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IN THE SUPREME COURT OF THE UNITED STATES

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AMGEN INC., ET AL., :

Petitioners : No. 11-1085

v. :

CONNECTICUT RETIREMENT PLANS AND :

TRUST FUNDS. :

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Washington, D.C.

Monday, November 5, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of  
Petitioners.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of  
Respondent.

MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; for  
United States, as amicus curiae, supporting  
Respondent.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	SETH P. WAXMAN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	DAVID C. FREDERICK, ESQ.	
7	On behalf of the Respondent	23
8	ORAL ARGUMENT OF	
9	MELISSA ARBUS SHERRY, ESQ.	
10	For United States, as amicus curiae,	38
11	supporting the Respondent	
12	REBUTTAL ARGUMENT OF	
13	SETH P. WAXMAN, ESQ.	
14	On behalf of the Petitioners	47
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 11-1085, Amgen, Incorporated v. The Connecticut Retirement Plans and Trust Funds.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

Our case is about whether the claim of liability is in a fundamental sense class wide or individual. The heart of a 10b-5 claim is, I bought or sold in reliance on a misleading statement. The question at the class cert stage is whether each individual will have to prove his own reliance directly on the statement, or whether every -- he can prove indirectly reliance on the statement by showing that everybody relied on a distorted market price.

A market price will reflect a statement if and only if the statement is material and is made publicly on an efficient market. So, absent materiality, the market price cannot be presumed to reflect the statement in question. And the plaintiffs --

1 CHIEF JUSTICE ROBERTS: Why is that -- why  
2 is that the case? I would suppose if there's no  
3 materiality, that means that the effect on the market  
4 price just happens to be zero.

5 MR. WAXMAN: That's exactly correct. And  
6 the point here is --

7 CHIEF JUSTICE ROBERTS: Well, why isn't that  
8 common to all parties?

9 MR. WAXMAN: Mr. Chief Justice, every one of  
10 the four predicates to the fraud-on-the-market theory,  
11 which is a shortcut that -- that excuses plaintiffs from  
12 proving that I heard the statement and relied on it --  
13 every one of those predicates is common.

14 Whether the market is efficient is common.  
15 Whether the statement is public is common. Whether the  
16 stocks were bought and sold during the period of market  
17 distortion is common. And materiality is common.

18 The question is not whether --

19 JUSTICE SOTOMAYOR: So is the falsity of the  
20 statement common as well?

21 MR. WAXMAN: The falsity of the statement is  
22 common, but it is not a predicate to whether or not you  
23 can prove reliance on a statement indirectly by relying  
24 on the integrity of the market price, because in an  
25 efficient market, material public statements, whether

1 they are true or false, will presumably move the market  
2 price.

3 And if you're trying to prove reliance on a  
4 false --

5 JUSTICE SOTOMAYOR: Can an individual who  
6 has -- it has been deemed in -- in a cert certification  
7 that an issue is immaterial, could an individual  
8 claimant ever prove it's material?

9 MR. WAXMAN: Sure. I'm not arguing --

10 JUSTICE SOTOMAYOR: On the  
11 truth-on-the-market -- the truth-on-the-market defense,  
12 which is the type of defense that you're raising here.

13 MR. WAXMAN: Yes. Either way. Let me  
14 explain why.

15 There's no doubt that this Court's standard  
16 for materiality announced in TSC v. Northway, and since  
17 reiterated, is an objective standard. It doesn't depend  
18 on who the relier was.

19 But the inability to prove to a certifying  
20 judge that class-wide reliance can be -- that class-wide  
21 reliance exists because the statement was material  
22 doesn't preclude a plaintiff like Connecticut  
23 Retirement, which has said it's going to proceed whether  
24 there's a class or not, or any other member of the  
25 class, from coming to court and saying either, "I

1 directly relied on this statement and here's my proof  
2 that it's material to the trier-of-fact," because the  
3 decision that the judge makes at certification is not  
4 binding on the trier-of-fact; or even to say, "I relied  
5 on the integrity of the market price, and I have proof  
6 that the market price was affected because here are  
7 three investors, they're all reasonable people, and they  
8 say that it was relevant, important to them in the total  
9 mix of information involved."

10 JUSTICE SOTOMAYOR: I'm sorry --

11 JUSTICE KAGAN: Mr. Waxman, that's just to  
12 say that a plaintiff can always relitigate the question  
13 of materiality. But at the class certification stage,  
14 isn't it correct that if the Court holds that a  
15 statement is immaterial, it's immaterial for all members  
16 of the class, and the suit has to be dismissed? Isn't  
17 that right?

18 MR. WAXMAN: The suit cannot -- that is, the  
19 suit cannot proceed as a class action.

20 Connecticut Retirement, or any --

21 JUSTICE KAGAN: It can't proceed as an  
22 anything action, can it? I mean, the -- the remedy, if  
23 you had thought that the statement was immaterial, is  
24 not to say, I won't approve a class. It would be to say  
25 the suit has no merit.

1                   MR. WAXMAN: I -- I think that's wrong. I  
2 think that's conceptually wrong, Justice Kagan, in the  
3 sense that all that the class certification decision  
4 says is that the putative class representative can sue  
5 on his own behalf, but he can't drag everybody else into  
6 the --

7                   JUSTICE KAGAN: Well, do you mean to say  
8 that a judge who has just ruled that a statement is  
9 immaterial is going to keep the case in his court  
10 litigated by an individual plaintiff, even though he's  
11 just ruled that the statement is immaterial?

12                   MR. WAXMAN: Well, I want to -- I'd like to  
13 come back to the question of why whether, even if  
14 your -- the premise of your question is correct, it  
15 doesn't matter for this case. But let me take one more  
16 run at -- at your premise.

17                   The next thing that would happen if I'm  
18 right, presumably, and the case isn't over, the class  
19 just isn't certified, is that defendant, you know,  
20 emboldened by the judge's rule, will file a motion for  
21 summary judgment on the grounds that materiality -- the  
22 element of the substantive offense, not materiality, the  
23 predicate to class certification -- has just been  
24 determined in favor of me. That is a very different  
25 question for the Court.

1           Materiality, as this Court has said, is  
2 fact-sensitive, and it involves a balancing of  
3 credibility of witnesses or of expert opinions, and the  
4 judge at the -- at the class cert stage has to find  
5 facts and has to make a ruling.

6           When it comes up on summary judgment, what  
7 the -- if there is a dispute of material facts, what the  
8 judge should do under the law is to say: Look, I just  
9 held that I didn't think it was material, but I resolved  
10 disputed material facts, and that's for the jury, and  
11 this case will go to the jury.

12           JUSTICE KAGAN: So you're saying that a  
13 judge on a class certification stage can say: This is  
14 immaterial, the statement is immaterial; therefore, this  
15 can't proceed as a class action. But when a summary  
16 judgment motion comes in arguing the exact same thing,  
17 the judge will say: Oh, it's not immaterial after all,  
18 or it's disputed enough that the case can continue?

19           MR. WAXMAN: Well, in some cases if -- if  
20 the alleged fact is, you know, that Amgen's president  
21 got a haircut at 10:30, the judge presumably can say  
22 there are -- you know, this is immaterial as a matter of  
23 law. But the vast majority of cases -- this is a  
24 perfect example -- where they have statements that in  
25 the abstract, extracted from the total mix of



1 information, look pretty material. These are flagship  
2 drugs. On the other hand, the evidence we wanted to  
3 introduce and the judge wouldn't hear because in the  
4 Ninth Circuit the test is not proving facts, but simply  
5 alleging them --

6 JUSTICE KAGAN: I guess the question, Mr.  
7 Waxman, is if it is not immaterial as a matter of law at  
8 the summary judgment stage, how could a judge possibly  
9 say it is material at the class certification stage?

10 MR. WAXMAN: The judge at the class  
11 certification stage is required to weigh competing  
12 evidence and -- and render his or her best judgment. At  
13 the summary judgment stage, a judge is precluded from  
14 doing that.

15 JUSTICE KAGAN: So the class certification  
16 stage becomes kind of a super merits inquiry?

17 MR. WAXMAN: No, not at all.

18 JUSTICE KAGAN: -- where the plaintiff has  
19 to -- has to surmount a higher burden on the merits?

20 MR. WAXMAN: No, no, no. The -- the class  
21 certification stage requires the moving party, the  
22 putative -- the -- the class representative who is  
23 proposing to arrogate to himself and his method of proof  
24 the fortunes of all the absent class members, whether  
25 they are direct reliers or indirect reliers, tie their

1 fortunes to his fortune at trial. And the judge simply  
2 has to say: Is this a case in which reliance is a  
3 common issue? That is the key through the certification  
4 gate in 10b-5 cases.

5 JUSTICE GINSBURG: I thought we were talking  
6 about, Mr. Waxman, the materiality of the alleged  
7 misstatement; and I am really nonplussed by your answer  
8 that if the judge says it's immaterial, that doesn't end  
9 it for everybody. Certainly it ends it for the class;  
10 you said that. Should it also end it for the  
11 representative of the class to say: Okay, now I'm going  
12 to come back, and this statement, this finding of the  
13 immateriality doesn't bind me.

14 Of course it's going to bind the class  
15 representative. So if it's immaterial, the case ends.  
16 And if it is material, then it is material to everybody  
17 in the class.

18 MR. WAXMAN: Well, Justice Ginsburg, let's  
19 take an easier case. Let's say I'm somebody who bought  
20 Amgen during the relevant period, and they - - the  
21 judge says, you know, I've heard your -- I've considered  
22 your event studies and I think this is -- information  
23 isn't material. There is nothing whatsoever that  
24 precludes me from bringing a suit and saying, here's my  
25 evidence of -- I directly relied; here's my evidence of

1 materiality.

2 JUSTICE SOTOMAYOR: How could that be --

3 JUSTICE KENNEDY: Are you saying that  
4 there -- are you saying that there is a difference  
5 between materiality for the fraud-on-the-market theory  
6 and for direct reliance, or that there can be a  
7 difference?

8 MR. WAXMAN: The standard of --

9 JUSTICE KENNEDY: And that if there was  
10 fraud on the market, that is a materiality question  
11 addressed at the certification stage, but if the class  
12 isn't certified, the investor can still show that he had  
13 had direct reliance that was reasonable?

14 MR. WAXMAN: Yes.

15 JUSTICE KENNEDY: Am I right about that?

16 Or --

17 MR. WAXMAN: You are -- You are either right  
18 or wrong, depending on how I understood you. Let me --

19 (Laughter.)

20 MR. WAXMAN: Let me start with you're right,  
21 Justice Kennedy, you're absolutely right.

22 JUSTICE KENNEDY: Do the first part.

23 (Laughter.)

24 MR. WAXMAN: Okay. Materiality -- the quirk  
25 of this case is that materiality is both, as all my

1 friends on the other side agree, an essential predicate  
2 of the fraud-on-the-market theory, that is the essential  
3 predicate of the ability to prove indirect reliance on  
4 the statement through an assertion that the market  
5 price -- that the statement distorted the market price.  
6 Everyone agrees that if the statement isn't material, it  
7 didn't distort the market price, and therefore reliance  
8 is an individualized issue for those who actually heard  
9 and detrimentally relied on the statement.

10           One of the elements that has to be proven in  
11 a 10b-5 case is reliance, which is what we were talking  
12 about on the class cert stage, and there materiality is  
13 a predicate for reliance. But even if reliance is  
14 proven, materiality is also an element of a 10b-5(b)  
15 cause of action, and the standard for materiality is the  
16 same.

17           The real question in this case is what is  
18 the purpose of Rule 23? If you think that the purpose  
19 of Rule 23 is to postpone to the merits everything that  
20 can be postponed without a risk of foreclosing valid  
21 individual claims, we lose. But that's not the purpose.  
22 The purpose is for a court to determine whether all of  
23 the preconditions for forcing everyone into a class  
24 action are present before you certify.

25           JUSTICE BREYER: Or you can take exactly

1 what you said and phrase it the opposite way.

2 MR. WAXMAN: But I wouldn't.

3 JUSTICE BREYER: I know you wouldn't, but I  
4 suspect your opponents might. That if it's the purpose  
5 of the certification stage to try out every element of  
6 liability at that stage rather than waiting for the  
7 trial?

8 MR. WAXMAN: No.

9 JUSTICE BREYER: No, it's not. Good.

10 Now, once you say that, what you have said is,  
11 you know, it could still be material for some  
12 individual, even though there is no market reliance.  
13 And similarly, a silence going (indicating), some odd  
14 set of words or whatever it is, although it's not false  
15 for almost anybody, for some particular person it could  
16 seem -- convey something false in some particular set of  
17 circumstances.

18 So let's try out falsity at the  
19 certification stage, too. In fact, let's try out  
20 everything, because we could always think of a few  
21 examples where, despite the fact that, you know, that  
22 it's only a common issue 99 percent of the time, we can  
23 dream up a situation where it's not a common issue.

24 MR. WAXMAN: Justice Breyer, the point of  
25 class certification is not to pre-try the merits of the

1 case.

2 JUSTICE BREYER: No, but you are saying with  
3 a cert -- class certification here, if there is no  
4 materiality there is no class; and you are repeatedly  
5 faced with the question: You are absolutely right; in  
6 fact there is no case. And so then what you say is, and  
7 indeed I have a few instances here in which there could  
8 be a case, and I would say I bet if we are, you know,  
9 professorial enough, we could dream up a hypothetical  
10 for anything, where there still is a case.

11 MR. WAXMAN: The point of the class  
12 certification, as this Court explained in Amchem and  
13 other cases, and as the Rules Advisory Committee notes,  
14 is the question of whether there is class coherence in  
15 the first place. It's not the merits issue. It's  
16 whether it's fair for the class representative to impose  
17 on the defendant the juggernaut of class action and on  
18 the absent class members their fortunes in his or her  
19 hands. And what --

20 JUSTICE KAGAN: Mr. Waxman, that is right,  
21 and that's what we said in Walmart recently, that the  
22 question is a question of coherence; it's a question of  
23 whether the class wins or loses together. And here, for  
24 materiality, the class wins or loses together. If it's  
25 material, it's material as to everybody. If it's not

1 material it's not material as to everybody.

2           And that's just a function of the fact that  
3 materiality, as we've repeatedly said, is an objective  
4 test. It doesn't have anything to do with whether a  
5 particular person finds it material. And where that's  
6 the case, it seems to me that the Walmart test, which  
7 is, is an issue central to the -- you know, when you  
8 rule on the issue, do you rule on each of the claims in  
9 one stroke? The answer to that is yes.

10           MR. WAXMAN: Justice Kagan, this Court has  
11 explained more than once, and I am now quoting from  
12 Amchem, that "class" -- "It is class cohesion and only  
13 class cohesion that legitimizes representative action in  
14 the first place." And that question, quote, "preexists  
15 any settlement and therefore any fortiori any  
16 litigation." Now --

17           JUSTICE KAGAN: Mr. Waxman, I was saying  
18 that's right.

19           MR. WAXMAN: Okay.

20           JUSTICE KAGAN: There is class cohesion as  
21 to materiality. People win or lose on materiality  
22 together.

