No. 16-1309

IN THE
Supreme Court of the United States

S.G.E. MANAGEMENT, L.L.C., ET AL.,

Petitioners,

v.

JUAN RAMON TORRES, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR MARK MOLLER SUPPORTING PETITIONERS

VINCENT M. WAGNER
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, TX 75201
(214) 953-6499

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1855
aaron.streett@bakerbotts.com

Counsel for Amicus Curiae Professor Mark Moller

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

To certify a RICO fraud class action, must the plaintiff show that reliance is a common issue because virtually all class members would have relied—as the Second, Ninth, and Tenth Circuits have all held? Or is it sufficient to show merely that it "follows logically" that some class members would have relied—as the Fifth Circuit has now held?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is a law professor at the DePaul University College of Law and an adjunct scholar at the Cato Institute who teaches and writes about class actions and complex litigation. His recent articles address class certification in securities law, the due process rights of class-action defendants, class-action procedure's effect on the

[1] Pursuant to Rule 37.2(a), *amicus* provided timely notice of his intention to file this brief to counsel for all parties. Petitioners' counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. Respondents' counsel of record consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or his counsel, have made a monetary contribution to the preparation or submission of this brief.

substantive law, and the proper division of rulemaking authority between the Court, the Civil Rules Advisory Committee, and Congress. *Amicus curiae* is concerned about the effect of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), on class certification, and urges the Court to grant certiorari to clarify that *Basic* and its progeny do not change the standards for class certification in other areas of law.

SUMMARY OF ARGUMENT

The petition asks the Court to confront a common misuse of the approach to class certification articulated in *Basic*.

Allowing an "inference[] of reliance" because, in the district court's view, reliance "follow[ed] logically" from the pyramid scheme alleged in Respondents' complaint, the Fifth Circuit presumed that common "issues of causation" would predominate over individualized ones. Pet. App. 19a-20a, 30a; see Fed. R. Civ. P. 23(b)(3). It did so despite acknowledging that Petitioners have the right to offer individualized evidence rebutting this inference at trial—and despite the fact Respondents have failed to proffer any evidence supporting their contention that common issues bearing on the merits of this defense will predominate. See Pet. App. 38a-40a (Jolly, J., dissenting). As a result, the Fifth Circuit relieved Respondents of their usual burden of demonstrating that Rule 23's prerequisites are satisfied. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011) (requiring "party seeking class certification [to] affirmatively demonstrate his compliance" with Rule 23).

The Fifth Circuit explicitly patterned this approach to class certification on the specialized reliance theory from securities law. See Pet. App. 28a-29a (finding this Court's fraud-on-the-market theory "highly instructive"). It is thus the latest in a line of lower courts that have invoked *Basic* as authority for ad hoc "shortcuts" to class

certification in areas other than securities law. See Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1012-1013 & n.24 (2005).

This use of *Basic* is improper for two reasons. First, this Court has never suggested that the *Basic* rule should apply outside the narrow securities-fraud context from which it emerged. Although a divided Court sustained the *Basic* presumption on *stare decisis* grounds and market-efficiency reasoning unique to the securities context, see *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), nothing in *Basic* or *Halliburton* gives courts carte blanche to manufacture similar class-certification-enabling presumptions in different substantive settings.

Second, the *Basic* presumption is a judicial departure from a bedrock (and trans-substantive) tenet of class-certification—that Rule 23 requisites must be proved, not presumed. *Id.* at 2412; see *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982). That departure is an especially important reason to limit *Basic*'s reach into new substantive areas. As this Court has underscored, the adoption of exceptional procedure in specific categories of cases is a job for the federal civil rulemakers and Congress—not federal courts. *Jones* v. *Bock*, 549 U.S. 199, 224 (2007).

Basic is an anomaly that survives solely thanks to the grace of *stare decisis*. It should not contaminate the carefully crafted framework for class certification that governs beyond securities law. This case offers the Court an opportunity to cement this important point. It should grant the petition.

ARGUMENT

I. The Fifth Circuit Improperly Expanded *Basic*'s Presumption of Reliance

If the Fifth Circuit's "inference of reliance" sounds familiar, that is by design. Respondents invited the

courts below to draw upon and extend the "fraud-on-the-market" presumption of reliance created by *Basic*, 485 U.S. at 247. Respondents argued that "proximate cause" in RICO-fraud class actions "is akin to a fraud-on-the-market scheme in which it can be rationally inferred" that the alleged victims acted upon allegedly false representations. Pet. App. 111a.

