No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,

v.

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

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

REPLY FOR PETITIONERS

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MISCELLANEOUS

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REPLY FOR PETITIONERS

I. THE FUND'S DEFENSE OF *BASIC* IGNORES LAW, ECONOMICS, AND EXPERIENCE

A. The Fund fails to show that *Basic* is entitled to *stare decisis* protection

1. Implicitly agreeing that "*stare decisis* is the last hope for salvaging *Basic*," Pet. Br. 29, the Fund tellingly leads with *stare decisis*, see Fund Br. 11-19, 24-29, rather than by defending the law or economics underlying *Basic*. But the Fund's bold declaration that "[p]rinciples of *stare decisis* apply with full force to *Basic*" depends on the false premise that *Basic* "is a quintessential statutory interpretation case that this Court should not overrule." Fund Br. 12.

Basic is doubly removed from the paradigmatic statutory-construction case. *Basic* layered a judicially created presumption onto the 10b-5 action, itself a "judicial construct that *Congress did not enact* * * * ." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (emphasis added). "The text of § 10(b) does not provide for private claims. Such claims are of judicial creation * * * . [W]e have made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 358-359 (1991) (footnote and citations omitted). The *Basic* Court acknowledged acting on its own, claiming only that "[t]he presumption of reliance employed in this case is *consistent with*, *and*, by facilitating Rule 10b-5 litigation, *supports*, the congressional policy embodied in the 1934 Act." 485 U.S. at 245 (emphasis added). This "helping hand" approach fundamentally differs from—and warrants far less precedential respect than—decisions interpreting a statute's language and meaning.

2. Even in the most straightforward statutory context, where *stare decisis* has the greatest traction, the Court "ha[s] never applied *stare decisis* mechanically to prohibit overruling [its] earlier decisions determining the meaning of statutes." *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658, 695 (1978). There is thus no truth to the Fund's assertion that a decision overruling *Basic* would be practically unprecedented. See Fund Br. 12. The Court in fact has overruled "statutory" precedents in multiple areas:

- **Labor relations.** In *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 240 & n.5, 241 (1970), the court authorized anti-strike injunctions by overruling *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). It did so despite recognizing that Congress declined an opportunity to abrogate *Sinclair*. *Boys Markets*, 398 U.S. at 241-242.

- **Patent law.** In *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, the Court overruled a 35-year-old decision that required mutuality of estoppel in patent cases. 402 U.S. 313, 349-350 (1971) (overruling *Triplett* v. *Lowell*, 297 U.S. 638 (1936)). It did so despite codification of the Patent Act in its current form between *Triplett* and *Blonder-Tongue*, and despite the failure of legislation that would have overruled *Triplett*. *Id.* at 327 n.17.
- **Tax law.** "[W]ant of specific Congressional repudiations of the *St. Louis Trust* cases [does not] serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with [an intervening] case, make for dissonance of doctrine." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940).
- **Immigration law.** The Court should not "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U.S. 61, 70 (1946) (overruling Naturalization Act precedent).

The Fund observes that the Court's greater readiness to revisit its antitrust precedents is not perfectly analogous to securities law. Fund Br. 18-19 (citing *Stoneridge*, 552 U.S. at 163). *Stoneridge* rightly distinguished securities law from antitrust law because judicial elaboration is constrained in the 10b-5 context *where Congress has expressly resolved the question at issue.* 552 U.S. at 163. Unsurprisingly, nothing in *Stoneridge* or elsewhere suggests that, if Congress remains silent on a 10b-5 question previously addressed by this Court, later Courts are powerless to reverse course.

3. Contrary to the Fund's argument, *Basic*'s judicially inspired litigation presumption does not implicate reli-

ance interests that traditionally animate *stare decisis*. It neither "serve[s] as a guide to lawful behavior," *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995), nor alters anyone's rights or duties, see *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991). If *Basic* is overruled, fraudulent statements remain just as illegal under Section 10(b).[1]

The Fund states that investors have relied on the deterrent effect of private securities actions. Fund Br. 25. That effect is questionable at best. See Pet. Br. 43-44; Chamber of Commerce Br. 24-26; Comm. on Capital Mkts. Reg. Br. 14-17. Moreover, any conceivable deterrence wrought by private actions predated *Basic*. See, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964) (calling private actions an "effective weapon in the enforcement" of securities laws). Nor does that effect depend on *Basic*'s continued validity, because speakers remain civilly liable to anyone who relies on their misstatements and remain subject to governmental enforcement without any reliance showing at all.

