 2001). Accord *In re Polymedica*, 432 F.3d at 12 ("*Basic* . . . did not directly address the meaning of an efficient market, choosing instead to leave the development of that concept to the lower courts"); Patricia Groot, *Fraud on the Market Gets a Mini-Trial*, 58 Duke L.J. 1143, 1154-1155 (2009) (observing that *Basic* "seemed content that lower courts would sort out substantive and procedural issues—including what proof plaintiffs must show to invoke the theory"); Russell Robinson, Comment, *Fraud-on-the-Market Theory and Thinly-Traded Securities under Rule 10b-5: How Does a Court Decide if a Stock Market is Efficient?*, 25 Wake Forest L. Rev. 223, 225 (1990) (stating that *Basic* "left to

the lower courts the task of determining the practical application of fraud-on-the-market theory"). This Court's grant of discretion to the lower courts to work out the details concerning class certification in fraud-on-the-market cases weighs heavily against review in the absence of a significant and direct circuit split.

The Fund, moreover, seeks review of an interlocutory order denying class certification. This Court is quite reluctant to review decisions that do not finally resolve the merits of a dispute. Eugene Gressman et al, *Supreme Court Practice* 280-283 (9th ed. 2007). *Basic* itself addressed the class-certification issue only after "the District Court granted summary judgment." 485 U.S. at 228-229. When this Court's reluctance to review interlocutory appeals is combined with *Basic*'s intent to allow the courts of appeals flexibility in addressing the fraud-on-the-market presumption, it is unsurprising that this Court has *never* granted certiorari to review an interlocutory class-certification decision in a securities-fraud case.[5] The Fund has presented no compelling reasons why this case should be the first.

II. THIS CASE PRESENTS A POOR VEHICLE BECAUSE THE OUTCOME WOULD BE THE SAME IN ANY COURT OF APPEALS.

In addition to the foregoing prudential reasons to deny certiorari, this case is not an appropriate vehicle to address the procedural framework for considering loss causation. The Fund's reliance on a Second Circuit decision *vacating* a certified class cannot possibly demonstrate that this case would be decided differently

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[5] Indeed, it appears that the *only* case in which this Court has ever reviewed an interlocutory decision pertaining to class certification is *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 597 (1997) (affirming decertification of settlement class of plaintiffs allegedly harmed by asbestos).

in another circuit. Indeed, the class proposed here could not be certified regardless of whether this case was litigated in the Second or Fifth circuit.

Both courts of appeals apply the same substantive standard of proof. The Fifth Circuit requires plaintiffs alleging losses resulting from a stock-price decline to prove that it was a corrective disclosure, "and not any unrelated negative information," that caused the stock price to drop. Without such a showing, the premise for the fraud-on-the-market presumption—that "the alleged misstatement actually moved the market"—is absent. Pet. App. 115. The Second Circuit permits defendants to rebut the presumption at the class-certification stage by showing that "the misrepresentation in fact did not lead to a distortion in price." *In re Salomon*, 544 F.3d at 483; *id.* at 484.

It is not overly difficult for a defendant to rebut the presumption of reliance. *Basic* holds that *"[a]ny showing* that severs the link between the alleged misrepresentation and . . . the price . . . will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added). The Second Circuit seems to set a similarly low bar, requiring only that a defendant *"submi[t] evidence* to show that the misrepresentations did not affect market price." *In re Salomon*, 544 F.3d at 485 (emphasis added). Halliburton indisputably met that standard. But even if the Second Circuit would have required Halliburton to disprove loss causation by a preponderance of the evidence—which is unlikely, see, *supra*, at 9-11 & nn.1-2—Halliburton's proof was more than sufficient.

The Fund did not even allege that the stock price increased following the release of misrepresentations. Pet. App. 116. In fact, the Fund's expert conceded that her own study showed that there was no price increase caused by any of the alleged misrepresentations. C.A.

