No. 17-_______

In the Supreme Court of the United States

BARCLAYS PLC, ET AL., PETITIONERS

v.

JOSEPH WAGGONER, ET AL., RESPONDENTS

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 seeking to rebut the fraud-on-the-market presumption of reliance under *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), has a burden of production or a burden of persuasion.

2. Whether plaintiffs may invoke the fraud-on-the-market presumption without direct evidence that the price of the security responded to new, material information during the class period.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Barclays PLC, Barclays Capital Inc., Robert Diamond, Antony Jenkins, and William White. Respondents are Joseph Waggoner, Mohit Sahni, and Barbara Strougo.

Petitioner Barclays PLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Barclays Capital Inc. is an indirect subsidiary of Barclays PLC and has no other parent corporations or publicly held corporations that own 10% or more of any class of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Barclays PLC, Barclays Capital Inc., Robert Diamond, Antony Jenkins, and William White 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 is reported at 875 F.3d 79, App., *infra*, 1a, and its order denying the petition for rehearing is unreported, App., *infra*, 111a. The district court's class certification order is reported at 312 F.R.D. 307 (S.D.N.Y. 2016). App., *infra*, 57a.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2017. App., *infra*, 1a. A petition for rehearing was denied on January 5, 2018. App., *infra*, 111a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 78j(b) of Title 15 of the United States Code, Section 240.10b-5 of Title 17 of the Code of Federal Regulations, Federal Rule of Civil Procedure 23(f), and Federal Rule of Evidence 301 are reprinted at App., *infra*, 113a.

STATEMENT OF THE CASE

This case presents two important and recurring questions involving the presumption of reliance that plaintiffs seek to invoke in most securities-fraud class actions: the fraud-on-the-market presumption recognized by the Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). *See Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407-08 (2014) (*Halliburton II*).

The first question, as to which the lower courts are in express disagreement, asks which party has the burden of persuasion where a defendant attempts to rebut the presumption. Although the Eighth Circuit has held that plaintiffs retain the burden of persuasion under Federal Rule of Evidence 301, the decision below held that the burden of persuasion shifts to defendants pursuant to an implied statutory exception to Rule 301.

The second question asks what evidence a plaintiff must put forth to invoke the presumption in the first place, a question that the lower courts have addressed with a variety of approaches. Specifically, the question asks whether a plaintiff seeking to show that the market for a security is efficient—*i.e.*, that the price of the security generally responded to new, material information—must offer evidence that the price of the security did in fact respond to new, material information during the class period.

Respondents are three individuals who seek to represent a class of owners of American depositary shares (ADS) of Barclays PLC.[1] They filed a putative class action against Barclays, one of its subsidiaries, and some of its officers, alleging securities fraud. Respondents moved to certify a class and invoked the fraud-on-the-market presumption of reliance. The district court, in relevant part, granted respondents' motion without requiring respondents either to:

(1) present any direct evidence that the price of Barclays' ADS responded to new, material information entering the market; or

(2) defend their entitlement to the presumption of reliance after counsel for petitioners presented evidence rebutting the fraud-on-the-market presumption.

After granting interlocutory review under Federal Rule of Civil Procedure 23(f), the court of appeals affirmed the district court's order. Expressly disagreeing with the only other court of appeals that has addressed the issue, the court of appeals held that, if a plaintiff establishes the prerequisites of the *Basic* presumption, the defendant bears the ultimate burden of persuasion of rebutting the presumption by a preponderance of the evidence. *Compare* App., *infra*, 40a & n.36, *with IBEW Local 98 Pension Fund* v.

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[1] American Depositary Shares represent an interest in the shares of a non-U.S. company that have been deposited with a U.S. bank. ADS can be traded on U.S. exchanges, allowing U.S. investors easier access to equity interests in foreign companies. *See* App., *infra*, 6a n.3.

Best Buy Co., 818 F.3d 775, 782 (8th Cir. 2016). The court of appeals further held that a plaintiff could rely exclusively on "indirect factors" (such as market size and trading volume) to show market efficiency for purposes of the fraud-on-the-market presumption without offering any evidence that the price of the company's security in fact reacted to new, material information. That holding intensified existing confusion in the lower courts regarding the sufficiency of indirect evidence to prove market efficiency for the purpose of invoking the *Basic* presumption. *Compare* App., *infra*, 38a-39a, *and Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund* v. *Regions Fin. Corp.*, 762 F.3d 1248, 1256-57 (11th Cir. 2014), *with In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512 (1st Cir. 2005), *and Unger* v. *Amedisys Inc.*, 401 F.3d 316, 324-25 (5th Cir. 2005). This Court should grant certiorari to review both of the court of appeals' holdings.

