No. 20-222

# In the Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., ET AL.,
*Petitioners*,
v.
ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.,
*Respondents*.

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

## BRIEF OF *AMICI CURIAE* SECURITIES AND FINANCIAL MARKETS ASSOCIATION, BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, AND U.S. CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association.

The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, BPI's members employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine of financial innovation and economic growth.

American Bankers Association (the "ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion

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[1] Pursuant to Rule 37.6, Counsel for *amici* represent that they authored this brief in its entirety and that none of the parties nor their counsel, nor any other person or entity other than *amici*, their members or their counsel have made a monetary contribution intended to fund the preparation of submission of this brief. Counsel of record provided timely notice of the intent to file this *amicus* brief pursuant to Rule 37.2 and both parties have consented to the filing.

banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The Chamber of Commerce of the United States of America (the "Chamber" and, together with SIFMA, BPI, and the ABA, the "*Amici*") is the Nation's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of approximately 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. Many of the Chamber's members are companies subject to the U.S. securities laws who would be adversely affected if the majority's decision is not corrected.

The *Amici* have a substantial interest in the issues presented in the petition. The precedent set below by the Second Circuit is contrary to this Court's guidance with respect to the ability of defendants to rebut the presumption of classwide reliance at the class certification stage; threatens unwarranted class litigation for securities plaintiffs proceeding under an inflation maintenance theory; and could subject the *Amici*'s membership to runaway class certification regardless of the merit of claims.

## SUMMARY OF ARGUMENT

This case presents questions of importance to the *Amici*'s members. If left to stand, the decision below threatens to make the presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) effectively unrebuttable, and to burden companies and their shareholders with meritless claims based on generic statements which have no price impact.

The Plaintiffs in this case allege that generic, aspirational statements contained in Goldman Sachs Group, Inc.'s ("Goldman's") public filings—such as "[o]ur clients' interests always come first"—misled the market and artificially maintained an inflated price for Goldman's stock. The Second Circuit majority held that it could not consider the general and aspirational nature of the challenged statements in assessing whether Defendants had met their burden under *Basic* to show the alleged misstatements did not affect stock price. This holding contradicts this Court's precedent that a court may not "artificially limit" the evidence to be considered at class certification. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) (*Halliburton II*). As explained by Judge Sullivan in dissent, when assessing price impact, the statements themselves cannot be ignored. A court should be "free to consider the alleged misrepresentations in order to assess their impact on price." App. 45a.

Should the decision below stand, it risks leading to liability for countless companies including members of the *Amici* that also make general, aspirational statements that could be converted into inflation-maintenance claims following any negative corporate

announcement causing a stock price drop. If defendants are not provided a legitimate opportunity to rebut the *Basic* presumption, including by reference to the alleged fraudulent statements at issue, there is a substantial risk of unwarranted class certification, even on meritless claims, leading to potential runaway liability and mounting financial pressure for companies and their shareholders to pay on claims brought by plaintiffs who have suffered no loss.

## ARGUMENT

### I. THE CHALLENGED STATEMENTS IN THIS CASE ARE GENERAL, ASPIRATIONAL, AND UBIQUITOUS IN THE MARKETPLACE

Plaintiffs proceed on the "inflation maintenance" theory—something never previously endorsed by this Court. Plaintiffs argue that Goldman made certain false statements in its Annual Reports and Form 10-Ks published between 2007 and 2010. As Plaintiffs concede, Goldman's stock price did not increase as a result of these statements. However, Plaintiffs posit that the statements maintained Goldman's stock price at artificially inflated levels until the stock dropped in 2010 following the filing of an SEC complaint against Goldman regarding the Paulson & Co. hedge fund's role in a collateralized debt obligation transaction, and news reports of possible additional federal investigations.

The alleged misrepresentations Plaintiffs cite to support their inflation maintenance theory do not concern collateralized debt obligations or Paulson & Co. Indeed, they do not refer to any particular transaction,

product line, procedure, or practice. Rather, they are vague, generic, and aspirational.

Many of the statements are general descriptions in the "Business Principles" section of Goldman's Annual Reports. Examples include:

- "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard. . . ."
- "Integrity and honesty are at the heart of our business. . . ."
- "Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow. . . ."

App., 63a.

The other challenged statements are contained in the "Risk Factors" section of Goldman's Form 10-K filings. Like the business principles statements, the risk factors statements are general and aspirational. They do not refer to any particular conflicts or conflict avoidance procedures and also make no guarantee that Goldman will be able to avoid or resolve all conflicts of interest. Examples include:

- "Conflicts of interest are increasing and a failure to appropriately deal with conflicts of interest could adversely affect our businesses. Our reputation is one of our most important assets. As we have expanded

the scope of our businesses and our client base, we increasingly have to address potential conflicts of interest . . . ."

- "We have extensive procedures and controls that are designed to address conflicts of interest . . . ."

C.A. App., 5043.

Statements similar to Defendants' are ubiquitous. They are made by companies innumerable, including among the *Amici*'s membership. Companies publish general, aspirational statements like Defendants' for a variety of reasons, including to motivate employees and affirm organizational culture. C.A. App. 5036. Such statements communicate an organization's goals and principles to key stakeholders, including customers, employees, and investors. C.A. App. 5041.