App. 6953, 6955-6956, 7059-7071; see Pet. App. 7 n.11 (stating that the Fund did "not point to any stock price increases resulting from positive misrepresentations"); *id.* at 116. Rather, the Fund alleged only that the stock price declined following the release of negative news, which it contended was related to one or more of the three categories of alleged misrepresentations. The Second and Fifth circuit's substantive standards for proving loss causation via negative disclosures are identical. Compare Pet. App. 116 (plaintiffs must prove loss resulted from "release of the alleged 'truth' of the earlier falsehood") with *In re Flag Telecom*, 574 F.3d at 41 (declining to certify class of plaintiffs who "have not presented sufficient evidence on which the lower court could conclude that any of the events revealed the truth about the subject of any of Defendants' alleged misstatements"). The Fifth Circuit held that the record evidence did not measure up to this standard. Thus, Halliburton would prevail regardless of the procedural road travelled.

The Fund makes no serious attempt to demonstrate that the outcome of this case would be different under the Second Circuit's procedural framework. Indeed, the Fund does not dispute that the preponderance of evidence in this case showed the absence of loss causation. The Fund discusses the specific facts of the case for only one paragraph on page 25 of its petition. Presumably, the Fund recounts what it thinks is its strongest allegation. A brief examination of the alleged corrective disclosure mentioned in the petition illustrates that the preponderance of record evidence defeats loss causation.

The Fund alleged that Halliburton misrepresented its projected asbestos liability and the reserves set aside to cover that liability. See Pet. 25; Pet. App. 124-125. One stock-price decline on which the Fund relied occurred

when Halliburton had to establish new reserves in June 2001 as a result of becoming responsible for the liability of a company (Harbison-Walker) spun off nine years earlier by another company (Dresser Industries) that was later acquired by Halliburton. *Ibid.*

In 1992, several years before merging with Halliburton, Dresser spun off Harbison-Walker. In connection with that transaction, Harbison-Walker agreed to indemnify Dresser for all future asbestos claims. C.A. App. 7685. When Halliburton later acquired Dresser in 1998, Halliburton disclosed information to the market concerning Harbison-Walker's indemnity agreement. *Ibid.* Harbison-Walker confirmed its agreement to indemnify Dresser/Halliburton in 2000, a fact that Halliburton disclosed in its 2000 Form 10-K, issued in March 2001. C.A. App. 7704.

In May 2001, Halliburton stated that its asbestos reserves for pending claims were $30 million dollars. Pet. App. 124. In June 2001, despite having recently acknowledged its indemnity obligation, Harbison-Walker unexpectedly "asked Halliburton to provide financial assistance for asbestos claims that Harbison-Walker had previously agreed to assume." *Ibid.*; cf. Pet. 25. Halliburton immediately disclosed this information in a June 28, 2001 press release, announcing that it would need to add new asbestos reserves of $50 to $60 million to cover this unexpected liability, and Halliburton's stock declined. Pet. App. 124-125.

The June 28 press release was not a corrective disclosure that revealed the falsity of any alleged misstatement. To the contrary, the June 28 press release stated that Harbison-Walker's request for assistance was "an unexpected development." C.A. App. 7747; Pet. App. 124. Indeed, Halliburton's 2000 10-K—filed in March 2001—had made clear that Harbison-Walker claims were *not* included in the previous estimate of $30 million in

asbestos liability. C.A. App. 7703-7704; see Pet. App. 126. Halliburton, moreover, produced evidence that it had made the market aware in the same 10-K (and previous filings) of Harbison-Walker's agreement to indemnify Halliburton; thus, the market knew Halliburton would be on the hook if Harbison-Walker became unable to fulfill its agreement to be responsible for its own asbestos liability. C.A. App. 7685, 7704; Pet. App. 126.

The Fund's own expert admitted that Halliburton had not previously told the market that Harbison-Walker "will never request or need our assistance on any of the asbestos claims they agreed to assume." C.A. App. 7668; Pet. App. 125 ("Plaintiff makes no argument that Halliburton made prior statements about exposure from claims related to Harbison-Walker.") Pet. App. 16 ("[t]here is no allegation—and certainly no evidence—that Harbison-Walker required Dresser's assistance prior to this disclosure"). Unsurprisingly then, the Fund's expert declined to testify that the June 28, 2001 statement corrected the falsity of any previous misrepresentation. She claimed only that the new information "corrected investors' erroneous assessments [of] Halliburton's asbestos liability." C.A. App. 6916; see Pet. App. 125-126.[6]