Congress has no separate "reliance" interest in retaining *Basic* because it has not legislated with "specific reference to" *Basic*. Cf. *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (Congress "indicated without ambiguity" its reliance on specific cases in enacting the McCarran-Ferguson Act). Cf. *infra* Part I.B

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[1] The Fund often repeats *Amgen*'s *dictum* that *Basic* created a "substantive doctrine of federal securities-fraud law that can be invoked by any Rule 10b-5 plaintiff," *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). Whatever the "substantive" overtones, the doctrine is fundamentally "procedural" for *stare decisis* purposes. *Basic*'s presumption—like purely procedural rules—applies only in court. It neither prohibits nor permits primary conduct, while most statutory precedents delimit lawful behavior. *Basic*'s presumption simply "facilitat[es] Rule 10b-5 litigation" by reducing plaintiffs' burden to prove reliance. 485 U.S. at 245.

(noting that the PSLRA does not depend on *Basic*'s presumption and is wholly silent about reliance).

The SEC likewise has no cognizable reliance interest in retaining *Basic*. The Fund and various *amici* raise the concern that overruling *Basic* would somehow affect the validity of SEC regulations or enforcement actions predicated on the notion that new, material information usually affects markets.[2] That is a *non sequitur*; the SEC need not establish reliance in its enforcement actions, and whatever its regulations and actions assume about the behavior of capital markets, they in no way involve reliance in private 10b-5 actions.

In the end, the only parties that "rely" on *Basic* are those within the class-action industry, especially lawyers. That is not the sort of reliance that *stare decisis* protects.

4. The Fund and various *amici* ask the Court to adopt an insular, one-way "ratchet" approach to *stare decisis*, under which any majority could fashion its own rules, even those that may be patently erroneous, and force all future courts to accept them on the theory that Congress could sweep up the mess if it chose. See, *e.g.*, *Stare Decisis* Scholars Br. 5 ("judicial interpretation * * * does operate on a ratchet"). Perhaps the *Basic* Court should not have decided *Basic* as it did, *amici* acknowledge; but it did, so the Court must forever leave *Basic* undisturbed, heedless of errors, costs, or consequences. *Id.* at 16-17. That is a dangerous distortion of *stare decisis* that takes direct aim at the separation of powers.

Strikingly, all parties appear to agree that the substantive question of reliance is one that Congress best

[2] See, *e.g.*, Fund Br. 27-29; Former SEC Chairmen Br. 11-22; *Stare Decisis* Scholars Br. 18-19.

can decide. See, *e.g.*, *id*. at 14-15. That is precisely Halliburton's point. Congress requires actual reliance in the most analogous aftermarket-trading context. See *infra* Part I.C. Overruling *Basic* would not limit Congress, but would squarely remove the question from the realm of judicial tinkering and allow Congress to make further policy refinements if it wishes.

B. The Fund mistakenly treats congressional silence as an endorsement of the Fund's views

The Fund characterizes the PSLRA as evidence that Congress has ratified wide-ranging class actions that depend on *Basic*. Fund Br. 13-17. But nothing in the PSLRA references or depends upon *Basic*'s conception of reliance. The PSLRA applies to individual suits, class actions alleging non-10b-5 violations (such as under Sections 9, 14, or 18 of the Exchange Act), and 10b-5 class actions where all members can otherwise establish common reliance. No party has identified any PSLRA provision that would be inoperable without *Basic*.

The Fund points to failed legislative proposals that would have overturned *Basic*. Fund Br. 13; U.S. Br. 22. But it neglects to acknowledge that legislative proposals *embracing* the *Basic* presumption equally failed in both Houses. See Br. for Members of Congress Supporting Neither Party 7-8, 10, 11-14, 17-18. Together they signify nothing. Congress as a body took no position on *Basic*'s continued viability. See *id.* at 7-9, 17-18. The Fund and its *amici* undertake to write on this decidedly clean slate by selectively citing legislative history that supports their view.

Moreover, the vast majority of the Fund's congressional *amici* voted *against* the PSLRA.[3] It is never helpful to misconstrue a major bipartisan piece of legislation by turning to those who refused to participate in the compromise. Nor do the Fund's congressional *amici* better their position by incorrectly asserting that "when Congress takes action in [an area where the law is settled] but does not overturn that settled legal position, it is deliberately preserving that position." Br. 2. That assertion flatly conflates inaction and acquiescence—two concepts that this Court has been careful to distinguish.[4] Confusing the two is particularly improper here, because Congress *codified* judicially-defined elements it wished to endorse in the PSLRA, but not *Basic*'s presumption of reliance. See, *e.g.*, *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005) (recognizing PSLRA's codification of judicially generated loss-causation element).