1. In *Basic*, the Court held it was "not inappropriate" for a court to apply the fraud-on-the-market presumption of reliance to avoid subjecting plaintiffs to "an unnecessarily unrealistic evidentiary burden" of showing direct reliance on alleged misrepresentations in securities class actions. 485 U.S. at 245, 250. The fraud-on-the-market presumption consists of "two constituent presumptions." A plaintiff who proves that the market for a security is generally efficient benefits from a presumption that a misrepresentation that is both public and material affected the security's price. And a plaintiff who also purchased the security at the market price during the relevant period benefits from a presumption that he purchased the security "in reliance on the defend-

ant's misrepresentation." *Halliburton II*, 134 S. Ct. at 2414.

2. Respondents brought securities fraud claims against petitioners—Barclays, its subsidiary Barclays Capital Inc., and some of its officers—regarding alleged misrepresentations concerning the Barclays LX alternative trading system, a so-called "dark pool" run by Barclays Capital. Dark pools perform many of the same functions as national securities exchanges, such as matching buy and sell orders. Like national securities exchanges, dark pools are regulated by the Securities and Exchange Commission (SEC). They are known as "dark pools" because they are not required to provide pricing and order data to the public in real time. Barclays LX generated less than 0.1% of Barclays' revenue during the class period.

On June 25, 2014, the New York Attorney General filed a lawsuit against Barclays, generally alleging that Barclays misrepresented (1) the extent to which it protected LX clients from high-frequency traders who were trading in LX, and (2) the manner in which Barclays routed certain client orders. According to respondents, the filing caused the price of Barclays' ADS to drop.

3. On July 28, 2014, a plaintiff filed a putative class action in the Southern District of New York on behalf of investors in Barclays' ADS, asserting claims under the Securities Exchange Act of 1934. After additional plaintiffs joined the action, an amended complaint was filed. In the amended complaint, respondents alleged that petitioners had

made misstatements regarding: (1) Barclays' general business practices and risk controls; (2) its implementation of recommendations made in an April 2013 report commissioned in the wake of a June 2012 settlement stemming from Barclays' practices concerning the London Interbank Offered Rate (LIBOR); and (3) LX itself. In particular, respondents alleged that, after the LIBOR settlement, Barclays stated that it would transform its culture and committed itself to the value of "integrity," and that Barclays' subsequent statements concerning LX made its statements regarding its commitment to integrity false and misleading.

The district court dismissed respondents' claims concerning the first two categories of statements, holding that those statements were not actionable. But the district court allowed respondents to proceed with respect to certain statements concerning LX, holding that, although the statements themselves were not material due to the relative insignificance of LX to Barclays' overall revenue, the alleged fraud concerning LX could be material to investors because it concerned Barclays' "integrity."

4. Respondents moved to certify a class of investors who had purchased Barclays' ADS from August 2, 2011 to June 25, 2014. Respondents sought to prove that Barclays' ADS traded efficiently—and thus that respondents were entitled to the *Basic* presumption of reliance—by focusing on factors set out in two district court decisions: *Cammer* v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), and *Krogman* v.

Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001).[2] Among other things, respondents' expert conducted an event study that purported to show that the price of Barclays' ADS had responded to new, material information during the class period. Respondents' expert agreed that evidence of a causal relationship between new, material information and changes in the price of a security is the "only" "direct test of market efficiency," and that the other factors discussed in the two district court opinions only "test characteristics that you would expect to be associated with an efficient market." Pets. C.A. Reply Br. 17-18 (quoting testimony of respondents' expert witness).

