No. 17-664

IN THE

Supreme Court of the United States

PETRÓLEO BRASILEIRO S.A. – PETROBRAS, *ET AL.*,

Petitioners,

v.

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, *ET AL.*,

Respondents.

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

BRIEF IN OPPOSITION

JEFFREY A. LAMKEN
MICHAEL G. PATTILLO, JR.
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

JEREMY A. LIEBERMAN
Counsel of Record
MARC I. GROSS
EMMA GILMORE
JOHN A. KEHOE
BRENDA F. SZYDLO
POMERANTZ LLP
600 Third Avenue, 20th Floor
New York, NY 10016
(212) 661-1100
jalieberman@pomlaw.com

Lead Counsel for Lead Plaintiff Universities Superannuation Scheme, Ltd. and Named Plaintiff North Carolina Department of State Treasurer and Lead Counsel for the Classes

(Additional Counsel Listed on Inside Cover)

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

THOMAS A. DUBBS
LOUIS GOTTLIEB
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700
tdubbs@labaton.com

Counsel for Employees' Retirement System of the State of Hawaii

QUESTIONS PRESENTED

1. Whether plaintiffs seeking to invoke the fraud-on-the-market presumption of reliance recognized in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988), must prove market efficiency through empirical evidence that a security generally reacts to new material information in a "directionally appropriate" manner.

2. Whether Federal Rule of Civil Procedure 23 contains an implied, free-standing, threshold requirement that, when establishing "ascertainability," plaintiffs must show that identification of class members is "administratively feasible"—or whether that consideration is instead encompassed within Rule 23's express requirements.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondents Universities Superannuation Scheme, Ltd., North Carolina Department of State Treasurer, and Employees' Retirement System of the State of Hawaii state that they do not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of either company's stock.

TABLE OF CONTENTS

Page

Statement 1

I. Statutory Background 1

II. Proceedings Below 2

A. Proceedings in District Court 3

1. The Complaint 3

2. The District Court's Ascertainability Ruling 4

3. The District Court's Reliance Analysis 6

B. Proceedings in the Second Circuit 9

1. Ascertainability 10

2. Reliance 11

Reasons for Denying the Petition 13

I. The First Question Presented Does Not Warrant Review 14

A. Petitioners' General Arguments About Empirical Proof Are Not Properly Presented—As the Second Circuit Squarely Held 14

B. The Decision Below Does Not Conflict With *Halliburton II* 16

C. Petitioners' "Directionality" Argument Does Not Warrant Review 21

II. The "Administrative Feasibility" Question Does Not Warrant Review 24

TABLE OF CONTENTS—Continued

Page

A. The Conflict Is Likely To Resolve Itself Given the "Growing Consensus" in the Courts of Appeals 25

B. Petitioners' Purported Due-Process Concerns Do Not Withstand Scrutiny and Defy Express Findings 29

C. This Case Does Not Properly Present the Issue for Review 32

Conclusion 34

TABLE OF AUTHORITIES

Page(s)

CASES

Absolute Activist Value Master Fund Ltd. v. *Ficeto*, 677 F.3d 60 (2d Cir. 2012).. 5, 6, 33

Allahar v. *Zahora*, 59 F.3d 693 (7th Cir. 1995).. 32

Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988).. *passim*

Bell v. *Ascendant Sols., Inc.*, No. Civ.A. 301CV0166N, 2004 WL 1490009 (N.D. Tex. July 1, 2004).. 21, 22

Brecher v. *Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015).. *passim*

Brecht v. *Abrahamson*, 507 U.S. 619 (1993).. 29

Briseno v. *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir.), cert. denied, — S. Ct. — (2017).. 26, 28, 34

Byrd v. *Aaron's, Inc.*, 784 F.3d 154 (3d Cir. 2015).. 27, 32, 34

Cammer v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).. *passim*

Carrera v. *Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).. 26

Carrera v. *Bayer Corp.*, No. 12-2621, 2014 WL 3887938 (3d Cir. May 2, 2014).. 27, 34

City Select Auto Sales Inc. v. *BMW Bank of N. Am. Inc.*, 867 F.3d 434 (3d Cir. 2017).. 27, 28, 34

TABLE OF AUTHORITIES—Continued

Page(s)

EQT Prod. Co. v. *Adair*,
764 F.3d 347 (4th Cir. 2014) 28

Erica P. John Fund, Inc. v. *Halliburton Co.*, 563 U.S. 804 (2011) 21

Halliburton Co. v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).......................... *passim*

Karhu v. *Vital Pharms., Inc.*,
621 F. App'x 945 (11th Cir. 2015).................. 28, 29

Krogman v. *Steritt*, 202 F.R.D. 467
(N.D. Tex. 2001) 7, 14

Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. *Regions Fin. Corp.*, 762 F.3d 1248 (11th Cir. 2014) 24

Loritz v. *Exide Techs.*,
No. 2:13-cv-02607, 1015 WL 6790247
(C.D. Cal. July 21, 2015)....................................... 22

Marcus v. *BMW of N. Am., LLC*,
687 F.3d 585 (3d Cir. 2012) 26, 27, 28

Morrison v. *Nat'l Austl. Bank Ltd.*, 561
U.S. 247 (2010)... *passim*

Mullins v. *Direct Dig., LLC*,
795 F.3d 654 (7th Cir. 2015), cert.
denied, 136 S. Ct. 1161 (2016)............. 25, 26, 32, 34

Petrie v. *Elec. Game Card, Inc.*,
308 F.R.D. 336 (C.D. Cal. 2015) 20, 21

In re Petrobras Secs. Litig.,
116 F. Supp. 3d 368 (S.D.N.Y. 2015) 4

In re Petrobras Secs. Litig.,
No. 14-CV-9662, 2015 WL 10846627
(S.D.N.Y. Oct. 19, 2015).. 6

TABLE OF AUTHORITIES—Continued

Page(s)

Rikos v. *Proctor & Gamble Co.*,
799 F.3d 497 (6th Cir. 2015), cert. denied, 136 S. Ct. 1493 (2016) 26

Sandusky Wellness Ctr., LLC v. *Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016) 26

Siskind v. *Sperry Ret. Program*,
437 F. 3d 498 (2d Cir. 1995) 31

Teamsters Local 445 Freight Div. Pension Fund v. *Bombardier Inc.*,
546 F.3d 196 (2d Cir. 2008) 14

Tyson Foods, Inc. v. *Bouaphakeo*,
136 S. Ct. 1036 (2016).. 31

United States v. *Georgiou*,
777 F.3d 125 (3d Cir. 2015) 33

Waggoner v. *Barclays PLC*,
— F.3d —, No. 16-1912-cv, 2017 WL 5077355 (2d Cir. Nov. 6, 2017)............................ 24

In re Xcelera.com Secs. Litig.,
430 F.3d 503 (1st Cir. 2005) 24

STATUTES AND RULES

Securities Exchange Act of 1933,
15 U.S.C. §§ 77a *et seq.* 1, 3, 4

Securities Exchange Act of 1934,
15 U.S.C. §§ 78a *et seq.* 1, 4, 9, 11

Fed. R. Civ. P. 8(c)(1) 32

Fed. R. Civ. P. 23 4

Fed. R. Civ. P. 23(a)... 4

Fed. R. Civ. P. 23(b)(3)................................... *passim*

Fed. R. Civ. P. 23(f)... 9

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959) 25

M. Hartzmark & H. Seyhun, *Understanding the Efficiency of the Market for Preferred Stock*, 8 Va. L. & Bus. Rev. 149 (2014) 19, 20

S. Shapiro *et al.*, *Supreme Court Practice* (10th ed. 2013) 6, 33, 34

IN THE

Supreme Court of the United States

NO. 17-664

PETRÓLEO BRASILEIRO S.A. – PETROBRAS, *ET AL.*,

Petitioners,

v.