C. The Fund wrongly asserts that Section 9 best informs the 10b-5 reliance element

The Fund and various *amici* defend *Basic*'s lax approach to reliance by asserting that Section 9(a), which does not require reliance at all, and not Section 18(a), is the 10b-5 action's closest analogue. For multiple reasons, this argument must fail.

1. *Basic* itself defeats the Fund's contention. The majority expressly noted the argument that "the analo-

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[3] See https://www.govtrack.us/congress/votes/104-1995/h216 (House vote); https://www.govtrack.us/congress/votes/104-1995/s295 (Senate vote).

[4] Various briefs cite *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), and *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), but those cases involved extraordinary and undisputable evidence that Congress had considered and embraced the *status quo*. See Br. for Members of Congress Supporting Neither Party 20. No such evidence exists here.

gous express right of action includes a reliance requirement, see, *e.g.*, § 18(a) of the 1934 Act." 485 U.S. at 243. It effectively adopted that argument by immediately "*agree[ing]* that reliance is an element of a Rule 10b-5 cause of action." *Ibid.* (emphasis added). But the majority then fatefully departed from Section 18(a)'s text when deciding what *type* of reliance was required. Ignoring the text's actual-reliance requirement, see 15 U.S.C. § 78r(a), the majority created the presumption of reliance based on its view of sound policy—exactly the methodology that this Court has rejected. See Pet. Br. 29.

Basic presumably regarded Section 9 as irrelevant because it lacks a reliance element. See 15 U.S.C. § 78i(f). If it were the proper analogue, then *Basic* could have avoided the need for a presumption of reliance altogether, and the opinion's logic would have been entirely different. But *no* Justice from *Basic* onward has challenged reliance as an element of 10b-5 claims. And outside of *Basic*'s enclave, reliance in this Court's 10b-5 cases increasingly follows the traditional understanding of *actual* reliance.[5] Section 9(a) thus has no relevance to reliance in 10b-5 cases, and the Fund's contrary assertion defends *Basic* on a ground that *Basic* itself rejected.[6] Cf. *Citi-*

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[5] For instance, because the plaintiff "did not *in fact* rely upon [defendants'] own deceptive conduct," *Stoneridge* rejected 10b-5 actions against customers and suppliers who allegedly enabled an issuer to make fraudulent financial statements. 552 U.S. at 160 (emphasis added). The dissent asserted that insistence on Section 18(a)-like actual reliance was "contrary to * * * our holding in *Basic*," *id.* at 168 (Stevens, J., dissenting); see *id.* at 170-171.

[6] Section 9 may be relevant to *other* aspects of 10b-5 litigation, but despite the Fund's strenuous arguments, Fund Br. 31-32, *Lampf*—a statute-of-limitations case—did not endorse Section 9 as the universal analogue for all 10b-5 issues. Both Sections 9 and 18 had the same limitations periods, so the Court was not choosing between

zens United v. *FEC*, 558 U.S. 310, 363 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.").

2. Even if the most analogous provision were an open question, the Fund does not dispute that Section 18(a) is more like 10b-5 claims in this crucial respect: Unlike Section 9(a), Section 18(a) permits *aftermarket* purchasers to sue issuers and their officers for damages caused by material misstatements. In exchange for not requiring reliance for Section 9(a) claims, Congress severely limited Section 9(a) by imposing a privity requirement for misstatement-based claims.[7] See 15 U.S.C. § 78i(a)(4); see U.S. Br. 16 n.3 (conceding that only buyers or sellers can be liable for misstatements under Section 9(a)(4)). The vast bulk of 10b-5 claims, including the Fund's, could not be brought under Section 9(a), because most 10b-5 suits involve aftermarket claims where the plaintiff did not buy from or sell to the company or officer making the misstatement.

By contrast, when Congress wanted to permit private

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them. It had to select *either* the one-and-three-year periods in those (and other) original 1934 Act sections *or* the five-year period in a newer section. Footnote 9, upon which the Fund relies, noted slight differences "in terminology"—limitations were triggered in Section 9 by a "violation," and in Section 18 by "accrual." In *dicta*, the Court concluded that "[t]o the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e)," 501 U.S. at 364 n.9. The Court did not base this unexplained selection on a determination that Section 9 is inherently more analogous than Section 18. Much less did the Court foreclose using Section 18 in cases like this one, where it is decidedly more analogous in every relevant respect.