In response, petitioners' expert contended that the event study submitted by respondents' expert used subjective, scientifically unsupportable methods that ensured that his interpretation of news would lead to a conclusion of market efficiency. *See* Pets. C.A. Br. 23-24. Additionally, petitioners argued that, to the extent respondents' evidence was sufficient to show market efficiency, petitioners had

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[2] The *Cammer* court identified five factors for courts to consider: (1) the security's average weekly trading volume; (2) analyst coverage of the security; (3) the number of market makers for the security; (4) whether the issuer was entitled to file an S-3 Registration statement; and (5) "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price"—"the essence of an efficient market and the foundation for the fraud on the market theory." *Cammer*, 711 F. Supp. at 1286-87. The *Krogman* court added the following factors: "(1) the capitalization of the company; (2) the bid-ask spread of the stock; and (3) the percentage of stock not held by insiders (the 'float')." *Krogman*, 202 F.R.D. at 474.

rebutted the *Basic* presumption by showing that the alleged misrepresentations did not, in fact, impact the price of Barclays' ADS. Respondents' own expert witness agreed, testifying that the alleged misstatements had no impact on the price of Barclays' ADS. *See id.* at 37-39. But he argued that, because there was no impact when the statements were made, those statements must have maintained inflation that was already reflected in the price of Barclays' ADS at some point before the class period. *See id.* Petitioners, however, demonstrated that this "inflation" theory was incompatible with the theory of the case that was the basis for the claims that survived petitioners' motion to dismiss—*i.e.*, that the statements were material because "Barclays staked its long-term performance on restoring integrity" after the "past scandals" alleged in the complaint, and the alleged misstatements "call[ed] into question th[at] integrity." *Strougo* v. *Barclays PLC*, 105 F. Supp. 3d 330, 349 (S.D.N.Y. 2015).

The district court granted respondents' motion for class certification. In determining that the fraud-on-the-market presumption applied, the district court explicitly refused to consider whether respondents had proven that the price of Barclays' ADS reacted to new, material information, because the district court believed that such a finding was not "necessary to demonstrate efficiency" as a matter of law. App., *infra*, 83a. The district court instead relied exclusively on indirect factors such as the average weekly trading volume, the number of analysts covering the security, the number of market makers, the ability to file on SEC Form S-3, the company's capitalization, the bid-ask spread, and the stock's float. *Id.* at 92a.

The district court also rejected petitioners' argument that they had rebutted the *Basic* presumption. It held that, under *Basic*, defendants were required to "prove by a preponderance of the evidence" the "*lack of* price impact." App., *infra*, 98a-103a (emphasis in original).

5. Petitioners petitioned for interlocutory review under Federal Rule of Civil Procedure 23(f). After granting the petition, the court of appeals affirmed. App., *infra*, 56a.

a. Regarding the standard for rebutting the *Basic* presumption, the court of appeals expressly disagreed with the Eighth Circuit's holding *in IBEW Local 98 Pension Fund* v. *Best Buy Co.* that, pursuant to Federal Rule of Evidence 301, defendants have only a burden of production when rebutting the *Basic* presumption. *See* 818 F.3d at 782. Instead, the court of appeals held that, once a plaintiff meets the prerequisites of the *Basic* presumption, "the burden of persuasion . . . shifts to defendants" with respect to the element of reliance. App., *infra*, 49a.

The court of appeals acknowledged that the *Basic* presumption was controlled by Rule 301, which provides that:

> "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"

> and that "the burden of persuasion . . . remains on the party who had it originally."

Fed. R. Evid. 301 (emphasis added). But the court of appeals then reasoned that this Court's instruction that a defendant may rebut the *Basic* presumption through "any showing that severs the link between the alleged misrepresentation and the price received," which both *Basic* and *Halliburton II* included, *Basic*, 485 U.S. at 248; *Halliburton II*, 134 S. Ct. at 2415, "aligns more logically with imposing a burden of persuasion rather than a burden of production." App., *infra*, 44a. With respect to Rule 301, the court of appeals concluded that the *Basic* presumption was adopted "pursuant to federal securities laws" and thus had a "sufficient link" to those statutes to qualify for the exception in Rule 301 for cases in which "a federal statute . . . provides otherwise." *Id.* at 47a-48a.

b. As to what a plaintiff would need to show to establish market efficiency, the court of appeals noted that it previously had "declined to adopt a particular test" for market efficiency, App., *infra*, 28a, but then held that a plaintiff seeking to prove that a market is generally efficient for purposes of the fraud-on-the-market presumption need not offer "direct evidence of market efficiency." *Id.* at 39a. In doing so, it diverged from several other courts that have considered the issue and the standard practice in securities litigations—*i.e.*, requiring an event study showing a cause-and-effect relationship between price and new, material information. *See infra* p. 20. The court of appeals concluded that, because indirect factors suggested the market was efficient, respondents did not need to offer direct evidence that the price had moved in reaction to new, material information. App., *infra,* 38a-39a. Despite acknowledging that the securities of large publicly traded companies do not always trade in an efficient market, the court of appeals reasoned that, because the indirect factors are associated with large companies that are widely traded, a finding of market efficiency is "unsurprising." *Id.* For such companies, the court of appeals continued, it is incumbent upon defendants to "challenge such efficiency" once plaintiffs point to the indirect factors. *Id.* at 38a.