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[6] This is but one example of how Halliburton amply demonstrated that the alleged "misrepresentation[s] in fact did not lead to a distortion in price." *In re Salomon*, 544 F.3d at 483. Through expert testimony and a side-by-side comparison of the alleged misrepresentations and subsequent disclosures, Halliburton rebutted the fraud-on-the-market presumption by proving that the Fund's only alleged "basis for finding that the fraud had been transmitted through the market price [was] gone." *Basic*, 485 U.S. at 248. In some cases, the alleged misrepresentation was confirmatory of information previously released to the market and therefore would have no effect on the market price under the fraud-on-the-market theory. Pet. App. 127. In other cases, the alleged

The court of appeals therefore concluded that the Fund could not rely on the June 28, 2001 press release for application of the fraud-on-the-market presumption because it did not correct any previous alleged misstatement. Pet. App. 125-127. This holding would occur even in the Second Circuit because Halliburton proved that the June 28, 2001 disclosure was no indication that any alleged misrepresentation "le[]d to a distortion in price." *In re Salomon*, 544 F.3d at 483.

It is noteworthy that the Fund does not dispute that "a company is allowed to be proven wrong in its estimates." Pet. App. 126. It would indeed be bad public policy to punish companies with a securities-fraud lawsuit every time they dutifully report negative developments to the market. The Fund's pro-class-action policy arguments (see Pet. 32-33), by contrast, simply are not implicated by this case, where the preponderance of the evidence indisputably shows an absence of loss causation. In light of that evidentiary record, the Fifth Circuit reasonably declined "to draw the inference that the June 28, 2001 press release corrected allegedly *false* estimates of asbestos reserves merely because those reserves *changed*." Pet. App. 126 (emphasis added). That commonsense conclusion would not alter under the Second Circuit's precedent.[7]

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corrective disclosures conveyed only new, negative information or industry-wide developments and did not correct prior allegedly misleading statements or estimates. *Id.* at 128-129, 131, 134-135.

[7] The Fund mistakenly contends that the court of appeals held that the June 28, 2001 statement was not a corrective disclosure because it "did not indicate that Halliburton *knew* of Harbison-Walker's financial difficulties prior to the announcement." Pet. 25 (emphasis in original). As the evidentiary discussion above shows, however, the Fund's claim failed because the June 28, 2001 statement did not correct any misstatement previously *conveyed to the market*. The Fifth Circuit's analysis thus turned on the state of the market's

Because the court of appeals' decision is correct regardless of which circuit's approach is applied, this case does not present a suitable vehicle for resolving the first question presented.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

In its second question presented and elsewhere throughout its petition, the Fund argues that the decision below conflicts with various decisions of this Court. To the contrary, the decision below faithfully interprets *Basic* and other precedents addressing securities-fraud class actions.

A. The Decision below is Consistent with *Basic*.

The decision below is consistent with the fraud-on-the-market framework set forth in *Basic*. See Pet. 18-31. Thus, it is hardly surprising that no court of appeals has rejected the Fifth Circuit's approach, nor that the approaches of the Second and Third circuits are substantively indistinguishable from the Fifth Circuit's. See, *supra*, at 7-14.

The Fund complains that the decision below "conflate[s] loss causation and the fraud-on-the-market theory of reliance," Pet. 22, while the Fund believes loss causation is "analytically distinct from whether [plaintiffs] can establish reliance based on the integrity of the market price." *Id.* at 20-21. Thus, the Fund contends that evidence concerning a misrepresentation's impact on stock price has no place whatsoever in determining whether a plaintiff may rely upon the fraud-on-the-market presumption. No circuit has endorsed such a

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knowledge, not on Halliburton's scienter. Pet. App. 125 ("The June 28, 2001, press release does not correct any specific misrepresentation by revealing a previously obscured truth."); see *id.* at 125-127.

categorical position. That is because the Fund misunderstands *Basic*.

