Back to Basics in Securities Fraud Class Actions: The Case for Rewinding the *Basic* Presumption

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ABSTRACT

This article demonstrates the current predicament in which federal courts find themselves mired when addressing securities fraud class actions. The confluence of Federal Rule of Civil Procedure 23, Rules 10(b) of the Securities and Exchange Act, and the Supreme Court's Basic presumption and subsequent jurisprudence has created an unworkable quagmire. While class actions are conceptualized by FRCP 23 (and virtually all interpretations thereof) to demand a procedural certification stage before a substantive merits stage, current precedent in this area effectively permits defendants to challenge class certification on substantive grounds.

This generates two negative consequences. First, both parties are denied potentially merited binding determinations. These actions instead can linger, limping along for upwards of fifteen years. Second, and more crucially, access to the courts is fundamentally restricted for plaintiffs with colorable claims. These results are harmful to both parties, wasteful of judicial resources, and anathema to any notion of judicial fair play.

The article examines a minimalist but effective solution which might be acceptable to the current Court, a Court which can be fairly described as hostile to the class action device.

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INTRODUCTION

The Honorable Paul A. Crotty received his commission to a seat on the United States District Court for the Southern District of New York on April 15, 2005.[1] Within his first two years on the bench, investors claimed that several statements Goldman Sachs made (or failed to make) constituted securities fraud violations[2] under § 10(b) of the Securities Exchange Act of 1934[3] and the Securities and Exchange Commission's Rule 10b-5.[4] These disputes found their way into Judge Crotty's courtroom seeking resolution via class action, and, a decade later, class certification has yet to be resolved.[5] The dispute has transformed into a "saga" that has seen Judge Crotty certify the same class three times, "prompt[ing] three decisions from the Second Circuit, one from the Supreme Court, and untold pages of cumulative briefing."[6] Judge Crotty assumed senior status nearly seven years ago,[7] yet the dispute still remains mired in the morass of class certification. In this time, the *Goldman* carousel has not progressed through novel challenges of cutting-edge law; rather, it has continuously spun on its axis, endlessly poking at procedural perimeters to find acceptable ways to challenge materiality at certification. And apparently, this case is working as the Supreme Court intended.[8]

Defendant Goldman Sachs faced allegations of violating securities laws by issuing misrepresentations it characterized as *generic*. According to Goldman, these were statements which no reasonable investor would likely use to impact trading decisions.

Assuming the truth of Goldman's argument, this assertion would secure a binding victory at summary judgment, as materiality is an element of § 10(b) and

1. *Crotty, Paul Austin*, FED. JUD. CTR., https://web.archive.org/web/20170729021849/https://www.fjc.gov/history/judges/crotty-paul-austin (last visited May 15, 2022).

2. Richman v. Goldman Sachs Grp., Inc., 868 F. Supp. 2d 261, 269–72 (S.D.N.Y. 2012).

3. 15 U.S.C. § 78j(b).

4. 17 C.F.R. § 240.10b-5 (2020).

5. The third (and most recent) certification granted to this class by the district court is currently being appealed to the Second Circuit.

6. *In re* Goldman Sachs Grp., Inc. Sec. Litig., 579 F. Supp. 3d 520, 522 (S.D.N.Y. 2021).

7. FEDERAL JUDICIAL CENTER, *supra* note 1.

8. The gist of the *Goldman* appeals saga, detailed below, is that the defendant repeatedly attempted to defeat certification of the plaintiff class by demonstrating that, due to the immaterial nature of the defendant's alleged misrepresentations (a forbidden topic at certification), there was no demonstrable price impact tying the defendant's actions to the plaintiffs' losses (a permissible topic at certification). The Supreme Court acknowledged that these types of assertions by defendants are a foregone conclusion of the jurisprudence:

> We recognize that materiality and price impact are overlapping concepts and that the evidence relevant to one will almost always be relevant to the other. But "a district court may not use the overlap to refuse to consider the evidence." Instead, the district court must use the evidence to decide the price impact issue "while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits, including materiality."

Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 1961 n.2 (2021) (citations omitted) (quoting *In re* Allstate Corp. Sec. Litig., 966 F.3d 595, 608–09 (7th Cir. 2020)).

Rule 10b-5 securities fraud claims. Instead, Goldman insisted on deploying its arguments at class certification to defeat the *Basic* presumption.[9] Such victory at certification would be suspect on two grounds. First, the uncertified class would not be bound by any ruling, leaving members free to refile with different named plaintiffs and different legal theories. Second, as happened in *Goldman*, certification decisions based on materiality virtually beg for appellate review.

Rather than see the court grant certification and then potentially dispose of the case for lack of materiality, the *Goldman* defendants entered the certification-appeals materiality carrousel. At their first certification challenge, the defendant attempted to rebut the *Basic* presumption by showing that historical "lack of investor reaction . . . demonstrate[d] that the market placed no detectable value" on the alleged type of misrepresentations made – a claim prohibited at certification as it "speaks to the statements' materiality."[10] After appealing certification and winning a second chance, the defendant continued to "hint at previously rejected arguments: that the alleged misstatements are not actionable," failing again.[11] Goldman continued this approach on its second appeal to the Second Circuit, asking "not . . . for a materiality test," but rather a "'special circumstances' test" which would "requir[e] courts to ask whether the alleged misstatements are, in Goldman's words, 'immaterial as a matter of law.'"[12] The Second Circuit considered this "the precise question posed by materiality."[13]

In addressing the ensuing appeal, the Supreme Court acknowledged that "materiality and price impact are overlapping concepts and that the evidence relevant to one will almost always be relevant to the other."[14] However, the Court advised that this overlap was not grounds for refusal to consider the evidence at certification; rather, the Court advised that "the district court must use the evidence to decide the price impact issue 'while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits, including materiality.'"[15] In doing so, the Court took an eraser to an already nearly invisible line, all the while commenting on its importance.

The true problem of the current regime is not the temptation for district courts to draw inconsistent inferences, though that is assuredly an undesirable outcome; rather, it is the temptation for defendants to find different angles for sneaking

9. The *Basic* presumption, explored in greater detail in Section I.C, enables certification of a putative class by presuming that, in particular circumstances, class members' reliance on the price of a company's stock stands in as reliance on public material information regarding the company itself. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 241–42 (1988).

10. *In re* Goldman Sachs Grp., Inc. Sec. Litig., 2015 WL 5613150, at *6 (S.D.N.Y., Sept. 24, 2015).

11. *In re* Goldman Sachs Grp., Inc. Sec. Litig., 2018 WL 3854757, at *6 (S.D.N.Y. Aug. 14, 2018).

12. Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc., 955 F.3d 254, 267 (2d Cir. 2020).

13. *Id*.