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, *ET AL.*,

Respondents.

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

---

BRIEF IN OPPOSITION

STATEMENT

This securities-fraud case arises from fraudulent schemes involving Petróleo Brasileiro S.A. – Petrobras ("Petrobras").

I. STATUTORY BACKGROUND

This case involves claims under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78a *et seq.*, and the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77a *et seq.* Two features of fraud claims under those statutes are relevant here.

First, under the Exchange Act, a plaintiff must establish (among other elements) a "material misrepresenta-

tion or omission" and "reliance upon the misrepresentation." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) ("*Halliburton II*") (quotation marks omitted). Under *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988), plaintiffs may sometimes invoke a rebuttable presumption of reliance under the "fraud-on-the-market" theory. *Id.* at 245. That theory holds that, in an efficient, well-developed market, public information about a company is generally reflected in its stock price. *Id.* at 246. Consequently, "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Because misrepresentations presumably distort the market price, "an investor's reliance on any public, material misrepresentations * * * may be presumed." *Ibid.*

Second, in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court addressed the Exchange Act's territorial scope. Noting the longstanding presumption against the extraterritorial application of United States laws, the Court held that the federal securities laws extend only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 267. Thus, plaintiffs may not proceed with federal securities-fraud claims except in compliance with *Morrison*'s domesticity requirement.

II. PROCEEDINGS BELOW

This case arises out of a fraud involving Petrobras, a multinational oil and gas company headquartered in Brazil. Pet. App. 9a. Petrobras purported to use competitive bidding for the construction of major projects, such as oil refineries. *Id.* at 13a-14a. For years, corrupt Petrobras executives colluded with a cartel of construction companies to rig the process and inflate prices. *Id.* at 14a. Cartel members used the excess funds to pay

billions of dollars in bribes and kickbacks to executives and politicians. *Ibid.* By incorporating these payoffs into the prices of assets it acquired, Petrobras not only hid them, but capitalized them as part of the price of "assets" on the company's books. *Ibid.*

Brazil's Federal Police discovered the scheme; many arrests ensued. Pet. App. 14a. As the scheme came to light, the value of Petrobras's securities fell dramatically—almost 88 percent. *Ibid.*

A. Proceedings in District Court

1. *The Complaint*

Respondents are investors in Petrobras who collectively filed five securities-fraud class actions arising from the Petrobras scandal. Pet. App. 15a. They include domestic purchasers of Petrobras equity and debt securities. *Id.* at 10a.

Petrobras's common and preferred shares trade on a Brazilian stock exchange. Pet. App. 14a. Petrobras also sponsors American Depository Shares ("ADS") representing those shares. ADS are listed and trade on the New York Stock Exchange ("NYSE"). *Id.* at 14a-15a. Respondents assert claims for the purchase of ADS shares, not shares on foreign exchanges. See *ibid.*

Respondents also include domestic purchasers of certain Petrobras debt securities ("notes"). Pet. App. 15a. The notes are listed on the NYSE, but trade in the over-the-counter bond market. *Ibid.* A significant percentage of the notes were purchased domestically by U.S. investors in the initial debt offerings, and many of the notes were later traded by U.S. institutional investors in domestic over-the-counter transactions. *Ibid.*

Respondents assert Exchange Act claims against Petrobras and certain subsidiaries, Pet. App. 16a, as well

as Securities Act claims against Petrobras and the underwriters of its notes, *id.* at 17a. They allege that the bribery and kickback scheme fraudulently inflated the value of the assets on Petrobras's books and with them the value of Petrobras shares and notes. *In re Petrobras Secs. Litig.*, 116 F. Supp. 3d 368, 375 (S.D.N.Y. 2015). The Complaint also alleges other misrepresentations about the value of Petrobras's assets, its internal controls over financial reporting, and the integrity and transparency of its management. See *id.* at 375-377.

2. *The District Court's Ascertainability Ruling*

Following the denial of petitioners' motions to dismiss, respondents moved to certify two classes—one for Exchange Act claims, and another for Securities Act claims—under Federal Rule of Civil Procedure 23. Pet. App. 67a-68a. The district court ruled that respondents had satisfied the requirements for class certification under Rule 23(a), including numerosity, commonality, typicality, and adequacy of representation. *Id.* at 70a-82a. The court further ruled that they met all of Rule 23(b)(3)'s requirements. *Id.* at 82a-108a. That included proof that "questions of law or fact common to class members predominate over any questions affecting only individual members"; and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 82a (quoting Fed. R. Civ. P. 23(b)(3)).

Most important here, the district court rejected petitioners' argument that a class action was not "superior" to other methods because of "so-called 'ascertainability'" issues. Pet. App. 84a. In *Brecher* v. *Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), the Second Circuit had stated that "the touchstone of ascertainability is whether the class is sufficiently definite so that it is administra-

tively feasible for the court to determine whether a particular individual is a member." *Id.* at 24 (quotation marks omitted). The district court understood *Brecher* to have "framed ascertainability" as an "'implied requirement' of Rule 23." Pet. App. 84a (quoting *Brecher*, 806 F.3d at 24). It therefore addressed ascertainability both as a "distinct" issue and as it related to the Rule 23(b)(3) element of "superiority." *Ibid.*

Petitioners challenged ascertainability based on *Morrison*'s holding that federal securities-fraud actions are available only to those who purchased securities on a U.S. exchange or in a domestic transaction. Pet. App. 84a-85a. There was no dispute that the purchase of Petrobras ADS on the NYSE—a domestic exchange—satisfies *Morrison*. *Id.* at 24a-25a & n.12. The Petrobras notes, however, did not trade on a domestic exchange; the holders could proceed only if their notes were acquired in a "domestic transaction." *Id.* at 25a. Petrobras claimed that, "because of the nuances of the 'domestic transaction' standard, determining who is a class member will be an administratively unfeasible task." *Id.* at 85a.

The district court rejected that argument. It reviewed the criteria that *Absolute Activist Value Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60 (2d Cir. 2012), identified "as relevant to the determination of whether a transaction was domestic." Pet. App. 86a. Those criteria, it held, were objectively determinable and "highly likely to be documented in a form susceptible to the bureaucratic processes of determining who belongs to a Class." *Ibid.* "For example, documentation of 'the placement of purchase orders' is the sort of discrete, objective record routinely produced by the modern financial system that a court, a putative class member, or a claims administrator

can use to determine whether a claim satisfies *Morrison*." *Ibid.*

The district court had *already* evaluated whether the proposed class representatives adequately pleaded that they purchased Petrobras notes in domestic transactions, concluding that two met the standard and two did not. Pet. App. 85a. And it had conducted similar inquiries in a number of opt-out cases.[1] The court was "confident that the *Morrison* determination is 'administratively feasible.'" *Id.* at 85a-86a (quoting *Brecher*, 806 F.3d at 24). The district court "conclude[d] that the proposed Classes are ascertainable and administratively manageable and that a class action is the superior method of adjudication under Rule 23(b)(3)." *Id.* at 86a.