[7] The remainder of Section 9(a) contains no privity limitation, but it is limited to specified forms of manipulation, not misrepresentations.

aftermarket liability in Section 18(a), it *expressly included actual reliance*. See Former SEC Commissioners Supporting Petitioner Br. 20-22 (noting that draft bill omitting an actual-reliance requirement was universally deemed inadequate). Put another way, the Fund *could not* have sued Halliburton under Section 9(a) for any alleged misrepresentation, but it *could* have brought a Section 18(a) suit. The Fund may dislike an actual-reliance requirement for aftermarket claims, but that principle comes directly from Congress.[8]

3. Various *amici* supporting the Fund resist the relevance of Section 18(a) by observing that it is considerably narrower than Section 10(b); the former requires that actionable statements be in SEC filings, while the latter is a "catch-all." But it hardly follows, as they contend, that the *broader* 10b-5 action should have a *looser* reliance requirement. See, *e.g.*, Securities Law Scholars Br. 28-30.

Neither the Fund nor any *amicus* adequately explains why a demanding actual-reliance requirement makes sense for liability associated with statements in SEC filings (Section 18(a)), while liability for other misrepresentations can be based on a loose presumption of reliance

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[8] The Fund relies heavily on *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972). But that case does not help the Fund and need not be affected by *Basic*'s overruling. *Affiliated Ute*, wholly unlike this case, granted a presumption of reliance on material *omissions* in a non-class action involving *both* privity *and* a duty to disclose. See *id.* at 144-145, 151-154. Its presumption rests not on the fraud-on-the-market theory, but on the view that, "*[u]nder the circumstances of this case*," the party bearing the duty to disclose must disprove reliance. *Id.* at 153-154 (emphasis added). After all, "it is fair to force one who breached his duty to prove that the plaintiff did not so rely." *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 385 (5th Cir. 2007).

(Section 10(b)). Representations in SEC filings are the very sort of public statement that, the Fund argues, ordinary investors need not personally read because such public information is quickly incorporated into share prices. See, *e.g.*, Fund Br. 19-23; U.S. Br. 14-21 (arguing that Congress believed that information would affect the price). Yet, on the Fund's reasoning, Congress required actual reliance where one would *least* expect it.

4. The Fund and the Government each seek an escape hatch from the foregoing analysis. The Fund contends that, because of the PSLRA, the historical-reconstruction approach of turning to the most analogous express cause of action is obsolete. Fund Br. 30. Post-PSLRA cases like *Stoneridge* and *Morrison* v. *National Australia Bank Ltd.*, it observes, did not employ it. *Ibid.* But that was because the technique was wholly unnecessary to resolve the questions presented. In *Stoneridge*, statutory text authorized an aiding-and-abetting cause of action, but *only* for the SEC. 552 U.S. at 158. And in *Morrison*, no statutory text rebutted the presumption against extraterritoriality. 130 S. Ct. 2869, 2881 (2010). By contrast, there is *no textual basis* in Section 10(b) or the PSLRA for deriving any congressional view of reliance in 10b-5 claims. Far from heralding the historical-reconstruction approach's obsolescence, *Morrison* affirms that it remains binding when the text does not resolve a question. *Id.* at 2881 n.5.

The Government likewise seeks to evade traditional analysis by imputing the theories animating *Basic* to the 1934 Congress. It supports this historical revisionism with citations to various pre-1934 cases, see U.S. Br. 17-18; Fund Br. 22, none of which remotely supports the proposition that Congress contemplated wide-ranging private actions based on a fraud-on-the-market theory of reliance. Some were *prosecutions* not requiring proof of reliance; one case denied recovery to a stock-tip-newsletter under an illegal contract to influence his subscribers with biased information. The rest were civil actions in which private plaintiffs *actually relied* on schemes to defraud the public. None of those cases suggests that Congress intended to allow presumed reliance when it enacted analogous provisions of the 1934 Act (much less when it enacted Section 10).[9]

D. The Fund fails to respond to *Basic*'s anomalous Rule 23 consequences

The Fund and the Government dismiss the serious tension between *Basic* and this Court's Rule 23 jurisprudence. Securities class actions are an important supplement to public enforcement, they say, and overruling *Basic* would often "preclude certification," leaving many "defrauded investors" without private "legal recourse." Fund Br. 24; see U.S. Br. 28.