23           MR. WAXMAN: The -- there is class -- with  
24 respect, there is class cohesion, investors cohere into  
25 a class, only when the alleged misinformation was

1 significant enough to affect the price, thus enabling  
2 the common claim of relying on the misinformation in the  
3 same way. Letting a putative representative through the  
4 certification gate without showing that key is like, on  
5 a theory of no harm, no foul, because we will all lose  
6 together --

7 JUSTICE GINSBURG: Mr. Waxman --

8 MR. WAXMAN: -- is like letting --

9 JUSTICE GINSBURG: Mr. Waxman, there is no  
10 question about 23(a), right? The 23(a) prerequisites  
11 have been satisfied.

12 MR. WAXMAN: Not challenged in this case.

13 JUSTICE GINSBURG: So the only thing is  
14 (b)(3), that is a question of law or fact common to the  
15 class members predominates over questions affecting only  
16 individual members. The question that predominates is  
17 the question of were these representations material; if  
18 they were material, then the certification is proper.  
19 If they were immaterial, it's not. It's just -- I don't  
20 understand why this isn't just a clear case of a  
21 question common to the class; that is, the question of  
22 materiality.

23 MR. WAXMAN: The answer, Justice Ginsburg,  
24 is that the question at the class certification stage,  
25 the predominance question is the reliance element, not



1 the materiality element.

2           Everyone agrees that materiality, like  
3 falsity, like scienter, like loss causation, are all  
4 common questions. As this Court explained in Basic and  
5 reiterated last term in Halliburton, in 10b-5 actions,  
6 the question at class certification is whether reliance  
7 needs to be proven directly; that is, individually by  
8 people who heard and acted in response; or whether the  
9 shortcut that this Court authorized in Basic of allowing  
10 indirect proof by proving that the statement caused a  
11 distortion of the market, is the way to go.

12           There are two tracks, and it happens in this  
13 case that materiality is both an element which is common  
14 and a predicate to class-wide reliance. Everyone agrees  
15 that you can't rely as a class on the -- the challenged  
16 misstatement unless the statement moved or had the  
17 capability of moving the market price, and that's why  
18 the materiality is the glue that holds --

19           JUSTICE SCALIA: Mr. Waxman, you have a  
20 habit of not pausing between sentences. You pause in  
21 the middle of the sentence, and you end a sentence and  
22 go right on to the next. So I apologize for  
23 interrupting but --

24           MR. WAXMAN: Not at all.

25           JUSTICE SCALIA: -- but you leave me no

1 alternative.

2 MR. WAXMAN: It's the red light.

3 JUSTICE SCALIA: Yes, I understand.

4 MR. WAXMAN: The purity.

5 JUSTICE SCALIA: Is it not the case that one  
6 of the other elements necessary for the  
7 fraud-on-the-market theory would also be decided  
8 conclusively for future individual litigants, namely the  
9 efficiency of the market? A future litigant will  
10 ordinarily claim: I either sold it at a depressed price  
11 or bought it at an inflated price because of the  
12 market's reaction to this particular fraudulent  
13 statement.

14 MR. WAXMAN: Yes.

15 JUSTICE SCALIA: So -- so you can say the  
16 same thing about the efficiency of the -- of the market  
17 being determined in this preliminary question as you can  
18 say about -- about the issue here.

19 MR. WAXMAN: That's absolutely right. And  
20 the same is true for public statement. The way that the  
21 Government in responding --

22 JUSTICE KAGAN: What is that statement,  
23 Mr. Waxman?

24 MR. WAXMAN: I'm sorry.

25 JUSTICE KAGAN: Because the difference is if

1 there is an insufficient market, the case goes forward  
2 and people have to prove individual reliance, and that  
3 means that the class splits apart and you don't get a  
4 coherent class. So the function of your winning an  
5 argument either on publicity or on the efficient market  
6 is that the class becomes incoherent, that everybody  
7 then has to prove individual reliance.

8 But that's not what happens when you prove  
9 immateriality. When you prove immateriality, the whole  
10 class falls together, because it's immaterial for  
11 everybody.

12 MR. WAXMAN: That's not correct, and in any  
13 event, that analysis, that approach is, as I was trying  
14 to say, is like letting the fruits justify the search.

15 The question is at the time that class  
16 certification is sought, the question is do common  
17 issues predominate? And the question in a securities  
18 case is, is reliance in fact, to quote this Court's  
19 opinion, "in fact a common issue?" You also have to --  
20 to show that in fact it's a common issue, you have to  
21 show that the market reacted to the statement, whether  
22 it was true or false, whether it was made with scienter  
23 or not, whether there was loss causation or not, the  
24 market had to react, and to do that, you need all three  
25 legs of the stool.

1           The statement has to be material because  
2 immaterial statements don't move markets.

3           JUSTICE GINSBURG: Mr. Waxman, the -- the  
4 Basic opinion that started all this off, on page 242,  
5 lists materiality as a common question. The materiality  
6 of the misrepresentation, if any, is listed as a common  
7 question, and that made perfect sense to me.

8           MR. WAXMAN: It makes perfect sense to me as  
9 well, Justice Ginsburg, and I'm not being sarcastic.  
10 Materiality is a common question. Just as are many of  
11 the other elements of a 10b-5 action --

12           CHIEF JUSTICE ROBERTS: So at certification  
13 you just assume that materiality -- you don't have to  
14 show it. If it's always a common question, you assume  
15 it in trying to weigh out the number of -- whether or  
16 not common issues predominate or not.

17           MR. WAXMAN: Well, the question, Justice --  
18 I mean, for -- if it worked for class certification,  
19 that would be fine. The question is, what the purported  
20 class representative has to show to get through the  
21 certification gate to transform an ordinary bilateral  
22 dispute about "you made a false statement, I relied on  
23 it, it caused me to lose money" into something entirely  
24 different, a class of tens or hundreds of thousands of  
25 people, all of whom are proceeding together, all of

1 their fortunes are married, and the defendant is faced  
2 with the full class, what you have to show. And you  
3 have to show that reliance is a common issue.  
4 Regardless of what you have to show down the road.

5 JUSTICE GINSBURG: Mr. Waxman, you seem to  
6 be setting out two determinations of materiality. You  
7 say in order to certify the class you have to show that  
8 the misrepresentation was material. And in order to win  
9 on the merits, you certainly have to show that the  
10 misrepresentation was material. How do those two  
11 findings of materiality differ? How does the finding  
12 that you say must be made at the certification stage  
13 differ from the finding that must be made at the trial?

14 MR. WAXMAN: They differ temporally, they  
15 differ functionally, and they differ in terms of who  
16 decides it and with what level of finality. They differ  
17 temporally because the first question is, is this  
18 case going to -- which of two tracks is this case going  
19 to proceed?

20 Is it going to proceed as a -- as a direct  
21 reliance case -- I heard the statement and I relied on  
22 it -- or is it going to proceed on a theory on behalf of  
23 everybody that whether -- the people who relied on it,  
24 the people who heard it or who didn't hear it on a  
25 theory that the -- we rely on the integrity of the

1 market, and the integrity of the market was impaired if  
2 the statement was false.

3 In any event, there was a price effect. And  
4 there isn't a price effect if the statement wasn't  
5 material and made publicly into an efficient market.

6 JUSTICE GINSBURG: But I still -- what does  
7 "material" mean at the trial level, what does "material"  
8 mean at the certification level?

9 MR. WAXMAN: Material means at both, as this  
10 Court said, that there is a substantial likelihood that  
11 the information would have been viewed by a reasonable  
12 investor as having significantly altered the total mix  
13 of information available. That is the test.

14 JUSTICE GINSBURG: So it's the same  
15 question. It has to be -- if it's established at the  
16 certification stage, it has to be established again at  
17 trial?

18 MR. WAXMAN: That's correct. Just like the  
19 market efficiency and the public statement and the  
20 market timing. Every one of those predicates has to be  
21 proven to the jury's satisfaction at trial. All of them  
22 are exactly the same in that respect.

23 May I reserve the balance of my time?

24 CHIEF JUSTICE ROBERTS: Yes, you may.

25 Mr. Frederick.

1 ORAL ARGUMENT OF DAVID C. FREDERICK  
2 ON BEHALF OF THE RESPONDENT

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

5 The class certification process determines  
6 whether the case can generate common answers for all  
7 class members. So for three reasons --

8 JUSTICE SOTOMAYOR: Why don't you answer the  
9 question that was asked earlier, if Basic set forth a  
10 presumption, and are you disputing that at the class  
11 certification stage a defendant can prove that the  
12 market is inefficient?

13 MR. FREDERICK: Yes.

14 JUSTICE SOTOMAYOR: So why shouldn't we hold  
15 Basic to its position that all of its presumptions can  
16 be rebutted as well, not just efficiency? Why do we set  
17 out efficiency as the one issue that can be rebutted?

18 MR. FREDERICK: There is a lot to said about  
19 Basic, and let me just start the ball rolling by making  
20 these observations. First, Basic did not try to  
21 distinguish between the requisites of Rule 23 and the  
22 substantive component of the fraud-on-the-market theory.  
23 And that's important, because in that case the court  
24 remanded for a redetermination of materiality, but it  
25 upheld the class certification order. So in the context

1 of Basic, the court seemed to be thinking there was a  
2 difference between what needed to be proved for class  
3 certification and what would need to be proved on the  
4 merits of the case.

5           Now, the second thing to be said is that  
6 Basic needs to be read against the backdrop of Rule 23,  
7 and especially this Court's recent decision in  
8 Walmart v. Dukes. Because materiality always generates  
9 a common answer for all class members, it is the  
10 quintessential common issue that does not splinter the  
11 class or cause it to be noncohesive for purposes of  
12 understanding predominance.

13           JUSTICE KENNEDY: Doesn't -- doesn't that  
14 assume that the efficient market theory is always  
15 relevant to materiality? And there might be instances  
16 in which there is subjective reliance, which we inquire  
17 into, that is objectively reasonable, but that does not  
18 involve a fraud on the market?

19           MR. FREDERICK: Only in a hypothetical case,  
20 Justice Kennedy. And this is the absolute most  
21 important point that I can try to make today. In a  
22 fraud-on-the-market case, the idea of reliance, the only  
23 theory of reliance that is being advanced, is indirect  
24 reliance on the integrity of the market. There is no  
25 other theory of reliance.



1           Why do we know that in this case? For two  
2 reasons. First, the Connecticut Retirement System could  
3 not be the class representative if it did not meet the  
4 typicality requirement of Rule 23(a), which the district  
5 court found. This is on page 25A of the petition  
6 appendix, and has not been challenged subsequently.

7           But why doesn't Connecticut have a direct  
8 reliance theory? We know they don't because they have a  
9 fiduciary duty to their investors to apply whatever  
10 theory they have of securities fraud. So we know in  
11 this case, and this is by far clear in the  
12 run-of-the-mine fraud-on-the-market case, that the class  
13 representative will only establish reliance indirectly  
14 by showing that the integrity of the market was  
15 impaired.

16           And so their construct is an entirely  
17 hypothetical and theoretical one. It simply does not  
18 arise in the real world of fraud-on-the-market cases.

19           JUSTICE SCALIA: Mr. Frederick, you -- you  
20 say that, you know, it's a flukey hypothetical where --  
21 where the -- the issue here would -- would come up again  
22 in a different context in an individual suit. Let --  
23 let me give you a -- a case that's not flukey and  
24 hypothetical. That is, it is usually the case that  
25 people who are allegedly defrauded in stocks rely upon

1 the fact that they bought it at an -- at an inflated  
2 price or sold it at a depressed price. Both of those  
3 questions depend upon the efficiency of the market.

4 If the market is not efficient, a question  
5 that has to be decided for the class certification case,  
6 the individual investor is not going to be able to say,  
7 you know, that's -- that's why I got cheated, because  
8 the market reflected this false statement and I paid  
9 more money for the stock than I should have. That --  
10 that is not a flukey hypothetical. That is what will  
11 happen in most individual cases. And yet, that question  
12 of the efficiency of the market has to be decided at the  
13 class certification stage.

14 MR. FREDERICK: Right, precisely because we  
15 have to know are all the investors standing in the same  
16 position. If the market is efficient and it is  
17 absorbing information into the price, all investors will  
18 have the same question with respect to materiality.

19 JUSTICE SCALIA: You could say the same  
20 about materiality. If it's immaterial, it isn't  
21 reflected in -- in the market.

22 MR. FREDERICK: They all lose on the merits  
23 if there is no materiality. The question about  
24 efficiency, Justice Scalia, and the reason why it is  
25 advanced at class certification is because it serves a

1 gatekeeping role in determining whether all the  
2 investors can show indirect reliance on the market. If  
3 the -- if the stock is thinly traded, there are no  
4 public analysts, there are no stock reports given about  
5 it, and no one knows exactly why is the price being  
6 determined, that creates exactly the kind of individual  
7 issues that would predominate in a securities fraud  
8 case.

9 JUSTICE SCALIA: So -- so the difference you  
10 assert is that, with respect to the issue here, it will  
11 be an issue in all individual cases, whereas with regard  
12 to the efficiency of the market it will only be an issue  
13 in what, 95 percent of -- of the individual cases?

14 MR. FREDERICK: No, the question is, does  
15 efficiency serve as a means of determining are all the  
16 investors similarly situated? Are they a cohesive  
17 class? If the market is not efficient, and mind you,  
18 they conceded this question in their answer and they did  
19 not challenge the expert that was put into this report  
20 on the question of efficiency, so that question's really  
21 not in this case.

22 But in the case that you're hypothesizing,  
23 Justice Scalia, efficiency serves the gatekeeping  
24 function of determining are all the investors similarly  
25 situated so that indirect reliance can be a -- a method

1 of showing that predicate for a common answer to be  
2 determined at trial.

3 JUSTICE SOTOMAYOR: Could we --

4 MR. FREDERICK: Publicity serves the same  
5 function.

6 JUSTICE SOTOMAYOR: Could we get a  
7 hypothetical that I actually think could occur, which is  
8 not a truth-on-the-market defense, but a known truth to  
9 the individual person seeking certification. So that  
10 is, it's immaterial to that person because they were  
11 told this information by someone and still trading.  
12 Would that defense be available at certification?

13 MR. FREDERICK: I think it -- where it gets  
14 appropriately done is the adequacy and typicality prongs  
15 of Rule 23(a), because that person has a different  
16 factual basis for attempting to assert a securities  
17 fraud, and that person is not typical of the class and  
18 so therefore would not meet the typicality requirement  
19 of 23(a).

