No. 25-____

IN THE

# Supreme Court of the United States

SHANDA GAMES LIMITED, YINGFENG ZHANG, LI YAO, LIJUN LIN, HENG WIN CHAN, YONG GUI, SHAOLIN LIANG, DANIAN CHEN,

*Petitioners*,

v.

DAVID MONK,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


Noah B. Bokat-Lindell
O'MELVENY & MYERS LLP
1625 Eye Street
Washington, D.C. 20006
(202) 383-5300

Abby F. Rudzin
*Counsel of Record*
Anton Metlitsky
O'MELVENY & MYERS LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 326-2000
arudzin@omm.com

## QUESTION PRESENTED

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court recognized a rebuttable fraud-on-the-market presumption for establishing reliance in a securities action. That presumption is grounded on the "premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246. The Court therefore made that presumption available to "[a]n investor who buys or sells stock at the price set by the market" and thereby "reli[es] on the integrity of that price." *Id.* at 247. But in the opinion below, the Second Circuit extended the fraud-on-the-market presumption beyond "investors who trade at the market price," holding that it encompassed all "investors who acquire or divest themselves of stock" regardless of whether they do so in the market or at the market price. Pet. App. 42a.

The question presented is whether *Basic*'s fraud-on-the-market presumption is available to all plaintiffs who purchase or sell securities or is limited to only those who do so in an efficient market at the market price.

## PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. In addition to the parties listed in the caption, Capitalcorp Limited and Capitalhold Limited were defendants in the district court but were dismissed from the appeal. Astor BK Realty Trust, on behalf of itself and all others similarly situated, was a plaintiff in the district court but did not participate in the court of appeals.

2. Petitioner Shanda Games Limited is owned entirely by Capitalhold Limited, a privately held company. No publicly held corporation owns 10% or more of its stock. The remaining petitioners are individuals.

## RELATED PROCEEDINGS

*In re Shanda Games Ltd. Securities Litigation*, No. 1:18-cv-2463 (S.D.N.Y.)

*In re Shanda Games Ltd. Securities Litigation*, No. 22-3076 (2d Cir.)

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT ..... ii

RELATED PROCEEDINGS ..... iii

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 5

A. The Fraud-on-the-Market Presumption ..... 5

B. Factual Background and Proceedings Below ..... 8

REASONS FOR GRANTING THE PETITION ..... 15

I. The court of appeals' decision defies this Court's precedents. ..... 16

A. The fraud-on-the-market presumption requires a transaction in an efficient market. ..... 16

B. The court of appeals' contrary analysis is incorrect. ..... 19

II. The decision below establishes the de facto nationwide rule on an important legal question, and this petition offers an ideal vehicle for considering that question ..... 24

**TABLE OF CONTENTS**
(continued)

**Page**

CONCLUSION ..... 31

Appendix A: Opinion of the United States Court of Appeals for the Second Circuit, *David Monk, et al. v. Shanda Games Limited, et al.*, No. 22-3076 (February 3, 2025) ... 1a

Appendix B: Opinion and Order of the United States District Court for the Southern District of New York, *In Re Shanda Games Limited Securities Litigation*, No. 1:18-CV-2463-ALC (March 31, 2022) ..... 77a

Appendix C: Order of the United States Court of Appeals for the Second Circuit, *rehearing denied*, *David Monk, et al. v. Shanda Games Limited, et al.*, No. 22-3076 (April 25, 2025)..... 101a

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*,
568 U.S. 455 (2013).....6, 17, 27

*AT&T Mobility LLC v. Concepcion*,
563 U.S. 333 (2011).....28

*Basic Inc. v. Levinson*,
485 U.S. 224 (1988)..... i, 1, 5-6, 16-18, 20

*Blue Chip Stamps v. Manor Drug Stores*,
421 U.S. 723 (1975).....20, 21, 22

*Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,
511 U.S. 164 (1995).....21

*Coopers & Lybrand v. Livesay*,
437 U.S. 463 (1978).....27

*Desai v. Deutsche Bank Sec. Ltd.*,
573 F.3d 931 (9th Cir. 2009).....25

*Egbert v. Boule*,
596 U.S. 482 (2022).....21

*Erica P. John Fund, Inc. v. Halliburton Co.*,
563 U.S. 804 (2011).....20

*Freeman v. Laventhol & Horwath*,
915 F.2d 193 (6th Cir. 1990).....25

*Halliburton Co. v. Erica P. John Fund, Inc.*,
573 U.S. 258 (2014)..... 2, 5, 7-8, 17, 30

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

*In re DVI, Inc. Sec. Litig.*,
639 F.3d 623 (3d Cir. 2011) .....25

*In re LTV Secs. Litig.*,
88 F.R.D. 134 (N.D. Tex. 1980) .....17

*In re PolyMedica Corp. Sec. Litig.*,
432 F.3d 1 (1st Cir. 2005) .....25

*Janus Cap. Grp., Inc. v. First Derivative Traders*,
564 U.S. 135 (2011).....21

*Kamen v. Kemper Fin. Servs., Inc.*,
500 U.S. 90 (1991).....28

*Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,
547 U.S. 71 (2006).....21

*Mills v. Elec. Auto-Lite Co.*,
396 U.S. 375 (1970).....13, 14, 23, 24

*Musick, Peeler & Garrett v. Emps. Ins. of Wausau*,
508 U.S. 286 (1993).....30

*Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*,
487 F.3d 261 (5th Cir. 2007).....25