14. *Goldman*, 141 S. Ct. at 1961 n.2.

15. *Id*. (quoting *In re* Allstate Corp. Sec. Litig., 966 F.3d at 609).

materiality into certification. At *Goldman*'s third certification hearing, six years after the first, the defendant "shift[ed] considerable weight" to expert testimony, opining that "investors do not find general and aspirational statements . . . 'to be pertinent to making investment decisions.'"[16] In addition, the defendant again argued that the alleged misstatements were so generic that they "*could not* influence Goldman's stock price,"[17] an argument the Court again rejected as "materiality by another name."[18] Judge Crotty's third certification of the plaintiff class now awaits a fourth appearance before the Second Circuit, an abysmal use of judicial resources.

The *Goldman* odyssey drives home the critical point that, under the current *Basic* presumption regime of rebuttable reliance in securities fraud suits, defendants are helplessly drawn by the sirens' song of challenging materiality at class certification. This is to their detriment. If Goldman's argument is a winning one, it deserves a dispositive and binding judgment on the merits. Instead, Goldman has perpetually harried the district court to accept materiality arguments at certification, an approach that, "if embraced, would necessitate a mini-trial on the issue of materiality at the class-certification stage."[19] Should plaintiffs prevail, the precise same issue would require litigation "all over again at trial;"[20] should defendants win and "certification is denied for failure to prove materiality, nonnamed class members would not be bound by that determination."[21]

Meanwhile, the Supreme Court sits between the Scylla and Charybdis of the monumental waste of judicial resources and detriment to parties' interests, as represented by *Goldman*, and the policy rationale for limiting class actions to particular dispute types.[22] The rebuttable *Basic* presumption, the narrow strait bisecting this divide, has been the intended safe passage through these dangers.

This article submits that the current conception of the *Basic* presumption, though still the essential pathway for effective resolution of securities fraud class action litigation, has become a quagmire in which plaintiffs and defendants alike frequently find themselves entangled. This resulted from of a decade of overcorrections by the Court aimed at streamlining the process, only for the

16. *In re Goldman*, 579 F. Supp. 3d 520, 529. *Cf.* Basic, Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (internal quotations omitted) (adopting legal standard in SEC Rule 10b-5 cases that an omitted fact is "material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

17. *In re Goldman*, 579 F. Supp. 3d at 533 (emphasis added) (internal quotation omitted).

18. *Id.* at 533 n.16 (quoting *Goldman*, 141 S. Ct. at 1964 (Sotomayor, J., concurring in part)).

19. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 477 (2013).

20. *Id.*

21. *Id.*

22. "Ordinarily, such vicarious representation would violate the due process principle that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by service of process. However, the class action serves as an exception to this maxim so long as the procedural rules regulating class actions afford absent class members sufficient protection." 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1:1 (6th ed.) (2022) (internal quotations omitted).

morass to deepen to its current state. Instead of dramatic change, the process requires the measured and minor adjustment of simply removing the defendant's ability to rebut the presumption on materiality grounds. This will preserve the integrity of the presumption by ensuring its availability to those with classes alleging a securities fraud claim. The fact that materiality is still a required element of those claims means there will be no net change to substantive law or correct legal outcomes. Rather, it will merely ease the path to certification while maintaining the current balance to parties' interests.

I. SECURITIES FRAUD, CLASS ACTIONS, AND BASIC

There are three foundational concepts critical to understanding why the current jurisprudence surrounding the *Basic* presumption is so convoluted: (1) the policy behind § 10(b) and Rule 10b-5, which are the twin pillars of the legislative scheme employed to protect shareholders from fraudulent corporate manipulation of the market, (2) how this scheme intersects with F.R.C.P. Rule 23, the procedural requirements governing class action lawsuits, and (3) the mechanics of the *Basic* presumption itself.

A. § 10(b) and Rule 10b-5 Actions

A few years after the stock market crash of 1929, Congress passed the Securities Exchange Act of 1934. A critical purpose of this legislation was "to protect investors against manipulation of stock prices."[23] Essentially, Congress aimed to "implement[] 'a philosophy of full disclosure.'"[24] The courts then actualized that goal by inferring a private cause of action under § 10(b) and Rule 10b-5[25] as "an essential tool for enforcement of the 1934 Act's requirements."[26] Under this cause of action, a plaintiff must prove: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[27] The theory was that private parties would enforce the act's provisions by suing noncompliant defendants for resultant losses.[28]

This was a simple theory and compelling rationale, but reality intervened. Though the policy aims at enforcing a philosophy of full disclosure, actions by

23. *Basic*, 485 U.S. at 230.

24. *Id*. at 230 (quoting Santa Fe Indus. Inc. v. Green, 430 U.S. 462, 477–78).

25. *See* Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 573 U.S. 258, 284 (2014) (Thomas, J., concurring) ("The implied Rule 10b-5 private cause of action is 'a relic of the heady days in which this Court assumed common-law powers to create causes of action.'") (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

26. *Basic*, 485 U.S. at 231.

27. *Amgen*, 568 U.S. at 460–61 (internal quotations omitted) (quoting Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37–38 (2011)).

28. *Basic*, 485 U.S. at 231.

individual traders will likely have minimal impact on corporate decision-making. Rather, the collective force of the class action lawsuit is all but necessary to achieve Congress's goals. And therein lies the rub.

B. The Intersection with F.R.C.P. Rule 23

The framework of a class action lawsuit is both vitally necessary and virtually impossible for achieving the demands of a securities fraud action. Federal Rules of Civil Procedure Rule 23 lays out Congress's requirements for a class action: numerous class members raising some common issue, with class representatives adequately representing common class members and bringing class-typical claims.[29] Additionally, a class seeking damages faces two further requirements. First, when viewing all the benefits and challenges of a class action lawsuit, the court must believe that a class action is the best possible method for legal resolution.[30] Second, and most critical in this context, common questions of law or fact must "predominate over any questions affecting only individual members."[31]

These first five requirements do not typically forestall securities fraud class action suits. Incidents of corporate fraud and market manipulation are likely to affect a wide-ranging group of stock-traders, all of whom bring substantially identical accusations that the same corporate action caused their losses. In many ways, the class action lawsuit is clearly the superior method of resolving such a situation, lest thousands of courts around the country hold virtually identical trials assessing virtually identical fact patterns invoking literally identical laws with the risk of infinitely variable results.

The reliance aspect of the predominance requirement, however, is anathema to a securities fraud action. Direct reliance is, by nature, a personalized inquiry. In an accusation that a misrepresentation or omission led to a wrong investment decision, each individual plaintiff would need "to show a speculative state of facts, *i.e.*, how they would have acted if omitted material information had been disclosed or if the misrepresentation had not been made."[32] Such an individualized reliance requirement does not allow questions common to the class to predominate over individualized questions, as the class action device demands. Thus, the securities fraud action loses its value as an "essential tool for enforcement"[33] if unable to proceed on a class-wide basis.