Both courts below accepted Respondents' invitation. The District Court certified this class because Respondents sought "certification based on a fraud-on-the-market theory and the common sense inference that IAs were duped into joining a pyramid scheme." *Id.* at 116a. The Fifth Circuit referred to this Court's recent fraud-on-the-market precedent as "highly instructive" to developing an inference of reliance in the RICO context. *Id.* at 28a-29a.

This was mistaken. The fraud-on-the-market theory that underpins *Basic*'s presumption of reliance stems from considerations unique to the securities-fraud context. See *Halliburton*, 134 S. Ct. at 2408. And even in that singular context, *Basic*'s presumption of reliance is in substantial tension with this Court's recent class-certification precedent. See *id.* at 2423-2424 (Thomas, J., concurring in the judgment) (detailing how *Basic* "conflicts with [the] more recent cases clarifying Rule 23's class-certification requirements"). *Basic* is a legal–historical anomaly, and the Fifth Circuit was wrong to extend its *sui generis* reasoning to RICO-fraud class actions.

A. *Basic*'s presumption of reliance applies uniquely to the securities-fraud context

According to *Basic*, "anyone who buys or sells [a] stock at the market price [in an efficient market] may be considered to have relied on" any "public, material information" released by the defendant. *Halliburton*, 134 S. Ct. at 2405. Constituting that rule are two assump-

tions about the functioning of capital markets, discussed in detail below. These "two premises" inextricably bind *Basic*'s presumption to the securities-fraud context. *Id.* at 2409-2411. Not only that, but these two premises also "are highly contestable" and have "garnered substantial criticism." *Id.* at 2420 (Thomas, J., concurring in the judgment). Limited as it is to the securities-fraud context by these two premises, *Basic*'s judicially created presumption of reliance may not be judicially expanded to RICO-fraud class actions.

Drawing from the " 'efficient capital markets hypothesis,' " *Basic*'s first premise "state[s] that 'the market price of shares traded on well-developed markets reflects all publicly available information.' " *Id.* at 2409 (majority opinion) (quoting *Basic*, 485 U.S. at 246). The *Basic* Court rooted that premise in its review of "empirical studies," citing "sophisticated statistical analysis and the application of economic theory." 485 U.S. at 246 & n.24. *Basic*'s second premise is "the notion that investors invest 'in reliance on the integrity of [the market] price.' " *Halliburton*, 134 S. Ct. at 2410 (quoting *Basic*, 485 U.S. at 247) (some quotation marks omitted) (alteration in *Halliburton*). As the *Basic* Court noted, " 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity.' " 485 U.S. at 246-247 (quoting *Schlanger* v. *Four-Phase Sys., Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).

In other words, *Basic*'s "two premises" stem exclusively from the economic realities of securities trading on well-developed markets. In such markets, investors presumptively purchase securities in reliance on the integrity of the market's price for that security—a price that presumptively reflects all public information, including any material misrepresentations. *Halliburton*, 134 S. Ct. at 2409-2411 (citing *Basic*, 485 U.S. at 246-247).

No similar economic framework justifies the broad presumption of reliance announced by the Fifth Circuit in this case. Petitioners pressed the Fifth Circuit to presume reliance only in cases where " 'no rational economic actor would enter' " the transaction without relying on the defendant's misrepresentation. Pet. App. 20a-22a (quoting *CGC Holding Co.* v. *Broad & Cassel*, 773 F.3d 1076, 1081 (10th Cir. 2014)). But the Fifth Circuit refused. Instead, it held that an "inference[] of reliance" would be permitted in a RICO-fraud class action whenever it "*follows logically* from the nature of the scheme" alleged by the plaintiff. *Id.* at 20a (emphasis added). The Fifth Circuit explicitly refused to ground its presumption of reliance in the sorts of economic justifications that motivated the *Basic* Court.

