No.

In the Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., ET AL., PETITIONERS

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality.

2. Whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are The Goldman Sachs Group, Inc.; Lloyd C. Blankfein; Gary D. Cohn; and David A. Viniar. The Goldman Sachs Group, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are Arkansas Teacher Retirement System; West Virginia Investment Management Board; and Plumbers and Pipefitters National Pension Fund.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

In re Goldman Sachs Group, Inc., Securities Litigation, Civ. No. 10-3461 (Aug. 8, 2018)

In re Goldman Sachs Group, Inc., Securities Litigation, Civ. No. 10-3461 (Sept. 24, 2015)

United States Court of Appeals (2d Cir.):

Arkansas Teacher Retirement System v. *Goldman Sachs Group, Inc.*, No. 18-3667 (Apr. 7, 2020)

Arkansas Teacher Retirement System v. *Goldman Sachs Group, Inc.*, No. 16-250 (Jan. 12, 2018)

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The Goldman Sachs Group, Inc.; Lloyd C. Blankfein; Gary D. Cohn; and David A. Viniar respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 955 F.3d 254. The earlier opinion of the court of appeals (App., *infra*, 60a-78a) is reported at 879 F.3d 474. The opinions of the district court (App., *infra*, 47a-59a, 79a-94a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. A petition for rehearing was denied on June 15, 2020 (App., *infra*, 95a-96a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> >
> > (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> > (3) the court finds that the 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.

Federal Rule of Evidence 301 provides:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

STATEMENT

This is the most important securities case to come before the Court since *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*). It presents recurring questions of huge practical significance concerning the presumption of classwide reliance first recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)—a presumption that plaintiffs must invoke for a private securities case to proceed as a class action seeking potentially billions of dollars in damages.

In *Halliburton II*, this Court made clear that a defendant must be afforded a meaningful opportunity at the class-certification stage to rebut the *Basic* presumption, by showing that the alleged misrepresentation had no impact on the price of the relevant security. See 573 U.S. at 283-284. Courts may not "artificially limit" the evidence used to rebut the presumption, even if such evidence is also relevant to one of the substantive elements of the securities claim (such as materiality). *Ibid.* The questions presented here are, first, whether a defendant may rebut the *Basic* presumption by pointing to the generic nature of the alleged misstatements, even though that evidence is also relevant to the substantive element of materiality; and second, whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.

In this case, respondents, shareholders that frequently file securities class actions, brought suit against petitioners, Goldman Sachs and three former executives, seeking $13 billion in damages. Respondents alleged that petitioners had engaged in securities fraud by making certain aspirational and generic statements of the sort that virtually every public company makes, such as that "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest" and that "[o]ur clients' interests always come first." App., *infra*, 4a. Respondents further alleged that those generic statements were fraudulent because Goldman Sachs had undisclosed conflicts of interests.

Respondents conceded that the statements did not inflate Goldman Sachs' stock price when made; instead, they alleged, the statements had maintained the stock price at a previously inflated level. Respondents claimed they were harmed when the price of Goldman Sachs' stock later dropped following reports of government enforcement activity concerning the firm's mortgage business, including allegations of client conflicts in certain collateralized debt obligations on subprime mortgages that the firm structured and sold before the financial crisis.

Applying the *Basic* presumption, the district court certified the class. It concluded that petitioners had failed to rebut the presumption despite evidence that the stock price did not react when the challenged statements were made and that the stock price did not decline on 36 separate dates when the press reported in detail on alleged conflicts of interest at Goldman Sachs (including on the front pages of the Wall Street Journal and the New York Times). The court of appeals vacated, determining that the district court had not properly applied the preponderance-of-the-evidence standard. In so doing, however, the court held that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion.

On remand, the district court once again certified the class, again concluding that petitioners had failed to rebut the *Basic* presumption. This time, a divided panel of the court of appeals affirmed. Of particular note here, the court rejected petitioners' effort to rebut the presumption by pointing to the generic and aspirational nature of the alleged misstatements in showing that the statements had no impact on the price of the security. It reasoned that a contrary rule would permit a defendant to "smuggl[e] materiality," a merits issue, into the price-impact inquiry at the class-certification stage. App., *infra*, 22a.

As Judge Sullivan noted in dissent, however, that "rigid compartmentalization" of the materiality and price-impact inquiries is not "possible." App., *infra*, 45a. And it contravenes this Court's mandate in *Halliburton II* that a defendant is entitled to rebut the *Basic* presumption at the class-certification stage with any relevant evidence, regardless of whether that evidence is also relevant, or even "highly relevant," at the merits stage. 573 U.S. at 283. Under the majority's approach, Judge Sullivan concluded, "the *Basic* presumption is truly irrebuttable." App., *infra*, 44a.

If the decision below is allowed to stand, it will have devastating practical consequences for public companies. Taken together, the challenged holdings will guarantee plaintiffs the ability to obtain certification in virtually any securities class action premised on the increasingly popular and plaintiff-friendly "inflation maintenance" theory. Under that theory—which this Court has never recognized—a plaintiff who identifies a drop in a company's stock price can claim that a misstatement affected the stock's price not by artificially inflating it at the time the misstatement was made, but simply by preventing the stock price from decreasing from a previously inflated level. Significantly, unlike in a traditional securities class action, a defendant seeking to rebut the *Basic* presumption in an inflation-maintenance case cannot point to evidence that the price did not increase on the "front end" when the alleged misrepresentation was made; the defendant can show only that the "correction" of the alleged misrepresentation did not cause the decrease in price on the "back end."