20 Now, it is possible, certainly, that in  
21 other cases there might be investors out there who do  
22 have a direct reliance theory, but they are protected by  
23 Rule 23 in a couple of ways. One is they can bring  
24 their own case, and they can say, I directly relied on  
25 Amgen's misstatements and the false things that they

1 said about their flagship products and I therefore have  
2 my own 10b-5 case, or if the class is certified and they  
3 think they have a direct reliance theory, they can opt  
4 out of the class.

5 JUSTICE BREYER: This is true, but I'm --  
6 I'm -- I'm trying to work out what, as I understand it  
7 now, Mr. Waxman's point is -- is basically this, that --  
8 that why do we use an efficient market theory? We use  
9 it because if the market is efficient and the statement  
10 is public, then someone who bought over the market is  
11 buying in a -- in a world that reflects the false  
12 statement. I mean, that's -- so he -- there was  
13 sufficient reliance indirectly.

14 All right. So I think his point is, yes, I  
15 can see materiality is something that's relevant to  
16 everybody. Of course it is, a common issue in the case.  
17 But also it is a feature of materiality that if it  
18 wasn't material, then our theory of market reliance --  
19 market -- efficient markets goes out the window, because  
20 you can have all the efficiency in the world, all the  
21 publicity in the world, but still where something to a  
22 reasonable stockbroker is irrelevant, his reaction is  
23 "who cares?" And therefore, although there could be  
24 special cases, the efficient market theory plays no  
25 role.

1                   Now, I think that's what his theory is, if I  
2 understand it. And -- and I don't hope it is if I've  
3 got it -- I mean, I hope I got it right. But -- but if  
4 that -- so what's your direct answer to that?

5                   MR. FREDERICK: My direct answer to that is  
6 that materiality still serves as a common answer. All  
7 the investors are going to lose if it is not a material  
8 misstatement that has any effect, and they will win or  
9 they will have the potential to win if it is a  
10 material --

11                   JUSTICE KENNEDY: Well, that -- that --

12                   JUSTICE SCALIA: The issue -- the issue is  
13 not whether -- whether it's a common question or not.

14                   MR. FREDERICK: Well --

15                   JUSTICE SCALIA: The issue is whether  
16 there's any reason to believe that the -- that the  
17 market reflects reality.

18                   MR. FREDERICK: Right.

19                   JUSTICE SCALIA: That's the issue.

20                   MR. FREDERICK: But, Justice Scalia, I think  
21 that the issue that you want to decide or you think that  
22 you want to decide is what constitutes the efficiency of  
23 the market, and that is a hotly litigated issue in many  
24 securities cases. It just happens not to be at issue in  
25 this one. And so the question of, you know, you've got

1 a Fortune 200 company with 1.1 billion shares  
2 outstanding, nine million traded a day during the class  
3 period. I mean, this is a hugely efficient market for  
4 the stock that is at issue before you.

5 JUSTICE BREYER: All right. So you're  
6 saying in this kind of case, the -- the materiality or  
7 not is not likely to be specially sufficient --  
8 specially significant. In fact, you are going to decide  
9 if it is a common issue, and there is no reason to  
10 import that common issue into the preliminary finding,  
11 even if what I just parroted, we hope is true.

12 MR. FREDERICK: Right. What you're ending  
13 up doing, Justice Breyer, is you are front loading. You  
14 are having a mini trial on the merits, because the  
15 materiality question here goes into what did the  
16 executives think and mean when they were making certain  
17 statements about clinical trials for their drug. What  
18 was --

19 JUSTICE KENNEDY: You -- you are saying that  
20 if everyone loses, if it's not material, that's a common  
21 issue and therefore, the trial court at the  
22 certification stage does not have to determine it.

23 MR. FREDERICK: No, what I'm saying is that  
24 it is -- because it is a common question, it is not one  
25 to be decided at class certification. Just like

1 falsity --

2 JUSTICE KENNEDY: I'm not sure how that's  
3 different from what I said. But in other words, you are  
4 saying that market efficiency is just presumed and  
5 everybody wins or everybody loses, and so you can have a  
6 class action even though the trial judge is convinced  
7 that there is no adequate common market theory to  
8 support the common -- the common injury.

9 MR. FREDERICK: That's not our position.  
10 Our position is that efficiency and publicity are  
11 gate-keeping functions to determine whether or not the  
12 answer for indirect reliance on the market is a common  
13 question.

14 JUSTICE GINSBURG: Mr. Frederick, you say --  
15 you say, you point out quite rightly that the efficiency  
16 of the market was conceded -- was conceded below.

17 MR. FREDERICK: Yes.

18 JUSTICE GINSBURG: It was not challenged.  
19 Except that now, in Amgen's brief, there is a suggestion  
20 that the efficiency of the market is a more  
21 sophisticated question. And it's not my note -- binary,  
22 I think is what they said -- it isn't that it's either  
23 efficient or it's not efficient; it depends on other  
24 factors.

25 MR. FREDERICK: It's a new concoction they



1 have not argued before this stage of the briefing in  
2 this case, and it's wrong because all investors will  
3 rise or fall based on whether or not those statements  
4 that may have some subsidiary materiality effect are  
5 going to be able to show that there was some consequence  
6 to the market. And it is that why -- that is why it is  
7 still a common question, even if there are the  
8 subsidiary inefficiencies --

9 JUSTICE BREYER: Right. So if I've got  
10 this, your answer -- which I am trying to follow it;  
11 don't tell me I'm right if I'm not -- that with  
12 efficiency of the market, that's not a traditional  
13 element of a tort --

14 MR. FREDERICK: Correct.

15 JUSTICE BREYER: -- that is something  
16 special to get into this theory.

17 MR. FREDERICK: That's correct.

18 JUSTICE BREYER: The publicity of the  
19 matter, that is not traditionally a common element of  
20 the tort, that is something special to get into this  
21 theory.

22 MR. FREDERICK: Correct.

23 JUSTICE BREYER: With materiality, it is a  
24 common element of the tort always; it is traditionally  
25 there; it will be litigated, so there is no special

1 reason to or desirability in or need for litigating at  
2 the outset.

3 MR. FREDERICK: That's correct. And  
4 Congress recognized that there were issues concerning  
5 these various elements. And that's why, in 1995, when  
6 it enacted the PSLRA, it addressed scienter by imposing  
7 a heightened pleading requirement and loss causation,  
8 but it was asked to address materiality and reliance and  
9 it chose not to. The first bill that was proposed would  
10 have dealt with Basic, and the -- and the Congress voted  
11 that down, and instead --

12 JUSTICE SCALIA: But there is -- there is a  
13 reason for deciding it earlier, and the reason is the --  
14 the enormous pressure to settle once the class is  
15 certified. In most cases, that's the end of the  
16 lawsuit. There's -- there's automatically a settlement.

17 Now, one way of -- of certifying the class  
18 is to show, well, you know, it's an efficient market and  
19 you can presume that everybody in the class relied on  
20 the market. But that's only true if -- if the -- the  
21 statement was material to the market. If it was  
22 immaterial to the market, that isn't true. And you  
23 should not proceed any further, and you should not begin  
24 this -- this class action which, in most cases, is  
25 simply the preliminary to a settlement. There is a good

1 reason for deciding it sooner.

2 MR. FREDERICK: Well, Justice Scalia, you  
3 would consign district court judges to having many  
4 trials on the merits because the fact that materiality  
5 is such a highly contextual inquiry --

6 JUSTICE KENNEDY: Well, you have the -- you  
7 have the burden of justifying class certification --

8 MR. FREDERICK: True.

9 JUSTICE KENNEDY: -- is that not correct?

10 MR. FREDERICK: That's correct.

11 JUSTICE KENNEDY: All right. Now suppose  
12 there is some real question of whether or not the causal  
13 chain hasn't been broken, the causal chain between the  
14 misstatement and the movement in price. Don't you have  
15 to prove the integrity of the causal chain?

16 MR. FREDERICK: Yes.

17 JUSTICE KENNEDY: At the certification  
18 stage?

19 MR. FREDERICK: Yes, but that's where  
20 efficiency comes in, Justice Kennedy, and that's why,  
21 when efficiency is contested at the class certification  
22 stage, what comes in are proofs of does information end  
23 up having an effect? And economists do event studies to  
24 try to show the general level at which information will  
25 be absorbed into the market price. That's where that

1 issue gets contested. It does not get contested on the  
2 question of materiality, because materiality looks at  
3 the total mix of information that would be relevant to  
4 an investor, not --

5 JUSTICE KENNEDY: You say it's material even  
6 though there is no cause in fact? I don't understand  
7 that.

8 MR. FREDERICK: What I'm saying is that the  
9 efficiency question goes into the individual stock's  
10 ability to absorb information, both material and  
11 nonmaterial information.

12 Now, the question on the merits, for which  
13 all investors will either rise or fall together, is was  
14 this company's misrepresentation a material one to the  
15 reasonable investor? And that's why all investors are  
16 going to have this same answer, because it's the same  
17 objective inquiry.

18 The question that you -- you and  
19 Justice Scalia are positing about the efficiency of the  
20 market is one on which there are disagreements among the  
21 lower courts as to how to challenge and how to deal with  
22 that question, but they do not do it on the basis of  
23 materiality.

24 Judge Easterbrook had a very sound opinion  
25 in the Schleicher case in which he goes through and he

1 explains that when there is a fraud on the market case,  
2 the notion of indirect reliance, where efficiency is  
3 established, really evolves -- devolves down to the core  
4 merits question of materiality. And that is a common  
5 question that -- in which all of the investors are going  
6 to rise together.

7           But I do want to end by saying that, when  
8 Congress looked at this question, it decided not to deal  
9 with this question of efficiency or materiality. It was  
10 faced with a specter of 300 lawsuits being filed per  
11 year that were securities fraud cases, in 1995, where a  
12 93 percent settlement rate was occurring, an average  
13 settlement of nearly \$9 million.

14           In 2011 the statistics showed that what  
15 Congress did was successful in achieving the purpose  
16 Congress attained. In the year 2011, there were 188  
17 class actions filed; 50 percent of them were dismissed  
18 mostly on the high-end pleading standards that Congress  
19 had enacted in the PSLRA.

20           So it's not really for this Court's province  
21 to be imposing policy judgments about what additional  
22 requirements ought to be put on 23(b)(3); Congress made  
23 that judgment. And these proceedings that have gone  
24 along in -- in this way were perfectly sound by -- with  
25 the district court and the court of appeals.

1 If the Court has no further questions?

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Sherry.

4 ORAL ARGUMENT OF MELISSA ARBUS SHERRY

5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENT

7 MS. SHERRY: Mr. Chief Justice and may it  
8 please the Court:

9 I would like to start by going back to the  
10 language of Rule 23 and, in particular, the predominance  
11 requirement. The only question is whether common issues  
12 predominate over individual issues.

13 As several of the justices have recognized,  
14 materiality is an objective inquiry, at least to a  
15 common answer, and that common answer unites the class  
16 rather than divides it. If materiality is shown, the  
17 class members can proceed together on the  
18 fraud-on-the-market theory. But --

19 JUSTICE SOTOMAYOR: But as Justice Scalia  
20 pointed out earlier, so is efficiency or nonefficiency.

21 MS. SHERRY: And the difference --

22 JUSTICE SOTOMAYOR: So that -- that  
23 differentiation, articulating it that way, doesn't move  
24 the ball.

25 MS. SHERRY: I would disagree with that

1 because the difference is with efficiency and with  
2 publicity. If the -- depending on the common answer,  
3 the class may divide. It may fragment because, even if  
4 the market is inefficient, individual members can make  
5 out claims of direct reliance. You can rely on an  
6 inefficient market and prevail. You can rely on  
7 nonpublic statements --

8 JUSTICE SCALIA: What's the difference  
9 between 100 percent and 95 percent? I mean, most of the  
10 other claims in -- in stock cases are going to be based  
11 on what -- what the market price was when the person  
12 bought or sold.

13 So, you know, 95 percent instead of  
14 100 percent, that's -- that's the basic difference?

15 MS. SHERRY: The -- the purpose of the class  
16 certification stage with respect to predominance is to  
17 weigh the common issues against individual issues. And  
18 with respect to market efficiency -- excuse me -- market  
19 efficiency and publicity, those are two matters that --  
20 that either bind the class together or divide them. To  
21 the extent the market is inefficient, or to the extent  
22 the statements are not public, they are not all getting  
23 the information from the same source.

24 JUSTICE BREYER: There are preconditions --  
25 there are preconditions, not related to the merits, that

1 do, in fact, justify the use of a special reliance  
2 theory. Now I've said that; of course, so is  
3 materiality.

4 MS. SHERRY: But --

5 JUSTICE BREYER: But materiality, unlike the  
6 other two, is part of the element of the basic case  
7 where it is a common issue in this case -- and in  
8 most -- to everybody.

9 MS. SHERRY: And that is exactly right. And  
10 the difference is --

11 JUSTICE BREYER: Is that exactly right?  
12 Because I am getting the -- facing the problem a few  
13 minutes from now somebody is going to say: Well, why is  
14 that exactly right? I mean, it is a precondition.

15 MS. SHERRY: I am going to say it's exactly  
16 right, because the confusion here is that materiality in  
17 a fraud-on-the-market case serves two purposes: It is a  
18 predicate to the fraud-on-the-market theory, but it is  
19 also an independent, separate element. And what  
20 Petitioners would have this Court do is isolate the two  
21 inquiries when they're really the same question.

22 It is asking the same question that leads to  
23 the same answer, and it's one that unites the class.  
24 There's -- Petitioners phrase the question as whether  
25 reliance --



1 JUSTICE SCALIA: If you have the same  
2 question, then maybe we shouldn't have this  
3 fraud-on-the-market theory. Because the whole purpose  
4 of it is -- is to -- to assume that -- that the whole  
5 class was -- was damaged and relied -- because you can  
6 rely on an efficient market. But you can only rely on  
7 an efficient market where there has been a material  
8 misrepresentation. So maybe we should overrule Basic  
9 because it was certainly based upon a theory that --  
10 that simply collapses once you remove the materiality  
11 element.

12 MS. SHERRY: The fraud-on-the-market theory,  
13 however, is a substantive theory. It's not a procedural  
14 doctrine. To be sure, one of the practical consequences  
15 is it allows classes to be certified, but it's a means  
16 of proving reliance in an impersonal market in which  
17 investors trade today.

18 What the Court did in Basic was adapt the  
19 direct reliance concept which envisioned face-to-face  
20 transactions to the impersonal market. And so with  
21 respect to actually proving a fraud on the market,  
22 you're absolutely right, but what we're talking about  
23 here is not whether a fraud on the market can be proven;  
24 we're talking about whether common issues predominate  
25 over individual issues.

1           And Petitioners still fail to point to any  
2 individual issues that would come into play in a case  
3 where materiality is not able to be shown. None would,  
4 because materiality would kill the case for all.

5           JUSTICE SCALIA: Materiality is a common  
6 issue. Reliance is only a common issue if you accept  
7 the fraud-on-the-market theory. That's the problem.  
8 And you are using the one, which is a common issue, to  
9 leapfrog into the second, to make the efficiency of the  
10 market reasoning something that it isn't.