*Santa Fe Indus., Inc. v. Green*,
430 U.S. 462 (1977).....28

*Stoneridge Inv. Partners v. Sci.-Atlanta, Inc.*,
552 U.S. 148 (2008).....30, 31

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

*Va. Bankshares, Inc. v. Sandberg*,
501 U.S. 1083 (1991).....23, 29

*Wilson v. Great Am. Indus., Inc.*,
979 F.2d 924 (2d Cir. 1992).....23

*Ziglar v. Abbasi*,
582 U.S. 120 (2017).....30

**Statutes**

15 U.S.C. § 77p(d)(1)(A).....29

15 U.S.C. § 78aa.....26

15 U.S.C. § 78bb(f).....21

15 U.S.C. § 78j(b).....5, 26

15 U.S.C. § 78n.....13

15 U.S.C. § 78u-4.....21

**Other Authorities**

17 C.F.R. § 240.10b–5 (2013).....5

Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010).....28

Fed. R. Civ. P. 23(b)(3).....5

S. Ct. R. 10(a).....26

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Shanda Games Limited, Yingfeng Zhang, Li Yao, Lijun Lin, Heng Win Chan, Yong Gui, Shaolin Liang, and Danian Chen respectfully request a writ of certiorari to the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-76a) is reported at 128 F.4th 26. The Second Circuit's order denying rehearing en banc (Pet. App. 101a-102a) is unreported. The district court's opinion and order (Pet. App. 77a-100a) is unpublished but is available at 2022 WL 992794.

## JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on February 3, 2025. Pet. App. 1a. The Second Circuit denied rehearing en banc on April 25, 2025. Pet. App. 101a. On June 23, 2025, Justice Sotomayor extended the deadline for filing the petition for a writ of certiorari to September 22, 2025. No. 24A1244. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## INTRODUCTION

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court held that a plaintiff who purchases or sells securities at a price set in an efficient market has presumptively relied on any material misstatement made about those securities. This fraud-on-the-market presumption is rooted in the economic premise that efficient markets incorporate all available infor-

mation, so that any material misstatement immediately affects the market price. A purchaser or seller who relied on the integrity of the market price when buying or selling a security therefore can be said to have (implicitly) relied on the misstatement.

But the fraud-on-the-market presumption necessarily requires a transaction anchored to the market price. Only where a security is bought or sold at a price tied to the market can a court presume that the buyer or seller relied on a price that reflected the alleged misstatement. As the Court has explained, only a plaintiff who "shows that he purchased the stock at the market price during the relevant period" can benefit from the "presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 279 (2014) (*Halliburton II*).

The court of appeals' decision in this case contravenes that foundational rule of securities law. Over Judge Jacobs's dissent, the panel held that a plaintiff could invoke the fraud-on-the-market presumption even though he did not transact at the market price and instead received a negotiated buy-out price for his canceled shares—a price that was negotiated before any alleged material misstatements occurred. The court explicitly ruled that *Basic*'s fraud-on-the-market presumption was not limited to "investors who trade at the market price" and instead was available to all "investors who acquire or divest themselves of stock," regardless of how they did so. Pet. App. 42a-43a. As Judge Jacobs explained, that ruling conflicts with this Court's teachings in *Basic* and *Halliburton II*.

This drastic expansion of the *Basic* presumption beyond its long-established limits requires this Court's review. The court of appeals' decision is directly contrary to this Court's precedents expressly limiting *Basic* to plaintiffs who purchased or sold at the market price. No other court of appeals has so much as gestured toward the Second Circuit's position. Unsurprisingly, other appellate courts recognize that the *Basic* presumption's prerequisites are *requisite*. And while all that would itself suffice to warrant this Court's review, the fact that the decision below comes out of the Second Circuit in particular makes this Court's review especially important. That is so because the Second Circuit is the *de facto* nationwide venue for securities cases, so plaintiffs will now be able to file in that forum and prevent any development of a further circuit split on this issue. The decision below will become the *de facto* nationwide rule on *Basic*'s scope—the type of rule *this Court*, not a single court of appeals, should decide.

The Second Circuit's error is also exceptionally "important," as Judge Jacobs noted in his dissent. Pet. App. 57a (Jacobs, J., dissenting). For one thing, a substantial expansion of the *Basic* presumption necessarily means a substantial expansion of the availability of securities class actions, because a principal effect of *Basic* is to allow plaintiffs to prove reliance on a classwide basis. And as the Court has explained on numerous occasions, easy class certification comes with substantial costs, including immediate pressure to settle even meritless class actions. The adverse consequences of the rule the court below adopted warrants this Court's review.

Moreover, the decision below implicates significant federalism concerns. There is a developed body of state corporate law governing the rights of shareholders in the buy-out and merger context. Yet the panel's decision "alters the calculus" by recasting quintessentially state-law complaints "as securities fraud claims." Pet. App. 76a (Jacobs, J., dissenting). As a result, plaintiffs dissatisfied with their state-law rights—or regretting a decision not to exercise them—can simply come to federal court and file a securities suit. The result will be an expansion of federal securities litigation and an erosion of state corporate law. It also raises separation of powers concerns because it balloons a cause of action that Congress did not enact—and has only ever sought to restrict—and that this Court has explained must be kept within its traditional bounds. This sort of encroachment on state and congressional prerogatives should not be countenanced without this Court's review.

Finally, this case presents the Court with an ideal vehicle to resolve the question presented, because (i) it is undisputed that respondent did not purchase or sell shares at the market price and in fact obtained a price that could not have been the product of fraud; and (ii) all agree that respondents' claim would fail as a matter of law absent the fraud-on-the-market presumption.