The decision below effectively strips defendants of any ability to rebut the *Basic* presumption in class actions premised on the inflation-maintenance theory in the Second Circuit, the most important circuit for securities litigation. Indeed, as Judge Sullivan observed, the decision renders class certification "all but a certainty in every case." App., *infra*, 44a. Future plaintiffs seeking class certification need only identify a drop in a company's stock price following the disclosure of alleged misconduct, then assert that the stock price had been improperly maintained by boilerplate aspirational statements that nearly all companies make. That result is deeply troubling given the reality that securities class actions are routinely filed after drops in stock price and nearly all of them settle following class certification.

Because the questions presented are of enormous legal and practical importance and this case is an optimal vehicle for addressing them, the petition for a writ of certiorari should be granted.

A. Background

1. Section 10(b) of the Securities Exchange Act of 1934 prohibits the "use or employ[ment]" of any "deceptive device" "in connection with the purchase or sale of any security" in contravention of rules prescribed by the Securities and Exchange Commission (SEC). 15 U.S.C.

78j(b). SEC Rule 10b-5(b) forbids entities subject to the Act from "mak[ing] any untrue statement of a material fact" or "omit[ting] to state a material fact necessary in order to make the statements made * * * not misleading." 17 C.F.R. 240.10b-5(b). This Court has inferred from those sources of law a private right of action permitting the recovery of damages for securities fraud. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975). The elements of such a claim are a material misstatement or omission; scienter; a connection with the purchase or sale of a security; reliance; economic loss; and loss causation (*i.e.*, that the misrepresentation caused the asserted loss). See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

2. In order to obtain class certification in a private action under Section 10(b) and Rule 10b-5(b), plaintiffs must satisfy the familiar requirements of Federal Rule of Civil Procedure 23. For a class seeking to recover damages, plaintiffs must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

Plaintiffs asserting Section 10(b) claims would ordinarily not be able to satisfy the predominance requirement, because the element of reliance would require an individual inquiry into the investment decisions of each potential class member. But in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), this Court made it easier for plaintiffs to satisfy the predominance requirement by creating a "rebuttable presumption" of classwide reliance. *Id.* at 242. That presumption is based on the "fraud on the market" theory, under which a company's stock is assumed to trade in an efficient market in which the stock price reflects all public information about the company, with the result that "[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. Under that theory, a court may presume that investors relied on a public company's material misrepresentation in buying or selling the relevant security. See *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 461-462 (2013).

The *Basic* presumption can be rebutted with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248. Of particular relevance here, if a defendant "show[s] that the misrepresentation in fact did not lead to a distortion in price," it thereby breaks the "causal connection" by eliminating "the basis for finding that the fraud had been transmitted through [the] market price." *Ibid.* As a practical matter, showing the absence of "price impact" is the principal way securities defendants can defeat class certification.

3. In a series of recent decisions, this Court has addressed the relationship between the *Basic* presumption of reliance and the substantive elements of a Section 10(b) claim. In *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804 (2011) (*Halliburton I*), the Court held that plaintiffs seeking class certification need not establish the substantive element of loss causation at the class-certification stage. See *id.* at 815. And in *Amgen*, *supra*, the Court similarly held that plaintiffs need not establish the substantive element of materiality to certify a class. See 568 U.S. at 474.

But in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), the Court held that courts must consider evidence offered to show that an alleged misrepresentation had no impact on the price of the relevant security, even if that same evidence would also be "highly relevant at the merits stage." *Id.* at 283. The

Court explained that a defendant is entitled to rebut the *Basic* presumption through any evidence showing that "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." *Id.* at 280, 284.

"In the absence of price impact," the Court continued, "*Basic*'s fraud-on-the-market theory and presumption of reliance collapse." 573 U.S. at 278. After all, if the alleged misrepresentation was not reflected in the market price at the time of the investor's transaction, there is no basis to conclude that the investor "indirectly relied" on the misrepresentation through the investor's "reliance on the integrity of the market price." *Ibid.* (internal quotation marks and citation omitted).

The Court further made clear that "[p]rice impact differs from materiality." *Halliburton II*, 573 U.S. at 283. While materiality is a substantive element of the claim on the merits, "[t]he fact that a misrepresentation was reflected in the market price at the time of [the] transaction"—*i.e.*, that it had price impact—"has everything to do with the issue of predominance at the class certification stage." *Ibid.* (internal quotation marks and citation omitted). The Court thus prohibited courts from "artificially limit[ing]" price-impact evidence and expressly permitted defendants to "seek to defeat the *Basic* presumption" at the class-certification stage "through direct as well as indirect price impact evidence." *Ibid.*

B. Facts And Procedural History

1. Petitioners are The Goldman Sachs Group, Inc., and three of its former executives—Lloyd C. Blankfein, Gary D. Cohn, and David A. Viniar. Respondents are shareholders of Goldman Sachs.