Petitioners subsequently filed a petition for rehearing, which the court of appeals denied without recorded dissent. App., *infra*, 111a-12a.

REASONS FOR GRANTING THE PETITION

This petition presents two significant questions regarding the operation of the *Basic* presumption of reliance that have divided the lower courts in securities class actions in the wake of the Court's decision in *Halliburton II*, which made clear that a defendant is entitled to rebut the fraud-on-the-market presumption of reliance at the class-certification stage. The Second Circuit's decision creates an express circuit conflict on one question, and deepens confusion among the federal courts on the other. Absent guidance from this Court, courts and litigants will continue to be uncertain as to what a defendant must show to rebut the presumption and what a plaintiff must show to invoke the presumption in the first place. Given how often plaintiffs in securities class actions rely on the fraud-on-the-market presumption, these questions recur frequently.

The decision below also has significant practical consequences. It lowers the bar for plaintiffs to establish the *Basic* presumption in class actions involving large, publicly traded companies, while at the same time raising the bar for defendants to rebut the presumption—particularly in the Second Circuit, where thousands of companies are located or listed on the New York Stock Exchange, NASDAQ, and other public markets. The Second Circuit's decision will accordingly create *in terrorem* pressure on large, publicly traded companies to settle almost any claim that survives a motion to dismiss—even when there is no proof that any investor relied on any alleged misstatements—because class certification will be inevitable in the Second Circuit. It is hard to overstate the practical significance of the Second Circuit's decision for securities litigation in this country. Given the disarray in the lower courts and the importance of the questions presented, this case warrants further review.

I. THIS COURT SHOULD ADDRESS THE BURDEN FOR REBUTTING THE *BASIC* PRESUMPTION

A. The Decision Below Creates A Conflict With The Eighth Circuit

1. In *Best Buy*, the Eighth Circuit applied Federal Rule of Evidence 301 to the *Basic* presumption. 818 F.3d at 782. Under that rule, "the party against

whom a presumption is directed has the burden of producing evidence to rebut the presumption" but the burden of persuasion "remains on the party who had it originally" "unless a federal statute or these rules provide otherwise." Fed. R. Evid. 301. The burden of proving reliance, like the burden for other elements of securities fraud, normally falls on the plaintiff. *See, e.g.*, *Halliburton II*, 134 S. Ct. at 2407. Accordingly, in applying Rule 301, the Eighth Circuit required the defendant only to "come forward with evidence showing a lack of price impact." *Best Buy*, 818 F.3d at 782. That is, the defendant bears only a burden of production, while the plaintiff bears the ultimate burden of persuasion.

In the decision below, the Second Circuit reached the opposite conclusion. It began from the premise that this Court adopted the *Basic* presumption "pursuant to federal securities laws." App., *infra*, 48a. The Second Circuit concluded that there was a "sufficient link to those statutes" to trigger Rule 301's exception for when "a federal statute . . . provides otherwise," and thereby to shift the burden of persuasion to defendants. *Id.*

2. The Second Circuit acknowledged *Best Buy* but dismissed the Eighth Circuit's holding as technically "dictum," because that case involved "overwhelming evidence" that the alleged misrepresentation had no impact on the price. App., *infra*, 49a n.36.

That is incorrect. The Eighth Circuit's decision in *Best Buy* established a legal rule that will plainly govern future decisions in that circuit. The Eighth

Circuit expressly invoked Rule 301 and articulated the defendant's burden as only involving a burden of production. *Best Buy*, 818 F.3d at 782. In so ruling, the Eighth Circuit resolved a question to which the parties had devoted substantial attention. *See* Appellants Br. at 26-30 (Dec. 4, 2014), Appellees Br. at 34-39 (Jan. 27, 2015), Appellants Reply Br. at 6-13 (Feb. 25, 2015), *Best Buy*, *supra* (No. 14-3178). The Eighth Circuit's rule conflicts with the Second Circuit's rule. It is therefore irrelevant whether the defendant in *Best Buy* may have been able to satisfy a higher evidentiary standard: the conflict between the Eighth Circuit's rule and the Second Circuit's rule is square, and that conflict warrants this Court's review.