The Court should thus grant certiorari and reverse. Indeed, the Second Circuit so clearly conflicts with this Court's precedents that the Court may wish to consider summary reversal.

## STATEMENT OF THE CASE

### A. The Fraud-on-the-Market Presumption

Section 10(b) of the Securities Exchange Act of 1934, as implemented by the Securities and Exchange Commission's Rule 10b–5, "prohibit[s] making any material misstatement or omission in connection with the purchase or sale of any security." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (*Halliburton II*); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b–5 (2013). This Court has "recognized an implied private cause of action to enforce the provision and its implementing regulation." *Halliburton II*, 573 U.S. at 267.

As in a common-law fraud action, a plaintiff pursuing a § 10(b) fraud claim must act in "reliance upon the misrepresentation or omission." *Halliburton II*, 573 U.S. at 267. That requirement "ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* (internal quotation marks omitted). A plaintiff would typically demonstrate reliance by showing that he read or heard the company's alleged misstatement and purchased or sold stock based on it. *See id.*

That reliance element makes it harder—by design—for a plaintiff to prove his individual securities claim, but it also makes certifying a class action essentially impossible, because questions of individual reliance would necessarily predominate over common issues. *See* Fed. R. Civ. P. 23(b)(3); *Halliburton II*, 573 U.S. at 268. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court therefore recognized an alternative route to proving reliance—now called the

fraud-on-the-market or *Basic* presumption—that could be demonstrated on a classwide basis and thus allowed for certification of § 10(b) class actions.

*Basic* affirmed that reliance "is and long has been an element of common-law fraud" and that reliance likewise "is an element of a Rule 10b–5 cause of action." *Id.* at 243. But it also recognized that "[t]he modern securities markets, literally involving millions of shares changing hands daily, differ from the fact-to-face transactions contemplated by early fraud cases." *Id.* at 243-44. Because "Congress expressly relied on the premise that securities markets are affected by information" in crafting the securities laws, the Court recognized a rebuttable presumption that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246. Under that presumption, "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.* at 247. Thus, after *Basic*, reliance could be proved on a classwide basis by demonstrating the existence of an efficient securities market and a class of plaintiffs who purchased or sold on that market. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 463 (2013) ("The fraud-on-the-market theory, however, facilitates class certification by recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations when shares are traded in an efficient market.").

From the time it was decided, observers have criticized *Basic* for effectively erasing the reliance element for a large portion of securities-fraud actions

and for causing a proliferation of securities class actions, many of questionable merit. *See Halliburton II*, 573 U.S. at 277 (noting that Congress responded to *Basic*'s expansion of securities actions by enacting Private Securities Litigation Reform Act "to combat perceived abuses in securities litigation"). In *Halliburton II*, the Court granted certiorari to consider whether *Basic* should be overruled. Three Justices would have answered, "yes." *Id.* at 284-85 (Thomas, J., joined by Scalia, J., and Alito, J., concurring in the judgment). Justice Thomas's concurrence charged that *Basic* "turned to nascent economic theory and naked intuitions about investment behavior in its efforts to fashion a new, easier way to meet the reliance requirement." *Id.* at 285. It questioned whether "even 'well-developed' markets . . . uniformly incorporate information into market prices with high speed." *Id.* at 290. It observed that many "investors trade for reasons entirely unrelated to price—for example, to address changing liquidity needs, tax concerns, or portfolio balancing requirements." *Id.* at 292. And it asserted that *stare decisis* could not justify maintaining the doctrine because the rationale for keeping flawed precedents on the books is weaker "when it comes to judge-made law like 'implied' private causes of action, which we retain a duty to superintend." *Id.* at 298 (internal quotation marks omitted).

The majority rejected these calls to overturn the fraud-on-the-market presumption but underscored the limits of the presumption. The Court recognized that *Basic* contains two "constituent presumptions": "First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the

stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Id.* at 279. And "[s]econd, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Id.* The Court declined to overturn *Basic* because it determined that both "constituent presumptions" were still anchored to economic reality. *Id.* But these two conditions impose crucial limitations on *Basic*. Without them, *Basic* does not apply, reliance cannot be presumed, and a class cannot be certified. *See id.* at 278.

### B. Factual Background and Proceedings Below

1. Petitioner Shanda Games Limited is a video games company. Pet. App. 3a. The remaining petitioners are former officers and directors at Shanda. *Id.* at 4a. From 2009 to 2015, Shanda was a public company registered in the Cayman Islands with American Depository Shares ("ADS") listed on NASDAQ. *Id.* at 3a, 11a.

This case arises out of a transaction to take Shanda private. In 2015, private investors that "collectively controlled 90 percent of all shareholder votes" decided to purchase the company. Pet. App. 7a. Shanda formed a disinterested committee to negotiate a price with the buyer group. *Id.* at 7a-8a. The committee and the buyer group agreed to a price of $7.10 per ADS. *Id.* at 9a. At the time that price was set, Shanda's ADS were trading on the NASDAQ at $5.65. C.A. J.A. 413. Merrill Lynch, which advised

the committee, issued an opinion that the "merger price was fair." Pet. App. 9a.

Although the buyer group itself held sufficient voting power to approve the merger and complete the buy-out, Cayman corporate law required Shanda to give shareholders the opportunity to vote in favor of the proposed transaction or to "dissent" and obtain an appraisal of their shares in the Cayman Islands. Pet. App. 9a. Shanda issued a preliminary and final proxy statement, in May and October 2015, respectively, in connection with that shareholder meeting. *Id.* at 9a-10a. The final proxy statement solicited votes for the transaction, while also explaining that the buyer group had the power to ensure that the transaction closed regardless of votes from other shareholders. C.A. J.A. 840-41. The proxy statements further explained that if a shareholder did nothing, his shares would be canceled and the consideration would be deposited into his account. C.A. J.A. 841. At the shareholder meeting, 99.3% of the voting shares voted to approve the transaction. Pet. App. 11a; C.A. J.A. 755.