3. *The District Court's Reliance Analysis*

The district court rejected petitioners' claim that each plaintiff would have to prove reliance individually and that, as a result, individual questions predominated over common ones. See Pet. App. 87a. Instead, the district court concluded that respondents were entitled to a class-wide presumption of reliance under the fraud-on-the-market theory this Court sustained in *Basic*.

---

[1] The district court initially dismissed certain opt-out plaintiffs' claims without prejudice for failure to adequately allege that they purchased their securities in domestic transactions. See *In re Petrobras Secs. Litig.*, No. 14-CV-9662, 2015 WL 10846627, at *1 (S.D.N.Y. Oct. 19, 2015). When plaintiffs amended their complaints to include details of the transactions, defendants dropped their *Morrison* defense in the vast majority of cases, declining to challenge over 1500 transactions. See, *e.g.*, Joint App. at 6931-6932, 6941-6959, *In re Petrobras Secs. Litig.*, No. 16-1914-cv (2d Cir. July 21, 2016).

The district court explained that, to invoke fraud on the market under *Basic*, respondents had to show that the Petrobras securities "traded in an efficient market." Pet. App. 87a. (quoting *Halliburton II*, 134 S. Ct. at 2413). When market efficiency is disputed, "courts generally apply" a set of factors identified in *Cammer* v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), and *Krogman* v. *Steritt*, 202 F.R.D. 467 (N.D. Tex. 2001). Pet. App. 87a-88a. Those factors include, for example, the extent of "analyst coverage"; "whether market makers existed"; the company's "market capitalization"; and the "bid-ask spread for the securities at issue." *Id.* at 88a-90a.

Petitioners did "not meaningfully dispute" any of the "*Cammer* factors" except one. Pet. App. 88a. The undisputed factors strongly supported the conclusion that Petrobras's securities traded in an efficient market. For example, the district court found that "over 50 analysts covered Petrobras's securities," and there was "extensive news coverage of Petrobras during the Class Period"; there were hundreds of market makers for Petrobras ADS and at least 20 underwriters of Petrobras notes; Petrobras's market capitalization was greater than the vast majority of "publicly traded U.S. companies"; trading volumes were "significantly high"; and "the average bid-ask spread" was exceptionally thin. *Id.* at 88a-93a.

The parties' experts "sparred" only over the fifth *Cammer* factor, Pet. App. 95a—*i.e.*, whether there are "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price," *Cammer*, 711 F. Supp. at 1287. Respondents' expert, Dr. Feinstein, ran empirical "event studies" that "found direct evidence of a link between events and price movements in Petrobras securities." Pet. App. 95a. After

"using a regression analysis to strip out any price movement that was caused by external forces," *id.* at 96a, Dr. Feinstein applied a "z-test"—a "widely accepted statistical tool[ ]," *id.* at 100a—to compare the proportion of event dates with statistically significant price movements to the proportion of non-event dates with statistically significant price movements, *id.* at 96a. He concluded that "there were more likely to be big price movements on days when important Petrobras events occurred, demonstrating the markets in Petrobras securities were responsive to new information." *Ibid.*

Petitioners' expert, Dr. Gompers, did not run any tests to show the market was not efficient. He merely "objected to Feinstein's conclusions on the grounds that Feinstein's z-tests failed to consider the directionality of movements in the Petrobras market." Pet. App. 101a. In other words, the z-tests "did not examine whether" share prices tended to move up in response to putatively "good" news and down in response to putatively "bad" news. *Ibid.* Dr. Gompers did not try to prove that the movement in Petrobras's market price was not directionally appropriate—generally or in response to the specific misrepresentations and corrective disclosures asserted in this case. See *id.* at 96a-108a. Instead, he urged that, because respondents did not prove that Petrobras's prices moved directionally based on whether news was good or bad, respondents had failed to carry their burden of showing market efficiency. See *id.* at 101a-104a. In response, Dr. Feinstein submitted a supplemental report showing directionality. *Id.* at 101a-102a.

The district court concluded that the fifth *Cammer* factor favored respondents. "In this case, where the indirect *Cammer* factors lay a strong foundation for a finding of efficiency," it was sufficient for respondents to

show that information in fact affected share prices. Pet. App. 106a. Respondents thus had provided "direct evidence of market efficiency" to "invoke *Basic*'s presumption of reliance." *Ibid.* Regarding "directionality," the district court acknowledged that Dr. Feinstein's supplemental report found that price responses were directionally appropriate. *Id.* at 102a. But it found that Dr. Feinstein had not sufficiently explained the bases for some of his conclusions, and gave them "limited weight." *Id.* at 102a-103a.

The district court found conclusive proof of directionality unnecessary for class-certification purposes. Pet. App. 103a. Citing *Halliburton II*, the district court observed that, "[s]uch evidence goes to the *accuracy* of the price of a security, and the Supreme Court has explained that it is not the accuracy of a price as a reflection of underlying value but instead the *sensitivity* of the price to false statements that underlies the *Basic* presumption." *Ibid.* (emphases added). "What is essential is evidence that, when the market received new information, it 'generally affect[ed]' the price." *Id.* at 104a (alteration in original) (quoting *Halliburton II*, 134 S. Ct. at 2410). Here, the district court found, "the z-test provides such evidence." *Ibid.* The court thus held that respondents had "demonstrated that common issues of law and fact will predominate over individual issues with respect to the reliance element of their Exchange Act claims." *Ibid.*

B. Proceedings in the Second Circuit

The Second Circuit granted interlocutory review of the class-certification order under Federal Rule of Civil Procedure 23(f). Pet. App. 19a. It affirmed in part and vacated and remanded in part. *Id.* at 8a.

1. *Ascertainability*

The Second Circuit first rejected petitioners' claim that class certification was inappropriate for failure to prove ascertainability. The court of appeals noted that most circuits "have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable, often characterized as an 'ascertainability' requirement." Pet. App. 29a (quotation marks omitted). In *Brecher*, the Second Circuit had defined ascertainability as requiring that the class be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member" based on "objective criteria" without resort to "a mini-hearing on the merits of each case." *Id.* at 30a (quoting 806 F.3d at 24-25).

In this case, petitioners argued that "the *Morrison* determination"—whether potential class members purchased notes in domestic transactions—is not "administratively feasible." Pet. App. 31a (quoting Pet. App. 85a-86a). Although petitioners relied on Third Circuit precedent articulating a "heightened" ascertainability requirement, the Second Circuit declined to require "heightened" proof. *Id.* at 32a. In doing so, the Second Circuit observed, it "join[ed] a growing consensus that now includes the Sixth, Seventh, Eighth, and Ninth Circuits." *Ibid.*

Respondents had argued that, to establish ascertainability, plaintiffs must show there is "a reliable and administratively feasible mechanism" for determining who meets the class definition. Pet. App. 38a. But the Federal Rules do not themselves impose such a free-standing test. *Id.* at 37a. Instead, they require courts to consider, for example, whether a class action is "superior to other available methods" for addressing the controversy. *Id.* at

39a. While administrative feasibility is an important consideration in that comparative inquiry, it is not an "absolute" and separate requirement. *Ibid.* Petitioners' "administrative feasibility test," the Second Circuit concluded, "would be inconsistent with the careful balance struck in Rule 23, which directs courts to weigh the competing interests inherent in any class certification decision." *Id.* at 40a. The Second Circuit found the classes here were ascertainable: "[N]either the parties nor the properties that are the subject of this litigation are fundamentally indeterminate." *Id.* at 43a.