But those are just the arguments this Court found unpersuasive when the Government pressed them in its *amicus* brief (*e.g.,* at 1, 33) in *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Here, neither the Fund nor the Government—nor *any* of its *amici*—cite, let alone distinguish, *American Express*, a case which Halliburton had emphasized. See Pet. Br. 48. The alleged importance of private enforcement and infeasibility of individual claims do not justify bending the

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[9] The Government also asserts that, if traditional reliance were restored, then investors who "purchase stock based on" a broker's recommendation "would be left without a remedy" even if the broker "was misled by the company's misrepresentations * * * ." U.S. Br. 13 n.2. But even without *Basic*, investors *could* still sue a company if their brokers were their agents and relied on a misrepresentation because, "[u]nder well-settled principles of agency law, one who defrauds an agent is liable to the principal." *In re Fine Host Corp. Sec. Litig.*, 25 F. Supp. 2d 61, 71 (D. Conn. 1998) (citing Restatement (Second) of Agency § 315 (1958)).

law to allow class actions. *Am. Express*, 133 S. Ct at 2309, 2311.

The Fund's cursory discussion of *Wal-Mart* and *Comcast* (Br. 41-43) elides the inherent conflict between Rule 23 and fraud actions where individualized reliance questions necessarily predominate. The drafters of modern Rule 23 recognized that tension, emphasizing that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." Advisory Comm. Note on Fed. R. Civ. P. 23(b)(3) (1966 amends.), 39 F.R.D. 69, 103 (1966).

A group of civil-procedure scholars supporting the Fund acknowledge that Note, but assure the Court that "this was understood to mean that common issues might not predominate where the defendant's oral communications varied significantly from one class member to the next." Br. 14 n.12. That might explain the *first* part of the Advisory Committee's explanation ("material variation in the representations made"), but it does not address the *second* part ("material variation * * * in the kinds or degrees of reliance" by plaintiffs). By presuming away that latter "variation," *Basic* engendered serious tension with Rule 23.

E. The Fund's faulty economic analysis cannot preserve *Basic*

The Fund and its *amici* expend considerable energy throughout their briefs defending a straw man that Halliburton never attacked—that market prices generally respond to new, material information. Likewise, despite their substantial effort defending "event studies," Halliburton has never contested that event studies are valuable in establishing elements of securities fraud. Indeed, event studies are central to why price impact can (and, if

Basic survives, should) be considered at certification, rather than relying on the imperfect proxy of market efficiency. See *infra* Part II.

Halliburton makes two primary economic contentions that justify overruling *Basic* as a legal matter. First, because markets do not consistently and efficiently respond to new information, a judicially crafted "rebuttable presumption" that is virtually irrebuttable in practice (especially at the class-certification stage) is inappropriate. See, *e.g.*, Former SEC Commissioners Supporting Petitioners Br. 22-26. Second, market realities now show that investors do not simply invest "in reliance on the integrity of [the market] price," *Basic*, 485 U.S. at 247, making the presumption of common reliance wholly fictional. Halliburton demonstrated that price integrity (much less information conveyed by price) often is marginal or irrelevant to investors' trading decisions; indeed, some investors are indifferent to prices or their fluctuations because their investment strategies do not depend on those features. See Pet. Br. 15-20. The Fund makes no effort to dispute this point. Logically, investors with such substantially varying motivations cannot be *presumed* to have *common reliance* guiding their every transaction.

The Fund and the Government seek to distract the Court from this fundamental truism (which neither actually denies). The Fund portrays a market at odds with reality, depicting most investors as *Basic* apparently envisioned them—a Norman Rockwell image of newspaper stock-quote pages spread across the kitchen table. Such investors no doubt exist, although likely far fewer today. Certainly, they do not come close to comprising the entire market, and indeed they are net *losers* in the *Basic*-generated litigation bonanza. Pet. Br. 41-43; Chamber of Commerce Br. 24-28. The Fund is long on rhetoric about protecting such long-term small investors, but short on showing that they and all others in a class rely in common on price integrity.