11           MS. SHERRY: With all due respect, the two  
12 really do collapse into one. Once you've proven that  
13 the market is efficient, and once you've proven that the  
14 statements are public, you're asking the same question.  
15 You can call it reliance or you can call it materiality.

16           JUSTICE KENNEDY: Well, that then -- that  
17 imparts the question of 24 years of economic  
18 scholarship -- I think that's how long it's been since  
19 Basic was decided -- has shown that the efficient market  
20 theory is -- is really an overgeneralization. It could  
21 be much more subtle than that and so you have an  
22 advanced theory. But you want us to ignore that.

23           MS. SHERRY: No, I -- a couple responses to  
24 that. The first one is the one that my colleague made,  
25 which is that market efficiency isn't disputed here. It

1 was conceded in the answer at paragraph 199. And not  
2 only is it not -- is it not contested here, Petitioners  
3 actually -- actually embrace an efficient market in  
4 order to pursue their truth-on-the-market defense.

5           And so my first response would be that's not  
6 something to be addressed in this case. And my second  
7 response is Basic didn't adopt any particular economic  
8 model of market efficiency. If you look at footnote 24  
9 of Basic, if you look at footnote 28 of Basic, the Court  
10 makes very clear that it's not adopting an economic  
11 theory as far as how quickly or completely the  
12 information is incorporated into the market price.

13           Instead, it was looking at congressional  
14 intent. It was looking at difficulties in direct proof.  
15 And it was looking at common sense to reach a result and  
16 again to adapt a reliance theory that was premised on  
17 face-to-face transactions to the impersonal market that  
18 exists today.

19           And so, again, I wouldn't consider market  
20 efficiency in this case. It's not presented. To the  
21 extent there's questions about how the determinations  
22 should be made in terms of levels of generality, that's  
23 something that the lower courts can decide.

24           Today, all we're talking about is the  
25 materiality component and again focusing on whether or

1 not common issues predominate over individual issues.  
2 It's a comparative inquiry. It requires comparing  
3 common issues on the one hand and individual issues on  
4 the other. And Petitioners have not identified any  
5 individual issues that will actually come into play as  
6 the case is litigated.

7           The -- going to the -- some of the policy  
8 concerns that were raised, I'd make a couple points.  
9 One is the one that my colleague made. Congress  
10 addressed those policy concerns in the PSLRA, in SLUSA,  
11 and it chose to address them through different means.

12           The second point I would make is the same  
13 argument could be made with respect to the other  
14 elements of the securities fraud cause of action. If  
15 the argument is you should have to prove it at class  
16 certification because otherwise the case is going to  
17 settle, you could say the same thing with respect to  
18 scienter, with respect to falsity, with respect to loss  
19 causation, which this Court in Erica John of course did  
20 said did not have to be proven at the class  
21 certification stage.

22           So in short, it proves too much. The third  
23 response is that there are countervailing policy  
24 concerns and there are countervailing concerns that are  
25 actually tethered to Rule 23 in terms of efficiency.

1                   Excuse me. Petitioners --

2                   CHIEF JUSTICE ROBERTS: Do you -- do you  
3 agree that you have to show materiality to rely on the  
4 fraud-on-the-market theory to establish reliance?

5                   MS. SHERRY: As a substantive matter on the  
6 merits, yes. It is a predicate.

7                   CHIEF JUSTICE ROBERTS: I don't understand  
8 why that is. If you're trying to show reliance, and you  
9 show that it's an efficient market, and that the  
10 information was -- was public, doesn't that show  
11 reliance without regard to whether the statement's  
12 material or not?

13                   MS. SHERRY: I think in terms of transaction  
14 causation, what you're -- and reliance is referred to as  
15 transaction causation -- what you're trying to show is  
16 whether or not the information affected or distorted the  
17 market price. And in order to show price distortion, it  
18 does require that the information be material. And so  
19 we accept that in terms of the fraud-on-the-market  
20 theory --

21                   JUSTICE SCALIA: Or, to put it differently,  
22 an efficient market is a market that takes account of  
23 material factors, right?

24                   MS. SHERRY: I -- I would say it's --

25                   JUSTICE SCALIA: It's not an efficient

1 market if it's, you know -- it's, who knows, random? It  
2 takes account of material factors.

3 MS. SHERRY: I would make a minor quibble on  
4 that. I would say that the market takes account of all  
5 public information, but it only -- it only moves based  
6 on material information, so that's exactly right.

7 And so our issue is not with the predicates  
8 for the fraud-on-the-market theory. Our issue is with  
9 Petitioners equating the predicate from the  
10 fraud-on-the-market theory with the actual prerequisites  
11 of Rule 23. And this Court made it very clear in Shady  
12 Grove that the only question at the Rule 23 stage is  
13 whether the prerequisites have been met. The only one  
14 that we're talking about here is predominance. It's a  
15 comparative inquiry between common issues and individual  
16 issues.

17 And if I can quickly go back to my point  
18 about countervailing policy concerns, as Petitioners  
19 acknowledge, a determination of the class certification  
20 stage is not binding on anybody -- in that case on the  
21 ultimate fact-finder, or in any other case.

22 And so the problem with Petitioners'  
23 position is that it would require relitigation of the  
24 materiality question at the merits stage to the extent  
25 the class is certified. Or if it's not in every other

1 case that is brought on the same issue. That doesn't  
2 serve the efficiency purposes that underlie Rule 23.

3 The -- in terms of absent class members, he  
4 suggests that absent class members would somehow be  
5 prejudiced, but as Your Honor, Justice Kagan, pointed  
6 out, the only prejudice is that they wouldn't be able to  
7 relitigate the very same issue. That is protected by  
8 allowing opt out. That is protected by Rule 23's  
9 adequacy of representation requirement.

10 And so that's already sufficiently  
11 protected. The most efficient course is to actually  
12 focus on common issues. Materiality is a common issue.  
13 It will result in the same answer for all. The class  
14 rises or falls together. And class certification is not  
15 about only certifying meritorious cases.

16 In 1966, when the current version of Rule  
17 23(b)(3) was adopted, it was an innovation. It was a  
18 change from the spurious class actions where it was a  
19 one-way ratchet, where only the defendant was bound. In  
20 the current rule of Rule 23(b)(3), you want to certify  
21 class actions that are both meritorious and those that  
22 are not, so it reaches a binding judgment.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Waxman, you have 5 minutes.

25 REBUTTAL ARGUMENT OF SETH P. WAXMAN

1 ON BEHALF OF THE PETITIONERS

2 MR. WAXMAN: Thank you, Mr. Chief Justice.

3 The advisory committee notes to the very  
4 amendment that Ms. Sherry was referring to states, "A  
5 fraud case may be unsuited for treatment as a class  
6 action if there was a material variation in the kinds or  
7 degrees of reliance by the persons to whom they were  
8 addressed."

9 That is this case. The anomaly of our -- my  
10 friend's position is they concede that materiality is a  
11 predicate for class reliance. They agree that unless  
12 the statement is material, however efficient the market,  
13 however loudly the statement was published, there is no  
14 detrimental reliance on the integrity of the market  
15 price.

16 Reliance can only be approved -- and  
17 Justice Breyer, this goes to your traditional paradigm  
18 case -- in the paradigm case, reliance was proven by the  
19 fact that you heard the statement and you did something  
20 in reliance on it, to your detriment.

21 The innovation of Basic, and the notion that  
22 Basic didn't say anything about class certification  
23 under Rule 23 is astonishing, given the fact that the  
24 whole reason that the question of the  
25 fraud-on-the-market theory was presented was the inquiry



1 about whether there could be -- whether the traditional  
2 bilateral method of proving detrimental reliance on a  
3 statement could be aggregated into a ginormous class by  
4 allowing everyone to say well, we relied on the  
5 integrity of the market price and a material  
6 misstatement -- a material statement affected that  
7 price.

8 They said "could have" --

9 JUSTICE BREYER: Traditionally, how did that  
10 work? How did that work traditionally? No class, okay?  
11 Joe -- Farmer Jones comes in, you have to show it's  
12 false? You have to show it's material, and then you  
13 show the reliance that he did something on that basis --

14 MR. WAXMAN: Right.

15 JUSTICE BREYER: So the materiality was not  
16 part of reliance. Materiality was an element that was  
17 always proved, and then you went on to show reliance.

18 MR. WAXMAN: Exactly right. And what the  
19 Court in Basic could have said, Justice Breyer, was:  
20 Forget the fraud-on-the-market theory; we are going to  
21 absolve, we are going to say that for 10b-5 actions, you  
22 don't have to prove reliance directly on the statement.  
23 We are going to allow you to -- we -- we posit that  
24 investors rely in common on the integrity of the market  
25 price; and if you can demonstrate to us that a

1 challenged statement moved the market, if there was  
2 market effect, we will allow you to proceed as a class;  
3 because then the common answer to the common question,  
4 how are you going to prove reliance is we are going to  
5 prove it all the same way, because investors rely on the  
6 integrity of the market price.

7 Now, the Court in Basic --

8 JUSTICE GINSBURG: It sounds like you are  
9 saying you have to win on the merits of the materiality  
10 question in order to get the class certified.

11 MR. WAXMAN: You have to prove that there --  
12 the Court explained correctly in Basic, and this -- this  
13 actually goes to -- anticipates my next point, Justice  
14 Ginsburg, the Court in Basic didn't say: Well, we're  
15 going to allow you to --

16 JUSTICE SCALIA: Excuse me.

17 MR. WAXMAN: -- we're going to allow you  
18 to --

19 JUSTICE SCALIA: You -- you don't have to  
20 prove it to get the class certified. You only have to  
21 prove it to get the class certified with the benefit of  
22 the fraud-on-the-market theory.

23 MR. WAXMAN: Correct.

24 JUSTICE SCALIA: Which is a shortcut to  
25 getting the class certified, right?

1 MR. WAXMAN: Yes.

2 JUSTICE SCALIA: So this is just a condition  
3 to the shortcut.

4 MR. WAXMAN: Yes. And in fact it's a  
5 shortcut to a shortcut. What the Court in Basic could  
6 have said is: If you want to proceed as a class, you  
7 prove to the Court that reliance is common by showing  
8 that the market misstatement affected the market price.  
9 But the Court in Basic went further in the direction of  
10 class plaintiffs and said: You don't have to prove that  
11 directly.

12 All you have to prove -- we will allow that  
13 to be presumed if you can demonstrate without effective  
14 rebuttal four things: the statement was of a type that  
15 the market would care about; the statement was made  
16 publicly in an efficient market; and the trading  
17 occurred during the period between the misstatement and  
18 the correction --

19 JUSTICE BREYER: And the reason that we want  
20 to prove it upfront in the 23 rather than wait till the  
21 merits, where it will be argued anyway in exactly the  
22 same way -- the reason that we want to do it first is  
23 since it's going to be there anyway and going to be  
24 litigated anyway, unlike publicity, unlike efficiency.  
25 But the reason we take this one and run it upfront is?

1                   And it can't be the answer we should  
2 litigate everything before we litigate anything.

3                   MR. WAXMAN: Of course not.

4                   JUSTICE BREYER: Okay. So -- so what's the  
5 answer?

6                   MR. WAXMAN: The answer is that this is  
7 the -- that the point of Rule 23 is to say, you get to  
8 use this very useful and powerful device if you have the  
9 key to the gate, and the key to the gate is showing that  
10 the answer to the question, will reliance be proven  
11 commonly -- not lost commonly, but proven commonly -- is  
12 in fact yes.

13                   Thank you.

14                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15                   The case is submitted.

16                   (Whereupon, at 12:06 p.m., the case in the  
17 above-entitled matter was submitted.)

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<b>A</b>	<p><b>adequate</b> 32:7</p> <p><b>adopt</b> 43:7</p> <p><b>adopted</b> 47:17</p> <p><b>adopting</b> 43:10</p> <p><b>advanced</b> 24:23 26:25 42:22</p> <p><b>advisory</b> 14:13 48:3</p> <p><b>affect</b> 16:1</p> <p><b>aggregated</b> 49:3</p> <p><b>agree</b> 12:1 45:3 48:11</p> <p><b>agrees</b> 12:6 17:2 17:14</p> <p><b>AL</b> 1:3</p> <p><b>alleged</b> 8:20 10:6 15:25</p> <p><b>allegedly</b> 25:25</p> <p><b>alleging</b> 9:5</p> <p><b>allow</b> 49:23 50:2 50:15,17 51:12</p> <p><b>allowing</b> 17:9 47:8 49:4</p> <p><b>allows</b> 41:15</p> <p><b>altered</b> 22:12</p> <p><b>alternative</b> 18:1</p> <p><b>Amchem</b> 14:12 15:12</p> <p><b>amendment</b> 48:4</p> <p><b>Amgen</b> 1:3 3:4 10:20</p> <p><b>Amgen's</b> 8:20 28:25 32:19</p> <p><b>amicus</b> 1:22 2:10 38:5</p> <p><b>analysis</b> 19:13</p> <p><b>analysts</b> 27:4</p> <p><b>announced</b> 5:16</p> <p><b>anomaly</b> 48:9</p> <p><b>answer</b> 10:7 15:9 16:23 23:8 24:9 27:18 28:1 30:4 30:5,6 32:12 33:10 36:16 38:15,15 39:2</p>	<p>40:23 43:1 47:13 50:3 52:1 52:5,6,10</p> <p><b>answers</b> 23:6</p> <p><b>anticipates</b> 50:13</p> <p><b>anybody</b> 13:15 46:20</p> <p><b>anyway</b> 51:21,23 51:24</p> <p><b>apart</b> 19:3</p> <p><b>apologize</b> 17:22</p> <p><b>appeals</b> 37:25</p> <p><b>APPEARANC...</b> 1:15</p> <p><b>appendix</b> 25:6</p> <p><b>apply</b> 25:9</p> <p><b>approach</b> 19:13</p> <p><b>appropriately</b> 28:14</p> <p><b>approve</b> 6:24</p> <p><b>approved</b> 48:16</p> <p><b>ARBUS</b> 1:20 2:9 38:4</p> <p><b>argued</b> 33:1 51:21</p> <p><b>arguing</b> 5:9 8:16</p> <p><b>argument</b> 1:13 2:2,5,8,12 3:3,7 19:5 23:1 38:4 44:13,15 47:25</p> <p><b>arrogate</b> 9:23</p> <p><b>articulating</b> 38:23</p> <p><b>asked</b> 23:9 34:8</p> <p><b>asking</b> 40:22 42:14</p> <p><b>assert</b> 27:10 28:16</p> <p><b>assertion</b> 12:4</p> <p><b>Assistant</b> 1:20</p> <p><b>assume</b> 20:13,14 24:14 41:4</p> <p><b>astounding</b> 48:23</p> <p><b>attained</b> 37:16</p>	<p><b>attempting</b> 28:16</p> <p><b>authorized</b> 17:9</p> <p><b>automatically</b> 34:16</p> <p><b>available</b> 22:13 28:12</p> <p><b>average</b> 37:12</p> <p><b>a.m</b> 1:14 3:2</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>b</b> 16:14</p> <p><b>back</b> 7:13 10:12 38:9 46:17</p> <p><b>backdrop</b> 24:6</p> <p><b>balance</b> 22:23</p> <p><b>balancing</b> 8:2</p> <p><b>ball</b> 23:19 38:24</p> <p><b>based</b> 33:3 39:10 41:9 46:5</p> <p><b>basic</b> 17:4,9 20:4 23:9,15,19,20 24:1,6 34:10 39:14 40:6 41:8 41:18 42:19 43:7,9,9 48:21 48:22 49:19 50:7,12,14 51:5 51:9</p> <p><b>basically</b> 29:7</p> <p><b>basis</b> 28:16 36:22 49:13</p> <p><b>behalf</b> 1:16,18 2:4,7,14 3:8 7:5 21:22 23:2 38:5 48:1</p> <p><b>believe</b> 30:16</p> <p><b>benefit</b> 50:21</p> <p><b>best</b> 9:12</p> <p><b>bet</b> 14:8</p> <p><b>bilateral</b> 20:21 49:2</p> <p><b>bill</b> 34:9</p> <p><b>billion</b> 31:1</p> <p><b>binary</b> 32:21</p> <p><b>bind</b> 10:13,14</p>	<p>39:20</p> <p><b>binding</b> 6:4 46:20 47:22</p> <p><b>bought</b> 3:13 4:16 10:19 18:11 26:1 29:10 39:12</p> <p><b>bound</b> 47:19</p> <p><b>Breyer</b> 12:25 13:3,9,24 14:2 29:5 31:5,13 33:9,15,18,23 39:24 40:5,11 48:17 49:9,15 49:19 51:19 52:4</p> <p><b>brief</b> 32:19</p> <p><b>briefing</b> 33:1</p> <p><b>bring</b> 28:23</p> <p><b>bringing</b> 10:24</p> <p><b>broken</b> 35:13</p> <p><b>brought</b> 47:1</p> <p><b>burden</b> 9:19 35:7</p> <p><b>buying</b> 29:11</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 1:18 2:1,6 3:1 23:1</p> <p><b>call</b> 42:15,15</p> <p><b>capability</b> 17:17</p> <p><b>care</b> 51:15</p> <p><b>cares</b> 29:23</p> <p><b>case</b> 3:4,11 4:2 7:9,15,18 8:11 8:18 10:2,15,19 11:25 12:11,17 14:1,6,8,10 15:6 16:12,20 17:13 18:5 19:1 19:18 21:18,18 21:21 23:6,23 24:4,19,22 25:1 25:11,12,23,24 26:5 27:8,21,22 28:24 29:2,16</p>
----------	---	---	---	---