The Second Circuit nonetheless "vacate[d] the district court's certification of the Classes" because the district court had not evaluated the effect of the *Morrison* inquiry on Rule 23(b)(3)'s predominance requirement. Pet. App. 54a. The court observed that "the investigation of domesticity" required when deciding whether a purchase of Petrobras securities was domestic might "be an 'individual question.'" *Id.* at 48a. The district court had "failed to meaningfully address" whether such individual inquiries outweighed common questions so as to defeat predominance. *Id.* at 46a. The Second Circuit "t[ook] no position" on that question, "leav[ing] the adjudication" of predominance "to the district court in the first instance." *Id.* at 54a-55a.

2. *Reliance*

The Second Circuit then turned to petitioners' argument that class certification was inappropriate for the Exchange Act claims because reliance had to be proved individually. Pet. App. 55a. Petitioners urged that the district court had erred by "holding that [respondents] were entitled to the *Basic* presumption" of reliance "based *solely* on their *indirect* evidence of market efficiency." *Id.* at 59a (first emphasis added). According to

petitioners, the district court committed legal error by failing to require proof on the "fifth *Cammer* factor"— "direct evidence, consisting of 'empirical facts,'" showing that market prices in fact responded to material information. *Id.* at 58a (quoting *Cammer*, 711 F. Supp. at 1287).

The Second Circuit dismissed that contention as "mischaracteriz[ing] the district court's analysis." Pet. App. 59a. The district court had not limited its analysis to the *Cammer* factors addressing *indirect* evidence of market efficiency. It had conducted "an 'involved analysis'" of respondents' "empirical evidence" and "concluded" that respondents "satisfied the fifth *Cammer* factor" as well. *Ibid.* The Second Circuit thus found no reason to address petitioners' argument whether "plaintiffs may satisfy the *Basic* presumption without *any* direct evidence of price impact" because "the issue is not squarely presented for our review." *Ibid.*

The Second Circuit then addressed petitioners' "attack on the *quality*" of respondents' empirical evidence of market efficiency. Pet. App. 60a. The court rejected petitioners' argument that, to establish market efficiency, plaintiffs must provide "directional empirical evidence"— *i.e.*, "data showing that the price of the relevant securities predictably moved up in response to good news and down in response to bad news." *Id.* at 62a. Petitioners were "attempting to relabel a *sufficient* condition as a *necessary* one." *Ibid.* The Second Circuit noted that both it and this Court had "declined to define a precise evidentiary standard for market efficiency." *Id.* at 63a.

The district court had found "a statistically significant showing that statistically significant price returns are more likely to occur on event dates." Pet. App. 61a. It had concluded that, "where the indirect *Cammer* factors lay a strong showing for a foundation of efficiency," such

proof was "sufficient as direct evidence of market efficiency and thereby to invoke *Basic*'s presumption of reliance at the class certification stage." *Ibid.* (quoting Pet. App. 106a). The Second Circuit held that the district court "properly considered a combination of direct and indirect evidence in reaching its conclusion that Petrobras ADS and Notes both trade in efficient markets." *Id.* at 65a.

The Second Circuit denied petitioners' petition for rehearing en banc. Pet. App. 117a.

REASONS FOR DENYING THE PETITION

Neither of the two questions presented warrants this Court's review. Petitioners first argue about the presumption of reliance under *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988). But they identify no circuit conflict on the narrow question they present for review. They assert a conflict with *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2410 (2014) ("*Halliburton II*"). But that supposed conflict rests on a misconstruction of the Second Circuit's decision; misreads *Halliburton II*; and is divorced from the question they purport to present for review. Petitioners' *actual* question presented asks whether plaintiffs seeking to invoke *Basic* must prove market efficiency through "empirical evidence that a security generally react[s] in a directionally appropriate manner to new material information." Pet. i. No court of appeals has adopted "directionality" as a prerequisite to showing market efficiency. Other than the decisions below, petitioners can muster only two district-court cases that have even *considered* the argument.

The second question likewise does not warrant review, and this case is a singularly inappropriate vehicle for addressing it. As the Second Circuit explained, there is "growing consensus" on "ascertainability" and its role

under Rule 23. Pet. App. 32a. Only the Third Circuit appears out of step with that consensus, but it appears to be moving in the right direction. Any split thus seems likely to resolve itself. In any event, the district court below applied the very "administrative feasibility" standard petitioners seek and concluded that it was met. This Court typically does not grant review where resolution of the question presented will not affect the outcome of the case.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners claim that courts are "deeply divided" over the "proof necessary to invoke the fraud-on-the-market presumption of reliance" under *Basic*. Pet. 11. No such conflict exists. Petitioners' arguments shift among various theories, but they scarcely touch on the actual question presented. That question is not remotely worthy of review.

A. Petitioners' General Arguments About Empirical Proof Are Not Properly Presented—As the Second Circuit Squarely Held

It is settled that, to invoke the "fraud-on-the-market" presumption adopted in *Basic*, 485 U.S. at 246, plaintiffs must show that the security "traded in an efficient market." *Halliburton II*, 134 S. Ct. at 2408; see p. 2, *supra*. To determine market efficiency, courts "routinely" look to various factors from *Cammer* v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), and *Krogman* v. *Steritt*, 202 F.R.D. 467 (N.D. Tex. 2001). *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008). Most of those factors "examine indirect indicia of market efficiency," including "high trading volume, extensive analyst coverage, multiple market makers, large market capitalization, and an

issuer's eligibility for simplified SEC filings." Pet. App. 58a. The so-called "fifth *Cammer* factor" considers "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." *Cammer*, 711 F. Supp. at 1287.

Petitioners argue that the decision below "holds" that plaintiffs can establish market efficiency—and thus "receive the benefit of the *Basic* presumption"—without "providing even indirect empirical evidence of 'price impact,' *i.e.*, that new news is reflected in the security's price." Pet. 13; see *id.* at 15 (similar).[2] But the Second Circuit held no such thing: It expressly "decline[d] to reach" whether "plaintiffs may satisfy the *Basic* presumption without *any* direct evidence of price impact," explaining that "the issue is not squarely presented for our review." Pet. App. 59a. As the Second Circuit explained, the district court conducted "an 'involved analysis' of [respondents'] empirical evidence." *Ibid.* And the district court found that respondents had made "a statistically significant showing that statistically significant price returns are more likely to occur on event dates" where news about Petrobras reached the public. *Id.* at 106a. The court thus "conclude[d] that plaintiffs had satisfied the fifth *Cammer* factor." *Id.* at 95a.

---

[2] Petitioners use the term "price impact" when addressing whether the price of Petrobras securities was *generally* responsive to material news. See, *e.g.*, Pet. 13, 15. This Court, however, has used the term "price impact" to refer to whether the *specific* "misrepresentation" at issue in the suit "actually affect[ed] the stock's price." *Halliburton II*, 134 S. Ct. at 2405. That discrepancy is a source of confusion throughout the petition.