To establish the threshold facts necessary for invoking the presumption of reliance, *Basic* requires a plaintiff to show that the defendant's "misrepresentations were material" and that those misrepresentations "would induce a reasonable, relying investor to misjudge the value of the shares." *Basic*, 485 U.S. at 248 n.27 (emphasis added). *Basic*'s presumption is bottomed on investors' "reliance on the integrity of [the market] price." *Id.* at 247. When the integrity of the market price has not been distorted by the alleged misrepresentation, there is no basis for the plaintiff to invoke the fraud-on-the-market presumption. Thus, as one leading commentator explained, the presumption of reliance and loss causation are closely intertwined: "[C]ourts attempting to apply the fraud-on-the-market theory to securities-fraud cases must concern themselves with whether a particular misstatement or material omission fooled the market. . . . If a particular nondisclosure did not fool the market, then plaintiff's reliance on the market's integrity was not misplaced." Jonathan R. Macey et al., *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 Stan. L. Rev. 1059, 1077 (1990).

Loss causation, moreover, is central to the presumption of reliance inasmuch as *Basic* recognizes defendants' ability to rebut the presumption by disproving any impact on price. "Any showing that severs the link between the alleged misrepresentation and . . . the price . . . will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248. Indeed, the Second Circuit decision that the Fund elsewhere endorses flatly rejects the Fund's position that loss-causation evidence is irrelevant to the reliance presumption: "*Basic* made clear that defendants could

'rebut proof of the elements giving rise to the presumption, *or show that the misrepresentation in fact did not lead to a distortion of price.*'" *In re Salomon*, 544 F.3d at 483 (quoting *Basic*, 485 U.S. at 248) (emphasis added). The Fund cannot identify a single appellate decision accepting its doctrinaire stance that evidence of loss causation has no bearing on whether a plaintiff may employ the fraud-on-the-market presumption.[8]

Basic and the courts of appeals place a relatively light burden on defendants to rebut the presumption. See, *supra*, at 9-11. And, in any event, the district court must ultimately resolve the fraud-on-the-market question by the preponderance of all admissible evidence. A slight variation in the circuits' procedural implementation of *Basic* is a tolerable consequence of this Court's decision to give lower courts leeway to interpret the broad strokes of the fraud-on-the-market theory. See *supra*, at 15-16. There is no call for this Court to grant review absent a

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[8] The Fund inexplicably reads *Basic* to mean that a defendant may rebut the presumption "only by evidence that the stock does not trade in an efficient market or that the plaintiff did not rely on the price of the stock." Pet. 30. No court of appeals has adopted such a crabbed interpretation of *Basic*'s mandate that "*any showing*" severing the link between misrepresentation and stock price is sufficient to rebut the presumption. The examples given in *Basic*, 485 U.S. at 248-249, are just that—examples—and by no means exhaust the types of evidence encompassed by "any showing." In any case, the examples illustrate that a defendant may rebut the presumption by proving "that the market price would not have been affected by their misrepresentations." *Ibid.* For example, a defendant may show that "despite petitioners' allegedly fraudulent attempt to manipulate market price, news of the merger discussion credibly entered the market and dissipated the effects of the misstatements." *Ibid.* This example is virtually identical to the Fifth Circuit's holding that many of plaintiffs' alleged corrective disclosures were actually "confirmatory" statements that merely confirmed what the market already knew. Pet. App. 119, 123, 127.

showing that the Fifth Circuit's interpretation of *Basic* is leading to drastically different results than in other circuits.

Finally, the Fund argues that *Basic* permits consideration of defendants' rebuttal evidence only *at trial.* Pet. 29-30. Again, the Fund's position is refuted by the Second Circuit decision on which it elsewhere principally relies. "The *Basic* Court explained that a successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement." *In re Salomon*, 544 F.3d at 485 (citing *Basic*, 485 U.S. at 249 n.29). Thus, "defendants are allowed to rebut the presumption, *prior to class certification*, by showing, for example, the absence of a price impact." *Id.* at 484 (emphasis added). The Fifth and Third circuits agree. Pet. App. 115; *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 175-176 (3d Cir. 2001) (denying class certification where "plaintiffs' claims do not involve an omission or misrepresentation that affected the value of a security in an efficient market.") The Fund's argument that rebuttal must be made at trial, if applied, would not only waste judicial resources, but would also flatly contradict the context and reasoning of *Basic*, which established a *rebuttable* presumption of reliance as part of its review of a *class-certification* order.[9]

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[9] The Fund cites footnote *dicta* from a single appellate decision that arguably supports its view that trial is the proper time for rebuttal evidence under *Basic*. Pet. 29 (citing *In re Polymedica*, 432 F.3d at 7 n.10). As discussed *supra*, at 12-13 n.3, however, *In re Polymedica* requires district courts to undertake a stringent "market efficiency" analysis before certifying a class that appears to overlap with loss-causation analysis.