Even economic considerations analogous to those in *Basic*, however, could not justify expanding its presumption of reliance to RICO-fraud class actions. As acknowledged by both the majority and concurrence in *Halliburton*, *Basic*'s economic rationale "has since lost its luster." 134 S. Ct. at 2421 (Thomas, J., concurring in the judgment); see *id.* at 2410 (majority opinion). "As it turns out, even 'well-developed' markets * * * do not uniformly incorporate information into market prices with high speed." *Id.* at 2421 (Thomas, J., concurring in the judgment). Worse still, " 'overwhelming empirical evidence' now suggests that even when markets do incorporate public information, they often fail to do so accurately." *Ibid.* (quoting Lev & de Villiers, Stock Price Crashes and 10b-5 Damages: A Legal, Economic and Policy Analysis, 47 Stan. L. Rev. 7, 20-21 (1994)).

These criticisms may not have constituted "the kind of fundamental shift in economic theory that could justify overruling a precedent," *id.* at 2410 (majority opinion), but they certainly caution against employing *Basic*'s embattled presumption in other areas of the law. That is

especially so where the RICO allegations at issue here bear no resemblance to the efficient market posited in *Basic*. Nor do Respondents remotely resemble *Basic*'s investor who relies on the price generated by an impersonal, heavily traded securities market. The Fifth Circuit should not have extended *Basic*'s presumption beyond the narrow context in which this Court has reaffirmed it. The Court should grant the petition to clarify that *Basic*'s presumption of reliance is limited to securities class actions.

B. *Basic* is increasingly anomalous among this Court's class-certification precedents

Petitioners have already explained how "[t]he Fifth Circuit's 'logically follows' inference suffers the same flaw as the lower court rulings overturned by" this Court in its recent class-certification decisions. Pet. 20; see *id.* at 19-21 (contrasting the Fifth Circuit's decision with *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013), and *Wal-Mart*, 564 U.S. at 367). Measured against those decisions, *Basic* stands as an increasingly anomalous " 'relic of * * * heady days' " in this Court's past. *Halliburton*, 134 S. Ct. at 2417 (Thomas, J., concurring in the judgment) (discussing 10b-5 cause of action) (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

The *Halliburton* Court held that *Comcast* and *Wal-Mart* do not require overruling *Basic*, reasoning that in the narrow context of efficient securities markets, the presumption constitutes a valid means of establishing class-wide reliance. *Id.* at 2412 (majority opinion). But there can be little doubt that there is substantial tension between *Basic*'s presumption and this Court's decisions requiring plaintiffs to "actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Ibid.* (citing *Com-*

cast, 133 S. Ct. at 1431-1432, and *Wal-Mart*, 564 U.S. at 350-351).

Individualized defenses impede predominance by foiling the ability of the class procedure to generate "common answers" about the defendant's liability to class members. *Id.* at 2423-2424 (Thomas, J., concurring in the judgment). Securities class actions, though, deviate from this principle. The *Basic* framework gives defendants a defense, in the form of an opportunity to "rebut the presumption of reliance as to plaintiffs who would have divested themselves of their * * * shares without relying on the integrity of the market." *Basic*, 485 U.S. at 249. Yet, as Justice Thomas noted in *Halliburton*, this rebuttal opportunity is, in most cases, an "inherently individualized" inquiry. 134 S. Ct. at 2423. And so the availability of this defense *should*, under ordinary class-action law, usually defeat class certification.

But that is not, in fact, how the *Basic* framework works. Once its requirements are satisfied, *Basic* and its progeny entitle plaintiffs not only to a substantive presumption of reliance but trigger a *procedural* presumption that Rule 23's predominance requirement is satisfied, notwithstanding the presence of individualized issues created by defendant's rebuttal opportunity. *Ibid.*; see *id.* at 2412 (majority opinion).

Basic, thus, amounts to a form of *presumed* predominance. See *id.* at 2423-2424 & n.6 (Thomas, J., concurring in the judgment). It is accordingly a strange and isolated departure from this Court's refrain that *plaintiffs* bear the burden of proving "actual, not presumed, conformance" with the class-certification requirements. *Falcon*, 457 U.S. at 160 (holding actual conformance with Rule 23(a)'s requirements is "indispensable").[2]

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[2] *Amicus curiae* takes no position on whether individualized defenses are categorically fatal to certification in every case. Compare Erb-

Adopting substance-specific procedure is, as this Court has repeatedly affirmed, a job for the formal rulemaking process or Congress—not judges exercising free-wheeling policymaking discretion. See *Jones*, 549 U.S. at 224 ("[A]dopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.").