29. FED. R. CIV. P. 23(a)(1–4).
30. FED. R. CIV. P. 23(b)(3).
31. *Id.*
32. *Basic*, 485 U.S. at 245 (internal citations omitted).
33. *Id.* at 231.

C. The Basic Presumption

In 1989, the Supreme Court resolved this dilemma in *Basic v. Levinson*. The relevant holding was an endorsement of the fraud-on-the-market theory[34] and an accompanying presumption of reliance. The Court viewed this presumption as "consistent with, and . . . support[ing], the congressional policy embodied in the 1934 Act" to better provide justice, rather than merely bending the rules of § 10(b) and Rule 10b-5 to formulate a pragmatic resolution.[35]

The presumption replaces the typical subjective reliance standard with an objective one, thereby circumventing any predominance problems under Rule 23(b)(3). As the Court explained, "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed . . . ."[36]

The mechanics are as follows: if the alleged misrepresentation or omission was (1) public, (2) material, and (3) one which occurred in an efficient market, the investor is presumed to have relied on the market price's integrity, which is equivalent to having relied on the alleged misrepresentation or omission.[37] The presumption circumvents Rule 23(b)(3)'s predominance roadblock by using fully objective inquiries (i.e. market efficiency and statement materiality and publicity) in place of individual and subjective ones.

The Supreme Court, however, protected defendant interests by allowing the presumption to be rebutted by several methods. First, the defendant "may rebut proof of the elements giving rise to the presumption"[38]—effectively, challenges to publicity (rarely at issue), materiality,[39] or market efficiency. Second, the defendant may argue that, presumption aside, in reality plaintiffs didn't rely on the alleged fraud, that they "would have traded despite . . . knowing the statement was false."[40] As these challenges are limited to class representatives, competent attorneys can avoid this rebuttal through capable selection of named plaintiffs. Third, the defendant may point out that the alleged harm was corrected before the plaintiffs suffered their losses. For example, perhaps "news of . . . merger

34. "'The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.'" *Basic*, 485 U.S. at 241–42 (quoting Peil v. Speiser, 806 F.2d 1154, 1160–61 (3d Cir. 1986)).

35. *Id*. at 245.

36. *Id*. at 247.

37. *See id*.

38. *Id*. at 248 (citing Levinson, v. Basic Inc., 786 F.2d 741, 750 n.6 (6th Cir. 1986)).

39. *See* discussion in Part III, *infra*.

40. *Basic*, 485 U.S. at 248.

discussions credibly entered the market and dissipated the effects of the misstatements."[41] Although logical, this is a superfluous checkpoint. Any plaintiffs affected by this rebuttal would have failed the loss causation element on the merits, and they could easily remedy this problem by redefining the class parameters to a tighter time window. Last, and most ambiguous, "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance."[42]

Although the *Basic* Court outlined several avenues to rebuttal, in practice most are easily prevented. Two can be avoided entirely by competent representation in selecting named plaintiffs and delineating the class definition. And publicity is a virtual non-issue, as non-public comments will not logically lead to the large-scale plaintiff base necessary for a class action. Thus, a contested certification in which the plaintiff employs the *Basic* presumption typically boils down to arguments about how the market responds to stimuli (efficiency), whether it responded to particular stimuli (price impact), and whether those stimuli were the sort that would likely affect typical investors (materiality). Critically, the latter two of these—price impact and materiality—are each essential elements of any § 10(b) and Rule 10b-5 action. As a result, those rebuttals invite defendants to challenge the procedural basis for the plaintiffs' action by scrutinizing issues customarily reserved for the merits stage of the dispute.

Such an invitation for merits arguments at a procedural stage benefits immensely from clear limitations and requirements, guidelines which the Court enunciated in *Wal-Mart v. Dukes* and subsequent cases.[43] In *Wal-Mart*, the Court framed certification as a "rigorous analysis" of the plaintiff's "affirmatively demonstrate[d] . . . compliance" with the prerequisites of Rule 23(a).[44] That analysis will often require "some overlap with the merits of the plaintiff's underlying claim,"[45] and in such situations "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[46] This framework also applies to Rule 23(b), including the predominance inquiry which the *Basic* presumption addresses.[47]

Although these restrictions seem at first blush to benefit defendants and streamline judicial resources, attempts to rebut the *Basic* presumption at

41. *Id.* at 249.
42. *Id.* at 248.
43. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). *E.g. Amgen*, 568 U.S. at 466; Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013).
44. *Wal-Mart*, 564 U.S. at 350.
45. *Id.* at 351.
46. *Amgen*, 568 U.S. at 466 (citing *Wal-Mart*, 564 U.S. at 351 n.6).
47. *See Comcast*, 569 U.S. at 34.

certification via price impact and materiality bases manifests a bizarre inversion of both of those interests. A defendant with a losing argument will have wasted scant judicial resources in conducting "a mini-trial . . . at the class-certification stage" over issues that "might have to be shown all over again at trial."[48] And should defendant have succeeded in rebuttal, they will have only earned a watered-down victory, with the same arguments that would have merited a victorious, binding judgment at a later proceeding instead causing a denial of certification. Certainly, such a denial is a clear blow to plaintiffs, but "nonnamed class members would not be bound by that determination," freeing them to regroup and reattempt for as long as the statute of limitations runs.[49]

It was against this backdrop that the Court interpreted and clarified materiality and price impact rebuttals in two subsequent cases: *Amgen v. Connecticut Life Insurance* and *Halliburton v. Erica P. Fund* (*Halliburton II*).

II. MATERIALITY AND PRICE IMPACT

Basic v. Levinson had a second impactful holding, defining materiality in the § 10(b) and 10b-5 context as the "substantial likelihood that a reasonable shareholder would consider [the withheld or misrepresented information] important" in making trading decisions.[50] Relying on this definition, the Court engaged in a deep dive into the interplay of materiality and certification viz a viz the *Basic* presumption in *Amgen*. The Court held that, despite materiality's status as a required element of the presumption, it categorically has no place in the certification proceedings.[51]

The rationale used in *Amgen* demands an extremely strict application of the relevance of a Rule 23 requirement to any investigation of the merits at certification, including the elements of the *Basic* presumption. *Amgen* seems to tacitly hold that, for each element challenged, one must point to the Rule 23 requirement that is *directly* affected by its disproof.[52] Materiality cannot be challenged because, although a failing of materiality within the framework of the *Basic*-presumption-and-rebuttal scheme *should* cause a failure of the only objective path to reliance possible for a securities fraud class, nothing about materiality directly affects the predominance inquiry. As Justice Ginsburg famously noted, due to materiality's objective nature and presence as an element to the cause of action, it is a "fatal similarity" amongst all class members.[53]

48. *See Amgen*, 568 U.S. at 477.