Consequently, "whether plaintiffs may satisfy the *Basic* presumption without *any* direct evidence of price impact" is not presented here. That evidence was presented, and both courts found it sufficient. See Pet. App. 60a-63a, 95a-108a. Every *Cammer* factor showed that Petrobras securities trade in efficient markets. "Petrobras was one of the largest and most analyzed firms in the world * * * , and such size and sophistication raise the likelihood of an efficient market." *Id.* at 95a. Indeed, petitioners did not even attempt to prove inefficiency. They instead challenged respondents' showings with respect to just one factor, and lost on that one as well.

Petitioners' real argument thus is not that plaintiffs must provide empirical proof when showing market efficiency. It is that plaintiffs must provide a particular type of "empirical evidence": "that a security generally reacted in a *directionally appropriate* manner to new material information—*viz.*, that its price went up on good news and down on bad news." Pet. i (emphasis added); see Pet. App. 59a-60a. As explained below, no court of appeals has ever adopted that requirement; few courts have addressed it; and even that question is not properly presented for review.

B. The Decision Below Does Not Conflict With *Halliburton II*

Petitioners urge that the decision below "conflicts with the Court's ruling in *Halliburton II*." Pet. 13. "To justify a grant of certiorari," a putative "conflict" between a court of appeals' decision and this Court's precedents "must truly be direct and must be readily apparent from the lower court's rationale or result." S. Shapiro *et al.*, *Supreme Court Practice* 251 (10th ed. 2013). Here, there is no conflict of any sort.

1. *Halliburton II* had three holdings. First, it declined to overrule *Basic*'s fraud-on-the-market theory. 134 S. Ct. at 2407. Second, it held that plaintiffs need not "prove that a defendant's misrepresentation actually affected the stock price—so-called 'price impact'—to invoke the *Basic* presumption." *Id.* at 2413. Instead, proof of an efficient market, which creates a presumption of price impact, is sufficient. Third, the Court held that a defendant should "be allowed to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 2414. Petitioners fail to explain how the decision below directly conflicts with any of those holdings.

Petitioners claim that "[t]he Second Circuit's fundamental error" was "to excuse plaintiffs from offering any empirical proof of even indirect price impact" in establishing market efficiency. Pet. 15. As explained above, the Second Circuit did no such thing. It found it unnecessary to decide whether "empirical proof" was required because there was ample empirical evidence that the market price of Petrobras securities was responsive to material news. See pp. 11-12, 15-16, *supra*. Thus, while petitioners describe *Halliburton II* as holding "that plaintiffs must offer evidence that the price of a security reflected material news," Pet. 16, nothing in the decision below suggests otherwise.

2. Petitioners assert that the decision below "prevents a defendant from rebutting the presumption" of reliance under *Basic* "even with direct evidence concerning price impact." Pet. 13; see *id.* at 16, 18-19. But petitioners nowhere identify anything in the decisions below that "deprive[s] defendants of the ability to introduce empirical evidence to rebut the presumption of reliance." *Id.* at 16.

Petitioners' argument, moreover, appears to conflate two distinct concepts. See p. 15 n.2, *supra*. Under *Halliburton II* and *Basic*, a plaintiff can establish the presumption of reliance by proving the market is efficient and, as a result, market prices would be expected to incorporate material news. See p. 2, *supra*. *Halliburton II* adds a further consideration under the rubric of "price impact." It states that, *even if* the market is efficient, defendants can rebut the fraud-on-the-market presumption of reliance at the class-certification stage by showing that the *specific* misrepresentation at issue in the suit did not "actually affect the stock's price." 134 S. Ct. at 2405. That makes sense: If the stock price was unaffected by the misrepresentation, the plaintiff cannot claim he "relied" on the misrepresentation by relying on the price. In the face of such a showing, "the basis for finding that the fraud had been transmitted through the market price would be gone." *Id.* at 2415-2416 (quotation marks omitted).

Neither court below "prevented" petitioners from making that showing. Petitioners simply made no effort to rebut the absence of "price impact" by showing that the specific "misrepresentation (or its correction)" at issue "did not affect the market price of the defendant's stock." *Halliburton II*, 134 S. Ct. at 2414-2415. Nor could they have done so: The disclosure of the fraud had a dramatic impact on price. Respondents' damages expert has since performed an event study and identified over two dozen corrective disclosures that caused statistically significant declines in the price of Petrobras's securities. See Dist. Ct. Dkt. No. 654.

Nor were petitioners prevented from introducing empirical evidence that "new news is reflected in the security's price," Pet. 13, the other sense in which petitioners

use "price impact." Petitioners never sought to introduce empirical evidence that Petrobras's market prices did not *generally* respond to material news (directionally or otherwise). They simply criticized respondents' expert's findings. See Pet. App. 101a-104a. Nothing in the Second Circuit's or the district court's opinion "deprive[s] defendants of the ability to introduce empirical evidence to rebut the presumption of reliance." Pet. 16.

3. The crux of petitioners' remaining argument is that the Second Circuit erred in holding that "a market can be labeled 'efficient' * * * without any showing 'that the price of the relevant securities predictably *moved up in response to good news* and *down in response to bad news*." Pet. 17 (emphasis added). According to petitioners, *Halliburton II* requires that plaintiffs "demonstrat[e] *directionally appropriate* price movement." *Id.* at 21 (emphasis added). *Halliburton II* makes no mention of "directionally appropriate" price movement. It is hard to discern why petitioners think otherwise.

The notion that *Halliburton II* adopted the directionality requirement petitioners propose is dubious in part because the posited rule is not sound. In an efficient market, "it is not always clear what is the 'correct' direction [a stock price should move]—even if the news can be categorized as good or bad." M. Hartzmark & H. Seyhun, *Understanding the Efficiency of the Market for Preferred Stock*, 8 Va. L. & Bus. Rev. 149, 211 (2014). "For example, putative 'good news' can result in significant price declines if the news is not as good as expected or falls short of analyst predictions." *Ibid.* Moreover, where, as here, a firm issues multiple classes of stock, a piece of news can affect those classes differently: "[W]hat might be considered good news for a particular common stock may be neutral or even bad

news for a related preferred stock," and vice-versa. *Id.* at 169. Given these realities, "it may be virtually impossible" in some circumstances "to determine the 'correct' direction in which the price should move in response to a certain piece of information." *Petrie* v. *Elec. Game Card, Inc.*, 308 F.R.D. 336, 354 (C.D. Cal. 2015).

Halliburton II made clear, moreover, that it was not dictating a particular method of proof. The Court explained that, to "recognize the presumption of reliance," it was not necessary "'conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price.'" 134 S. Ct. at 2410 (quoting *Basic*, 485 U.S. at 248 n.28). The Court stressed that the presumption was based "on the fairly modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.'" *Ibid.* (quoting *Basic*, 485 U.S. at 247 n.24). "Debates about the precise degree to which stock prices accurately reflect public information," the Court explained, "are thus largely beside the point." *Ibid.* And Justice Ginsburg acknowledged that the Court's decision "should impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Id.* at 2417 (Ginsburg, J., concurring). It defies belief that, at the same time the Court stressed the *lack* of need "conclusively to adopt any particular theory of market efficiency," the Court also *sub silentio* imposed a rigid requirement that plaintiffs provide empirical evidence of directionality.