While the dissonance between *Basic*, general class-certification doctrine, and principles of procedural rulemaking did not mandate overruling *Basic*, it certainly ought to preclude giving its reasoning any authority beyond the narrow substantive field—securities law—in which it was adopted.[3]

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sen, *supra*, at 1004 (arguing that "courts should certify classes featuring some dissimilarity among members' circumstances only if there is a feasible plan for resolving factual and legal disputes regarding each element and defense applicable to each class member's claim"), with Laroia, Individualized Affirmative Defenses Bar Class Certification—Per Se, 2003 U. Chi. Legal Forum 805, 805-806 (arguing the presence of individualized affirmative defenses should defeat certification "per se"). At a minimum, however, the burden is properly on the plaintiff to demonstrate, not simply presume, that these defenses can be handled fairly, and consistently with the substantive law, in an aggregate proceeding. See *Wal-Mart*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.").

[3] This misuse of *Basic* also infects the Fifth Circuit's separate conclusion that causation in a pyramid-scheme case can be established without reference to inferred reliance because "fraud is necessary to temporarily sustain the scheme, and ultimately causes the scheme's collapse," thereby sustaining a causal link between the fraud and any given class members' injuries. Pet. App. 17a. Despite acknowledging that Petitioners can rebut this theory of causation based on individualized evidence that a class member actually knew "that Ignite is an illegal pyramid scheme," the Fifth Circuit again invoked *Basic*'s progeny to presume predominance. *Id.* at 18a; see *ibid.* (supporting presumption of predominance with cross-reference to discussion of

C. *Stare decisis* justified *Basic*'s preservation but cannot justify its expansion

Three years ago, in the face of a request to overrule *Basic*, this Court "adhere[d] to that decision and decline[d] to modify the prerequisites for invoking the presumption of reliance." *Halliburton*, 134 S. Ct. at 2417. The Court did not reaffirm *Basic* by defending the decision's interpretation of the securities laws. Indeed, the Court recognized that "the presumption is a judicially created doctrine designed to implement a judicially created cause of action." *Id.* at 2411. Rather, after acknowledging the intervening academic debate about *Basic*'s core premises, the *Halliburton* Court rested on *stare decisis* grounds to reaffirm that longstanding precedent. *Id.* at 2410-2411.

Such reasoning may well justify *Basic*'s continued existence, but it cannot support the expansion of *Basic* to other areas of the law. This Court often relies on *stare decisis* to avoid overruling a decision while simultaneously emphasizing that the decision's rule is to extend no further.

1. Regarding *Basic*'s economic underpinnings, the *Halliburton* majority did not disagree that "the efficient capital markets hypothesis" had " 'garnered substantial criticism since *Basic*.' " *Id.* at 2410 (quoting *id.* at 2420 (Thomas, J., concurring in the judgment)). The special concurrence elaborated: "[E]conomists now understand that the price impact *Basic* assumed would happen reflexively is actually far from certain even in 'well-developed' markets." *Id.* at 2421 (Thomas, J., concurring in the judgment). The "presumption of reliance," it turns out, "rests on shaky footing." *Ibid.*

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rebuttal evidence); *id.* at 28a-29a (applying *Halliburton* to this case). Under either theory, the Fifth Circuit improperly relied on *Basic* and its progeny to support class certification.

Disputing none of this, the majority refused to overrule *Basic* because "[t]he principle of *stare decisis* has 'special force in respect to statutory interpretation.' " *Id.* at 2411 (quoting *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008)) (some quotation marks omitted). However wrong *Basic*'s assumptions had proved to be, there was no " 'special justification' " for overruling it. *Id.* at 2407 (quoting *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000)). *Stare decisis* led the *Halliburton* Court to re-embrace the "modest premise" at the core of *Basic*: " 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.' " *Id.* at 2410 (quoting *Basic*, 485 U.S. at 247 n.24). The Court, however, unanimously limited the *Basic* presumption by providing defendants a robust right of rebuttal at class certification, thus ensuring that the presumption of price impact could be vigorously tested. *Id.* at 2414-2417; see *id.* at 2424-2425 & n.8 (Thomas, J., concurring in the judgment).

2. *Halliburton*'s *stare decisis*-based reaffirmation of *Basic*'s modest core weighs against the Fifth Circuit's expansion of *Basic* in this case. Time and again, when the Court has upheld the core of a decision on *stare decisis* grounds, it has declined later invitations to extend that decision.