49. *See id.*

50. *Basic*, 485 U.S. at 231 (quoting TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 439 (1976)).

51. *Amgen*, 568 U.S. at 466–68.

52. *See Amgen*, 568 U.S. at 467 n.4 ("[P]roof of materiality is not required prior to class certification because such proof is not necessary to ensure satisfaction of Rule 23(b)(3)'s predominance requirement.").

53. *See id.* at 470 (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 107 (2009)).

The substantial boon that this ruling grants to plaintiffs is counterbalanced by the result that a failure of materiality, while no longer lethal to class certification, will now terminally resolve the litigation in the defendant's favor on the merits. This has the potential to be much more rewarding for defendants, for reasons the opinion makes clear: rather than result in a denial of certification which plaintiffs can repeatedly challenge via new class representatives and novel theories to maintain the presumption,[54] the class is instead bound to certification of a hopeless case, one that will necessarily resolve in the defendant's favor.[55]

Amgen presents the perspective that certification is not necessarily a pro-plaintiff or pro-defendant stage, but rather a neutral procedural checkpoint to ensure that the case fits a class action resolution. This perspective is consistent with how claims are treated in the non-class-action setting: a plaintiff who presents a short and plain statement of his claim, which is both plausible and non-conclusory, is entitled to advance to a determination on the merits.[56] There is no requirement to present even a *prima facie* case prior to the merits stages, as that would be an evidentiary standard rather than a pleading requirement.[57] This access to the courts furthers the basic aim of the federal rules to "secure the just, speedy, and inexpensive determination of every action and proceeding."[58]

This clear policy imperative of the Federal Rules of Civil Procedure strongly commends the approach taken in *Amgen*. While class actions require a demanding standard to ensure justification as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,"[59] any need to present merits at certification is in clear tension with the overarching philosophy of FRCP Rule 1. This tension necessitates, as the *Amgen* Court prescribed, permitting merits questions only insofar as "they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[60] Anything less than a clear rule muddies the boundaries of permissible arguments at certification, either slowing down or closing off complaints that are both well-pleaded and compliant with the rigorous demands of Rule 23.

Amgen also suggested a link between materiality and price impact by approving the argument that "immaterial information, by definition, does not

54. *See id*. at 477.

55. *See id*. at 470.

56. FED. R. CIV. P. 8; Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In the non-class-action securities fraud context, Congress prescribed heightened pleading requirements through the Private Securities Litigation Reform Act (PSLRA), which demands the plaintiff to set forth in his complaint each misleading statement with particularity. 15 U.S.C. § 78u-4(b)(1).

57. *See e.g*., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

58. FED. R. CIV. P. 1. *See* 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1216 (4th ed. 2022).

59. *See Wal-mart*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

60. *Amgen*, 568 U.S. at 466 (internal citation omitted).

affect market price."[61] However, despite the Court's statement to the contrary, materiality is not necessarily tied to price effect. Materiality indicates how a reasonable investor would likely act upon the information. It is a common-sense prediction made regarding how people would likely respond. But as critics have pointed out, many traders intentionally refrain from adopting a herd mentality, instead seeking to profit from discrepancies between their own evaluation of what the stock value should be and whatever price the market reflects at a given time.[62] As such, it is in the very nature of securities trading that participants seek to discover, quantify, and exploit deviations between information that some traders value and actual impacts on market price. Price impact is not a consequence of public material information; rather, it is an *ex post* analysis of what actually occurred.[63]

This disconnect is rooted in the *Basic* presumption itself. The presumption purports to satisfy the requirement that an injured party relied on the defendant's statements. It accomplishes this by asserting that a typical plaintiff relies on the stock price, and that price is a proxy for publicly available material information. Yet, what does the materiality of public information have to do with stock price? Information can affect stock price, regardless of whether it is material. Materiality may affect the *probability* or *depth* of price impact, but impact is not conditioned upon it. As the theory of the *Basic* presumption is that plaintiffs rely on price, the type of information driving that price is wholly irrelevant. This is highlighted in cases of omissions, misrepresentations which, by definition, are unknown to plaintiffs at the time of their investment. How, then, should the nature of the unknown omission have any impact whatsoever on a given plaintiff's reliance on a price as reflecting accurate, public information relating to the stock?

The Court seemed to acknowledge the materiality/price-impact distinction in *Halliburton II*.[64] Citing *Amgen*, the Fifth Circuit had barred price impact evidence at certification as "not bear[ing] on the question of common question predominance, and . . . thus appropriately considered only on the merits after the

61. *Id*. at 466.

62. *Basic*, 485 U.S. at 256 (White, J., dissenting in part) ("[M]any investors purchase or sell stock because they believe the price *inaccurately* reflects the corporation's worth.") (quoting Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirement in Certain Open Market Transactions*, 62 N.C. L. REV. 435, 455 (1984)); *Halliburton*, 573 U.S. at 292 (Thomas, J., concurring) ("It cannot be seriously disputed that a great many investors do *not* buy or sell stock based on a belief that the stock's price accurately reflects its value. Many investors in fact trade for the opposite reason – that is, because they think the market has under- or overvalued the stock, and they believe they can profit from that mispricing.") (citing *Basic*, 485 U.S. at 256 (White J., concurring in part and dissenting in part)).

63. As an example, if a corporate CEO covered up an affair with a popular celebrity, completely unrelated to any trading or corporate behavior, this might seem thoroughly immaterial. And in practice, it nevertheless might cause an impact on the market. This is why both elements, materiality and loss causation, are critical to § 10(b) and 10b-5 actions: without loss causation, no damages can be calculated; without materiality, defendants lack the ability to predict the effects of their behavior.

64. *Halliburton II*, 573 U.S. at 282.

class has been certified."[65] In reversing, the Supreme Court acknowledged substantial similarities between the two concepts. The Court pointed out that *Amgen* relied on the facts that materiality is "an objective issue susceptible to common, class wide proof" and that "a failure to prove [it] would necessarily defeat every plaintiff's claim on the merits," then conceded the same to be true for price impact.[66] The critical difference, however, lays in the fact that "*Basic*'s fundamental premise" was not how reasonable investors are likely to react to a misrepresentation, but rather how that misrepresentation would be reflected in the market price.[67]

Although this may appear a clear distinction in theory, in practice it falls short. *Halliburton II* opened the floodgates to unencumbered presentation of price impact evidence at certification.[68] As "indirect evidence" of price impact had already been permitted for market efficiency arguments, the Court saw "no reason to artificially limit the inquiry at the certification stage" by precluding direct evidence of the same.[69] The problem is that price impact is itself indirect evidence of materiality, and defendants are thereby encouraged to sneak materiality arguments into certification, *Amgen* notwithstanding.