Respondents alleged that petitioners had made material misrepresentations concerning Goldman Sachs' risks of conflicts of interest. Respondents relied on generic and aspirational statements by Goldman Sachs that "[o]ur clients' interests always come first"; that "[w]e are dedicated to complying fully with the letter and spirit of the laws"; and that "[w]e have extensive procedures and controls designed to identify and address conflicts of interest" (which it warned were "increasing" and could "give rise to litigation or enforcement actions" if not "appropriately" addressed). App., *infra*, 4a-5a; C.A. App. 93-94, 5716. According to one expert, such "truisms" are "pervasive in company communications." C.A. App. 5047-5048.

Respondents alleged that those statements, repeated by Goldman Sachs in its annual financial reports since at least 2003, were fraudulent because Goldman Sachs had client conflicts in four of the numerous collateralized debt obligations that it structured and sold in 2006 and 2007. In 2010, following reports of an SEC enforcement action against Goldman Sachs involving one such obligation and rumors of additional enforcement actions, respondents brought a securities class action against petitioners under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5(b) (as well as Section 20(a), the provision for "control person" liability).

Respondents' claims rested on an ambitious and unprecedented use of the theory of "inflation maintenance"—a theory previously recognized by lower courts in limited circumstances, but never by this Court. See, *e.g.*, *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 257 (2d Cir. 2016); *Glickenhaus & Co.* v. *Household International, Inc.*, 787 F.3d 408, 418 (7th Cir. 2015); *FindWhat Investor Group* v. *FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011), cert. denied, 568 U.S. 814 (2012). Under that theory, a misstatement can have price impact not only by artificially inflating a stock's price at the time it was made, but also by preventing the stock price from decreasing. In the face of that theory, a defendant cannot rebut the *Basic* presumption by showing that an alleged misstatement did not increase the stock price at the time it was made, as the defendant could in a traditional securities class action. Instead, the defendant can rebut the presumption only by showing that the "correction" of the alleged inflation-maintaining misstatement did not cause a subsequent drop in the stock price. See *Vivendi*, 838 F.3d at 225, 257, 259-260.

2. Petitioners moved to dismiss, and the district court denied the motion in relevant part. App., *infra*, 7a. The court rejected petitioners' contention that the alleged misstatements were immaterial as a matter of law. *Ibid.*

Respondents moved to certify a class, invoking the *Basic* presumption. Petitioners sought to rebut the presumption, arguing that, under *Halliburton II*, the "general, aspirational statements" alleged as misrepresentations had no price impact, notwithstanding any "overlap with considerations relevant to the merits issue[] of materiality." D. Ct. Dkt. 142, at 17-18. Petitioners also offered evidence that Goldman Sachs' stock price had not declined in response to news reports on 36 dates that disclosed Goldman Sachs' alleged conflicts of interest involving the collateralized debt obligations and other transactions—reports that appeared, among other places, on the front pages of the Wall Street Journal and the New York Times. App., *infra*, 40a-41a. And petitioners introduced evidence showing that news of government enforcement, not the disclosure of the alleged conflicts, accounted for the full amount of decline in stock price and that the alleged misrepresentations were not mentioned in any of the analyst reports on Goldman Sachs during the relevant period. *Id.* at 40a, 87-88a.

The district court granted the motion for class certification. App., *infra*, 79a-94a. The court refused to consider petitioners' evidence that Goldman Sachs' stock price had not reacted to the news reports, reasoning that the evidence related only to "the statements' materiality and not price impact." *Id.* at 90a-91a. The court ultimately concluded that petitioners had failed to rebut the *Basic* presumption by failing "conclusively" to prove a "complete lack" of price impact. *Id.* at 89a, 92a.

3. After granting petitioners' petition for an interlocutory appeal under Federal Rule of Civil Procedure 23(f), a unanimous panel of the court of appeals vacated the district court's order. App., *infra*, 60a-78a. It determined that the district court had failed to apply the preponderance-of-the-evidence standard for determining whether petitioners had rebutted the *Basic* presumption. *Id.* at 78a. In articulating that standard, however, the court of appeals rejected petitioners' argument that, under Federal Rule of Evidence 301, defendants bear only the burden of production to rebut the *Basic* presumption and not the ultimate burden of persuasion. *Id.* at 75a-76a. Citing its earlier decision in *Waggoner* v. *Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), cert. denied, 138 S. Ct. 1702 (2018), the court explained that, while Rule 301 was the default rule governing presumptions, the *Basic* presumption had "altered" that rule and "imposed a burden of persuasion on defendants." App., *infra*, 75a.

The court of appeals concluded that the district court had also erred by refusing to consider evidence that Goldman Sachs' generic statements had no price impact because the stock price had not reacted to the numerous news reports of client conflicts, observing that the district court had erroneously deemed it to be "evidence of the statements' lack of materiality" not permitted at the class-certification stage. App., *infra*, 76a. Petitioners had in fact introduced that evidence to show lack of price impact.

As the court of appeals explained, "[w]hether a misrepresentation was reflected in the market price at the time of the transaction * * * 'has everything to do with the issue of predominance at the class certification stage.'" App., *infra*, 77a (quoting *Halliburton II*, 573 U.S. at 283). The court noted that, "[a]lthough price impact touches on materiality, which is not an appropriate consideration at the class certification stage, it 'differs from materiality in a crucial respect'" because it "refers to the effect of a misrepresentation on a stock price." *Ibid.* (quoting *Halliburton II*, 573 U.S. at 282). The court of appeals instructed the district court to consider petitioners' evidence on remand in "determining whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect" the stock price. *Id.* at 78a.