The Government asserts that because new information generally affects prices, and because investors "reasonably may rely on the integrity of the market prices," U.S. Br. 9 (comma omitted), then the courts should *treat* all of them as so relying, *id.* at 9-10. And it says that *Basic*'s factual economic premises were actually "*conclusions of law* to which the current economic debate regarding the efficient-market hypothesis is altogether irrelevant." *Id.* at 26. This merely restates (without attribution) Professor Langevoort's theory of "juristic grace," a *post hoc* rationalization of *Basic*. See Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 161, 198. Although counterfactual, it would, on policy grounds, treat all transactions *as if* they relied on market-price integrity. "The most straight-forward way of articulating this" approach, Professor Langevoort explains, "is to jettison reliance entirely"—which is what the Fund and the Government, though less candidly, would do.[10] If we presume common reliance as a matter of law when we know investors do *not* rely even on price integrity (much less misrepresentations) as a matter of fact, then there is indeed no point in having a reliance element.

In any event, *even if* well-developed markets efficiently incorporated material information to the degree presumed by *Basic*, and *even if* investors actually purchased in reliance on market-price integrity, *Basic* would still represent an unjustified departure from the 1934 Act's

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[10] Langevoort, Judgment Day for Fraud-on-the-Market?: Reflections on *Amgen* and the Second Coming of *Halliburton*, Georgetown Public Law and Legal Theory Research Paper No. 13-058, at 15 (Nov. 16, 2013).

text. That the central economic premises of *Basic*'s reasoning are now hotly disputed only confirms the wisdom of Justice White's warning against elevating a "mere babe" of economic theory into law. 485 U.S. at 250.

II. THE FUND CANNOT SHOW WHY PLAINTIFFS SHOULD BE EXEMPT FROM ESTABLISHING PRICE IMPACT

The "fundamental premise" of *Basic*'s presumption remains "that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added). Neither the Fund nor the Government cites or acknowledges that principle, and neither shows why, even if the Court declines to require actual reliance, it should not at least require plaintiffs to establish price impact to invoke the presumption.

1. The Fund accepts its certification-stage burden to prove market efficiency. But generalized efficiency is at best an imperfect proxy for an alleged misrepresentation's price impact. Indeed, in defending *Basic*'s "modest" economic underpinnings, the Fund and the Government repeatedly emphasize that efficient-market theory means only that misrepresentations *typically* affect prices. *E.g.*, Fund Br. 8, 9, 25; U.S. Br. 6, 8-9, 33-34. Likewise, the binary market-efficiency test is often satisfied even when it is doubtful that misrepresentations distorted the market price; rigorous efficiency analysis is commonly skipped altogether for widely-traded companies. *E.g.*, *In re Nature's Sunshine Prods. Inc. Sec. Litig.*, 251 F.R.D. 656, 664 (D. Utah 2008) (finding efficiency where prices reacted to unexpected news less than 25% of the time); Chamber of Commerce Br. 19. Price impact is far more precise and relevant to certification than its flawed proxy, generic market efficiency.

Ironically, the Fund and its *amici* laud event studies for their ability to establish a given market's efficiency.

They do not contest that the same event studies can be used to establish the narrower and more salient question of whether alleged misrepresentations—as opposed to other information—distorted the market price. Br. for Law Professors Supporting Petitioners 24-32 (explaining how event studies make this pinpoint determination more easily than overall-market determinations). Indeed, the Fund itself used the *same* event study to establish market efficiency *and* to support its claim that Halliburton's stock price dropped in response to corrective disclosures. See J.A. 579-580.

2. Neither Rule 23 nor *Amgen* constrain this Court from modifying its own precedent to clarify plaintiffs' burden to prove price impact. Cf. U.S. Br. 27-28. *Basic* openly recognized that a straightforward application of Rule 23 to securities-fraud lawsuits would mean that individual questions predominate. 485 U.S. at 242. But "[t]he Court in *Basic* sought to alleviate [that] concer[n] by permitting plaintiffs to invoke a rebuttable presumption of reliance."[11] *EPJ Fund*, 131 S. Ct. at 2185. Without overruling *Basic*, the Court can recalibrate the balance between Section 10(b) and Rule 23 to "alleviate * * * concerns" that the presumption is being applied to certify classes where its "fundamental premise" is lacking.

Moreover, this Court's non-securities Rule 23 caselaw now demands that plaintiffs bear the burden of establishing the "glue" binding class claims together. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 (2011). Under *Basic*, the glue for common reliance is price impact. Thus, plaintiffs should be required to "prove * * * *in fact*" that alleged misrepresentations distorted the market price, *id.* at 2551, rather than relying upon market effi-

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[11] The Government thus incorrectly suggests (Br. 10-11 n.1) that easing class certification did not motivate the *Basic* majority.

ciency—the very sort of imperfect proxy and flawed classwide methodology this Court rejected in *Wal-Mart* and *Comcast.* Pet. Br. 26-27.