B. The Decision below is Consistent with *Stoneridge* and *Merck*.

In the course of propounding its novel interpretation of *Basic*, the Fund argues that the decision below conflicts with two other decisions of this Court. It does not.

First, the Fund half-heartedly argues that the decision below conflicts with the recitation of *Basic*'s requirements in *Stoneridge Investment Partners* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). See Pet. 20. *Stoneridge* held that plaintiffs may not bring a securities-fraud action against third-party non-issuers who allegedly participated in a scheme to defraud where the plaintiffs did not rely on the third party's representations. The Court in *Stoneridge* affirmed the granting of a motion to dismiss, so class certification was not in issue, and the Court did not even hint at whether loss causation is a proper consideration in deciding class certification. Moreover, the non-issuer's "deceptive acts were not communicated to the public" and therefore could not possibly have caused plaintiffs' loss. *Stoneridge*, 552 U.S. at 159.

Next, the Fund contends that the decision below goes beyond requiring loss causation to requiring proof of scienter at the class-certification stage, and is therefore inconsistent with the reasoning of *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784 (2010). Pet. 24-26. That is patently incorrect. The court of appeals expressly disavowed that the Fund was required to prove scienter or intentional fraud. Pet. App. 123 n.35. Nor did the court of appeals' standard for proving loss causation "effectively requir[e]" that the Fund prove scienter. Pet. 26 n.20. The decision below simply holds that a negative disclosure that does not "reveal the truth of the previously misleading statement is insufficient to establish loss causation." Pet. App. 118. This standard

does not require a "confession" of fraud in the negative disclosure, as the Fund misreads the opinion. Pet. 25. Indeed, the court of appeals has squarely rejected the rule that "a fraud causes a loss only if the loss follows a corrective statement that specifically reveals the fraud." *Flowserve*, 572 F.3d at 230 (O'Connor, J.). And contrary to the Fund's contention, the court of appeals did not impose a "much stiffer standard" than in *Oscar Private Equity* and *Flowserve*. Pet. 11. In fact, the court extensively quoted and applied the standard set forth in those decisions. Pet. App. 117 n.17, 118 n.19, 120 n.26, 122 n.33, 125 n.37, 126-127 nn.40-41, 135 n.51. Because the Fifth Circuit did not require proof of scienter or actual fraud, the Fund is wrong to argue that the decision below is inconsistent with *Merck*. See Pet. 24-25.[10]

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[10] Besides mischaracterizing the Fifth Circuit's test for loss causation, see also, *supra*, at 21-22 n.7, the Fund rips this Court's recent decision in *Merck* from its context. The Fund deploys *Merck* for the proposition that the Fifth Circuit requires plaintiffs to prove too much before "discovery" takes place. Pet. 24. But *Merck* used the phrase "'discovery' of scienter-related facts," 130 S. Ct. at 1797, in the statute-of-limitations context to refer to the statute's provision that the limitations period starts upon "discovery" of the facts necessary to bring a claim. *Id.* at 1796 (quoting 28 U.S.C. § 1658(b)(1)). *Merck*'s recognition that the limitations period begins to run upon discovery of scienter-related facts obviously offers no support to the Fund's view that it is impossible to prove loss causation before full-blown merits discovery. In any event, despite declaring that it "would be able to establish loss causation" if only it had "full discovery," Pet. 33, the Fund cannot explain why the 600,000 pages of discovery it received was not enough to prove loss causation—a matter proved through "public data and public filings." *Oscar Private Equity*, 487 F.3d at 267. Nor does the Fund identify what additional evidence it could hope to uncover that would prove loss causation when the publicly available data conclusively establishes the contrary. See, *supra*, at 17-21.