<p>31:6 33:2 36:25 37:1 40:6,7,17 42:2,4 43:6,20 44:6,16 46:20 46:21 47:1 48:5 48:9,18,18 52:15,16 <b>cases</b> 8:19,23 10:4 14:13 25:18 26:11 27:11,13 28:21 29:24 30:24 34:15,24 37:11 39:10 47:15 <b>causal</b> 35:12,13 35:15 <b>causation</b> 17:3 19:23 34:7 44:19 45:14,15 <b>cause</b> 12:15 24:11 36:6 44:14 <b>caused</b> 17:10 20:23 <b>central</b> 15:7 <b>cert</b> 3:15 5:6 8:4 12:12 14:3 <b>certain</b> 31:16 <b>certainly</b> 10:9 21:9 28:20 41:9 <b>certification</b> 5:6 6:3,13 7:3,23 8:13 9:9,11,15 9:21 10:3 11:11 13:5,19,25 14:3 14:12 16:4,18 16:24 17:6 19:16 20:12,18 20:21 21:12 22:8,16 23:5,11 23:25 24:3 26:5 26:13,25 28:9 28:12 31:22,25 35:7,17,21 39:16 44:16,21</p>	<p>46:19 47:14 48:22 <b>certified</b> 7:19 11:12 29:2 34:15 41:15 46:25 50:10,20 50:21,25 <b>certify</b> 12:24 21:7 47:20 <b>certifying</b> 5:19 34:17 47:15 <b>chain</b> 35:13,13 35:15 <b>challenge</b> 27:19 36:21 <b>challenged</b> 16:12 17:15 25:6 32:18 50:1 <b>change</b> 47:18 <b>cheated</b> 26:7 <b>Chief</b> 3:3,9 4:1,7 4:9 20:12 22:24 23:4 38:2,7 45:2,7 47:23 48:2 52:14 <b>chose</b> 34:9 44:11 <b>Circuit</b> 9:4 <b>circumstances</b> 13:17 <b>claim</b> 3:11,13 16:2 18:10 <b>claimant</b> 5:8 <b>claims</b> 12:21 15:8 39:5,10 <b>class</b> 3:12,15 5:24,25 6:13,16 6:19,24 7:3,4 7:18,23 8:4,13 8:15 9:9,10,15 9:20,22,24 10:9 10:11,14,17 11:11 12:12,23 13:25 14:3,4,11 14:14,16,17,18 14:23,24 15:12</p>	<p>15:12,13,20,23 15:24,25 16:15 16:21,24 17:6 17:15 19:3,4,6 19:10,15 20:18 20:20,24 21:2,7 23:5,7,10,25 24:2,9,11 25:3 25:12 26:5,13 26:25 27:17 28:17 29:2,4 31:2,25 32:6 34:14,17,19,24 35:7,21 37:17 38:15,17 39:3 39:15,20 40:23 41:5 44:15,20 46:19,25 47:3,4 47:13,14,18,21 48:5,11,22 49:3 49:10 50:2,10 50:20,21,25 51:6,10 <b>classes</b> 41:15 <b>class-wide</b> 5:20 5:20 17:14 <b>clear</b> 16:20 25:11 43:10 46:11 <b>clinical</b> 31:17 <b>cohere</b> 15:24 <b>coherence</b> 14:14 14:22 <b>coherent</b> 19:4 <b>cohesion</b> 15:12 15:13,20,24 <b>cohesive</b> 27:16 <b>collapse</b> 42:12 <b>collapses</b> 41:10 <b>colleague</b> 42:24 44:9 <b>come</b> 7:13 10:12 25:21 42:2 44:5 <b>comes</b> 8:6,16 35:20,22 49:11 <b>coming</b> 5:25</p>	<p><b>committee</b> 14:13 48:3 <b>common</b> 4:8,13 4:14,15,17,17 4:20,22 10:3 13:22,23 16:2 16:14,21 17:4 17:13 19:16,19 19:20 20:5,6,10 20:14,16 21:3 23:6 24:9,10 28:1 29:16 30:6 30:13 31:9,10 31:20,24 32:7,8 32:8,12 33:7,19 33:24 37:4 38:11,15,15 39:2,17 40:7 41:24 42:5,6,8 43:15 44:1,3 46:15 47:12,12 49:24 50:3,3 51:7 <b>commonly</b> 52:11 52:11,11 <b>company</b> 31:1 <b>company's</b> 36:14 <b>comparative</b> 44:2 46:15 <b>comparing</b> 44:2 <b>competing</b> 9:11 <b>completely</b> 43:11 <b>component</b> 23:22 43:25 <b>concede</b> 48:10 <b>conceded</b> 27:18 32:16,16 43:1 <b>concept</b> 41:19 <b>conceptually</b> 7:2 <b>concerning</b> 34:4 <b>concerns</b> 44:8,10 44:24,24 46:18 <b>conclusively</b> 18:8 <b>concoction</b> 32:25</p>	<p><b>condition</b> 51:2 <b>confusion</b> 40:16 <b>Congress</b> 34:4 34:10 37:8,15 37:16,18,22 44:9 <b>congressional</b> 43:13 <b>Connecticut</b> 1:6 3:5 5:22 6:20 25:2,7 <b>consequence</b> 33:5 <b>consequences</b> 41:14 <b>consider</b> 43:19 <b>considered</b> 10:21 <b>consign</b> 35:3 <b>constitutes</b> 30:22 <b>construct</b> 25:16 <b>contested</b> 35:21 36:1,1 43:2 <b>context</b> 23:25 25:22 <b>contextual</b> 35:5 <b>continue</b> 8:18 <b>convey</b> 13:16 <b>convinced</b> 32:6 <b>core</b> 37:3 <b>correct</b> 4:5 6:14 7:14 19:12 22:18 33:14,17 33:22 34:3 35:9 35:10 50:23 <b>correction</b> 51:18 <b>correctly</b> 50:12 <b>counsel</b> 38:2 47:23 52:14 <b>countervailing</b> 44:23,24 46:18 <b>couple</b> 28:23 42:23 44:8 <b>course</b> 10:14 29:16 40:2 44:19 47:11</p>
---	---	---	---	---

<p>52:3  <b>court</b> 1:1,13 3:10                      5:25 6:14 7:9                      7:25 8:1 12:22                      14:12 15:10                      17:4,9 22:10                      23:4,23 24:1                      25:5 31:21 35:3                      37:25,25 38:1,8                      40:20 41:18                      43:9 44:19                      46:11 49:19                      50:7,12,14 51:5                      51:7,9  <b>courts</b> 36:21                      43:23  <b>Court's</b> 5:15                      19:18 24:7                      37:20  <b>creates</b> 27:6  <b>credibility</b> 8:3  <b>curiae</b> 1:22 2:10                      38:5  <b>current</b> 47:16,20</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1  <b>damaged</b> 41:5  <b>DAVID</b> 1:18 2:6                      23:1  <b>day</b> 31:2  <b>deal</b> 36:21 37:8  <b>dealt</b> 34:10  <b>decide</b> 30:21,22                      31:8 43:23  <b>decided</b> 18:7                      26:5,12 31:25                      37:8 42:19  <b>decides</b> 21:16  <b>deciding</b> 34:13                      35:1  <b>decision</b> 6:3 7:3                      24:7  <b>deemed</b> 5:6  <b>defendant</b> 7:19</p>	<p>14:17 21:1                      23:11 47:19  <b>defense</b> 5:11,12                      28:8,12 43:4  <b>defrauded</b> 25:25  <b>degrees</b> 48:7  <b>demonstrate</b>                      49:25 51:13  <b>Department</b> 1:21  <b>depend</b> 5:17 26:3  <b>depending</b> 11:18                      39:2  <b>depends</b> 32:23  <b>depressed</b> 18:10                      26:2  <b>desirability</b> 34:1  <b>despite</b> 13:21  <b>determination</b>                      46:19  <b>determinations</b>                      21:6 43:21  <b>determine</b> 12:22                      31:22 32:11  <b>determined</b> 7:24                      18:17 27:6 28:2  <b>determines</b> 23:5  <b>determining</b> 27:1                      27:15,24  <b>detriment</b> 48:20  <b>detrimental</b>                      48:14 49:2  <b>detrimentally</b>                      12:9  <b>device</b> 52:8  <b>devolves</b> 37:3  <b>differ</b> 21:11,13                      21:14,15,15,16  <b>difference</b> 11:4,7                      18:25 24:2 27:9                      38:21 39:1,8,14                      40:10  <b>different</b> 7:24                      20:24 25:22                      28:15 32:3                      44:11</p>	<p><b>differentiation</b>                      38:23  <b>differently</b> 45:21  <b>difficulties</b> 43:14  <b>direct</b> 9:25 11:6                      11:13 21:20                      25:7 28:22 29:3                      30:4,5 39:5                      41:19 43:14  <b>direction</b> 51:9  <b>directly</b> 3:16 6:1                      10:25 17:7                      28:24 49:22                      51:11  <b>disagree</b> 38:25  <b>disagreements</b>                      36:20  <b>dismissed</b> 6:16                      37:17  <b>dispute</b> 8:7 20:22  <b>disputed</b> 8:10,18                      42:25  <b>disputing</b> 23:10  <b>distinguish</b> 23:21  <b>distort</b> 12:7  <b>distorted</b> 3:19                      12:5 45:16  <b>distortion</b> 4:17                      17:11 45:17  <b>district</b> 25:4 35:3                      37:25  <b>divide</b> 39:3,20  <b>divides</b> 38:16  <b>doctrine</b> 41:14  <b>doing</b> 9:14 31:13  <b>doubt</b> 5:15  <b>drag</b> 7:5  <b>dream</b> 13:23                      14:9  <b>drug</b> 31:17  <b>drugs</b> 9:2  <b>due</b> 42:11  <b>Dukes</b> 24:8  <b>duty</b> 25:9  <b>D.C</b> 1:9,16,18,21</p>	<p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 2:1 3:1,1  <b>earlier</b> 23:9                      34:13 38:20  <b>easier</b> 10:19  <b>Easterbrook</b>                      36:24  <b>economic</b> 42:17                      43:7,10  <b>economists</b>                      35:23  <b>effect</b> 4:3 22:3,4                      30:8 33:4 35:23                      50:2  <b>effective</b> 51:13  <b>efficiency</b> 18:9                      18:16 22:19                      23:16,17 26:3                      26:12,24 27:12                      27:15,20,23                      29:20 30:22                      32:4,10,15,20                      33:12 35:20,21                      36:9,19 37:2,9                      38:20 39:1,18                      39:19 42:9,25                      43:8,20 44:25                      47:2 51:24  <b>efficient</b> 3:22                      4:14,25 19:5                      22:5 24:14 26:4                      26:16 27:17                      29:8,9,19,24                      31:3 32:23,23                      34:18 41:6,7                      42:13,19 43:3                      45:9,22,25                      47:11 48:12                      51:16  <b>either</b> 5:13,25                      11:17 18:10                      19:5 32:22                      36:13 39:20  <b>element</b> 7:22                      12:14 13:5</p>	<p>16:25 17:1,13                      33:13,19,24                      40:6,19 41:11                      49:16  <b>elements</b> 12:10                      18:6 20:11 34:5                      44:14  <b>emboldened</b> 7:20  <b>embrace</b> 43:3  <b>enabling</b> 16:1  <b>enacted</b> 34:6                      37:19  <b>ends</b> 10:9,15  <b>enormous</b> 34:14  <b>entirely</b> 20:23                      25:16  <b>envisioned</b> 41:19  <b>equating</b> 46:9  <b>Erica</b> 44:19  <b>especially</b> 24:7  <b>ESQ</b> 1:16,18,20                      2:3,6,9,13  <b>essential</b> 12:1,2  <b>establish</b> 25:13                      45:4  <b>established</b>                      22:15,16 37:3  <b>ET</b> 1:3  <b>event</b> 10:22                      19:13 22:3                      35:23  <b>everybody</b> 3:19                      7:5 10:9,16                      14:25 15:1 19:6                      19:11 21:23                      29:16 32:5,5                      34:19 40:8  <b>evidence</b> 9:2,12                      10:25,25  <b>evolves</b> 37:3  <b>exact</b> 8:16  <b>exactly</b> 4:5 12:25                      22:22 27:5,6                      40:9,11,14,15                      46:6 49:18</p>
--	--	--	---	--