Three shareholders dissented and exercised their appraisal rights in Cayman court. The Cayman Islands Court of Appeal and the Privy Council ultimately concluded that those dissenting ADS holders should receive $12.84 per ADS. Pet. App. 11a. As a Delaware court would do in an appraisal proceeding—Cayman law is modeled on Delaware law—the Cayman Islands Court of Appeal reached that conclusion based on the "fair value" of the dissenting shareholders' minority shareholding as of the effective date of the merger, not as of the date the price was agreed and the deal announced. C.A. J.A. 165. This decision

was based in part on the fact that, between the transaction announcement and the transaction closing, Shanda had released a mobile version of its successful Mir II PC game, Mir II Mobile, which Shanda described in press statements as a "blockbuster success." C.A. J.A. 755.

2. Respondent David Monk is a former holder of Shanda ADS. Monk did not exercise his appraisal rights or sell his shares on the market before the closing of the transaction. Pet. App. 11a. Consequently, when the transaction closed in November 2015, his shares were canceled, and $7.10 per ADS was deposited into his account. *Id.*

In 2018, Monk became the lead plaintiff in this securities-fraud putative class action filed in the Southern District of New York. Pet. App. 12a. Monk does not allege that he read the proxy statement Shanda issued or that he made a decision on how to vote on the transaction. *See id.* Nor does Monk claim that he made a conscious decision not to dissent and seek appraisal—which would require hiring a Cayman Islands attorney to litigate the value of his shares. Monk does not claim he even knew about the proposed transaction. He nonetheless claims that he was defrauded, alleging that the proxy statement materially understated Shanda's financial strength, including by inaccurately projecting future revenues from the Mir II Mobile that would subsequently launch. Monk contends that his damages are equal to the difference between the deal price he received and the amount dissenting shareholders received via the Cayman appraisal process—essentially, he asks to be compensated for his unexercised appraisal rights because

*someone else could have been* misled into forfeiting them.

3. Because Monk did not read the proxy statement—and in fact does not plead that he was even aware of the transaction or vote—he cannot claim actual reliance on any misstatements. Thus, to state a claim he must rely on the *Basic* fraud-on-the-market presumption, created to permit class certification. The problem, however, is that he did not sell Shanda stock on the market or at the market price. Rather, he received the agreed buy-out price—negotiated before any fraud allegedly occurred—when the transaction closed.

The district court nevertheless held that Monk could benefit from the fraud-on-the-market presumption. *See* Pet. App. 77a-100a. The district court noted that Monk alleged that "he and other [share]holders traded in an efficient market, which would entitle them to a rebuttable presumption of reliance under the fraud-on-the-market doctrine." *Id.* at 84a-85a. The court ruled that Monk therefore "meets his burden, albeit minimally," of invoking that fraud-on-the-market presumption because Shanda shareholders, "such as [Monk], could have reasonably relied on the integrity of the market price when deciding whether to exercise dissenters' rights or sell shares at the negotiated price." *Id.* at 88a-90a.

The court nonetheless dismissed the operative complaint because it found that Monk had not sufficiently alleged a separate necessary element—loss causation. It concluded that he did not "plead that

any causal link exists between the alleged misrepresentation and his failure to exercise appraisal rights." Pet. App. 91a.

4. A divided panel of the Second Circuit vacated the district court's dismissal order, finding that Monk plausibly pleaded even the loss-causation element the district court found lacking. As relevant here, however, the Second Circuit agreed with the district court that Monk could rely on the fraud-on-the-market presumption.[1]

a. The majority explained (incorrectly) that "[t]his case presents the question whether the fraud-on-the-market presumption is available to minority-shareholder tenderers, such as Monk, who sold their shares in a freeze-out merger." Pet. App. 42a.[2] The panel held that the presumption was available. It opined that "investors who trade at the market price are not the only ones who rely on the market price in making decisions to buy or sell," and that it was "reasonable to presume that most investors who acquire or divest themselves of stock look at the market." *Id.* Thus, it made the fraud-on-the-market presumption available to a minority shareholder who—unlike Monk—must "determine whether to tender his shares or to dissent

---

[1] The panel reached several additional holdings—including reversing the district court's loss-causation ruling—that Shanda opposed but does not ask this Court to review. *See* Pet. App. 54a-55a.

[2] Contrary to the majority's assumption, shareholders do not decide whether to "tender" their shares in a freeze-out merger; their shares are automatically canceled, whether or not they take any action.

and seek appraisal." *Id.* at 43a ("[S]uch a person may be presumed to rely on the market price as an accurate measure of his stock's value when deciding to tender.").