C. The Decision below is Consistent with *Eisen* and Federal Rule of Civil Procedure 23.

The Fund also urges that the decision below conflicts with Federal Rule of Civil Procedure 23 and this Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). See Pet. 33-37. It does not.

The Fund argues that the Fifth Circuit has improperly engrafted a new requirement onto Rule 23. But it was this Court that created the fraud-on-the-market presumption of reliance as one way a plaintiff may satisfy Rule 23(b)(3)'s predominance requirement. In order to invoke the presumption of reliance, the plaintiff must establish certain elements, including that the defendant made material misrepresentations that distorted the integrity of the market price. See *Basic*, 485 U.S. at 247-248. The fact that a plaintiff must make such a showing in order to avail himself of the presumption of reliance does not somehow amend Rule 23. The Fund's position goes too far and is inconsistent with *Basic*.

The Fund's assertion that loss causation is always "common" to class members and therefore is not relevant to class certification similarly rings hollow. Pet. 21. By allowing a defendant to rebut the fraud-on-the-market presumption with "[a]ny showing that severs the link" between the alleged misrepresentation and stock price, 485 U.S. at 248, *Basic* itself recognizes that an absence of loss causation destroys class certification.

In reality, the Fund is upset with *how* the Fifth Circuit interprets the required proof under *Basic*. This argument collapses into the Fund's principal contention that loss causation simply may not be considered prior to class certification. That question cannot be resolved by examining Rule 23, but only by examining *Basic* itself and the interpretive decisions of the courts of appeals. See, *supra*, at 22-25. Contrary to the Fund's claims, the

Fifth Circuit is not alone in considering loss causation "central to the certification decision." Pet. 35 (quoting *Oscar Private Equity*, 487 F.3d at 267). Both the Second and Third circuits consider loss causation prior to class certification as part of determining whether plaintiffs may invoke the presumption of reliance. See, *supra*, at 7-14. And, like the Fifth Circuit, neither of those circuits will certify a class if the preponderance of the evidence demonstrates a lack of loss causation. *Ibid.*

Nor does considering loss causation violate *Eisen*'s prohibition on "conduct[ing] a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. The Fund concedes that *Eisen* permits "delving into the merits" where "necessary to determine whether the prerequisites under Rule 23 have been met." Pet. 36. Loss causation is just such a merits issue, for the Fund attempted to satisfy Rule 23(b)(3)'s predominance requirement by invoking the fraud-on-the-market presumption. The Second, Third, and Fifth circuits all agree that this required the district court to consider evidence of loss causation in the course of determining whether the Fund could utilize the presumption. See *supra*, at 7-14.[11] As *In re Salomon* explains, a district court is not prohibited from "weigh[ing] conflicting evidence and determin[ing] the existence of a Rule 23

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[11] The Fifth Circuit's decision in *Bell* v. *Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005), does not aid the Fund. See Pet. 35. There, the court of appeals held that the plaintiff failed to satisfy *Basic*'s requirement to prove market efficiency, and therefore could not invoke the fraud-on-the-market presumption. *Id.* at 314. The court had no occasion to address loss causation. The court, moreover, *rejected* the argument urged by the Fund here, holding that *Eisen* does not prohibit placing the burden on plaintiffs to establish the *Basic* prerequisites at the class-certification stage. *Id.* at 311-314.

requirement just because that requirement is identical to an issue on the merits." 544 F.3d at 484 (quoting *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (en banc)). Considering loss causation in the context of the fraud-on-the-market presumption does not entail an impermissible inquiry into the merits. The Fund identifies no court of appeals' decision holding to the contrary. See Pet. 36-37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBB L. VOYLES
JESSICA B. PULLIAM
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, Texas 75201
(214) 953-6500

DONALD E. GODWIN
GODWIN RONQUILLO P.C.
1201 Elm St.
Dallas, Texas 75270
(214) 939-4400

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

R. ALAN YORK
GODWIN RONQUILLO P.C.
1331 Lamar St.
Houston, Texas 77010
(713) 595-8300

Counsel for Respondents

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