To prevail on the *merits*, a securities-fraud plaintiff must prove loss causation, which "requires a plaintiff to show that a misrepresentation" not only "affected the integrity of the market price," but also "caused a sub-

sequent economic loss." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 812 (2011). That may require showing that the price went up in response to misrepresentations and/or down when the truth was disclosed. But the requirements of loss causation have "no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.* at 813.

C. Petitioners' "Directionality" Argument Does Not Warrant Review

Petitioners' complaint here is not that empirical evidence should be required—it was provided here. For that reason, the question presented raises a different issue. It asks whether plaintiffs are foreclosed from invoking the fraud-on-the-market presumption absent a *particular type* of empirical evidence—proof "that a security generally reacted in a *directionally appropriate manner* to new material information." Pet. i (emphasis added).

1. Petitioners, however, cannot cite a single court of appeals decision—other than the decision below—even addressing whether plaintiffs must provide empirical evidence of directional price movement. Needless to say, the circuits are not in conflict on the issue. The issue, moreover, rarely arises. The best petitioners can muster (Pet. 25-26) is two district court decisions—one of them unpublished—separated by 11 years. In *Petrie*, the court held that "there is no absolute requirement [for plaintiffs] to show that certain information caused prices to move in a specific direction." 308 F.R.D. at 354. In *Bell* v. *Ascendant Solutions, Inc.*, No. Civ.A. 301CV0166N, 2004 WL 1490009 (N.D. Tex. July 1, 2004), the court thought the "purpose of requiring market efficiency" would be undercut if one ignored "the direction of price

movement," but the only authority it cited was defendants' expert witness—Dr. Gompers—the expert petitioners retained here. *Id.* at *4.[3] The fact that only one district court has ever embraced the theory, in an unpublished opinion, hardly establishes an important, recurring, and well-developed division of authority warranting further review.

Nor is the issue properly presented even in this case. Respondents *did* present evidence of directionality. See Pet. App. 101a-103a. The district court gave that evidence "limited weight," *id.* at 102a—but that is not "no weight." And petitioners did not introduce evidence to disprove directionality. Accordingly, evidence of directionality was not absent even in this case.

2. Perhaps for that reason, petitioners focus on something different—the so-called *Cammer* factors. They agree those factors have been "influential in the lower courts." Pet. 22. But petitioners complain that some factors have been "criticized" by "[c]ommentators." *Ibid.* They urge that there is no single definitive ruling on "how these factors are to be weighed or by what standard they are to be evaluated." *Id.* at 24.

But the propriety and weight given to the *Cammer* factors is not the question presented for review. Petitioners did not argue below that the district court committed legal error in applying the *Cammer* factors. And, other than the "fifth" factor, they did "not meaningfully dispute" the application of those factors to the facts of

---

[3] Petitioners overlook another unpublished district-court decision addressing the issue, which also rejected the directionality requirement. See *Loritz* v. *Exide Techs.*, No. 2:13-cv-02607, 1015 WL 6790247, at *12-*13 (C.D. Cal. July 21, 2015).

this case. Pet. App. 88a. The issue is waived. And this case presents no opportunity to address those factors in any event. The district court concluded that each and every factor that courts traditionally consult—those that demonstrate efficiency indirectly and the one that looks to it directly—all point the same way.

The district court found that "over 50 analysts covered Petrobras's securities," and there was "extensive news coverage of Petrobras during the Class Period"; there were hundreds of market makers for Petrobras ADS and at least 20 underwriters of Petrobras bonds; Petrobras's market capitalization was greater than the vast majority of "publicly traded U.S. companies"; trading volumes were "significantly high"; and "the average bid-ask spread" for Petrobras securities was thin. See Pet. App. 88a-93a. Petitioners did not dispute that those elements would "logically appear in, or contribute to, an efficient securities market." *Id.* at 63a-64a.[4] It may be that different cases stress different factors. But that is because each case is different. "*Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof." *Halliburton II*, 134 F.3d at 2410.

Ultimately, petitioners revert to their argument about *Cammer*'s "fifth, cause-and-effect factor." Pet. 25-26. But the role of that factor "is not squarely presented" here: The district court conducted "an 'involved analysis' of [respondents'] empirical evidence * * * and ultimately concluded that" respondents had "satisfied the fifth *Cam-*

---

[4] Petitioners argue that the standard applied below "would be satisfied for any large, publicly traded company." Pet. 19. That does not suggest the standard is wrong. It just means that the securities of any large, publicly traded company with extensive analyst coverage likely trade in efficient markets.

mer factor." Pet. App. 59a (quoting Pet. App. 95a). And there is no recognized conflict on that factor's importance in any event.[5]

II. THE "ADMINISTRATIVE FEASIBILITY" QUESTION DOES NOT WARRANT REVIEW

Petitioners claim a "deep and entrenched split" on whether Rule 23's implied "ascertainability" requirement mandates proof that identification of class members is "administratively feasible." Pet. 30. That is incorrect. Far from being entrenched, any conflict is thin and ready to evaporate. The interests protected by the court-made "administrative feasibility" requirement proposed by petitioners are addressed by the express criteria provided by Rule 23. This case, moreover, is a singularly poor vehicle for addressing the issue. The district court here applied the standard petitioners propose and found that identifying class members would be feasible.

[5] The fact that one court of appeals once described the fifth factor as, "in many ways, the most important *Cammer* factor," *In re Xcelera.com Secs. Litig.*, 430 F.3d 503, 512 (1st Cir. 2005), does not create a conflict with the view of other courts that it is not an "unwavering evidentiary requirement," *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund* v. *Regions Fin. Corp.*, 762 F.3d 1248, 1256 (11th Cir. 2014). After the decision below, the Second Circuit issued a decision holding that "direct evidence of price impact under *Cammer* 5 is not always necessary to establish market efficiency." *Waggoner* v. *Barclays PLC*, — F.3d —, No. 16-1912-cv, 2017 WL 5077355, at *1 (2d Cir. Nov. 6, 2017). The court noted that three other circuits likewise "have concluded that *Cammer* 5 is not necessary but nevertheless often helpful." *Id.* at *14 n.30.

A. The Conflict Is Likely To Resolve Itself Given the "Growing Consensus" in the Courts of Appeals

As the Second Circuit observed, there is "growing consensus" on the issue petitioners present for review. Pet. App. 32a. Court after court has concluded that it is improper to graft an extra-textual "administrative feasibility requirement" onto Rule 23. *Ibid.* The concerns underlying that requirement are amply addressed by criteria that Rule 23 already presents. And the Third Circuit—which invented the "administrative feasibility requirement"—may be poised to reconsider. Certiorari is not warranted where, as here, "it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals." Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959).

1. The courts of appeals have long held that Rule 23 requires that a putative plaintiff class be "ascertainable," in the sense that the class must "be defined clearly and based on objective criteria." *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016). That requirement addresses "the adequacy of the class definition itself"; it does not "focus[] on whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Ibid.*

That does not mean Rule 23 leaves courts free to certify classes where it will be difficult to determine who is (and is not) a class member, necessitating "mini-hearings." *Brecher*, 806 F.3d at 24-25. Those concerns are addressed by Rule 23's express criteria. As the Second Circuit explained, Rule 23 requires that a class action be "superior" to other modes of adjudication. Pet.