Thus, in the wake of *Amgen* and *Halliburton II*, confusion reigns. Defendants face an endless temptation to search for ways to justify arguing materiality at certification.[70] Courts must navigate the distinction between materiality and price impact, related concepts with deeply analogous relationships to Rule 23(b)(3) predominance and yet entirely contrary procedural rules. Along the way, the path from dispute to resolution grows longer and less certain, the purely procedural posture of certification dissipates, and the policy concerns that animated § 10(b) and Rule 10b-5 fade to the background.

The critical tension in this jurisprudence does not lie between competing plaintiff and defendant interests, nor in policy decisions pitting scarce judicial resources against demands for justice from all sides. Rather, it exists in the formulation of the *Basic* presumption itself. Permitting merits-based rebuttals at certification detrimentally affects the interests of the courts *and* both parties. In an ideal world, greasing the wheels towards certification for actionable claims both strong and weak directly advances access to the "just, speedy, and inexpensive determination of every action and proceeding."[71] Standing in opposition to this fundamental goal is the reality that the class action is an invasion of the basic premise that an individual party should pursue its own relief

65. Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 435 (5th Cir. 2013).

66. *Halliburton II*, 573 U.S. at 282.

67. *See id*. at 283 (quoting Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 563 U.S. 804, 813 (2011)).

68. *Id*.

69. *Id*.

70. *See* discussions on *Goldman* in Part I, *supra*, and Part IV, *infra*.

71. FED. R. CIV. P. 1

in litigation, not the relief of any other third party.[72] A presumption opening access to certification thus has two obligations: to ensure that only cognizable classes proceed, and to insist that any necessary safeguards in furtherance of that goal infringe on access to a just, speedy, and inexpensive determination as minimally as possible. To that end, the *Basic* presumption should be tweaked.

III. THE CASE FOR REMOVING MATERIALITY ENTIRELY FROM THE *BASIC* PRESUMPTION

Materiality, while a vital part of securities fraud actions, should not remain part of the *Basic* presumption – and importantly, this is the ruling that *Amgen* should have made to the benefit of *defendants*. The presumption is rooted in the notion that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."[73] Again, logically, both material and immaterial statements can impact price, and more succinctly put, a stocks' price *will* reflect both material and immaterial information.[74] Sometimes information which the average reasonable investor thinks unimportant will nevertheless affect the market price.[75] Thus, the presumption should not inhibit a class that relied on the market price, even if that price was informed by immaterial misrepresentations; those cases should clearly meet the presumption, then the Court should summarily judge them for the defendant. Although this is the goal *Amgen* prescribed, it should occur not through an artificial disqualification of materiality-based merits inquiries at certification, but rather through deletion of materiality from the presumption's requirements.

This is not merely an academic distinction the Court should have observed. In *Amgen*, the Court blocked materiality from consideration at certification. Granted, if a court cannot assess materiality at certification, it becomes a vestigial element of the *Basic* presumption, existing on paper but having no effect. The *Amgen* solution, however, created a thicket of analogous situations, with the unique status granted to materiality creating mounting jurisprudential pressure for the Court to extend it to logically analogous concepts. As things stand, *Halliburton II* and *Amgen* seem an incongruous junction. Despite arguments to the contrary,[76] the Court considers materiality and price impact to be deeply related to the point of fusion; yet, proof of one is forbidden at certification, proof of the other is widely permitted, and the proof regarding each topic is largely

72. *See Califano*, 442 U.S. at 700–01.

73. *Basic*, 485 U.S. at 247.

74. *See* discussion in Part III.D, *infra*.

75. The reverse is also true. *See* Richard A. Booth, *The Two Faces of Materiality*, 38 DEL. J. CORP. L. 517, 553 (2013) ("There is nothing in the definition of materiality that requires a showing of price impact in order to plead an individual claim. . . . [F]ailure to show price impact in connection with certification does not operate as a finding of fact as to materiality.").

76. *See* discussion in Part III.D, *infra*.

identical.[77] Continuing along this path cannot help but confuse plaintiffs and defendants, greatly tempting the latter to search for backdoors into materiality arguments at certification.[78] Rather than erect a parchment barrier around the enclave of materiality at certification, the Supreme Court should more simply remove it *in toto* from the presumption's requirements, while nonetheless maintaining materiality as an unyielding requirement for a plaintiff's judgment on the merits.

Additionally, the *Basic* Court's rationale in adopting the presumption directly supports this change. In *Basic*, the Court explained that presumptions "[a]rise[] out of considerations of fairness, public policy, and probability, as well as judicial economy."[79] These considerations led the Court to conclude that the presumption was not an "eliminat[ion of] the requirement that a plaintiff asserting a claim under Rule 10b-5 prove reliance,"[80] but rather an alternate method of "demonstrat[ing] the causal connection."[81] Removing materiality achieves a better realization of these factors without diluting the causal connection.

A. Fairness

Removing the materiality requirement from the *Basic* presumption will improve the presumption's fundamental fairness by better ensuring both parties' access to binding dispute resolution.

For plaintiffs, this will increase the likelihood that disputes that are eligible for class treatment (i.e., meeting the requirements of Rule 23(a) and (b)(3) via the *Basic* presumption) will receive certification. Currently, even under the *Amgen* model of no materiality arguments at class certification, classes that are otherwise valid under Rule 23 nonetheless face a flurry of obstacles. This is largely due to a combination of (1) the natural desire of defendants to argue assertively to prevent a putative class from ever maturing into a certified one, with (2) the fuzziness explored above between price impact and materiality. *Goldman* provides a compelling example of both.