4. On remand, the district court again granted respondents' motion for class certification, concluding that petitioners had failed to rebut the *Basic* presumption by a preponderance of the evidence. App., *infra*, 47a-59a. Of relevance here, the court rejected petitioners' argument, made in their opposition to the motion for class certification, that the statements at issue were so generic that they "could not have impacted" the stock price. D. Ct. Dkt. 192, at 5 n.2, 12-13 & n.8. The court also deemed "sufficient" the opinion of respondents' expert that there was "a link between the news of Goldman's conflicts and the subsequent stock price declines," asserting that "[i]t is only natural" that such "economically significant negative news" would "contribute to the stock price declines." App., *infra*, 54a (internal quotation marks and citation omitted).

The court of appeals rejected petitioners' "attempts to demonstrate the misstatements' complete lack of price impact" as "not persuasive," despite the evidence that the previous news reports of client conflicts had not moved the stock price. App., *infra*, 54a. That evidence, according to the court, "[was] not sufficient to sever the link between the first corrective disclosure and the subsequent stock price drop." *Id.* at 55a.

5. The court of appeals again granted petitioners' petition for an interlocutory appeal under Rule 23(f). The appeal was heard by a new panel, and this time the court affirmed by a 2-1 vote. App., *infra*, 1a-46a.

a. Despite the first panel's detailed discussion of *Halliburton II*, a majority of the second panel rejected petitioners' argument, based on *Halliburton II*, that the statements at issue were too generic to have had any impact on the stock price. App., *infra*, 19a-27a. While the court recognized that "[p]rice impact * * * resembles materiality," the court characterized petitioners' argument as an attempt to "smuggl[e] materiality into Rule 23." *Id.* at 22a, 23a. According to the court, whether misstatements are "too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate," because the issue of materiality is "common to all class members." *Id.* at 23a. The court of appeals cited this Court's statement in *Amgen* that courts should not "engage in free-ranging merits inquiries at the class certification stage." *Ibid.* (quoting *Amgen*, 568 U.S. at 465-466).

The court of appeals dismissed petitioners' contention that allowing class certification in this case "would open the floodgates to unmeritorious litigation" on the ground that "investor plaintiffs could just point to any general statement about the company's business principles or risk controls and proclaim 'price maintenance.'" App., *infra*, 25a-26a (citation omitted). The court noted that defendants could still challenge materiality at the motion-to-dismiss and summary-judgment stages and "present evidence to disprove lack of price impact" at the class-certification stage. *Id.* at 27a.

Having refused to consider the generic nature of the alleged misstatements, the court of appeals proceeded to determine that petitioners had failed to rebut the *Basic* presumption by a preponderance of the evidence. App., *infra*, 27a-35a. The court characterized petitioners' burden as a "heavy" one, repeatedly noting that petitioners bore the burden of persuasion in rebutting the presumption. *Id.* at 11a, 28a & n.18, 29a, 32a-33a n.19. As the court put it, "the question is not which side has better evidence, but whether the defendant has rebutted the presumption." *Id.* at 32a-33a n.19. The court discounted petitioners' evidence that the decline in Goldman Sachs' stock price was attributable not to investors learning of alleged conflicts of interest, but rather to reports of government enforcement activity. *Id.* at 29a-31a.

b. Judge Sullivan dissented. App., *infra*, 39a-46a. He criticized the majority's approach for "miss[ing] the forest for the trees" and "essentially turning the [*Basic*] presumption on its head." *Id.* at 39a. In Judge Sullivan's view, petitioners had "offered persuasive and uncontradicted evidence" that Goldman Sachs' stock price was "unaffected" by the press reports on 36 separate dates of the alleged conflicts of interest—"thereby severing the link that undergirds the *Basic* presumption." *Ibid.* In fact, petitioners' evidence clearly "demonstrated" that the alleged misstatements "had *no* impact" on the stock price, while respondents "offered no hard evidence, expert or otherwise, to refute [that] proof." *Id.* at 44a-45a. Judge Sullivan reasoned that, under the majority's approach, "the *Basic* presumption is truly irrebuttable and class certification is all but a certainty in every case." *Id.* at 44a.

Judge Sullivan also faulted the majority for refusing to "consider the nature of the alleged misstatements in assessing whether and why the misrepresentations did not in fact affect the market price of [the] stock." App., *infra*, 44a (internal quotation marks and citation omitted). "Candidly," he said, "I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact." *Ibid.* He explained that the generic nature of the statements provides the "obvious explanation" for the lack of a price decline in response to the numerous press reports concerning the alleged conflicts of interest. *Id.* at 44a-45a.