App. 39a. Manageability—and the feasibility of identifying class members—is an important component of that inquiry. *Ibid.* Likewise, common questions must "predominate" over individual ones. *Id.* at 40a. If determining class membership requires mini-hearings, that could cause individual issues to predominate over common ones. *Ibid.* The Second Circuit here remanded to the district court to consider that very question. *Id.* at 46a-55a.

Consequently, there is a "growing consensus" that a stand-alone, judge-made administrative-feasibility requirement is unnecessary and contrary to Rule 23. Pet. App. 32a. That consensus now includes the Second, "Sixth, Seventh, Eighth, and Ninth Circuits." *Ibid.*; see *Rikos* v. *Proctor & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015), cert. denied, 136 S. Ct. 1493 (2016); *Sandusky Wellness Ctr., LLC* v. *Medtox Sci., Inc.*, 821 F.3d 992, 995-996 (8th Cir. 2016); *Mullins*, 795 F.3d at 672 (7th Cir.); *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir.), cert. denied, — S. Ct. — (2017). Those courts agree that ascertainability "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." Pet. App. 31a.

2. The Third Circuit suggested a different approach in *Marcus* v. *BMW of North America, LLC*, 687 F.3d 585 (3d Cir. 2012). In the course of remanding the class-certification issue there, *Marcus* admonished the district court that it "must resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative" for doing so. *Id.* at 594. Later cases construed *Marcus* as imposing a free-standing "administrative feasibility" requirement under the banner of "ascertainability." See *Carrera* v. *Bayer Corp.*, 727 F.3d

300, 303-304 (3d Cir. 2013); *Byrd* v. *Aaron's, Inc.*, 784 F.3d 154, 163-165 (3d Cir. 2015).

The viability of a free-standing administrative-feasibility requirement—separate from the enumerated Rule 23 factors—is uncertain even in the Third Circuit. Judge Ambro, who authored *Marcus*, has expressed concern over "how far" the requirement has gone, urging his Circuit to conduct "en banc review." *Carrera* v. *Bayer Corp.*, No. 12-2621, 2014 WL 3887938, at *1 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc). Judge Rendell has opined that the "heightened ascertainability requirement" is something "the drafters of Rule 23 could not have intended." *Byrd*, 784 F.3d at 172 (Rendell, J., concurring). Months ago, Judge Fuentes observed that, "[s]ince [the Third Circuit's] adoption of this new requirement, circuits that have carefully considered whether to adopt our new requirement have declined to do so." *City Select Auto Sales Inc.* v. *BMW Bank of N. Am. Inc.*, 867 F.3d 434, 443 (3d Cir. 2017) (Fuentes, J., concurring). He urged that the time has come for the Third Circuit to "reject[ ] this additional requirement * * * as well." *Ibid.*

Three Third Circuit judges thus are ready to reconsider the issue in an appropriate case. There is every reason to believe the Third Circuit will, of its own volition, "retreat from [its] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23." *Byrd*, 784 F.3d at 177 (Rendell, J., concurring).[6]

---

[6] Petitioners claim the Third Circuit "recently adhered to the 'administrative feasibility' requirement." Pet. 30. But in the cited case—*City Select*—the Third Circuit reversed a district court's *refusal* to

3. In asserting a "deep" split, Pet. 29, petitioners invoke one decision from the Fourth Circuit and another from the Eleventh Circuit. Neither case establishes a stand-alone administrative-feasibility requirement.

In *EQT Production Co.* v. *Adair*, 764 F.3d 347 (4th Cir. 2014), the Fourth Circuit stated that "Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *Id.* at 358. The court clarified, however, that "the requirement" is definitional—*i.e.*, that the court must be able to "identify the class members in reference to objective criteria." *Ibid.* That objective-criteria requirement is the law of every circuit, and was adopted by the Second Circuit below. Pet. App. 41a. Plaintiffs, the Fourth Circuit further explained, "need not be able to identify every class member at the time of certification." 764 F.3d at 358. While the opinion cited *Marcus*, it did not purport to adopt the Third Circuit's standard wholesale. See *ibid.* Thus, as another court of appeals recognized, it is "far from clear that the Fourth Circuit requires an affirmative demonstration of administrative feasibility as a separate prerequisite to class certification." *Briseno*, 844 F.3d at 1127 n.6.

Petitioners' reliance on the unpublished decision in *Karhu* v. *Vital Pharmaceuticals, Inc.*, 621 F. App'x 945 (11th Cir. 2015), fares worse still. There, the court—relying on district-court cases—stated that "ascertainability" requires that a plaintiff "propose an administratively feasible method by which class members can be identified." *Id.* at 947. But the plaintiff-appellant in that

---

certify a class based on an overzealous application of the "administrative[ ] feasib[ility]" requirement. 867 F.3d at 436.

case *conceded* the administrative-feasibility requirement. See Br. of Appellant at 13, *Karhu* v. *Vital Pharms., Inc.*, No. 14-11648 (11th Cir. Aug. 2014). An unpublished and non-precedential decision, authored by a U.S. Court of International Trade judge sitting by designation, citing no circuit authority, in a case where the issue was not even litigated, is hardly the Eleventh Circuit's conclusive word on the matter. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 630-631 (1993) (no *stare decisis* effect given to decisions that "at most assumed the applicability" of a rule). Indeed, Judge Martin wrote separately to "address the problems" with a heightened, "court-created" ascertainability doctrine. *Karhu*, 621 F. App'x at 951 (Martin, J., concurring). *Karhu* is not even precedent in the Eleventh Circuit, much less evidence of an "entrenched" conflict.

B. Petitioners' Purported Due-Process Concerns Do Not Withstand Scrutiny and Defy Express Findings

Petitioners claim that this Court's review is necessary to "protect[ ] the due process rights of both defendants and putative class members." Pet. 33. But those arguments are not properly presented either. They are instead thinly disguised challenges to factual findings that do not warrant this Court's review.

1. Petitioners' due-process arguments focus on a specific premise: that, in this case, "[t]here is no administratively feasible means for investors in Petrobras notes, the court, or defendants to ascertain whether the notes were purchased in 'domestic transactions,'" as required to state a federal securities-fraud claim under *Morrison*. Pet. 34. Petitioners, however, do not cite a *single* case—and respondents could find none—in which a federal court expressed difficulty applying *Morrison* at

the class-certification stage. The fact-bound issue they raise is neither important nor recurring.

The due-process argument fails in any event. While petitioners claim the Second Circuit's decision deprives putative class members of the ability "to make fundamental decisions affecting their rights," such as deciding whether "to opt-out or participate," Pet. 36, the district court found that "a significant volume" of investors "*have* opted out of the present action"—indeed, there were "[h]undreds of opt-outs." Pet. App. 72a (emphasis added). Petitioners themselves acknowledged the high "volume of 'opt-out' individual actions against Petrobras." *Ibid.* Clearly class membership is not so un-ascertainable as to deprive investors the ability to decide whether to opt out of the class.