Consider the constitutional tort created by *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Despite calls to abandon it, the Court has not done so. See *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (calling on the Court to "limit *Bivens* and its two follow-on cases to the precise circumstances they involved" (citations omitted)); Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*, 88 Geo. L.J. 65, 100 n.152 (1999) ("[T]he Court adheres to *Bivens* * * * for

reasons that are not purely normative, including common-law and constitutional history, structure, principle, and, by now, *stare decisis*."). Instead, the Court has continued to apply the "core premise" of *Bivens*, *Malesko*, 534 U.S. at 71, while also "consistently refus[ing] to extend *Bivens* liability to any new context or new category of defendants," *id.* at 68.

In *Wilkie* v. *Robbins*, for example, the Court faced the question "whether to devise a new *Bivens* damages action for retaliating against the exercise of ownership rights" by landowners. 551 U.S. 537, 549 (2007). Because that proposed extension framed *Bivens* at a "high level of generality," it would stray from the core premise of *Bivens*. *Id.* at 561. The Court refused to extend *Bivens* out of a "fear that a general *Bivens* cure would be worse than the disease." *Ibid.* With cases like *Bivens*—whose continued vitality the Court has reduced to a "core premise"—the rule is "thus far and no further."

Similar principles have guided the Court elsewhere, in subjects as varied as antitrust and criminal procedure.

Around a century ago, this Court "held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws." *Toolson* v. *N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (citing *Fed. Baseball Club* v. *Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922)). Based on "a narrow application of the rule of *stare decisis*," the Court continues to exempt professional baseball from the antitrust laws. *Flood* v. *Kuhn*, 407 U.S. 258, 275-276 (1972).

Nevertheless, baseball's antitrust exemption "ha[s] become an aberration confined to baseball." *Id.* at 282. The Court's narrow, *stare decisis* rationale for preserving the exemption has not justified its extension to other professional sports. *Id.* at 282-283. Each time a case has presented the opportunity to extend the exemption—at

various times to professional boxing, football, and basketball—the Court has prohibited any expansion. See *id.* at 274-280 (collecting cases). With baseball as with *Bivens*, preserving a rule on *stare decisis* grounds was tantamount to announcing that the Court would brook no further expansion.

A similar example comes from the criminal procedure realm. In *Dickerson* v. *United States*, 530 U.S. 428 (2000), the Court considered whether it ought to overrule *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Regardless of whether it thought *Miranda* was correctly decided, the *Dickerson* Court determined that "the principles of *stare decisis* weigh heavily against overruling it now." 530 U.S. at 443. The Court reaffirmed *Miranda*'s "core ruling": "unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-444. But since then "the Court has steadfastly refused to extend" that core ruling. Powe, Judges Struck by Lightning: Some Observations on the Politics of Recent Supreme Court Appointments, 39 Ariz. St. L.J. 875, 886 (2007).

Thus, when the Court was asked to extend *Edwards* v. *Arizona*—a "judicially prescribed prophylaxis" to protect the *Miranda* rule—it refused. *Maryland* v. *Shatzer*, 559 U.S. 98, 105 (2010); see *Edwards*, 451 U.S. 477 (1981). With "[t]he protections offered by *Miranda*," the Court had "opened its 'protective umbrella' far enough." *Shatzer*, 559 U.S. at 109 (internal citation omited) (quoting *Solem* v. *Stumes*, 465 U.S. 638, 644 n.4 (1984)). Thus, where the core of *Miranda* did not directly govern, the Court has refused to go further. See *United States* v. *Patane*, 542 U.S. 630, 643 (2004) (plurality) (refusing to "extend * * * the prophylactic rule" of *Miranda–Dickerson* to exclude physical "fruit" of unwarned statements because "[t]he admission of such fruit presents no risk that a defendant's coerced statements (however de-

fined) will be used against him at a criminal trial"); *id.* at 645 (Kennedy, J., concurring in the judgment) (same).

In these and a variety of other jurisprudential contexts, this Court has refused to extend a decision after declining, on *stare decisis* grounds, to overrule that decision. This Court should grant the petition and likewise hold that *Halliburton*'s reasoning forecloses any extension of *Basic* to this case.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

VINCENT M. WAGNER
BAKER BOTTS L.L.P.
2001 Ross Ave.
Dallas, TX 75201
(214) 953-6499

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

Counsel for Amicus Curiae
Professor Mark Moller

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