Judge Sullivan reasoned that the majority's "rigid compartmentalization" of the materiality and price-impact inquiries was not "possible, much less required by" this Court's decisions in *Amgen* and *Halliburton II*. App., *infra*, 45a. "Once a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price," he continued, a court was "free to consider the alleged misrepresentations in order to assess their impact on price." *Ibid.* "The mere fact that such an inquiry 'resembles' an assessment of materiality," Judge Sullivan concluded, "does not make it improper." *Ibid.*

6. The court of appeals denied petitioners' petition for rehearing, App., *infra*, 95a-96a, but subsequently granted a stay of the mandate pending the outcome of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

It is hard to overstate the legal and practical importance of this case. In the decision below, the Second Circuit held that a defendant in a securities class action may not rebut the presumption of classwide reliance recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the alleged misstatements, because that evidence is also relevant to the substantive element of materiality. That rule flouts this Court's clear mandate that a defendant is entitled to rebut the *Basic* presumption at the class-certification stage with any evidence, regardless of whether it is also "highly relevant at the merits stage." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) (*Halliburton II*). In addition, the Second Circuit held that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion, perpetuating a conflict among the courts of appeals as to the appropriate burden.

The Second Circuit's decision on those questions is patently erroneous and will have enormous consequences for public companies, because it renders class certification a formality in virtually any securities action premised on the inflation-maintenance theory. A decision of this magnitude, from the preeminent court of appeals for securities litigation, cannot be allowed to stand. The petition for a writ of certiorari should be granted.

A. The Decision Below Contravenes This Court's Prior Decisions And Perpetuates A Conflict Among The Courts Of Appeals

1. The Second Circuit's decision conflicts with this Court's decision in *Halliburton II* because it erroneously bars a defendant from relying on the nature of the alleged misstatements to show the absence of an impact on the price of the relevant security when seeking to rebut the *Basic* presumption of reliance at the class-certification stage. That conflict, in a decision from the Nation's most important court of appeals for securities litigation, demands the Court's intervention.

a. In *Halliburton II*, the plaintiffs argued that the defendants could not present evidence of the absence of price impact if that evidence would also disprove loss causation. See 573 U.S. at 280-281. In so doing, the plaintiffs contended that this Court's decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), supported the proposition that evidence relevant to a substantive claim element, such as materiality and loss causation, cannot be considered at the class-certification stage, because such evidence would "defeat every plaintiff's claim on the merits." 573 U.S. at 282.

This Court squarely rejected that argument in *Halliburton II*, holding that courts may not "artificially limit" the evidence a defendant may use to rebut the *Basic* presumption by showing the absence of price impact, "even though such proof is also highly relevant at the merits stage." 573 U.S. at 283. The Court explained that whether "a misrepresentation was reflected in the market price at the time of [the] transaction—that it had price impact—is *Basic*'s fundamental premise" and "thus has everything to do with the issue of predominance at the class certification stage." *Ibid.* (internal quotation marks and citation omitted). The Court therefore permitted defendants to "defeat the *Basic* presumption at th[e] [class-certification] stage through direct as well as indirect price impact evidence." *Ibid.*

The Court made clear that a defendant can present evidence of the absence of price impact even if that evidence is also relevant to a merits element such as loss causation, and even though the defendant cannot challenge loss causation itself at the class-certification stage. See 573 U.S. at 282-284. The Court explained that a defendant can rebut the *Basic* presumption through "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff," and it emphasized that the defendant "must be afforded an opportunity" to do so "before class certification." *Id.* at 269, 284.

Even before *Halliburton II*, this Court had admonished courts at the class-certification stage to "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 35 (2013). It "cannot be helped," the Court explained, that "rigorous analysis" of the requirements for class certification "[f]requently" will "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011).

b. The decision below cannot be reconciled with *Halliburton II* or this Court's earlier class-certification decisions. The Second Circuit reasoned that "[w]hether alleged misstatements are too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones." App., *infra*, 23a. And it characterized an inquiry into the nature of the alleged misstatements as merely a "means for smuggling materiality into Rule 23." *Id.* at 22a.

That conclusion is directly at odds with *Halliburton II's* clear mandate that evidence of price impact should not be "artificially limit[ed]" simply because "such proof is also highly relevant at the merits stage." 573 U.S. at 283. As Judge Sullivan explained in his dissent, "[t]he mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper"; the "rigid compartmentalization" of the materiality and price-impact inquiries is not "possible, much less required" by this Court's precedents. App., *infra*, 45a.

The Second Circuit misconstrued this Court's decision in *Amgen* as requiring courts to ignore evidence of the nature of the alleged misstatements at the class-certification stage. App., *infra*, 23a. There, however, the Court held only that "plaintiffs are not required to *prove* materiality" at the class-certification stage. *Amgen*, 568 U.S. at 468 (emphasis added). The Court did not address what evidence courts may *consider* in assessing price impact, let alone categorically prohibit a defendant from pointing to evidence simply because it is also relevant to a claim element such as materiality. The Court addressed those questions only in *Halliburton II*.

c. A recent Seventh Circuit decision shows how a court should navigate between the holdings of *Halliburton II*, on the one side, and *Amgen* and *Halliburton I*, on the other. In *In re Allstate Corp. Securities Litigation*, 966 F.3d 595 (2020), the Seventh Circuit held that a district court had violated *Halliburton II* by failing to engage with the defendants' evidence on price impact that the court had deemed to be "tied" too "closely to the merits," inasmuch as it resembled a truth-on-the-market defense. *Id.* at 600.