51:21 <b>example</b> 8:24 <b>examples</b> 13:21 <b>excuse</b> 39:18 45:1 50:16 <b>excuses</b> 4:11 <b>executives</b> 31:16 <b>exists</b> 5:21 43:18 <b>expert</b> 8:3 27:19 <b>explain</b> 5:14 <b>explained</b> 14:12 15:11 17:4 50:12 <b>explains</b> 37:1 <b>extent</b> 39:21,21 43:21 46:24 <b>extracted</b> 8:25	28:25 29:11 49:12 <b>falsity</b> 4:19,21 13:18 17:3 32:1 44:18 <b>far</b> 25:11 43:11 <b>Farmer</b> 49:11 <b>favor</b> 7:24 <b>feature</b> 29:17 <b>fiduciary</b> 25:9 <b>file</b> 7:20 <b>filed</b> 37:10,17 <b>finality</b> 21:16 <b>find</b> 8:4 <b>finding</b> 10:12 21:11,13 31:10 <b>findings</b> 21:11 <b>finds</b> 15:5 <b>fine</b> 20:19 <b>first</b> 11:22 14:15 15:14 21:17 23:20 25:2 34:9 42:24 43:5 51:22 <b>flagship</b> 9:1 29:1 <b>flukey</b> 25:20,23 26:10 <b>focus</b> 47:12 <b>focusing</b> 43:25 <b>follow</b> 33:10 <b>footnote</b> 43:8,9 <b>forcing</b> 12:23 <b>foreclosing</b> 12:20 <b>Forget</b> 49:20 <b>forth</b> 23:9 <b>fortiori</b> 15:15 <b>fortune</b> 10:1 31:1 <b>fortunes</b> 9:24 10:1 14:18 21:1 <b>forward</b> 19:1 <b>foul</b> 16:5 <b>found</b> 25:5 <b>four</b> 4:10 51:14 <b>fragment</b> 39:3	<b>fraud</b> 11:10 24:18 25:10 27:7 28:17 37:1 37:11 41:21,23 44:14 48:5 <b>fraudulent</b> 18:12 <b>fraud-on-the-...</b> 4:10 11:5 12:2 18:7 23:22 24:22 25:12,18 38:18 40:17,18 41:3,12 42:7 45:4,19 46:8,10 48:25 49:20 50:22 <b>Frederick</b> 1:18 2:6 22:25 23:1 23:3,13,18 24:19 25:19 26:14,22 27:14 28:4,13 30:5,14 30:18,20 31:12 31:23 32:9,14 32:17,25 33:14 33:17,22 34:3 35:2,8,10,16 35:19 36:8 <b>friends</b> 12:1 <b>friend's</b> 48:10 <b>front</b> 31:13 <b>fruits</b> 19:14 <b>full</b> 21:2 <b>function</b> 15:2 19:4 27:24 28:5 <b>functionally</b> 21:15 <b>functions</b> 32:11 <b>fundamental</b> 3:12 <b>Funds</b> 1:7 3:5 <b>further</b> 34:23 38:1 51:9 <b>future</b> 18:8,9	<b>G</b> 3:1 <b>gate</b> 10:4 16:4 20:21 52:9,9 <b>gatekeeping</b> 27:1,23 <b>gate-keeping</b> 32:11 <b>general</b> 1:21 35:24 <b>generality</b> 43:22 <b>generate</b> 23:6 <b>generates</b> 24:8 <b>getting</b> 39:22 40:12 50:25 <b>ginormous</b> 49:3 <b>Ginsburg</b> 10:5 10:18 16:7,9,13 16:23 20:3,9 21:5 22:6,14 32:14,18 50:8 50:14 <b>give</b> 25:23 <b>given</b> 27:4 48:23 <b>glue</b> 17:18 <b>go</b> 8:11 17:11,22 46:17 <b>goes</b> 19:1 29:19 31:15 36:9,25 48:17 50:13 <b>going</b> 5:23 7:9 10:11,14 13:13 21:18,18,20,22 26:6 30:7 31:8 33:5 36:16 37:5 38:9 39:10 40:13,15 44:7 44:16 49:20,21 49:23 50:4,4,15 50:17 51:23,23 <b>good</b> 13:9 34:25 <b>Government</b> 18:21 <b>grounds</b> 7:21 <b>Grove</b> 46:12 <b>guess</b> 9:6	<hr/> <b>H</b> <hr/> <b>habit</b> 17:20 <b>haircut</b> 8:21 <b>Halliburton</b> 17:5 <b>hand</b> 9:2 44:3 <b>hands</b> 14:19 <b>happen</b> 7:17 26:11 <b>happens</b> 4:4 17:12 19:8 30:24 <b>harm</b> 16:5 <b>hear</b> 3:3 9:3 21:24 <b>heard</b> 4:12 10:21 12:8 17:8 21:21 21:24 48:19 <b>heart</b> 3:13 <b>heightened</b> 34:7 <b>held</b> 8:9 <b>higher</b> 9:19 <b>highly</b> 35:5 <b>high-end</b> 37:18 <b>hold</b> 23:14 <b>holds</b> 6:14 17:18 <b>Honor</b> 47:5 <b>hope</b> 30:2,3 31:11 <b>hotly</b> 30:23 <b>hugely</b> 31:3 <b>hundreds</b> 20:24 <b>hypothesizing</b> 27:22 <b>hypothetical</b> 14:9 24:19 25:17,20,24 26:10 28:7
<hr/> <b>F</b> <hr/> <b>faced</b> 14:5 21:1 37:10 <b>face-to-face</b> 41:19 43:17 <b>facing</b> 40:12 <b>fact</b> 8:20 13:19 13:21 14:6 15:2 16:14 19:18,19 19:20 26:1 31:8 35:4 36:6 40:1 48:19,23 51:4 52:12 <b>factors</b> 32:24 45:23 46:2 <b>facts</b> 8:5,7,10 9:4 <b>factual</b> 28:16 <b>fact-finder</b> 46:21 <b>fact-sensitive</b> 8:2 <b>fail</b> 42:1 <b>fair</b> 14:16 <b>fall</b> 33:3 36:13 <b>falls</b> 19:10 47:14 <b>false</b> 5:1,4 13:14 13:16 19:22 20:22 22:2 26:8	<hr/> <b>G</b> <hr/>	<hr/> <b>I</b> <hr/> <b>idea</b> 24:22 <b>identified</b> 44:4 <b>ignore</b> 42:22 <b>immaterial</b> 5:7 6:15,15,23 7:9 7:11 8:14,14,17		



8:22 9:7 10:8 10:15 16:19 19:10 20:2 26:20 28:10 34:22 <b>immateriality</b> 10:13 19:9,9 <b>impaired</b> 22:1 25:15 <b>imparts</b> 42:17 <b>impersonal</b> 41:16,20 43:17 <b>import</b> 31:10 <b>important</b> 6:8 23:23 24:21 <b>impose</b> 14:16 <b>imposing</b> 34:6 37:21 <b>inability</b> 5:19 <b>incoherent</b> 19:6 <b>incorporated</b> 3:4 43:12 <b>independent</b> 40:19 <b>indicating</b> 13:13 <b>indirect</b> 9:25 12:3 17:10 24:23 27:2,25 32:12 37:2 <b>indirectly</b> 3:18 4:23 25:13 29:13 <b>individual</b> 3:13 3:16 5:5,7 7:10 12:21 13:12 16:16 18:8 19:2 19:7 25:22 26:6 26:11 27:6,11 27:13 28:9 36:9 38:12 39:4,17 41:25 42:2 44:1 44:3,5 46:15 <b>individualized</b> 12:8 <b>individually</b> 17:7	<b>inefficiencies</b> 33:8 <b>inefficient</b> 23:12 39:4,6,21 <b>inflated</b> 18:11 26:1 <b>information</b> 6:9 9:1 10:22 22:11 22:13 26:17 28:11 35:22,24 36:3,10,11 39:23 43:12 45:10,16,18 46:5,6 <b>injury</b> 32:8 <b>innovation</b> 47:17 48:21 <b>inquire</b> 24:16 <b>inquiries</b> 40:21 <b>inquiry</b> 9:16 35:5 36:17 38:14 44:2 46:15 48:25 <b>instances</b> 14:7 24:15 <b>insufficient</b> 19:1 <b>integrity</b> 4:24 6:5 21:25 22:1 24:24 25:14 35:15 48:14 49:5,24 50:6 <b>intent</b> 43:14 <b>interrupting</b> 17:23 <b>introduce</b> 9:3 <b>investor</b> 11:12 22:12 26:6 36:4 36:15 <b>investors</b> 6:7 15:24 25:9 26:15,17 27:2 27:16,24 28:21 30:7 33:2 36:13 36:15 37:5 41:17 49:24	50:5 <b>involve</b> 24:18 <b>involved</b> 6:9 <b>involves</b> 8:2 <b>irrelevant</b> 29:22 <b>isolate</b> 40:20 <b>issue</b> 5:7 10:3 12:8 13:22,23 14:15 15:7,8 18:18 19:19,20 21:3 23:17 24:10 25:21 27:10,11,12 29:16 30:12,12 30:15,19,21,23 30:24 31:4,9,10 31:21 36:1 40:7 42:6,6,8 46:7,8 47:1,7,12 <b>issues</b> 19:17 20:16 27:7 34:4 38:11,12 39:17 39:17 41:24,25 42:2 44:1,1,3,3 44:5 46:15,16 47:12	<b>jury's</b> 22:21 <b>Justice</b> 1:21 3:3 3:9 4:1,7,9,19 5:5,10 6:10,11 6:21 7:2,7 8:12 9:6,15,18 10:5 10:18 11:2,3,9 11:15,21,22 12:25 13:3,9,24 14:2,20 15:10 15:17,20 16:7,9 16:13,23 17:19 17:25 18:3,5,15 18:22,25 20:3,9 20:12,17 21:5 22:6,14,24 23:4 23:8,14 24:13 24:20 25:19 26:19,24 27:9 27:23 28:3,6 29:5 30:11,12 30:15,19,20 31:5,13,19 32:2 32:14,18 33:9 33:15,18,23 34:12 35:2,6,9 35:11,17,20 36:5,19 38:2,7 38:19,19,22 39:8,24 40:5,11 41:1 42:5,16 45:2,7,21,25 47:5,23 48:2,17 49:9,15,19 50:8 50:13,16,19,24 51:2,19 52:4,14 <b>justices</b> 38:13 <b>justify</b> 19:14 40:1 <b>justifying</b> 35:7	18:22,25 47:5 <b>keep</b> 7:9 <b>Kennedy</b> 11:3,9 11:15,21,22 24:13,20 30:11 31:19 32:2 35:6 35:9,11,17,20 36:5 42:16 <b>key</b> 10:3 16:4 52:9,9 <b>kill</b> 42:4 <b>kind</b> 9:16 27:6 31:6 <b>kinds</b> 48:6 <b>know</b> 7:19 8:20 8:22 10:21 13:3 13:11,21 14:8 15:7 25:1,8,10 25:20 26:7,15 30:25 34:18 39:13 46:1 <b>known</b> 28:8 <b>knows</b> 27:5 46:1
<hr/> <b>J</b> <hr/>				
		<b>Joe</b> 49:11 <b>John</b> 44:19 <b>Jones</b> 49:11 <b>judge</b> 5:20 6:3 7:8 8:4,8,13,17 8:21 9:3,8,10 9:13 10:1,8,21 32:6 36:24 <b>judges</b> 35:3 <b>judge's</b> 7:20 <b>judgment</b> 7:21 8:6,16 9:8,12 9:13 37:23 47:22 <b>judgments</b> 37:21 <b>juggernaut</b> 14:17 <b>jury</b> 8:10,11	<b>Kagan</b> 6:11,21 7:2,7 8:12 9:6 9:15,18 14:20 15:10,17,20	<hr/> <b>L</b> <hr/> <b>language</b> 38:10 <b>Laughter</b> 11:19 11:23 <b>law</b> 8:8,23 9:7 16:14 <b>lawsuit</b> 34:16 <b>lawsuits</b> 37:10 <b>leads</b> 40:22 <b>leapfrog</b> 42:9 <b>leave</b> 17:25 <b>legitimizes</b> 15:13 <b>legs</b> 19:25 <b>letting</b> 16:3,8 19:14 <b>let's</b> 10:18,19 13:18,19 <b>level</b> 21:16 22:7 22:8 35:24 <b>levels</b> 43:22 <b>liability</b> 3:12 13:6