The defendant in *Goldman* had argued at the lower courts that certification was improper because the alleged misrepresentations were generic in nature.[82] As a result, Goldman claimed such statements were not the type that could reasonably make a price impact and therefore should be ruled immaterial as a matter of law.[83] The nature of the Supreme Court's response highlights the

77. *See Goldman*, 141 S. Ct. at 1961 n.2.
78. *See* discussion in Part I, *supra*.
79. *Basic*, 485 U.S. at 245.
80. *Id*. at 243.
81. *Id*.
82. *Ark. Tchr. Ret. Sys.*, 955 F.3d at 260.
83. *Id*. at 266–67.

difficulties inherent in the current model: despite acknowledging that "materiality should be left to the merits stage,"[84] the Court considered that "the generic nature of an alleged misrepresentation often will be important evidence of price impact."[85] The Court did not adopt Goldman's suggestion of ruling that "general statements are always *per se* irrelevant," a characterization observed as "materiality by another name."[86] The Court did, however, approve the assessment of the "generic nature of a misrepresentation at class certification even though it may also be relevant to materiality."[87]

Goldman stands as a strong example of two truths under the *Basic-Amgen* regime: first, that plaintiffs with class-worthy claims are still capable of losing at certification to arguments that the misrepresentations were not the sort to impact the stock price; second, that defendants with compelling arguments about the immateriality of the misrepresentations cannot resist pushing these arguments at certification, despite the fac that these same arguments could secure a binding victory at summary judgment.[88] This is to the defendants' detriment, as "nonnamed class members [are] not bound" by certification denial due to failure to prove materiality.[89] Those plaintiffs are thus free to reimagine their claims and start the entire procedure anew.[90]

Fundamentally, removing materiality from the *Basic* presumption will not have any improper effect on the balance of who wins binding judgments on the merits. With materiality still existing as a requisite element of the underlying fraud actions, no defendants will face liability where none stands under the current regime. Conversely, there will be some cases where the plaintiff-class has a claim that, if defendant is correct, suffers from a lethal substantive fault.[91] Should those claims advance to the merits stage, and the defendant's arguments are correct, the only change from the *status quo* will be in the defendant's favor – a binding judgment resolving the entire affair.

Admittedly, defendants are under intense pressure to settle class actions in general, and especially ones with certified classes in, given "the costs of defending a class action and . . . the risk of potentially ruinous liability."[92] However, there are three critical reasons why this practical concern should not stand as a barrier to improving the *Basic* presumption.

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84. *Goldman*, 141 S. Ct. at 1959.
85. *Id*. at 1960.
86. *Id*. at 1964 (Sotomayor, J., concurring in part) (quoting *Ark. Tchr. Ret. Sys.*, 955 F.3d at 268).
87. *Id*. at 1960.
88. *Amgen*, 568 U.S. at 468.
89. *Amgen*, 568 U.S. at 477.
90. *Amgen*, 568 U.S. at 477.
91. *E.g.*, *Goldman*, 141 S. Ct. at 1960.
92. *Amgen*, 568 U.S. at 474 (quoting FED R. CIV. P. 23(f) advisory committee's note on 1998 amendment).

First, as discussed in *Amgen*, settlement pressure alone should not be sufficient to transform a merits-based question into a certification-based question. In addition to materiality, the *Basic* presumption requires that the statement itself be misleading. Nevertheless, the "falsity . . . of the defendant's alleged statements or omissions . . . need not be adjudicated before a class is certified."[93]

Second, this settlement pressure is unfair only if the class's claims are not meritorious. Should the plaintiffs have a meritorious claim, the pressure on the defendant to settle is nothing less than warranted and appropriate. Likewise, if the issues are a close call, this is precisely where parties should equally be able to weigh all relevant factors and act accordingly. Conversely, if the claim lacks materiality, then the current regime generates unfair pressure for the defendants to settle. This only furthers the argument that this regime has flaws, as removing materiality from the *Basic* presumption yields defendants a net benefit. Defendants possessing undeployed but powerful arguments disproving a critical element of the plaintiff's claim sit in a powerful bargaining position, much stronger than if they had already presented those same arguments and lost at certification. A system in which those claims advance through certification quickly and conclude with a binding judgment for the defendant better protects defendants' interests.

Lastly, to the extent that any "unfair" settlement pressure exists, this is a practical reality of defendants' own engineering. Again, *Goldman* provides a clear example. Goldman alternatingly argued that the plaintiff's claims must fail certification due to failures of loss causation and/or materiality.[94] Both are elements of the fraud claim, each potentially dispositive in the defendant's favor. Presuming the defendant can prove these arguments, each on its own would suffice to resolve the case in the defendant's favor on the merits. Any pressure that the defendant feels to fold a winning hand is entirely of its own instigation.

This is not simply the fault of defendants, nor necessarily a failure of legal counsel. The *Basic-Amgen* regime encourages this behavior by arbitrarily setting materiality apart from other elements, partnered with a willingness to blur the lines.[95] This quagmire urges defendants toward an everything-but-the-kitchen-sink approach to challenging certification via price impact and backdoor materiality attempts. Defendants operating their settlement calculus are guilty of

93. *Id.* at 475.

94. *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. Civ. 3461 (PAC), 2018 WL 3854757, at 6 (S.D.N.Y. Aug. 14, 2018).

95. *Goldman*, 141 S. Ct. at 1961 n.2 ("We recognize that materiality and price impact are overlapping concepts and that the evidence relevant to one will almost always be relevant to the other. But 'a district court may not use the overlap to refuse to consider the evidence.' *In re Allstate*, 966 F.3d at 608. Instead, the district court must use the evidence to decide the price impact issue 'while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits, including materiality.' *Id.*, at 609.").

no more than overvaluing attempts at preventing certification via merits-based arguments. Clearer guidelines at certification will work to counter this inclination; from there, it will be up to defendants to seize the opportunity to better direct their efforts toward terminal conclusions. Ultimately, how and when to settle is entirely at the parties' discretion. Using defendants' collective tendency to settle between certification and summary judgment as justification for maintaining hazy rules at certification is to reward defendants for their own strategically questionable behavior, a decision which manages to decrease the fairness of the process for defendants and plaintiffs alike.

B. Judicial Economy

Goldman stands as a clear and recent paragon of the hazards to judicial economy posed by the current conception of the *Basic* presumption. As detailed above,[96] a decade of litigation has been trapped in a tangled web of materiality and price impact, with the Court recognizing the connection between the two to be too hazy. The looming hope of proving a statement immaterial at certification is too tempting for parties and judges to observe and enforce respectable boundaries.[97]

Essentially, Rule 23 exists to ensure that claims suitable for class treatment are eligible to receive it. Permitting challenges at certification based on merits unrelated to the Rule 23 requirements can only serve to disqualify valid classes from the class action device. Because decisions rendered onto a non-certified class do not bind the putative members, the plaintiffs are able to alternately appeal the decision or reapproach certification with a novel class definition or legal theory, taxing judicial resources. Additionally, defendants with winning merits arguments are deploying them to secure procedural victories that cannot bind the class. While those same arguments could have been used at the merits stage to potentially secure a final judgment, instead the dispute can linger in judicial limbo for over a decade. Lastly, the current regime foists a Herculean labor on district court judges to make decisions on the finest of legal distinctions while permitting interlocutory appeals.[98] The result is a recipe for vast expenditure of judicial resources.