The Seventh Circuit explained that, in "deciding whether the *Basic* presumption applies," a court must "consciously avoid deciding materiality and loss causation," but must also "consider evidence offered by the defense to show that the alleged misrepresentations did not actually affect the price of the securities." 966 F.3d at 608. While "the same evidence is likely to have obvious implications for the off-limits merits issues of materiality and loss causation," the Seventh Circuit correctly read *Halliburton II* to stand for the proposition that a court may not "refuse to consider the evidence" simply because of the overlap between the price-impact inquiry and those merits inquiries. *Ibid.*

If the Second Circuit had applied that framework here and had considered evidence of the generic nature of the alleged misstatements when assessing price impact, it would have easily resolved this case in petitioners' favor.

The alleged misstatements at issue conveyed the most generic and aspirational of sentiments, such as "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest" and "[o]ur clients' interests always come first." App., *infra*, 4a.

Those statements are of a piece with those routinely deemed "too general to cause a reasonable investor to rely upon them." *City of Pontiac Policemen's & Firemen's Retirement System* v. *UBS AG*, 752 F.3d 173, 177, 183 (2d Cir. 2014) (generic representations regarding "risk management policies" and "compliance, reputation, and integrity"); see, *e.g.*, *Employees' Retirement System* v. *Whole Foods Market, Inc.*, 905 F.3d 892, 902 (5th Cir. 2018) ("generalized" statements about "transparency, quality, and integrity"); *Retail Wholesale* v. *Hewlett-Packard Co.*, 845 F.3d 1268, 1273, 1278 (9th Cir. 2017) ("aspirational" statements about "avoiding conflicts of interest" and "conducting business consistent with * * * high ethical standards"); *ECA* v. *JP Morgan Chase Co.*, 553 F.3d 187, 205-206 (2d Cir. 2009) (generic representations regarding "highly disciplined" "risk management processes").

At a minimum, the nature of those statements should have been taken into account in determining whether the presumption had been rebutted. As Judge Sullivan explained, the generic quality of the statements provides the "obvious explanation" for why the statements had no price impact. App., *infra*, 44a-45a.

2. The Second Circuit's decision also perpetuates a conflict among the courts of appeals on the question whether a defendant seeking to rebut the *Basic* presumption bears only a burden of production or also the ultimate burden of persuasion.

a. In *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (2016), the Eighth Circuit applied Federal Rule of Evidence 301 to the *Basic* presumption. See *id.*

at 782. Under that rule, "unless a federal statute * * * provide[s] otherwise," "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," while the "burden of persuasion" does not "shift" and "remains on the party who had it originally." Fed. R. Evid. 301. As with other elements of a securities-fraud claim, the burden of proving reliance falls on the plaintiff. See, *e.g.*, *Halliburton II*, 573 U.S. at 267. Accordingly, by applying Rule 301, the Eighth Circuit required that a defendant merely "come forward with evidence showing a lack of price impact," leaving the ultimate burden of persuasion with the plaintiffs. *IBEW*, 818 F.3d at 782.

In the decision below, by contrast, the Second Circuit reached the opposite conclusion, following then-recent circuit precedent holding that a defendant "bear[s] the burden of persuasion to rebut the *Basic* presumption." App., *infra*, 61a; see *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 102 (2d Cir. 2017), cert. denied, 138 S. Ct. 1702 (2018). In *Waggoner*, the Second Circuit held that, because this Court had adopted the *Basic* presumption "pursuant to [the] federal securities laws," there was a "sufficient link to those statutes" to trigger the exception to the rule of Rule 301 where "a federal statute * * * provide[s] otherwise," thereby shifting the burden of persuasion to the defendant. *Id.* at 102, 103.

In its recent decision in *Allstate*, *supra*, the Seventh Circuit "agree[d]" with the Second Circuit. It held that a defendant bears the burden of persuasion to rebut the *Basic* presumption. See 966 F.3d at 610.

While the Second and Seventh Circuits attempted to characterize the Eighth Circuit's reliance on Rule 301 as mere dictum, that is simply wrong. See *Waggoner*, 875 F.3d at 103 n.36; *Allstate*, 966 F.3d at 610 n.4. The Eighth Circuit unambiguously concluded that Rule 301 supplies the standard governing the *Basic* presumption, thereby establishing a legal rule that will govern future decisions in that circuit. See *IBEW*, 818 F.3d at 782. Other courts have recognized as much. See, *e.g.*, *Bing Li* v. *Aeterna Zentaris, Inc.*, 324 F.R.D. 331, 344 (D.N.J. 2018); *KBC Asset Management NV* v. *3D Systems Corp.*, Civ. No. 15-2393, 2017 WL 4297450, at *8 (D.S.C. Sept. 28, 2017); *Marcus* v. *J.C. Penney Co.*, Civ. No. 13-736, 2016 WL 8604331, at *5 & n.1 (E.D. Tex. Aug. 29, 2016).

b. The Second Circuit's holding is patently incorrect. Both the private cause of action for securities fraud (with its reliance requirement) and the *Basic* presumption are judicial creations. And there is plainly no federal statute that "provide[s] otherwise," as would be required under Rule 301 to shift the burden of persuasion to the defendant. To the extent that the private right of action and the *Basic* presumption are "link[ed]" to Section 10(b), see *Waggoner*, 875 F.3d at 102-103, that is insufficient: no language in Section 10(b) alters the default rule of Rule 301. And a court "may not engraft [its] own exceptions onto [the] text" of a statute or rule. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). Indeed, the Second Circuit's approach is inconsistent with *Basic* itself, which expressly cited Rule 301 in observing that presumptions are "useful devices for allocating the burdens of proof between parties." 485 U.S. at 245.