The panel majority also found "instructive" this Court's decisions on Section 14(a) of the Exchange Act, 15 U.S.C. § 78n, a provision that governs proxy statements sent to shareholders. Pet. App. 45a. The majority explained that securities-fraud plaintiffs claiming misleading statements in proxy materials can prove reliance "by showing that the misstatements were material and that the proxy statements were an 'essential link' in the transaction." *Id.* (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384-85 (1970)). It concluded that this doctrine "reinforce[d] our belief that Monk may rely on the rebuttable presumption of fraud-on-the-market at the pleading stage to allege transaction causation." *Id.* (emphasis omitted).

b. Judge Jacobs dissented. Pet. App. 57a-76a. In his view, "the majority opinion burdens the fraud-on-the-market theory with more weight than it can bear," because an "investor's actual purchase or sale of a security at a price set by a developed market is needed" to invoke that presumption. *Id.* at 69a-70a. Judge Jacobs would have found the fraud-on-the-market presumption unavailable because "Monk's actual transaction did not occur at the price set by a market." *Id.* at 70a-71a. And Monk's "hypothetical action[s]" are not cognizable under the securities laws given that "Monk's holding of his stock was not an actionable investment decision." *Id.* at 71a; *see also id.* at 58a

("[H]ere, there was no transaction and thus no investment decision, let alone a developed market in which it hypothetically could have been made."). Quite the opposite—Monk's claim revolves around "the *absence* of an investment decision: Monk's passive holding of his stock while he failed to preserve and perfect his appraisal rights." *Id.*

Judge Jacobs also rejected the majority's reliance on the § 14(a) cases. Pet. App. 58a. He explained that those cases stand for the proposition that "[m]inority shareholders have a cognizable claim for securities fraud when a challenged proxy statement constitutes 'an essential link in the accomplishment of the transaction.'" *Id.* at 64a (quoting *Mills*, 396 U.S. at 385). There was no such link here, because "in a freeze-out merger . . . [n]o minority votes are required to authorize the merger, so proxy statements have no role in drumming up support or achieving approval." *Id.* "The result: Monk's status as a minority shareholder in a freeze-out merger forecloses him from pleading a causal link between the proxies and the transaction that disposed of his shares." *Id.* at 76a.

Finally, Judge Jacobs expressed his "worry" that the panel decision will "swallow whole the[] state law protections for minority shareholders," by allowing "minority shareholders who fail to exercise their individual right to appraisal under state law in the first instance [to] now have a second-chance claim via a class action under the federal securities law." Pet. App. 76a.

5. The Second Circuit denied rehearing and rehearing en banc. Pet. App. 101a-102a. This petition followed.

## REASONS FOR GRANTING THE PETITION

The court below held that the fraud-on-the-market presumption extended to "most investors who acquire or divest themselves of stock" and was not limited to investors who make those acquisitions or divestitures at a price set by the market. Pet. App. 42a. That error warrants this Court's review. It is irreconcilable with this Court's precedents establishing and policing the fraud-on-the-market presumption, as well as the precedents policing the boundaries of the judge-made cause of action to enforce the securities laws. If left to stand, the Second Circuit's breathtaking expansion of *Basic* will become the de facto nationwide rule, since district courts in that circuit are essentially always a proper venue in securities actions. It will thus have the effect of eviscerating nationwide the limitations that this Court set in *Basic* and reiterated in *Halliburton II*. And as a consequence, the Second Circuit rule will not only expand the scope of securities-fraud class actions beyond the strict limits set by this Court, but will necessarily erode principles of federalism and the separation of powers alike by allowing a judge-made federal cause of action without any input from Congress to displace the rules of state corporate law that govern shareholders' remedies after mergers. Any shareholders who are unhappy with a merger price but did not follow state corporate-law procedures for challenging it will now have a valid federal securities-fraud class action in New York federal court simply by alleging a misrepresentation or omission.

The decision below is so clearly irreconcilable with this Court's precedent that the Court might consider

summary reversal. At the very least, though, the Court should grant the petition, set the case for argument, and reverse the decision below.

## I. The court of appeals' decision defies this Court's precedents.

The court of appeals held that this case could proceed despite the fact that Monk does not allege that he read—let alone relied on—the supposedly fraudulent proxy statement. According to the court of appeals, Monk could rely on the *Basic* fraud-on-the-market presumption because "investors who trade at the market price are not the only ones who rely on the market price in making decisions to buy or sell." Pet. App. 42a. The court of appeals' holding is directly contrary to the Court's case law setting the fraud-on-the-market presumption's limits. The conflict between the decision below and this Court's rulings warrant review.

### A. The fraud-on-the-market presumption requires a transaction in an efficient market.

1. Over and over again, this Court has held that the fraud-on-the-market presumption does not apply absent a transaction at a price set by an efficient market. As *Basic* explained: "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price"; "a plaintiff must allege and prove . . . that the shares were traded on an efficient market"; and so on. 485 U.S. at 247, 248 n.27; *see also id.* at 244 ("With the presence of a market, the market is interposed between seller and

buyer and, ideally, transmits information to the investor in the processed form of a market price." (quoting *In re LTV Secs. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980))).

*Halliburton II* reinforced the requirement that a plaintiff invoking the fraud-on-the-market presumption show a transaction *at a market price affected by fraud*. It explained that "if the plaintiff also shows that he purchased the stock at the market price during the relevant period," then "he is entitled to a . . . presumption that he purchased the stock in reliance on the defendant's misrepresentation." 573 U.S. at 279. The Court subsequently repeated the point, writing that a plaintiff "who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation." *Id.* at 284; *see also Amgen Inc.*, 568 U.S. at 463 ("[C]ourts may presume that investors trading in efficient markets indirectly rely on public, material misrepresentations through their 'reliance on the integrity of *the price set by the market*.'" (emphasis added) (quoting *Basic*, 485 U.S. at 245)).