Examples of similar statements made by large financial institutions and Fortune 500 firms abound, including the following:

- "Our brand and reputation are key assets of our Company."
- "Our . . . reputation and experience are among this company's strongest advantages."
- "Our reputation is one of our most important assets."
- "Our continued success is substantially dependent on . . . the reputation we have built over many years . . . ."

- "[Our] success is based on creating innovative, high-quality products and services and on demonstrating integrity in every business interaction."
- "[W]e believe our success depends on maintaining the highest ethical and moral standards everywhere we operate. That focus on integrity starts at the top."
- "Our actual or perceived failure to address various issues could give rise to reputational risk that could harm us or our business prospects. These issues include but are not limited to, appropriately addressing potential conflicts of interest . . . ."
- "Management of potential conflicts of interests has become increasingly complex as we expand our business activities through more numerous transactions, obligations and interests with and among our clients."
- "Our businesses depend on our strong reputation and the value of [our] brand."

C.A. App. 5047-51; *see also Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944 (6th Cir. 2009) ("vague" and "loosely optimistic" affirmations are "ubiquitous" and "numbingly familiar in the marketplace"); *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (statements about defendant's integrity and risk management were "so general" that "[n]o investor would take such statements seriously in

assessing a potential investment, for the simple fact that almost every investment bank makes these statements").

Because the statements challenged by Plaintiffs are general, aspirational, and ubiquitous, they are, on their face, unlikely to have price impact. Investors do not consider them when buying and selling stock. *See* C.A. App. 5071 (Defendants' expert examining hundreds of statements similar to Goldman's made by public companies and concluding general statements of this kind are not pertinent to investors making investment decisions). *See also, e.g.*, *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (The statement that defendant "set the standard for best practices in risk management techniques . . . is so general that a reasonable investor would not depend on it as a guarantee that [defendant] would never take a step that might adversely affect its reputation.") (internal quotation marks omitted); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) ("[G]eneral statements about reputation, integrity, and compliance with ethical norms are inactionable").

## II. A COURT SHOULD BE PERMITTED TO CONSIDER THE NATURE OF THE ALLEGED MISREPRESENTATIONS WHEN EVALUATING WHETHER THE DEFENDANT HAS REBUTTED THE *BASIC* PRESUMPTION

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court recognized that in certain circumstances plaintiffs bringing a securities fraud claim are entitled to a presumption of reliance based on the theory that the prices at which investors bought and sold securities will reflect all publicly available information including any material misrepresentations. The *Basic* presumption is rebuttable. As stated in *Halliburton II*, 573 U.S. at 284, defendants "must be afforded an opportunity to rebut" the *Basic* presumption "through evidence that an alleged misrepresentation did not actually affect the market price of the stock." Thus, as applied to Plaintiffs inflation maintenance theory, a court is to consider at the class certification stage whether the evidence provided by defendant severs the link between the statements alleged to have maintained an inflated share price and the share price itself.

To rebut the *Basic* presumption, Defendants presented substantial evidence showing that the alleged misrepresentations did not maintain an inflated share price. Defendants' expert identified 36 news reports publicizing the existence and risk of conflicts of interest before any of the 2010 alleged corrective disclosure dates. If the challenged statements regarding Goldman's business principles

and conflicts procedures were artificially maintaining an inflated share price, then these news reports would have caused drops in Goldman's share price. But none of these news reports had any price impact.

An additional expert for Defendants presented an event study demonstrating that Goldman's 2010 stock price drop did not statistically differ from other companies' stock drops following announcements of enforcement actions. This evidence shows that the 2010 stock drop was due to the news that the government was investigating Goldman and bringing an enforcement action; not due to the alleged revelation of misstatements.

This conclusion is reinforced by the statements themselves. The vague, general, and aspirational nature of the statements suggests that no reasonable investor would consider them when buying and selling stock. As explained by Judge Sullivan in his dissent: "Candidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact. Here, the obvious explanation for why the share price didn't move after 36 separate news stories on the subject of Goldman's conflicts is that no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based." App., 45a.

The majority's decision, however, would bar courts from considering the nature of the alleged misstatements in assessing whether defendants rebut the *Basic* presumption. The Second Circuit reasoned that a court cannot consider the nature of the alleged misstatements when analyzing their price impact

without veering too closely into a materiality review that is inappropriate at the class certification stage. But this is not so. As Judge Sullivan noted, a "rigid compartmentalization" of the price impact and merits analyses is neither possible nor required by *Amgen* or *Halliburton II*. App., 45a. It is "fair for [a] court to consider the nature of the alleged misstatements in assessing whether and why the misrepresentations did not in fact affect the market price of Goldman stock." App., 44a (internal quotation marks omitted).