If the burden of persuasion had been correctly allocated, this would have been an easy case. In holding that the *Basic* presumption had not been rebutted, the majority below heavily relied on its view that petitioners bore the ultimate burden of persuasion, going so far as to fault them for focusing on the deficiencies in respondents' evidence. See App., *infra*, 11a, 28a, 29a, 32a-33a n.19. In fact, as Judge Sullivan stressed, petitioners' own evidence "demonstrated" that the alleged misstatements "had *no* impact" on the stock price. *Id.* at 44a. Judge Sullivan further noted the evidence that the stock price had not declined in response to news reports on 36 dates disclosing Goldman Sachs' alleged conflicts of interest and that the decline in price was instead attributable to reports of government enforcement activity. *Id.* at 40a.

For their part, respondents "offered no hard evidence, expert or otherwise, to refute [that] proof." App., *infra*, 45a. As Judge Sullivan observed, respondents' expert could not "explain the lack of price movement from the earlier disclosures"; "made no serious attempt to refute" the conclusion that reports of government enforcement activity caused the price decline; and did not even "differentiat[e] between the price impact of the conflict disclosures and the price impact of the enforcement actions"—the central issue in the price-impact analysis. *Id.* at 42a.

In light of that evidentiary record, there can be no doubt that respondents' effort to certify the class would have failed if they had borne the ultimate burden of persuasion. Both of the questions presented here go to the heart of the operation of the *Basic* presumption and warrant this Court's review.

B. The Questions Presented Are Exceptionally Important And Warrant The Court's Review In This Case

If allowed to stand, the Second Circuit's decision will have sweeping legal and practical consequences. In a series of cases, this Court has established a careful balance between providing securities plaintiffs a feasible method of proving reliance on a classwide basis, on the one hand, and giving defendants a meaningful opportunity to rebut the *Basic* presumption, on the other. Compare *Basic*, 485 U.S. at 245, with *Halliburton II*, 573 U.S. at 279-283. The decision below—from the Nation's most important court of appeals for securities litigation—destroys that balance, rendering the presumption effectively irrebuttable any time plaintiffs invoke the inflation-maintenance theory.

The Second Circuit's decision provides a clear roadmap for plaintiffs seeking class certification: identify public allegations of company misconduct and, after the inevitable stock drop that follows, assert that the stock price had been improperly "maintained" by generic, aspirational statements of the sort that virtually all companies make. That cheap ticket to class certification is a boon for plaintiffs (and their lawyers), given that the vast majority of securities class actions settle once class certification is granted. In light of those practical realities, this Court's intervention is sorely needed.

1. Because class certification in securities litigation almost always turns on reliance, see *Halliburton I*, 563 U.S. at 810, the *Basic* presumption is usually outcome-determinative at the class-certification stage. See *Amgen*, 568 U.S. at 462. It is thus critically important that lower courts correctly apply the presumption. For that reason, this Court has frequently granted certiorari to clarify the legal contours and operation of the *Basic* framework. See, *e.g.*, *Halliburton II*, *supra*; *Amgen*, *supra*; *Halliburton I*, *supra*. This case is no different: if the decision below is allowed to stand, the Second Circuit's distortion of the *Basic* framework will have devastating practical consequences for public companies by creating an almost automatic path for securities plaintiffs to obtain class certification (with its concomitant pressure to settle).

a. Because the inflation-maintenance theory precludes defendants from rebutting the *Basic* presumption with evidence that the price did not increase on the "front end" at the time the alleged misrepresentation was made, the decision below effectively hands inflation-maintenance plaintiffs a victory on price impact by stripping defendants of any meaningful "back end" defense that the "correction" of the alleged misrepresentation did not cause a price decrease. Indeed, by preventing defendants from even pointing to the generic nature of the alleged misstatements to rebut the presumption and then relieving plaintiffs of the burden of persuasion on price impact, the Second Circuit nullified the price-impact inquiry, rendering certification "all but a certainty" in inflation-maintenance cases. App., *infra*, 44a (Sullivan, J., dissenting).

That is particularly significant given the increasing popularity of the inflation-maintenance theory among securities plaintiffs. According to one estimate cited in the decision below, plaintiffs have asserted that theory in 71% of recent cases involving the *Basic* presumption—and have successfully established price impact in every instance. See Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077 (2019); App., *infra*, 19a n.9. The decision below only encourages reliance on the inflation-maintenance theory—a theory that this Court has never even recognized. See Miguel Estrada et al., *High Court Should Review Goldman's Maintenance Theory*, Law360 (June 24, 2020) <tinyurl.com/highcourtshouldreview>.