These statements are not loose dicta: They are core to the economic logic underpinning *Basic*. As the Court explained in *Halliburton II*—which decided (over a three-Justice dissent) to retain the *Basic* presumption despite significant doubts about its validity—one of the premises of the fraud-on-the-market presumption is that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." 573 U.S. at 270 (quoting *Basic*, 485 U.S. at 246). If a plaintiff does not transact at "the

market price," then she does not transact at a price reflecting "any material misrepresentations." As Judge Jacobs explained, "[t]he investor's actual purchase or sale of a security at a price set by a developed market is needed to connect the premise (that the market price of a security reflects all public material misstatements) to the causal inference (that the reason for an investor's trading decision was reliance on public material misstatements)." Pet. App. 70a (Jacobs, J., dissenting). Thus, a plaintiff who cannot show that she traded at a price set by an efficient market is not entitled to the fraud-on-the-market presumption.

2. Under a faithful reading of the Court's precedents, the fraud-on-the-market presumption cannot benefit Monk, who cannot show that he in any way "relied on the integrity of the price set by the market" in automatically receiving $7.10—a pre-fraud, privately negotiated merger price—for each of his Shanda ADS. *Basic*, 485 U.S. at 226.

The decisive fact in this case is that Monk did not sell his stock at the market price. Instead, his stock shares were automatically "cashed out" after Shanda's freeze-out merger. Pet. App. 11a. The cash-out price was not set by market forces; it was privately negotiated between Shanda's buyers and the disinterested committee that Shanda formed to negotiate with those buyers. *See supra* at 8-9. That price was agreed to in April 2015, seven months before Monk's shares were canceled, six months before Shanda's final proxy statement, and one month before Shanda's initial proxy statement. *See* Pet. App. 9a.

As Judge Jacobs thus explained in dissent, "[t]he fraud-on-the-market theory is not fit for purpose in this case." Pet. App. 70a (Jacobs, J., dissenting). Again, Monk's suit is not premised on a market transaction. It is not even premised on a voluntary act to transact shares. So even if the market had efficiently priced in Shanda's alleged material misstatements after they were made, Monk did not buy or sell stock at the market price after that. The price he received could not possibly have incorporated the alleged material representations—it was set *before* the alleged misstatements. And there is accordingly no basis, either in this Court's precedents or from the first principles animating those precedents, to presume that the price Monk received incorporated the later-in-time alleged misstatements.

### B. The court of appeals' contrary analysis is incorrect.

The court of appeals gave various rationales for divorcing the fraud-on-the-market presumption from the marketplace. None withstands scrutiny.

1. The panel sought to sidestep the fraud-on-the-market issue by pointing to a hypothetical transaction. It explained that Monk "ha[d] the choice . . . to dissent and exercise his appraisal rights." Pet. App. 44a. And it speculated that Monk *might* have made such a choice and *might* have "look[ed] at the market price" in doing so. *Id.* at 42a. In other words, it concluded that because Monk *might* have made a decision based on the market trading price, he can sue Shanda for the consequences of that hypothetical decision.

*Basic* and *Halliburton II* do not permit that move. As already explained, those cases limit the fraud-on-the-market presumption to plaintiffs who have "traded on an impersonal market." *Basic*, 485 U.S. at 245. Not one word of those opinions supports expanding that presumption to plaintiffs who did not trade in the market at all. A plaintiff who has purchased or sold stock at the market price can rely on the *Basic* presumption because paying the market price in an efficient market means relying on any statements (or misstatements) incorporated into the market price. By contrast, a plaintiff who declined to transact in the market cannot show that her decision was shaped by market factors—she might have opted not to sell or buy the relevant security for many other reasons, including inertia, and hence there is no basis to conclude that she relied on the market price (and thus misstatements reflected in that price). There can be no reliance without a transaction. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011) (*Halliburton I*) ("[W]hen considering whether a plaintiff has relied on a misrepresentation, we have typically focused on facts surrounding *the investor's decision to engage* in the transaction." (emphasis added)).

Indeed, as Judge Jacobs explained, the Second Circuit's opinion runs headlong into this Court's limitations on the implied cause of action for enforcing the securities laws. *See* Pet. App. 63a-65, 72a-73a (Jacobs, J., dissenting). "When we deal with private actions under Rule 10b–5, we deal with a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 737 (1975); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1995) ("We thus have had to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act." (original alterations and internal quotation marks omitted)). "Now long past 'the heady days in which this Court assumed common-law powers to create causes of action,'" this Court has "come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (internal quotation marks omitted). And these "concerns with the judicial creation of a private cause of action caution against its expansion," requiring courts to give "narrow dimensions" to the § 10(b) implied right of action. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (original alterations and internal quotation marks omitted). Particularly since, when Congress *has* considered private actions under the 1934 Act, it has chosen to *limit* such actions—first via the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4, and then via the Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb(f). *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006).

One bedrock constraint on the § 10(b) cause of action is that the court does not indulge hypotheticals. Only "actual purchasers and sellers of securities" can seek damages; individuals who "decided not to sell their shares" or "not to purchase" cannot. *Blue Chip*, 421 U.S. at 730, 737. And those who do not claim to

have made any such decision, even less so. That actual-transaction requirement ensures that securities suits are provable "by documentation," thus avoiding "rather hazy issues of historical fact the proof of which depend[s] almost entirely on oral testimony." *Id.* at 742-43.

Monk therefore cannot press a securities-fraud case on the theory that he *could have* sold his shares on the market, or *could have* sought appraisal. As Judge Jacobs put it, "[t]o invoke a presumption for why he acted as he did, Monk must first show that he acted at all." Pet. App. 74a (Jacobs, Jr., dissenting). His road-not-traveled choices cannot support his fraud-on-the-market claim.