3. It is fundamentally anomalous to presume that the putative class relied in common on Halliburton's alleged misrepresentations when both lower courts found no evidence that those statements distorted the market price. Considering price impact as one non-determinative factor in a binary market-efficiency test (Fund Br. 53; U.S. Br. 26)[12] is as backwards as treating a census as a non-determinative factor to assess a statistical sample. Efficiency at most shows whether price impact is likely, but price impact itself is what matters. See Br. for Law Professors Supporting Petitioners 6-9. Indeed, *Amgen* explained that market efficiency is a predicate of price impact, not vice versa. 133 S. Ct. at 1199 (explaining that without efficiency "there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price"). Thus, the focus (and the plaintiff's burden) should be on whether common questions of reliance actually exist—whether the misrepresentations distorted the market price—not on irrelevant evaluation of whether the market is *generically* efficient in processing information.

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[12] The Fund mistakenly claims that the widespread *Cammer* test is not "binary" because one factor considers whether stock prices react to unexpected news, and it faults Halliburton for not pressing such a challenge below. But that is just one of five factors that courts consider in declaring a market binarily efficient or not efficient. *E.g.*, *Smilovitz* v. *First Solar, Inc.*, __ F.R.D. __, No. CV12-00555-PHX-DGC, 2013 WL 5551096, at *13 (D. Ariz. Oct. 8, 2013) (finding efficiency under other factors despite evidence of inefficiency on cause-and-effect factor).

III. THE FUND'S ARGUMENTS AGAINST PRICE-IMPACT REBUTTAL CONTRAVENE *BASIC*'S OWN GUARANTEE

1. The Fund and the Government acknowledge that market efficiency and publicity are fit subjects for class-certification inquiries. Their argument that certification-stage price-impact consideration is *not* appropriate, however, is that it "can be proved through evidence common to the class." U.S. Br. 31, 33 (quoting *Amgen*, 133 S. Ct. at 1195). But efficiency and publicity are also "classwide" questions that must be addressed at certification. *Amgen*, 133 S. Ct. at 1199.

The Fund and the Government next assert that the absence of price impact makes it impossible for any individual class member to prove loss causation in a fraud-on-the-market case. But they never answer Halliburton's showing (Pet. Br. 51-53) that this rationale would equally prohibit certification-stage consideration of market efficiency and publicity. Without them, no plaintiff can prove loss causation in a fraud-on-the-market case because there would be no basis to believe that the misrepresentation affected the market price. Neither the Fund nor the Government identifies any scenario in which a class failing to prove price impact is differently situated vis-à-vis loss causation than a class that cannot prove market efficiency or publicity.[13] That should end the matter.

[13] The Fund argues that efficiency and publicity "are entirely collateral to the merits," while "price impact goes to the heart of a Rule 10b-5 claim." Fund Br. 52. Not so: Market efficiency is "[p]erhaps the most common example of considering a merits question at the Rule 23 stage." *Wal-Mart*, 131 S. Ct. at 2552 n.6. After proving it then, plaintiffs "will surely have to prove [it] again at trial in order to make our their case on the merits." *Ibid.*

2. Moreover, the Fund and the Government are wrong that the absence of price impact necessarily prevents all class members from showing loss causation. The Government correctly notes that "the relevant 'price' for this purpose is the *market* price of a publicly-traded security." U.S. Br. 31. Halliburton identified three published appellate opinions in which individual plaintiffs prevailed on loss causation *without* showing that the "market price" was affected because they purchased in off-exchange transactions and thus were not bound to prove loss by reference to the market price.[14] Pet. Br. 52. The Government dismisses cases involving "non-market (rather than open-market) transactions, where the fraud-on-the-market presumption does not apply." U.S. Br. 32 n.8. But that misses the point, as *Amgen* asks precisely whether individual plaintiffs could prevail *even though* they "cannot invoke the fraud-on-the-market presumption." 133 S. Ct. at 1199.

Nor is the Government correct (Br. 32) that non-exchange transactions in publicly listed stocks are "far more imaginative than real." *Amgen*, 133 S. Ct. at 1197. Fully *40%* of stock transactions now take place in "private trading venues, mostly operated by big banks," rather than NYSE or NASDAQ. See Editorial, Trading in the Dark, N.Y. Times, SR10 (April 7, 2013).[15] These private transactions often occur at non-exchange prices. *Ibid.* Thus, even if defendants showed that misrepresen-

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[14] Statements by Halliburton and this Court that loss causation means "price impact *plus* a subsequent loss caused by the fraud" (see Fund Br. 50) are accurate in the fraud-on-the-market context in which they were made. They are not applicable in non-fraud-on-the-market cases, as explained above.