What is more, the ease with which inflation-maintenance plaintiffs will be able to obtain class certification will further incentivize the troubling practice of "event-driven securities litigation"—*i.e.*, securities actions filed reflexively in the "immediate wake of a stock drop" caused by a "disast[rous]" (and usually unexpected) event. See John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: It's Time to Draw Some Distinctions*, CLS Blue Sky Blog (Jan. 22, 2019) <tinyurl.com/changingcharactersecurities>. Such litigation threatens to expand securities litigation beyond recognition, as illustrated by recent securities suits against Boeing on the basis of a crash involving one of its planes, see *ibid.*, and against Marriott arising from a widespread data breach, see Kevin LaCroix, *Marriott Hit With Data Breach-Related Securities Lawsuit*, D&O Diary (Dec. 3, 2018) <tinyurl.com/marriottdatabreachsecurities>.

Most event-driven securities suits are brought against defendants who "already face[] liability for the underlying event on which these cases are based" (through, for example, a "products liability lawsuit[]"). U.S. Chamber Institute for Legal Reform, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* 13 (2018) <tinyurl.com/risingthreatclassaction>. The decision below ensures the proliferation of those suits by virtually guaranteeing class certification in any securities action premised on the inflation-maintenance theory.

b. As those cases multiply, so too will coercive settlement pressures. In a class action, class certification is generally the most important practical decision a district court makes, because the post-certification costs and risks of litigation very often compel defendants to settle even meritless claims. The potential for damages in a class action is, by definition, exponentially larger than in ordinary litigation. And in the age of electronic discovery, the costs of discovery have become "astronomical" and can "disrupt[]" the "defendant's operations," as management and employees must devote substantial time to responding to document requests and preparing and sitting for depositions. *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting); see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). Securities litigation in particular "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739.

As this Court has long recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that the defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). The very fact of certification gives a class-action plaintiff enormous leverage in settlement negotiations, putting "hydraulic pressure" on defendants to settle. *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004). It is little wonder, then, that class certification in a securities case almost always leads to the "extort[ion]" of a settlement by "plaintiffs with weak claims" but significant potential damages. *Halliburton II*, 573 U.S. at 296 n.7 (Thomas, J., concurring in judgment).

Increased coercive settlement pressure is especially concerning because negotiated settlement amounts in securities class actions are systematically divorced from the merits. Since 1996, fewer than 25 of the more than 5,200 securities class actions filed have gone to trial. See Kevin LaCroix, *Rare Securities Class Action Lawsuit Trial Results in Partial Verdict for Plaintiffs*, D&O Diary (Feb. 5, 2019) <tinyurl.com/raresecuritiestrial>; Melissa Colón-Bosolet, *The Elusive Nine: Securities Class-Action Trials Since 1995*, Com. & Bus. Litig. 1, 1 (Summer 2010) (identifying only nine securities class actions tried to a verdict). Because accurate predictions of trial outcomes are virtually impossible without a meaningful body of precedents, settlement negotiations cannot happen in the "shadow" of a trial as they do in other areas of law. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 556-557 (1991). That significantly distorts settlement amounts.

And "when companies pay settlements that have little to do with the merits of the case," that harms investors because they are "ultimately footing the bill." M. Todd Henderson, *Halliburton Will Raise Cost of Securities Class Actions*, Law360 (July 2, 2014) <tinyurl.com/costs-ofsecclassactions>. Indeed, the costs associated with class actions are "payable in the last analysis by innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)). The result is often simply to transfer wealth from current shareholders to former ones, with the plaintiffs' bar collecting a sizable tax on the transfer. See, *e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996).

Contrary to the Second Circuit's suggestion, the possibility that defendants can still challenge materiality at the motion-to-dismiss and summary-judgment stages is no consolation for the increased risk of distorted settlements. The element of materiality will "rarely be dispositive in a motion to dismiss," because it usually "presents a mixed question of law and fact." *In re Morgan Stanley Information Fund Securities Litigation*, 592 F.3d 347, 360 (2d Cir. 2010). And most securities class actions never reach summary judgment, given the cost of discovery and inordinate pressure to settle following class certification—which will only be compounded if the Second Circuit's decision is allowed to stand.

c. Review is especially important in this case because of the Second Circuit's outsized influence in securities class actions. The Second Circuit has been called the "'Mother Court' of securities law," *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 276 (2010) (Stevens, J., concurring) (citation omitted), because of its "preeminence in the field" to which other courts routinely "defer[]." *Id.* at 260 (majority opinion). Indeed, far more securities class actions are litigated there than in any other circuit. In 2019, the number of filings within the Second Circuit was almost double that within the Ninth Circuit, the next most popular circuit. See Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* 2 (2020) <tinyurl.com/secclassactions2019>.

2. This case is an optimal vehicle for the Court's review. It cleanly presents two legal questions concerning the operation of the *Basic* presumption, each outcome-determinative. No factual or procedural issues would impede resolution of those questions, which were pressed and passed upon in a lengthy majority opinion and a comprehensive and well-reasoned dissenting opinion. The stakes in this case are extraordinary, with plaintiffs seeking $13 billion in damages. App., *infra*, 7a. And given the enormous legal and practical significance and the errant nature of the holdings from the Second Circuit, further percolation is not warranted. Put simply, litigants cannot afford to wait. This Court should intervene and correct the Second Circuit's clearly erroneous decision before it becomes the de facto law of the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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