Instead, Monk can establish a securities claim only by pointing to the "transaction" that actually occurred—the automatic cancelation of his Shanda ADS at $7.10 per ADS. That transaction is untethered to the market, and the amount of consideration Monk received was set before the alleged misstatements in the proxy statements. So the "price" cannot possibly be the product of any fraud. There is no basis for a presumption that the price Monk received incorporated the allegedly fraudulent misstatements as part of an efficient market.

2. The panel also sought to invoke this Court's precedents interpreting § 14(a) of the Exchange Act, which regulates proxy materials. Those cases do not discuss the fraud-on-the-market presumption because they do not concern trades in an efficient market.

Rather, they are about voting on proposed corporate transactions. Under those cases, if a proxy statement contains alleged misstatements to solicit shareholder votes and the votes are necessary for proceeding with the transaction, reliance is proven (not merely presumed). *See, e.g.*, *Mills*, 396 U.S. at 384-85. But where shareholders' votes are not necessary—for example, because there is a freeze-out merger and so the remaining shareholders' assent is "not required by law or corporate bylaw" for the merger to succeed—there is no causation. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, 1102 (1991) (refusing to expand implied right of action under Section 14 "to include shareholders whose initial authorization of the transaction prompting the proxy solicitation is unnecessary").[3]

These precedents do not validate the court of appeals' holding. Even assuming that the fraud-on-the-market presumption incorporates the theory of the § 14(a) cases—although they rest on different principles—those cases cut against Monk's arguments here. As Judge Jacobs explained, under *Virginia Bankshares* and its progeny, proxy statements would only be relevant to reliance "when [the] challenged proxy statement constitutes 'an essential link in the accomplishment of the transaction.'" Pet. App. 64a (Jacobs,

---

[3] *Virginia Bankshares* left open whether a plaintiff can establish reliance by showing that she "lost state remedies" as a result of her vote in favor of a merger. 501 U.S. at 1107. The Second Circuit has answered that question in the affirmative. *See Wilson v. Great Am. Indus., Inc.*, 979 F.2d 924, 931 (2d Cir. 1992). That question does not arise here, because Monk does not allege that he voted for or against the freeze-out merger.

J., dissenting) (quoting *Mills*, 396 U.S. at 385). There was no such link here because the vote was preordained—the buyer group had sufficient shares to complete the transaction regardless of how other shareholders voted. The court of appeals' reliance on those cases as support for their decision is therefore simply incorrect. And if this Court grants certiorari, it can clarify that nothing about *Mills* or subsequent merger cases excuses the foundational requirement that a plaintiff invoking the fraud-on-the-market presumption point to a transaction at the market price.

* * *

For the reasons just explained, the decision below is irreconcilable with this Court's established precedent. This Court should grant certiorari—if not summarily reverse the decision below—and bring the fraud-on-the-market presumption back in line with its own precedents.

## II. The decision below establishes the de facto nationwide rule on an important legal question, and this petition offers an ideal vehicle for considering that question.

The court of appeals' illogical expansion of the fraud-on-the-market presumption is highly consequential. The Second Circuit's decision will necessarily establish the de facto nationwide rule allowing the fraud-on-the-market presumption to apply in the absence of a market transaction. Such a nationwide rule will have substantial consequences for class-action litigation (because it will drastically expand the ability of plaintiffs to state a securities-fraud claim

and have a class certified), federalism (because it injects federal securities law into areas governed by state corporate law), and the separation of powers (because it expands the scope of a cause of action that Congress has never authorized). Before these consequences start to flow nationwide from a cause of action this Court created and a presumption this Court invented, this Court should consider the question presented. And this petition affords the Court a highly suitable vehicle to do so.

A. No other court of appeals has agreed with the Second Circuit on the question presented. To the contrary, every other Circuit to consider the issue has held (unsurprisingly) that "to invoke the presumption of reliance, plaintiffs must show they *traded securities in an efficient market*." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 633 (3d Cir. 2011) (emphasis added and internal quotation marks omitted), *abrogated in part on other grounds by Amgen Inc.*, 568 U.S. 455; *see also In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 8 (1st Cir. 2005) (*Basic* presumption applies only when "an investor buys or sells stock in reliance on the integrity of the market price" in an efficient market); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 198 (6th Cir. 1990) ("The rationale supporting the fraud on the market presumption of reliance does not apply when securities are not traded in an efficient market."); *accord Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 942 (9th Cir. 2009); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 264 (5th Cir. 2007), *abrogated in part on other grounds by Halliburton I*, 563 U.S. 804. The Second Circuit is thus an

outlier, which is itself a reason to grant certiorari. *See* S. Ct. R. 10(a).

The problem is exacerbated, however, by the Second Circuit's outsized influence and authority in cases (such as § 10(b) suits) brought under the Exchange Act. That statute establishes venue in (among other courts) "the district wherein any act or transaction constituting the [Exchange Act] violation occurred." 15 U.S.C. § 78aa. The Southern District of New York will be the proper venue for essentially all suits under § 10(b) because such suits must be "in connection with the purchase or sale of [a] security," *id.* § 78j(b), and nearly every security is traded on an exchange in New York City. Otherwise said, essentially every § 10(b) suit can be—and, after this plaintiff-friendly decision, will be—litigated in the Second Circuit under Second Circuit law.

That means that the Second Circuit's outlier status on the question presented imposes no practical limitation on the effect and scope of the decision below. Any plaintiff who has not purchased or sold securities on the market or at the market price but who nevertheless wants to bring a securities-fraud class action will simply file the action in the Second Circuit and, under the decision below, will get the benefit of the fraud-on-the-market presumption. If left undisturbed, then, the decision below establishes a de facto nationwide rule as to the question presented.