Excising materiality from the *Basic* presumption would define the boundaries of acceptable merits arguments at certification far more clearly. In turn, this would remove a substantial amount of legal confusion, and disincentive defendants from testing procedural limits with winning substantive arguments, clearing the way for increased judicial efficiency. While this will logically increase the percentage of cases that progress to a final judgment (or post-

96. *See* discussion in Part I, *supra*.
97. *See Goldman*, 141 S. Ct. at 1961 n.2.
98. FED. R. CIV. P. 23(f).

certification settlement), those cases will be permanently disposed, rather than cycling through the certification stage on a decades-long carousel. Additionally, claims clearly lacking materiality will be disposed through summary judgment. These are positive, attainable changes to judicial efficiency and economy.

C. Public Policy

Two policy drivers are at the crux of the *Basic* presumption: the furtherance of the purpose behind § 10(b) and Rule 10b-5, and the intention of the procedural restrictions governing class action lawsuits. The former clearly motivates the need for the *Basic* presumption. To wit, "meritorious private actions to enforce federal antifraud securities laws are an *essential* supplement to criminal prosecutions and civil enforcement actions."[99] In the securities fraud context, "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[100] Policy grounds clearly support creating a presumption necessary to further the purpose animating these regulations, and better ensure that claims resolved through that mechanism likewise stand on firm foundation.

Through a broader lens, the removal of materiality from the *Basic* presumption better aligns the presumption with the general policies behind Rule 23. At bottom, "the office of Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'"[101] For at least the last decade, there has been a push-and-pull regarding the demands of persuasion and production at certification, with the consensus being that merits inquiries are only appropriate at that stage to the extent that they relate to particular Rule 23 requirements.[102]

As posited in *Basic*, the presumption was justified in substituting reliance on market price in place of reliance on statements because "the market [acts] as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price."[103] Price impact, not materiality, "is *Basic*'s fundamental premise."[104] In comparison, "materiality

99. *Amgen*, 568 U.S. at 478 (emphasis added) (quoting Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007)).

100. *Id.* at 478 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).

101. *Amgen*, 568 U.S. at 460 (quoting FED. R. CIV. P. 23(b)(3)).

102. *See Wal-Mart*, 564 U.S. at 350–51 ("Frequently [a rigorous analysis determining that Rule 23(a) conditions have been satisfied] will entail some overlap with the merits of the plaintiff's underlying claim."); *Amgen*, 568 U.S. at 466 ("Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.") (citing *Wal-Mart*, 564 U.S. at 351).

103. *Basic*, 485 U.S. at 244 (quoting *In re* LTV Sec. Litig., 88 F.R.D. 134, 143 (N.D. Tex. 1980).

104. *Halliburton II*, 573 U.S. at 283 (quoting *Halliburton I*, 563 U.S. at 813).

is a discrete issue that can be resolved in isolation from the other prerequisites, . . . wholly confined to the merits stage."[105]

Materiality thus stands as a limitation to the ability of a broad class to adjudicate identical alleged injuries from a common defendant, and as such only works a procedural injustice on that class. The *Amgen* Court said as much: "[P]roof of materiality is not required prior to class certification because such proof is not necessary to ensure satisfaction of Rule 23(b)(3)'s predominance requirement."[106] Keeping materiality as a core-though-cordoned part of the presumption only serves to tempt parties and courts into subverting the purposes of certification away from "select[ing] the method best suited to adjudication"[107] and towards conducting an early assessment of merits unrelated to any Rule 23(b)(3) prerequisite.

D. Probability of Actual Price Impact

Probability of the presumption's factual correctness is an important consideration for an evidentiary presumption.[108] However, a presumption only seems fair and worthwhile if standing in for a highly probable reality. The fact of the matter is that there is no magic line at which a theoretical truth becomes probable enough to necessarily merit presumption.

In the past, Justice Thomas has levied substantial arguments at the sufficiency of probability behind the *Basic* presumption.[109] However, subsequent decisions, have mooted those concerns. Chief Justice Roberts slammed the door on any momentum to overruling the *Basic* presumption in *Halliburton II*,[110] and more recently, the Court unanimously joined in the section of *Goldman* approving the presumption's use.[111]

However, one can still make a compelling argument that materiality is a vital component to the *Basic* presumption precisely because of probability. Even if one grants the assertion that the materiality of misrepresentations in no way guarantees the price impact required for the presumption to logically stand, materiality in that usage exists as a proxy for probability. In the general scheme, material misrepresentations are much more likely to create a price impact than

105. *Id*. at 282–83.

106. *Amgen*, 568 U.S. at 467 n.4.

107. *Id*. at 460 (internal quotation omitted).

108. *Basic*, 485 U.S. at 245.

109. *See, e.g*., *Halliburton II*, 573 U.S. at 289 (Thomas, J., concurring) ("In reality, both of the Court's key assumptions are highly contestable and do not provide the necessary support for *Basic*'s presumption of reliance. The first assumption – that public statements are 'reflected' in the market price – was grounded in an economic theory that has garnered substantial criticism since *Basic*. The second assumption – that investors categorically rely on the integrity of the market price – is simply wrong.") (quoting *Basic*, 485 U.S. at 247).

110. *Id*. at 274.

111. *Goldman*, 141 S. Ct. at 1958–60, 1963, 1965 (Sotomayor, J., concurring) (Gorsuch, J., concurring).

their immaterial counterparts. As such, materiality might play a vital balancing role in the presumption, ensuring that it buffers out misrepresentations below an acceptable threshold of probability, regardless of whether they had an empirical price impact.

This argument, however, must fail in the wake of *Amgen*, the holding of which was also favorably cited by the section of *Goldman* featuring unanimous Court approval.[112] Since, as *Goldman* states, "materiality . . . does not bear on Rule 23's predominance requirement,"[113] it serves no legitimate buffering role whatsoever. Removal from certification entirely precludes that function. By keeping it as an obsolete-but-present requirement of the *Basic* presumption, though, confusion reigns at certification.

Perhaps this confusion serves a *de facto* buffering role after all, giving district courts a chance to weed out the weaker cases, a reality that might seem desirable to defendants' interests. Nevertheless, this comes with equally real costs: certification becomes a denser, more complicated process that still has no ability to render binding determinations on the merits;[114] defendants are incentivized to fight merits battles wholly unrelated to predominance at the certification stage;[115] and guidelines on the scope of appropriate argument grow ever hazier.[116] Alternately, removing materiality from the presumption would alleviate these concerns while causing no negative shift in the realized probability governing the presumption, due to the *Amgen* embargo on materiality at certification.

CONCLUSION

Substituting a presumption in which one prerequisite is precluded from adversarial challenge for another, nearly identical presumption which simply removes that one prerequisite is an admittedly miniscule change. However, a few undeniable truths countenance both the wisdom and worth of this approach.