<b>light</b> 18:2	22:19,20 23:12	11:10,24,25	12:19 13:25	<b>N</b>
<b>likelihood</b> 22:10	24:14,18,24	12:12,14,15	14:15 21:9 24:4	<b>N</b> 2:1,1 3:1
<b>listed</b> 20:6	25:14 26:3,4,8	14:4,24 15:3,21	26:22 31:14	<b>nearly</b> 37:13
<b>lists</b> 20:5	26:12,16,21	15:21 16:22	35:4 36:12 37:4	<b>necessary</b> 18:6
<b>litigant</b> 18:9	27:2,12,17 29:8	17:1,2,13,18	39:25 45:6	<b>need</b> 19:24 24:3
<b>litigants</b> 18:8	29:9,10,18,19	20:5,5,10,13	46:24 50:9	34:1
<b>litigate</b> 52:2,2	29:24 30:17,23	21:6,11 23:24	51:21	<b>needed</b> 24:2
<b>litigated</b> 7:10	31:3 32:4,7,12	24:8,15 26:18	<b>met</b> 46:13	<b>needs</b> 17:7 24:6
30:23 33:25	32:16,20 33:6	26:20,23 29:15	<b>method</b> 9:23	<b>new</b> 32:25
44:6 51:24	33:12 34:18,20	29:17 30:6 31:6	27:25 49:2	<b>nine</b> 31:2
<b>litigating</b> 34:1	34:21,22 35:25	31:15 33:4,23	<b>middle</b> 17:21	<b>Ninth</b> 9:4
<b>litigation</b> 15:16	36:20 37:1 39:4	34:8 35:4 36:2	<b>million</b> 31:2	<b>noncohesive</b>
<b>loading</b> 31:13	39:6,11,18,18	36:2,23 37:4,9	37:13	24:11
<b>long</b> 42:18	39:21 41:6,7,16	38:14,16 40:3,5	<b>mind</b> 27:17	<b>nonefficiency</b>
<b>look</b> 8:8 9:1 43:8	41:20,21,23	40:16 41:10	<b>mini</b> 31:14	38:20
43:9	42:10,13,19,25	42:3,4,5,15	<b>minor</b> 46:3	<b>nonmaterial</b>
<b>looked</b> 37:8	43:3,8,12,17	43:25 45:3	<b>minutes</b> 40:13	36:11
<b>looking</b> 43:13,14	43:19 45:9,17	46:24 47:12	47:24	<b>nonplussed</b> 10:7
43:15	45:22,22 46:1,4	48:10 49:15,16	<b>misinformation</b>	<b>nonpublic</b> 39:7
<b>looks</b> 36:2	48:12,14 49:5	50:9	15:25 16:2	<b>Northway</b> 5:16
<b>lose</b> 12:21 15:21	49:24 50:1,2,6	<b>matter</b> 1:12 7:15	<b>misleading</b> 3:14	<b>note</b> 32:21
16:5 20:23	51:8,8,15,16	8:22 9:7 33:19	<b>misrepresenta...</b>	<b>notes</b> 14:13 48:3
26:22 30:7	<b>markets</b> 20:2	45:5 52:17	20:6-21:8,10	<b>notion</b> 37:2 48:21
<b>loses</b> 14:23,24	29:19	<b>matters</b> 39:19	36:14 41:8	<b>November</b> 1:10
31:20 32:5	<b>market's</b> 18:12	<b>mean</b> 6:22 7:7	<b>misstatement</b>	<b>number</b> 20:15
<b>loss</b> 17:3 19:23	<b>married</b> 21:1	20:18 22:7,8	10:7 17:16 30:8	<b>O</b>
34:7 44:18	<b>material</b> 3:21	29:12 30:3 31:3	35:14 49:6 51:8	<b>O</b> 2:1 3:1
<b>lost</b> 52:11	4:25 5:8,21 6:2	31:16 39:9	51:17	<b>objective</b> 5:17
<b>lot</b> 23:18	8:7,9,10 9:1,9	40:14	<b>misstatements</b>	15:3 36:17
<b>loudly</b> 48:13	10:16,16,23	<b>means</b> 4:3 19:3	28:25	38:14
<b>lower</b> 36:21	12:6 13:11	22:9 27:15	<b>mix</b> 6:9 8:25	<b>objectively</b> 24:17
43:23	14:25,25 15:1,1	41:15 44:11	22:12 36:3	<b>observations</b>
<b>M</b>	15:5 16:17,18	<b>meet</b> 25:3 28:18	<b>model</b> 43:8	23:20
<b>majority</b> 8:23	20:1 21:8,10	<b>MELISSA</b> 1:20	<b>Monday</b> 1:10	<b>occur</b> 28:7
<b>making</b> 23:19	22:5,7,7,9	2:9 38:4	<b>money</b> 20:23	<b>occurred</b> 51:17
31:16	29:18 30:7,10	<b>member</b> 5:24	26:9	<b>occurring</b> 37:12
<b>market</b> 3:19,20	31:20 34:21	<b>members</b> 6:15	<b>motion</b> 7:20 8:16	<b>odd</b> 13:13
3:22,23 4:3,14	36:5,10,14 41:7	9:24 14:18	<b>move</b> 5:1 20:2	<b>offense</b> 7:22
4:16,24,25 5:1	45:12,18,23	16:15,16 23:7	38:23	<b>Oh</b> 8:17
6:5,6 11:10	46:2,6 48:6,12	24:9 38:17 39:4	<b>moved</b> 17:16	<b>okay</b> 10:11 11:24
12:4,5,7 13:12	49:5,6,12	47:3,4	50:1	15:19 49:10
17:11,17 18:9	<b>materiality</b> 3:23	<b>merit</b> 6:25	<b>movement</b> 35:14	52:4
18:16 19:1,5,21	4:3,17 5:16	<b>meritorious</b>	<b>moves</b> 46:5	<b>once</b> 13:10 15:11
19:24 22:1,1,5	6:13 7:21,22	47:15,21	<b>moving</b> 9:21	34:14 41:10
	8:1 10:6 11:1,5	<b>merits</b> 9:16,19	17:17	

<p>42:12,13  <b>one-way</b> 47:19  <b>opinion</b> 19:19              20:4 36:24  <b>opinions</b> 8:3  <b>opponents</b> 13:4  <b>opposite</b> 13:1  <b>opt</b> 29:3 47:8  <b>oral</b> 1:12 2:2,5,8              3:7 23:1 38:4  <b>order</b> 21:7,8              23:25 43:4              45:17 50:10  <b>ordinarily</b> 18:10  <b>ordinary</b> 20:21  <b>ought</b> 37:22  <b>outset</b> 34:2  <b>outstanding</b> 31:2  <b>overgeneraliza...</b>              42:20  <b>overrule</b> 41:8</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 1:16 2:3,13 3:1              3:7 47:25  <b>page</b> 2:2 20:4              25:5  <b>paid</b> 26:8  <b>paradigm</b> 48:17              48:18  <b>paragraph</b> 43:1  <b>parroted</b> 31:11  <b>part</b> 11:22 40:6              49:16  <b>particular</b> 13:15              13:16 15:5              18:12 38:10              43:7  <b>parties</b> 4:8  <b>party</b> 9:21  <b>pause</b> 17:20  <b>pausing</b> 17:20  <b>people</b> 6:7 15:21              17:8 19:2 20:25              21:23,24 25:25</p>	<p><b>percent</b> 13:22              27:13 37:12,17              39:9,9,13,14  <b>perfect</b> 8:24 20:7              20:8  <b>perfectly</b> 37:24  <b>period</b> 4:16              10:20 31:3              51:17  <b>person</b> 13:15              15:5 28:9,10,15              28:17 39:11  <b>persons</b> 48:7  <b>petition</b> 25:5  <b>Petitioners</b> 1:4              1:17 2:4,14 3:8              40:20,24 42:1              43:2 44:4 45:1              46:9,18,22 48:1  <b>phrase</b> 13:1              40:24  <b>place</b> 14:15              15:14  <b>plaintiff</b> 5:22              6:12 7:10 9:18  <b>plaintiffs</b> 3:25              4:11 51:10  <b>Plans</b> 1:6 3:5  <b>play</b> 42:2 44:5  <b>plays</b> 29:24  <b>pleading</b> 34:7              37:18  <b>please</b> 3:10 23:4              38:8  <b>point</b> 4:6 13:24              14:11 24:21              29:7,14 32:15              42:1 44:12              46:17 50:13              52:7  <b>pointed</b> 38:20              47:5  <b>points</b> 44:8  <b>policy</b> 37:21 44:7              44:10,23 46:18</p>	<p><b>posit</b> 49:23  <b>positing</b> 36:19  <b>position</b> 23:15              26:16 32:9,10              46:23 48:10  <b>possible</b> 28:20  <b>possibly</b> 9:8  <b>postpone</b> 12:19  <b>postponed</b> 12:20  <b>potential</b> 30:9  <b>powerful</b> 52:8  <b>practical</b> 41:14  <b>precisely</b> 26:14  <b>preclude</b> 5:22  <b>precluded</b> 9:13  <b>precludes</b> 10:24  <b>precondition</b>              40:14  <b>preconditions</b>              12:23 39:24,25  <b>predicate</b> 4:22              7:23 12:1,3,13              17:14 28:1              40:18 45:6 46:9              48:11  <b>predicates</b> 4:10              4:13 22:20 46:7  <b>predominance</b>              16:25 24:12              38:10 39:16              46:14  <b>predominate</b>              19:17 20:16              27:7 38:12              41:24 44:1  <b>predominates</b>              16:15,16  <b>preexists</b> 15:14  <b>prejudice</b> 47:6  <b>prejudiced</b> 47:5  <b>preliminary</b>              18:17 31:10              34:25  <b>premise</b> 7:14,16  <b>premised</b> 43:16</p>	<p><b>prerequisites</b>              16:10 46:10,13  <b>present</b> 12:24  <b>presented</b> 43:20              48:25  <b>president</b> 8:20  <b>pressure</b> 34:14  <b>presumably</b> 5:1              7:18 8:21  <b>presume</b> 34:19  <b>presumed</b> 3:23              32:4 51:13  <b>presumption</b>              23:10  <b>presumptions</b>              23:15  <b>pretty</b> 9:1  <b>prevail</b> 39:6  <b>pre-try</b> 13:25  <b>price</b> 3:19,20,23              4:4,24 5:2 6:5,6              12:5,5,7 16:1              17:17 18:10,11              22:3,4 26:2,2              26:17 27:5              35:14,25 39:11              43:12 45:17,17              48:15 49:5,7,25              50:6 51:8  <b>problem</b> 40:12              42:7 46:22  <b>procedural</b> 41:13  <b>proceed</b> 5:23              6:19,21 8:15              21:19,20,22              34:23 38:17              50:2 51:6  <b>proceeding</b>              20:25  <b>proceedings</b>              37:23  <b>process</b> 23:5  <b>products</b> 29:1  <b>professorial</b> 14:9  <b>prongs</b> 28:14</p>	<p><b>proof</b> 6:1,5 9:23              17:10 43:14  <b>proofs</b> 35:22  <b>proper</b> 16:18  <b>proposed</b> 34:9  <b>proposing</b> 9:23  <b>protected</b> 28:22              47:7,8,11  <b>prove</b> 3:16,17              4:23 5:3,8,19              12:3 19:2,7,8,9              23:11 35:15              44:15 49:22              50:4,5,11,20              50:21 51:7,10              51:12,20  <b>proved</b> 24:2,3              49:17  <b>proven</b> 12:10,14              17:7 22:21              41:23 42:12,13              44:20 48:18              52:10,11  <b>proves</b> 44:22  <b>province</b> 37:20  <b>proving</b> 4:12 9:4              17:10 41:16,21              49:2  <b>PSLRA</b> 34:6              37:19 44:10  <b>public</b> 4:15,25              18:20 22:19              27:4 29:10              39:22 42:14              45:10 46:5  <b>publicity</b> 19:5              28:4 29:21              32:10 33:18              39:2,19 51:24  <b>publicly</b> 3:22              22:5 51:16  <b>published</b> 48:13  <b>purity</b> 18:4  <b>purported</b> 20:19  <b>purpose</b> 12:18</p>
---	--	--	--	---

<p>12:18,21,22 13:4 37:15 39:15 41:3 <b>purposes</b> 24:11 40:17 47:2 <b>pursue</b> 43:4 <b>put</b> 27:19 37:22 45:21 <b>putative</b> 7:4 9:22 16:3 <b>p.m</b> 52:16</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 3:15,24 4:18 6:12 7:13 7:14,25 9:6 11:10 12:17 14:5,14,22,22 14:22 15:14 16:10,14,16,17 16:21,21,24,25 17:6 18:17 19:15,16,17 20:5,7,10,14 20:17,19 21:17 22:15 23:9 26:4 26:11,18,23 27:14,18,20 30:13,25 31:15 31:24 32:13,21 33:7 35:12 36:2 36:9,12,18,22 37:4,5,8,9 38:11 40:21,22 40:24 41:2 42:14,17 46:12 46:24 48:24 50:3,10 52:10 <b>questions</b> 16:15 17:4 26:3 38:1 43:21 <b>question's</b> 27:20 <b>quibble</b> 46:3 <b>quickly</b> 43:11 46:17</p>	<p><b>quintessential</b> 24:10 <b>quirk</b> 11:24 <b>quite</b> 32:15 <b>quote</b> 15:14 19:18 <b>quoting</b> 15:11</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 3:1 <b>raised</b> 44:8 <b>raising</b> 5:12 <b>random</b> 46:1 <b>ratchet</b> 47:19 <b>rate</b> 37:12 <b>reach</b> 43:15 <b>reaches</b> 47:22 <b>react</b> 19:24 <b>reacted</b> 19:21 <b>reaction</b> 18:12 29:22 <b>read</b> 24:6 <b>real</b> 12:17 25:18 35:12 <b>reality</b> 30:17 <b>really</b> 10:7 27:20 37:3,20 40:21 42:12,20 <b>reason</b> 26:24 30:16 31:9 34:1 34:13,13 35:1 48:24 51:19,22 51:25 <b>reasonable</b> 6:7 11:13 22:11 24:17 29:22 36:15 <b>reasoning</b> 42:10 <b>reasons</b> 23:7 25:2 <b>rebuttal</b> 2:12 47:25 51:14 <b>rebutted</b> 23:16 23:17 <b>recognized</b> 34:4</p>	<p>38:13 <b>red</b> 18:2 <b>redetermination</b> 23:24 <b>referred</b> 45:14 <b>referring</b> 48:4 <b>reflect</b> 3:20,24 <b>reflected</b> 26:8,21 <b>reflects</b> 29:11 30:17 <b>regard</b> 27:11 45:11 <b>Regardless</b> 21:4 <b>reiterated</b> 5:17 17:5 <b>related</b> 39:25 <b>relevant</b> 6:8 10:20 24:15 29:15 36:3 <b>reliance</b> 3:14,16 3:18 4:23 5:3 5:20,21 10:2 11:6,13 12:3,7 12:11,13,13 13:12 16:25 17:6,14 19:2,7 19:18 21:3,21 24:16,22,23,24 24:25 25:8,13 27:2,25 28:22 29:3,13,18 32:12 34:8 37:2 39:5 40:1,25 41:16,19 42:6 42:15 43:16 45:4,8,11,14 48:7,11,14,16 48:18,20 49:2 49:13,16,17,22 50:4 51:7 52:10 <b>relied</b> 3:19 4:12 6:1,4 10:25 12:9 20:22 21:21,23 28:24 34:19 41:5 49:4</p>	<p><b>relier</b> 5:18 <b>reliers</b> 9:25,25 <b>relitigate</b> 6:12 47:7 <b>relitigation</b> 46:23 <b>rely</b> 17:15 21:25 25:25 39:5,6 41:6,6 45:3 49:24 50:5 <b>relying</b> 4:23 16:2 <b>remanded</b> 23:24 <b>remedy</b> 6:22 <b>remove</b> 41:10 <b>render</b> 9:12 <b>repeatedly</b> 14:4 15:3 <b>report</b> 27:19 <b>reports</b> 27:4 <b>representation</b> 47:9 <b>representations</b> 16:17 <b>representative</b> 7:4 9:22 10:11 10:15 14:16 15:13 16:3 20:20 25:3,13 <b>require</b> 45:18 46:23 <b>required</b> 9:11 <b>requirement</b> 25:4 28:18 34:7 38:11 47:9 <b>requirements</b> 37:22 <b>requires</b> 9:21 44:2 <b>requisites</b> 23:21 <b>reserve</b> 22:23 <b>resolved</b> 8:9 <b>respect</b> 15:24 22:22 26:18 27:10 39:16,18 41:21 42:11 44:13,17,18,18</p>	<p><b>Respondent</b> 1:19 1:23 2:7,11 23:2 38:6 <b>responding</b> 18:21 <b>response</b> 17:8 43:5,7 44:23 <b>responses</b> 42:23 <b>result</b> 43:15 47:13 <b>Retirement</b> 1:6 3:5 5:23 6:20 25:2 <b>right</b> 6:17 7:18 11:15,17,20,21 14:5,20 15:18 16:10 17:22 18:19 26:14 29:14 30:3,18 31:5,12 33:9,11 35:11 40:9,11 40:14,16 41:22 45:23 46:6 49:14,18 50:25 <b>rightly</b> 32:15 <b>rise</b> 33:3 36:13 37:6 <b>rises</b> 47:14 <b>risk</b> 12:20 <b>road</b> 21:4 <b>ROBERTS</b> 3:3 4:1,7 20:12 22:24 38:2 45:2 45:7 47:23 52:14 <b>role</b> 27:1 29:25 <b>rolling</b> 23:19 <b>rule</b> 7:20 12:18 12:19 15:8,8 23:21 24:6 25:4 28:15,23 38:10 44:25 46:11,12 47:2,8,16,20 47:20 48:23 52:7</p>
--	--	--	---	---