For the reasons explained directly below, the Second Circuit's answer to the question presented has significant implications for class actions, federalism,

and the separation of powers. If any Court is to announce a nationwide rule with such significant consequences, it should be this one.

B.1. As explained earlier, the fraud-on-the-market presumption not only allows individual plaintiffs to establish the reliance element of a § 10(b) action, but it is crucial to certifying securities-fraud class actions. Absent presumed reliance, individual proof of reliance would predominate over any common questions. *See Amgen Inc.*, 568 U.S. at 463 ("The fraud-on-the-market theory . . . facilitates class certification by recognizing a rebuttable presumption of classwide reliance.").

Until now, this Court has carefully limited the availability of this class-certification-facilitating rule to plaintiffs who have purchased or sold shares on an efficient market. The decision below, however, blows through that crucial limitation, thus substantially expanding the scope of § 10(b) class actions. Under the Second Circuit's ruling, if Monk's claim were successful, every single Shanda shareholder would be able to reap the benefit of the Cayman appraisal price—even though only *three* shareholders actually exercised their appraisal rights, while the rest simply sat on their shares.

This Court has repeatedly explained the important practical consequences that follow class certification. "Certification of a large class may so increase the defendant's potential damages liability and litigation cost[]" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). "Faced with even

a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). That the decision below substantially expands the circumstances under which securities-fraud class actions can be certified renders its importance self-evident.

2. The decision below also has substantial federalism implications by extending federal securities law into the realm traditionally occupied by state corporate law.

Judge Jacobs put the point best: the court of appeals' holding "appears to swallow whole . . . state law protections for minority shareholders." Pet. App. 75a (Jacobs, J., dissenting). Federal securities litigation does not "cover the corporate universe." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 480 (1977). So the "extension of the federal securities laws would overlap and quite possibly interfere with state corporate law," *id.* at 479, an area in which "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). Congress itself has confirmed the primacy of state regulation in this area, preempting most state-law securities litigation but leaving untouched those suits "based upon the statutory or common law of the State in which the issuer is

incorporated . . . or organized." 15 U.S.C. § 77p(d)(1)(A).

In crafting their corporate laws, States have comprehensively regulated what remedies are available to shareholders who choose to dissent from a merger transaction. *See, e.g.*, *Va. Bankshares*, 501 U.S. at 1107 (discussing Virginia state-law regulations). Typically, dissenting shareholders seek judicial "appraisal" of their shares. *Id.* "Appraisal actions can be expensive and chancy: the 'fair value' could be less than the merger price." Pet. App. 76a (Jacobs, J., dissenting). So under state law, a dissenting shareholder has generally been required to choose whether to undergo that appraisal process or instead go along with the merger and receive a set price.

Not anymore. Under the Second Circuit's construction of § 10(b), "minority shareholders who fail to exercise their individual right to appraisal under state law in the first instance will now have a second-chance claim via a class action under the federal securities law." Pet. App. 75a (Jacobs, J., dissenting). Even if (as Monk did here) they decline to bind themselves in the appraisal process—and even if they do not allege that they saw the supposed misstatements—they can still freeride off of another shareholder's appraisal result by using that result in subsequent securities litigation. *See supra* at 9-11. Monk and others like him can now seek all of the upside of the state appraisal process, with none of the potential downside. Thus, the court of appeals' ruling will upset the careful balance that States have crafted to reg-

ulate and enable corporate governance, and undermine Congress's explicit decision to keep federal courts out of it.

3. It would be one thing if Congress had authorized this expansion of securities fraud-class actions and intrusion on States' traditional domain. But federal securities litigation under § 10(b) is "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). And "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Id.* at 165. That is because "[t]he decision to extend the cause of action is for Congress, not for us." *Id.*; *accord Musick, Peeler & Garrett v. Emps. Ins. of Wausau*, 508 U.S. 286, 292 (1993) ("The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b–5 right and the definition of the duties it imposes."); *see also Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (noting in *Bivens* context that, "[g]iven the notable change in the Court's approach to recognizing implied causes of action, . . . the Court has made clear that expanding the [implied] remedy is now a 'disfavored' judicial activity" (internal quotation marks omitted)).

The Court's special responsibility to delimit the cause of action it created is a final reason that certiorari is warranted in this case. As Justice Thomas explains, "when we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes." *Halliburton II*, 573 U.S. at 298 (Thomas, J., concurring in the judgment). All the

more so for the errors of the lower courts. If allowed to stand, the Second Circuit's ruling will throw open the federal courts to even more suits that Congress has never chosen to authorize. This Court should grant certiorari to ensure that § 10(b)'s judge-made right of action is "extend[ed] . . . no further" than the Court's cases already allow. *Stoneridge*, 552 U.S. at 166.

C. This petition affords the Court an ideal vehicle through which to resolve the question presented. That question—whether the *Basic* fraud-on-the-market presumption applies to plaintiffs who have not purchased or sold securities on the market or at the market price—is purely legal. The relevant fact—namely, that Monk did not purchase or sell his Shanda ADS on the market or at the market price during the relevant period—is undisputed. And the answer to the question presented is outcome-determinative: If the Court grants review and reverses, Monk's suit will fail as a matter of law.

The petition for a writ of certiorari should be granted.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Noah B. Bokat-Lindell
O'MELVENY & MYERS LLP
1625 Eye Street
Washington, D.C. 20006
(202) 383-5300

Abby F. Rudzin
*Counsel of Record*
Anton Metlitsky
O'MELVENY & MYERS LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 326-2000
arudzin@omm.com

September 22, 2025