[15] http://www.nytimes.com/2013/04/07/opinion/sunday/trading-in-the-dark.html?_r=0.

tations did not distort the NYSE price of Halliburton's stock, thereby defeating the presumption of reliance, a class member who purchased in a non-exchange transaction could still prove actual reliance, as well as loss causation by reference to the non-exchange price *at which he purchased*.

It matters not that this scenario is allegedly "atypical." Fund Br. 51. *Amgen* refused consideration of materiality at certification because the absence of that "indispensable elemen[t]" doomed "all" individual claims "as a matter of law." 133 S. Ct. at 1199. By contrast, because price impact is not a 10b-5 element, the real possibility that non-exchange purchasers have viable claims causes individualized questions of reliance to predominate.

3. Despite the concession that price-impact evidence *is* relevant to efficiency, see *supra* p. 18, the Government contends that price-impact rebuttal should not be considered because in an "efficient market" the lack of price impact could mean that the misstatement was not material, and materiality need not be proved at certification. U.S. Br. 32; Fund Br. 52. This again confuses cause and effect. No matter what *caused* price impact to be absent—whether lack of materiality, efficiency, publicity, or something else (see Pet. Br. 20-22 for examples)—price impact remains the "fundamental premise" justifying class certification.

Neither *Amgen* nor *Basic* reserves price-impact rebuttal for summary judgment or trial. See Fund Br. 53. *Amgen* repeatedly emphasized that its reference to later-stage proof applied only to rebuttal of "materiality," which was barred at certification for the same reason that plaintiffs need not establish materiality to begin with. 133 S. Ct. at 1203-1204. Tellingly, the Fund cites no case in which a rebuttable presumption could be invoked at one stage of litigation, but could not be rebutted until a later stage.

4. The Fund proffers several meritless arguments not joined by the Government.

Loss Causation: The Fund mistakenly asserts (Br. 52) that "requiring plaintiffs to establish price impact at the time of the corrective disclosure, which necessarily establishes loss causation, is directly contrary to *Halliburton*'s holding that plaintiffs do not have to establish loss causation at class certification." But price impact only requires distortion at the time of the misrepresentation. *EPJ Fund*, 131 S. Ct. at 2186-2187. That a plaintiff may seek to reverse-engineer that showing by asserting price declines following corrective disclosures does not convert *Basic*'s "fundamental premise" of price impact into the "distinct concept" of loss causation. *Ibid.*

Discovery: The fact that discovery and expert testimony may be necessary to establish price impact is irrelevant to whether it should be considered at class certification. See Advisory Comm. Notes on Fed. R. Civ. P. 23 (2003 amends.), 28 U.S.C. App., p. 144 (2006 ed.) ("it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis"). Indeed, *Comcast* and *Wal-Mart* teach that such measures are frequently necessary for a plaintiff to satisfy Rule 23. And courts within the Second Circuit have been deciding price impact at class certification for five years, often by relying on event studies, without noted difficulty. See Chamber of Commerce Br. Supporting Cert. 23.

Summary Judgment: Moving for summary judgment on price impact *before* class certification is not a realistic option, and the Fund cites no securities case where this was done. As a practical matter, such an early summary-judgment disposition would bind only named plaintiffs, with no preclusive effect against putative class members. Rubenstein, Newberg on Class Actions 7:10 (5th ed. 2013). And price impact is relevant to Rule 23's predominance requirement and thus must be proved at the class-certification stage by a preponderance of the evidence; it need not be confined to summary judgment.

Rule 301: Halliburton does not bear the burden of persuasion to rebut the reliance presumption because Rule 301, which *Basic* cited, governs all presumptions "unless a federal statute * * * provide[s] otherwise." The 1934 Act, which lacks a private action, hardly "provide[s] otherwise." Lower courts' application of *Affiliated Ute* does not aid the Fund. *Affiliated Ute* was decided before Rule 301's adoption, as the Fund observes, and this Court first referred to *Affiliated Ute* as providing a "presumption of reliance" in *Stoneridge*, 552 U.S. at 159. Thus, there may be good reason to treat *Affiliated Ute*'s rebuttal burden differently than *Basic*'s. See also *supra* n.8.

Respectfully submitted.

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