That materiality is a question for the merits stage rather than the class certification stage does not mean that evidence relevant to price impact which may *also* be relevant to materiality at the merits stage must be ignored. This Court has repeatedly made clear that the mere fact that evidence may be relevant at the merits stage is not reason to exclude it from consideration at the Rule 23 phase. In *Halliburton II* the Court was faced with the question of whether direct evidence that the statements had no price impact could be considered at the class certification stage, even though such evidence could also be before the court at the merits stage. The Court held that such evidence could be considered and that the class certification inquiry should not be "artificially limit[ed]." 573 U.S. at 283. In *Comcast* this Court implored courts 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 ), and in *Wal-Mart* this Court further explained that a class certification analysis may "entail some overlap with the merits of plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

The same principle applies to the consideration of the generic nature of the statements themselves when assessing evidence of those statements' price impact. A court must not be required to close its eyes and pretend not to read the misstatements that are alleged to have misled the market and maintained an inflated stock price, when considering precisely that: whether the statements had an impact on the stock price. To hold otherwise is to require a court to divorce other price impact evidence of critical context and would impose an artificial limitation on evidence of price impact in contravention of *Halliburton II*. Here, the generic nature of the challenged statements should have been considered as part of the total mix of price impact evidence presented by Defendants.

The *Amici* agree with Judge Sullivan, who found that "[o]nce a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price. The mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper." App., 45a.

## III. THE SECOND CIRCUIT'S DECISION WILL RESULT IN UNWARRANTED CLASS LITIGATION IN INFLATION MAINTENANCE THEORY CASES

The artificial application of judicial blinders at the class certification stage in the Second Circuit, as required by the decision below, threatens the *Amici*'s membership with unwarranted class litigation. This

case provides a blueprint for enterprising Plaintiffs (and their lawyers) to use everyday occurrences as grist for price maintenance claims. After economically significant news, such as a company falling short of its earnings targets, an unfavorable business development or the announcement of enforcement activity against it, a company's stock price may drop. Following this price decline, as they presumably did in this case, plaintiffs will review years of public filings made by the company to select statements vague and generic enough to conceivably cover the cause for the stock decline, such "[o]ur reputation is one of our most important assets" or "[w]e are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us." Armed with these statements and a subsequent stock price drop, Plaintiffs can try to allege without any evidence that the statements served to maintain an artificially inflated stock price, in order to obtain class certification. Thus, the decision below threatens to financially burden company shareholders with paying claims to plaintiffs who have suffered no loss.

The situation for defendants in the Second Circuit—the country's most active Circuit for securities litigation[2]—is particularly dire because the Second Circuit has previously held that defendants bear the burden at class certification to show no price impact. This precedent conflicts with *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016)

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[2] *See* Cornerstone Research, Securities Class Action Filings 2019 Year in Review, 38 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.

where the Eighth Circuit made clear that while defendants bear a burden of production in rebutting *Basic*, the burden of persuasion to show price impact ultimately remains with the plaintiffs. 818 F.3d 775, 782 (8th Cir. 2016) (applying Fed. R. Evid. 301 to the *Basic* presumption).

This is all the more significant as the inflation maintenance theory gains prominence in securities litigation. The decision below noted that in the wake of *Halliburton II*, more than two-thirds of securities fraud plaintiffs in federal district courts invoked the inflation-maintenance theory when defendants tried to rebut the *Basic* presumption. In nearly every case, the court held that defendant failed to rebut the presumption.[3]

Although a class would ultimately have to withstand a motion for summary judgment and prove its case at trial, these burdens cannot be relied on to save defendant companies and their shareholders from paying out meritless claims. Once a class is certified, defendants often face "hydraulic pressure" to settle and "avoid[] the risk, however small, of potentially ruinous liability." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."). This

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[3] The only two decisions in which a court has found defendants rebutted the *Basic* presumption are the district court's decision upon remand from the Supreme Court in *Halliburton II* itself, *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 270 (N.D. Tex. 2015), and *Best Buy Co.*, 818 F.3d at 783.

Court has recently acknowledged that it is "well known that [class actions] can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims.'" *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018) (citing *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n. 3, (2010) (Ginsburg, J., dissenting)). Studies indicate that less than 1 percent of securities class action filings are litigated to a verdict. Cornerstone Research, Securities Class Action Filings 2019 Year in Review, 16 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review. Event-driven securities class actions such as this one are on the rise, and they frequently "remain viable" despite weakness on the merits "because the potential damages are often very high." U.S. Chamber Institute for Legal Reform, Containing the Contagion: Proposals to Reform the Broken Securities Class Action System 10 (February 2019), https://www.instituteforlegalreform.com/uploads/sites/1/Securites-Class-Action-System-Reform-Proposals.pdf (internal quotation marks omitted).

The implication of this holding is therefore that companies, including the *Amici*'s membership, will be exposed to runaway class litigation regardless of the merit of claims, as the inflation maintenance theory becomes ever more widespread. Where the nature of the alleged misstatements cannot be considered at the class certification stage—and where the other evidence presented by Defendants is found insufficient—it is difficult to see what could stand in the way of class certification following any substantial decrease in a company's stock price. In spite of the Court's clear

guidance in *Halliburton II* that the *Basic* presumption may be rebutted with evidence of no price impact, even if such evidence is also relevant to the merits, the Second Circuit's decision threatens to render the rebuttable presumption of classwide reliance unrebuttable.

## CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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