First, the *Basic* presumption performs a function that must be accomplished by some means. Congress has seen fit to deputize private citizens to enforce securities fraud violations. In landscapes where actions brought by individual investors must contend with strong corporate defenses in return for relatively low individualized damages, the class action device plays a vital role in realizing the legislative goals. Furthermore, apart from the reliance/predominance problem which the *Basic* presumption resolves, the very nature of securities fraud commends these actions to class resolution, as a defendant's statements will typically affect a multitude of class members who must prove identical issues of fact and law.

112. *Goldman*, 141 S. Ct. at 1959.
113. *Id*.
114. *See Amgen*, 568 U.S. at 477.
115. *See Goldman*, 141 S. Ct. at 1959 (citing *Amgen*, 568 U.S. at 466–68).
116. *See Goldman*, 141 S. Ct. at 1961 n.2.

Second, the *Basic* presumption has been recently and concretely affirmed. *Halliburton II* saw Justices Thomas, Scalia, and Alito lobby for its removal.[117] Yet, in the *Halliburton II* majority opinion, Chief Justice Roberts expressly held that the presumption is not exempted "from ordinary principles of *stare decisis*," finding it situated on steady ground.[118] More recently, the *Goldman* Court unanimously approved the section of the majority opinion approving the presumption.[119] The *Basic* presumption seems to have a long life ahead of it.

Third, the jurisprudence has real problems on both theoretical and practical levels. *Goldman* is a recent paragon of the difficulties parties and courts have in navigating the current regime. Certification challenges to the presumption lead to deep merits inquiries in which materiality, price impact, and efficiency intermingle in a dense web of facts. Moreover, settlement pressure and hazy rules incentivize defendants to try any approach possible to circumvent judgment through a denial of certification. As a result, certification features wide-ranging substantive arguments despite being a procedural checkpoint. While these arguments are, under certain circumstances, necessary to determine which claims comport with class treatment, this practice is in remarkable tension with two critical features of class certification:

Rule 23 dictates strict procedural restrictions, and the Court has clearly stated that merits inquiries are only permitted to the extent they directly impact those restrictions compel.[120] This tension compels minimizing certification-based merits arguments as much as possible.

Yet merits challenges blossom at certification under the guise of *Basic* presumption rebuttals. Materiality, distinct yet intertwined with price impact, provides fantastic cover for defendants to exploit. The prior bright-line approaches adopted in *Amgen* and *Halliburton II*, which respectively barred materiality but permitted price impact arguments at certification,[121] combined to form a muddled result: defendants try to argue materiality while pretending they do not, exploiting that the two are "overlapping concepts."[122] Certainly, *Amgen* could be abandoned as a failed approach; however, *Goldman* cited it approvingly,[123] and *Amgen*'s logic coincides with the policy of Rule 23.

These inappropriate challenges are not merely negative from policy or philosophical standpoints. They also harm both parties while squandering judicial resources. Permitting excess substantive arguments at certification opens the door for dismissal of colorable claims in a non-dispositive manner, using

117. *Halliburton II*, 573 U.S. at 285 (Thomas, J., concurring).

118. *Id*. at 274.

119. *Goldman*, 141 S. Ct. at 1958–60, 1963, 1965 (Sotomayor, J., concurring) (Gorsuch, J., concurring).

120. *Amgen*, 568 U.S. at 466.

121. *Id*. at 466–68; *Halliburton*, 573 U.S. at 282–84.

122. *Goldman*, 141 S. Ct. at 1961 n.2.

123. *Id*. at 1959.

hazy standards for judgment, in a context that permits interlocutory appeals.[124] This is a recipe for extreme judicial inefficiency. Additionally, it serves to push both parties away from desirable final judgments. Plaintiffs with colorable claims to materiality face a needless risk of failing at certification, and defendants with winning substantive arguments are tempted to deploy them at certification, arguments which could have rather secured a winning summary judgment.

All these hardships could be eased by removing the materiality requirement from the *Basic* presumption. For one, any seeming incongruity between *Halliburton II* and *Amgen* would diminish. Second, materiality challenges at certification would be inappropriate not because they are special, or alike or unlike price impact, but rather because they are not germane to the presumption. Courts and parties currently must evaluate borderline rebuttal arguments by simultaneously gauging whether the arguments ultimately go to price impact without crossing the materiality tripwire. Removing materiality from the certification equation altogether allows courts and parties to base permissibility concerns entirely on relationship to price impact, with materiality being a complete non-factor.

Admittedly, this may increase the range of arguments permissible at certification, as *Amgen*'s ban on materiality arguments will be displaced. This drawback, however, is offset by two concerns. First, this result may already be inevitable, given the dicta of *Goldman* acknowledging the overlap of materiality and price impact while expressly asserting that courts "should be open to *all* probative evidence on [price impact]" at certification.[125] Second, defendants forced to acknowledge that arguments of materiality are irrelevant to the *Basic* presumption may increasingly choose to withhold those arguments until the merits and aim for a binding judgment in their favor.

Additionally, this alteration to the presumption will better fulfill the factors upon which the *Basic* Court originally relied. Fairness, judicial resources, policy, and probability are the key factors cited as such,[126] and the removal of materiality from the presumption furthers all four. Furthermore, the Court has already shown some willingness to rework the presumption's logistics, as *Amgen* directly altered the *Basic* Court's express instruction that defendants may rebut by attacking "proof of the elements giving rise to the presumption."[127]

The *Basic* presumption has stood for 35 years, functioning as a necessary adaptor between a Congressionally granted cause of action and the class action vehicle necessary to make that cause of action effective. In the last decade, however, the jurisprudential shift over how to conceptualize merits arguments at certification, particularly those touching on materiality, has produced substantial,

124. FED. R. CIV. P. 23(f).
125. *Goldman*, 141 S. Ct. at 1960 (citing *In re* Allstate Corp. Sec. Litig., 966 F.3d at 613 n.6).
126. *Basic*, 485 U.S. at 245.
127. *Id*. at 248.

negative downstream consequences for the parties and courts, and these changes have pulled the *Basic* presumption away from justifications on which it was initially premised. Clearly, broad changes to how and when materiality and price impact can be argued at certification have failed to improve justice or efficiency.

Removing materiality from the *Basic* presumption, however, is a minimalist change that can produce outsized positive results. Certification arguments will be better streamlined with the language and intent of Rule 23 and *Amgen*. More importantly, the critical impact on litigants will be a faster, surer path towards a final resolution. Weaker claims will be greenlit through certification and into summary judgment, while colorable claims will have the opportunity for their day in court, fulfilling the policy intent of § 10(b) and Rule 10b-5. Relegating materiality inquiries to the merits stage of dispute, therefore, can provide the subtle improvement that securities fraud class-action jurisprudence sorely needs.