Petitioners are simply disputing the district court's express findings. The district court ruled that transactional documentation "routinely produced by the modern financial system" would make class membership easily determinable. Pet. App. 86a. For example, "documentation of 'the placement of purchase orders' is the sort of discrete, objective record" that "a court, a putative class member, or a claims administrator can use to determine whether a claim satisfies *Morrison*." *Ibid.*

The district court's ruling, moreover, was grounded in experience. "[H]aving recently evaluated whether the four proposed class representatives adequately pleaded that they purchased Petrobras securities," the district court had first-hand experience with the administrative feasibility of making the *Morrison* determination. Pet. App. 85a. The district court had similar experience in myriad opt-out cases. See p. 6 & n.1, *supra*. Given that experience, the district court was "confident that the

Morrison determination is 'administratively feasible." Pet. App. 85a-86a.

Petitioners "themselves" had "elsewhere represented" that "the site of the transaction" can "be easily determined based on recognized and readily understood standards." Pet. App. 85a (quotation marks omitted). Petitioners now invoke supposedly "undisputed evidence to the contrary." Pet. 9; see also *id.* at 36 (urging the need for "extensive inquiry into third-party records"). But they provide no citation to support that assertion. This Court, in any event, does not sit to resolve factual disputes between the parties. The fact that this case threatens to devolve into a dispute over the facts weighs against review.

2. Petitioners urge that, under *Siskind* v. *Sperry Retirement Program*, 47 F.3d 498 (2d Cir. 1995), due process requires "that a defendant named in a suit be told promptly the number of parties to whom it may ultimately be liable for money damages." Pet. 37 (quotation marks omitted). But this Court has rejected the argument that a defendant is entitled to know, at class certification, to how many parties it may be liable. See *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1049-1050 (2016). And petitioners misread *Siskind*. That case addressed "the due process concerns raised by awarding judgment to an *uncertified* class." 47 F.3d at 503 (emphasis added). It does not hold that due process is offended where, as here, a class is certified "using objective criteria that establish a membership with definite boundaries." Pet. App. 31a.

Courts have explained that the true "due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair oppor-

tunity to present its defenses when putative class members actually come forward." *Mullins*, 795 F.3d at 670; see also *Byrd*, 784 F.3d at 171. Petitioners will receive such a "fair opportunity" at the appropriate juncture here.

Petitioners' argument about "fail safe" classes also misses the mark. Pet. 36; see *id.* at 39. They claim that, because investors cannot determine "whether they purchased in domestic transactions," they might attempt to assert their rights abroad even if they lose this case in the United States. *Id.* at 36-37. But a fail-safe class is one in which the class is defined so as to "depend on the liability of the defendant." *Mullins*, 795 F.3d at 660. That is not the case here—class membership will not turn on litigation of whether Petrobras made material misrepresentations that caused loss. Petrobras raises the specter that a dissatisfied class member could sue Petrobras in "courts all over the world," forcing "*defendants* to prove * * * that the transaction was 'domestic'" to invoke res judicata. Pet. 37. But defendants always must prove the elements of res judicata. See *Allahar* v. *Zahora*, 59 F.3d 693, 696 (7th Cir. 1995) ("[r]es judicata is an affirmative defense" on which the defendant has the burden of proof); Fed. R. Civ. P. 8(c)(1). That is hardly offensive to American law.

C. This Case Does Not Properly Present the Issue for Review

Petitioners claim that "[t]he substantive context and procedural background of this case make it an ideal vehicle for the court to address" the administrative-feasibility issue. Pet. 38. But the opposite is true.

1. In terms of "procedural background," Pet. 38, one consideration looms large: Petitioners cannot prevail even under the standard they press on the Court. They

ask this Court to decide whether "Rule 23 and due process require that class membership be ascertainable through administratively feasible means." Pet. ii. But the district court *already* applied that very standard in this case. It had interpreted an earlier Second Circuit decision as imposing a requirement that it be "'administratively feasible for the court to determine whether a particular individual is a member'" of the proposed class. Pet. App. 84a (quoting *Brecher*, 806 F.3d at 24). And it "conclude[d] that the proposed Classes are ascertainable and administratively manageable." *Id.* at 86a. Certiorari is not appropriate where resolution of the question presented is "irrelevant to the ultimate outcome of the case before the Court." Shapiro *et al.*, *supra*, at 249.

The ascertainability issue, moreover, turns in part on an issue this Court has not explored—how one determines whether a transaction is "domestic." The Second Circuit addressed that issue in *Absolute Activist Value Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60 (2d Cir. 2012). In that case, it expressed the view that there were "simple and direct" ways of making the *Morrison* determination. *Id.* at 68; see *United States* v. *Georgiou*, 777 F.3d 125, 136 (3d Cir. 2015) ("agree[ing]" with the Second Circuit). Petitioners' contrary argument threatens to devolve into disputes over the application of Second Circuit law. With respect to the criteria the Second Circuit identified "as relevant to the determination of whether a transaction was domestic," however, the district court held that they are "highly likely to be documented in a form susceptible to the bureaucratic processes of determining who belongs to a Class." Pet. App. 86a. Those findings are supported by the record and the district court's experience. Consequently, "resolution of the conflict" over ascertainability "could not change the result

reached below." Shapiro *et al.*, *supra*, at 249. Review should occur, if at all, in a case where it can make a difference.

2. The "substantive context," Pet. 38, also weighs against review. Petitioners tout the fact that this case is *not* a "consumer class action[]." *Id.* at 39. But that makes this case atypical. If a heightened-ascertainability requirement poses a threat to "the viability" of any category of cases, it is to "the low-value consumer class action," which is the type of action "that necessitated Rule 23 in the first instance." *Carrera*, 2014 WL 3887938, at *1 (Ambro, J., dissenting from denial of rehearing en banc) (quotation marks omitted); see also *Byrd*, 784 F.3d at 173 (Rendell, J., concurring); *City Select*, 867 F.3d at 443 (Fuentes, J., concurring); *Mullins*, 795 F.3d at 658. An "administrative feasibility" requirement "would likely bar such actions because consumers generally do not keep receipts or other records of low-cost purchases." *Briseno*, 844 F.3d at 1129.

Here, the district court—experienced in securities litigation and with Petrobras documentation in particular—ruled that ample records exist. In this context, the administrative-feasibility requirement is unlikely to make a difference. If this issue is to be reviewed at all, it should be reviewed in a context where it is likely to make a difference, such as a consumer class action—free of the sorts of factual disputes the petition here rests upon.

CONCLUSION

The petition should be denied.

Respectfully submitted.

THOMAS A. DUBBS
LOUIS GOTTLIEB
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700
tdubbs@labaton.com

Counsel for Employees' Retirement System of the State of Hawaii

JEREMY A. LIEBERMAN
Counsel of Record
MARC I. GROSS
EMMA GILMORE
JOHN A. KEHOE
BRENDA F. SZYDLO
POMERANTZ LLP
600 Third Avenue
20th Floor
New York, NY 10016
(212) 661-1100
jalieberman@pomlaw.com

JEFFREY A. LAMKEN
MICHAEL G. PATTILLO, JR.
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

Lead Counsel for Lead Plaintiff Universities Superannuation Scheme, Ltd. and Named Plaintiff North Carolina Department of State Treasurer and Lead Counsel for the Classes

November 2017