<p><b>ruled</b> 7:8,11  <b>Rules</b> 14:13  <b>ruling</b> 8:5  <b>run</b> 7:16 51:25  <b>run-of-the-mine</b> 25:12</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>S</b> 2:1 3:1  <b>sarcastic</b> 20:9  <b>satisfaction</b> 22:21  <b>satisfied</b> 16:11  <b>saying</b> 5:25 8:12  10:24 11:3,4  14:2 15:17 31:6  31:19,23 32:4  36:8 37:7 50:9  <b>says</b> 7:4 10:8,21  <b>Scalia</b> 17:19,25  18:3,5,15 25:19  26:19,24 27:9  27:23 30:12,15  30:19,20 34:12  35:2 36:19  38:19 39:8 41:1  42:5 45:21,25  50:16,19,24  51:2  <b>Schleicher</b> 36:25  <b>scholarship</b> 42:18  <b>scienter</b> 17:3  19:22 34:6  44:18  <b>search</b> 19:14  <b>second</b> 24:5 42:9  43:6 44:12  <b>securities</b> 19:17  25:10 27:7  28:16 30:24  37:11 44:14  <b>see</b> 29:15  <b>seeking</b> 28:9  <b>sense</b> 3:12 7:3</p>	<p>20:7,8 43:15  <b>sentence</b> 17:21  17:21  <b>sentences</b> 17:20  <b>separate</b> 40:19  <b>serve</b> 27:15 47:2  <b>serves</b> 26:25  27:23 28:4 30:6  40:17  <b>set</b> 13:14,16 23:9  23:16  <b>SETH</b> 1:16 2:3  2:13 3:7 47:25  <b>setting</b> 21:6  <b>settle</b> 34:14  44:17  <b>settlement</b> 15:15  34:16,25 37:12  37:13  <b>Shady</b> 46:11  <b>shares</b> 31:1  <b>Sherry</b> 1:20 2:9  38:3,4,7,21,25  39:15 40:4,9,15  41:12 42:11,23  45:5,13,24 46:3  48:4  <b>short</b> 44:22  <b>shortcut</b> 4:11  17:9 50:24 51:3  51:5,5  <b>show</b> 11:12 19:20  19:21 20:14,20  21:2,3,4,7,9  27:2 33:5 34:18  35:24 45:3,8,9  45:10,15,17  49:11,12,13,17  <b>showed</b> 37:14  <b>showing</b> 3:18  16:4 25:14 28:1  51:7 52:9  <b>shown</b> 38:16 42:3  42:19  <b>side</b> 12:1</p>	<p><b>significant</b> 16:1  31:8  <b>significantly</b> 22:12  <b>silence</b> 13:13  <b>similarly</b> 13:13  27:16,24  <b>simply</b> 9:4 10:1  25:17 34:25  41:10  <b>situated</b> 27:16  27:25  <b>situation</b> 13:23  <b>SLUSA</b> 44:10  <b>sold</b> 3:14 4:16  18:10 26:2  39:12  <b>Solicitor</b> 1:20  <b>somebody</b> 10:19  40:13  <b>sooner</b> 35:1  <b>sophisticated</b> 32:21  <b>sorry</b> 6:10 18:24  <b>SOTOMAYOR</b> 4:19 5:5,10  6:10 11:2 23:8  23:14 28:3,6  38:19,22  <b>sought</b> 19:16  <b>sound</b> 36:24  37:24  <b>sounds</b> 50:8  <b>source</b> 39:23  <b>special</b> 29:24  33:16,20,25  40:1  <b>specially</b> 31:7,8  <b>specter</b> 37:10  <b>splinter</b> 24:10  <b>splits</b> 19:3  <b>spurious</b> 47:18  <b>stage</b> 3:15 6:13  8:4,13 9:8,9,11  9:13,16,21</p>	<p>11:11 12:12  13:5,6,19 16:24  21:12 22:16  23:11 26:13  31:22 33:1  35:18,22 39:16  44:21 46:12,20  46:24  <b>standard</b> 5:15,17  11:8 12:15  <b>standards</b> 37:18  <b>standing</b> 26:15  <b>start</b> 11:20 23:19  38:9  <b>started</b> 20:4  <b>statement</b> 3:14  3:17,18,20,21  3:24 4:12,15,20  4:21,23 5:21  6:1,15,23 7:8  7:11 8:14 10:12  12:4,5,6,9  17:10,16 18:13  18:20,22 19:21  20:1,22 21:21  22:2,4,19 26:8  29:9,12 34:21  48:12,13,19  49:3,6,22 50:1  51:14,15  <b>statements</b> 4:25  8:24 20:2 31:17  33:3 39:7,22  42:14  <b>statement's</b> 45:11  <b>states</b> 1:1,13,22  2:10 38:5 48:4  <b>statistics</b> 37:14  <b>stock</b> 26:9 27:3,4  31:4 39:10  <b>stockbroker</b> 29:22  <b>stocks</b> 4:16  25:25</p>	<p><b>stock's</b> 36:9  <b>stool</b> 19:25  <b>stroke</b> 15:9  <b>studies</b> 10:22  35:23  <b>subjective</b> 24:16  <b>submitted</b> 52:15  52:17  <b>subsequently</b> 25:6  <b>subsidiary</b> 33:4,8  <b>substantial</b> 22:10  <b>substantive</b> 7:22  23:22 41:13  45:5  <b>subtle</b> 42:21  <b>successful</b> 37:15  <b>sue</b> 7:4  <b>sufficient</b> 29:13  31:7  <b>sufficiently</b> 47:10  <b>suggestion</b> 32:19  <b>suggests</b> 47:4  <b>suit</b> 6:16,18,19  6:25 10:24  25:22  <b>summary</b> 7:21  8:6,15 9:8,13  <b>super</b> 9:16  <b>support</b> 32:8  <b>supporting</b> 1:22  2:11 38:6  <b>suppose</b> 4:2  35:11  <b>Supreme</b> 1:1,13  <b>sure</b> 5:9 32:2  41:14  <b>surmount</b> 9:19  <b>suspect</b> 13:4  <b>System</b> 25:2</p> <hr/> <p style="text-align: center;"><b>T</b></p> <p><b>T</b> 2:1,1  <b>take</b> 7:15 10:19</p>
--	--	--	--	--

<p>12:25 51:25  <b>takes</b> 45:22 46:2  46:4  <b>talking</b> 10:5  12:11 41:22,24  43:24 46:14  <b>tell</b> 33:11  <b>temporally</b> 21:14  21:17  <b>tens</b> 20:24  <b>term</b> 17:5  <b>terms</b> 21:15  43:22 44:25  45:13,19 47:3  <b>test</b> 9:4 15:4,6  22:13  <b>tethered</b> 44:25  <b>Thank</b> 23:3 38:2  47:23 48:2  52:13,14  <b>theoretical</b> 25:17  <b>theory</b> 4:10 11:5  12:2 16:5 18:7  21:22,25 23:22  24:14,23,25  25:8,10 28:22  29:3,8,18,24  30:1 32:7 33:16  33:21 38:18  40:2,18 41:3,9  41:12,13 42:7  42:20,22 43:11  43:16 45:4,20  46:8,10 48:25  49:20 50:22  <b>thing</b> 7:17 8:16  16:13 18:16  24:5 44:17  <b>things</b> 28:25  51:14  <b>think</b> 7:1,2 8:9  10:22 12:18  13:20 28:7,13  29:3,14 30:1,20  30:21 31:16</p>	<p>32:22 42:18  45:13  <b>thinking</b> 24:1  <b>thinly</b> 27:3  <b>third</b> 44:22  <b>thought</b> 6:23  10:5  <b>thousands</b> 20:24  <b>three</b> 6:7 19:24  23:7  <b>tie</b> 9:25  <b>till</b> 51:20  <b>time</b> 13:22 19:15  22:23  <b>timing</b> 22:20  <b>today</b> 24:21  41:17 43:18,24  <b>told</b> 28:11  <b>tort</b> 33:13,20,24  <b>total</b> 6:8 8:25  22:12 36:3  <b>tracks</b> 17:12  21:18  <b>trade</b> 41:17  <b>traded</b> 27:3 31:2  <b>trading</b> 28:11  51:16  <b>traditional</b> 33:12  48:17 49:1  <b>traditionally</b>  33:19,24 49:9  49:10  <b>transaction</b>  45:13,15  <b>transactions</b>  41:20 43:17  <b>transform</b> 20:21  <b>treatment</b> 48:5  <b>trial</b> 10:1 13:7  21:13 22:7,17  22:21 28:2  31:14,21 32:6  <b>trials</b> 31:17 35:4  <b>trier-of-fact</b> 6:2  6:4</p>	<p><b>true</b> 5:1 18:20  19:22 29:5  31:11 34:20,22  35:8  <b>Trust</b> 1:7 3:5  <b>truth</b> 28:8  <b>truth-on-the-m...</b>  5:11,11 28:8  43:4  <b>try</b> 13:5,18,19  23:20 24:21  35:24  <b>trying</b> 5:3 19:13  20:15 29:6  33:10 45:8,15  <b>TSC</b> 5:16  <b>two</b> 17:12 21:6  21:10,18 25:1  39:19 40:6,17  40:20 42:11  <b>type</b> 5:12 51:14  <b>typical</b> 28:17  <b>typicality</b> 25:4  28:14,18</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimate</b> 46:21  <b>underlie</b> 47:2  <b>understand</b>  16:20 18:3 29:6  30:2 36:6 45:7  <b>understanding</b>  24:12  <b>understood</b>  11:18  <b>United</b> 1:1,13,22  2:10 38:5  <b>unites</b> 38:15  40:23  <b>unsuited</b> 48:5  <b>upfront</b> 51:20,25  <b>upheld</b> 23:25  <b>use</b> 29:8,8 40:1  52:8  <b>useful</b> 52:8</p>	<p><b>usually</b> 25:24</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:5 3:4 5:16  24:8  <b>valid</b> 12:20  <b>variation</b> 48:6  <b>various</b> 34:5  <b>vast</b> 8:23  <b>version</b> 47:16  <b>viewed</b> 22:11  <b>voted</b> 34:10</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> 51:20  <b>waiting</b> 13:6  <b>Walmart</b> 14:21  15:6 24:8  <b>want</b> 7:12 30:21  30:22 37:7  42:22 47:20  51:6,19,22  <b>wanted</b> 9:2  <b>Washington</b> 1:9  1:16,18,21  <b>wasn't</b> 22:4  29:18  <b>Waxman</b> 1:16  2:3,13 3:6,7,9  4:5,9,21 5:9,13  6:11,18 7:1,12  8:19 9:7,10,17  9:20 10:6,18  11:8,14,17,20  11:24 13:2,8,24  14:11,20 15:10  15:17,19,23  16:7,8,9,12,23  17:19,24 18:2,4  18:14,19,23,24  19:12 20:3,8,17  21:5,14 22:9,18  47:24,25 48:2  49:14,18 50:11  50:17,23 51:1,4</p>	<p>52:3,6  <b>Waxman's</b> 29:7  <b>way</b> 5:13 13:1  16:3 17:11  18:20 34:17  37:24 38:23  50:5 51:22  <b>ways</b> 28:23  <b>weigh</b> 9:11 20:15  39:17  <b>went</b> 49:17 51:9  <b>We'll</b> 3:3  <b>we're</b> 41:22,24  43:24 46:14  50:14,17  <b>we've</b> 15:3  <b>whatsoever</b>  10:23  <b>wide</b> 3:12  <b>win</b> 15:21 21:8  30:8,9 50:9  <b>window</b> 29:19  <b>winning</b> 19:4  <b>wins</b> 14:23,24  32:5  <b>witnesses</b> 8:3  <b>words</b> 13:14 32:3  <b>work</b> 29:6 49:10  49:10  <b>worked</b> 20:18  <b>world</b> 25:18  29:11,20,21  <b>wouldn't</b> 9:3 13:2  13:3 43:19 47:6  <b>wrong</b> 7:1,2  11:18 33:2</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>x</b> 1:2,8</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> 37:11,16  <b>years</b> 42:17</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/>
---	--	---	---	--

<b>zero</b> 4:4	<b>4</b>			
<hr/>	<hr/>			
<b>\$</b>	<b>47</b> 2:14			
<hr/>	<hr/>			
<b>\$9</b> 37:13	<b>5</b>			
<hr/>	<hr/>			
<b>1</b>	<b>5</b> 1:10 47:24			
<hr/>	<hr/>			
<b>1.1</b> 31:1	<b>50</b> 37:17			
<b>10b-5</b> 3:13 10:4	<hr/>			
12:11 17:5	<b>9</b>			
20:11 29:2	<hr/>			
49:21	<b>93</b> 37:12			
<b>10b-5(b)</b> 12:14	<b>95</b> 27:13 39:9,13			
<b>10:30</b> 8:21	<b>99</b> 13:22			
<b>100</b> 39:9,14				
<b>11-1085</b> 1:4 3:4				
<b>11:06</b> 1:14 3:2				
<b>12:06</b> 52:16				
<b>188</b> 37:16				
<b>1966</b> 47:16				
<b>199</b> 43:1				
<b>1995</b> 34:5 37:11				
<hr/>				
<b>2</b>				
<hr/>				
<b>200</b> 31:1				
<b>2011</b> 37:14,16				
<b>2012</b> 1:10				
<b>23</b> 2:7 12:18,19				
23:21 24:6				
28:23 38:10				
44:25 46:11,12				
47:2 48:23				
51:20 52:7				
<b>23's</b> 47:8				
<b>23(a)</b> 16:10,10				
25:4 28:15,19				
<b>23(b)(3)</b> 37:22				
47:17,20				
<b>24</b> 42:17 43:8				
<b>242</b> 20:4				
<b>25A</b> 25:5				
<b>28</b> 43:9				
<hr/>				
<b>3</b>				
<hr/>				
<b>3</b> 2:4 16:14				
<b>300</b> 37:10				
<b>38</b> 2:10				