B. The Court of Appeals' Holding Contravenes Federal Rule of Evidence 301

The decision below was also plainly incorrect and will create confusion among the lower courts on the proper interpretation of Rule 301.

1. The Second Circuit did not follow Rule 301, because it concluded "there is a sufficient link" between the federal securities laws and the *Basic* presumption to trigger Rule 301's exception. App., *infra*, 48a. But Rule 301 requires more. The allocation of burdens that the Rule provides applies "unless a federal statute or [the Federal Rules of Evidence] provide otherwise." Fed. R. Evid. 301 (emphasis added). The relevant provision of the federal securities laws, Section 10(b) of the Securities Exchange Act, does not contemplate the fraud-on-the-market presumption, much less "provide" an alternative al-

location of the relative burdens of proof. To disregard Rule 301 any time a court creates a presumption that applies to a claim related to a statute bends the text of the rule past breaking.

That is especially true in the case of the *Basic* fraud-on-the-market presumption, because that presumption arises in the context of an implied right of action. The private claim under Section 10(b) is "a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." *Halliburton II*, 134 S. Ct. at 2411 (quoting *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011) (citation omitted)). Accordingly, the burdens of proof for the fraud-on-the-market presumption are *three steps removed* from being "provide[d]" by a statute. There is no statute that allocates the burdens of proof. Nor is there any statute that even establishes the presumption; the presumption is a judicial creation of this Court in *Basic*. And there is not even a statute that creates the civil cause of action; that too is a judicial creation. *See Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

Indeed, this Court has cautioned that "the § 10(b) private right should not be extended beyond its present boundaries." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008); *see Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1085 (1991). In the years since *Basic* was decided, this Court has repeatedly emphasized that private rights of action must be constrained by the language of the statutes enacted by Congress. *See, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-88 (2001) (holding that, without "[s]tatutory intent" expressed through "'rights-creating' language," "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

The Second Circuit's observation that the *Basic* presumption is a "substantive doctrine of federal securities-fraud law" that is "designed to implement a judicially created cause of action" is beside the point. App., *infra*, 49a. Section 10(b) does not codify the *Basic* presumption, let alone an exception to the operation of the presumption under Rule 301. Accordingly, no such exception can be implied, regardless of whether such an exception would further the purpose of the statute. *See, e.g.*, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

2. The Second Circuit also erred in its reading of language from *Halliburton II*. There, the Court commented that defendants could rebut the *Basic* presumption through "*any showing* that severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff." 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248) (emphasis added; alterations omitted). The Second Circuit interpreted that language to support placing the burden of persuasion on defendants.

But that language supports the opposite conclusion. One would ordinarily think a party obligated to make merely "any showing" bears only a burden of production, not the ultimate burden of persuasion. Indeed, this Court has recognized precisely that distinction. *See, e.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S.

317, 322 (1986) (holding that summary judgment is appropriate "against a party who fails to make a *showing* sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of *proof* at trial") (emphases added). Certainly, that is what the *Basic* Court intended when it used that phrase, as it had cited Rule 301 earlier in its analysis to support the proposition that "presumptions are also useful devices for allocating the burdens of proof between parties." 485 U.S. at 245.

The Second Circuit's decision also mistook *Halliburton II*'s reference to "defendants' 'direct, more salient evidence'" as a suggestion that defendants must carry the burden of persuasion. App., *infra*, 45a (quoting *Halliburton II*, 134 S. Ct. at 2415-16). *Halliburton II* merely recognized that "an indirect proxy should not preclude direct evidence when such evidence is available," because direct evidence is "more salient." 134 S. Ct. at 2415-16. Where, as here, such direct evidence has been produced, App., *infra*, 18a-19a, the presumption of price impact is rebutted, and the ultimate burden remains with plaintiffs to prove by a preponderance of the evidence that the price was actually affected by the alleged misstatements. *See St. Mary's Honor Ctr* v. *Hicks*, 509 U.S. 502, 507 (1993) (observing that presumptions under federal law generally only "shift[] the burden of *production* to the defendant") (emphasis in original).

3. The court of appeals' decision has substantial practical consequences, both for securities litigation and beyond. Placement of the burden of persuasion is crucially important to the proper operation of the

Basic presumption. Whereas a correct understanding of Rule 301 would require plaintiffs to prove that the alleged misstatements had some impact on the price of the security, the Second Circuit's holding requires defendants to prove a negative—that the alleged misstatement had no impact at all. By placing the burden of persuasion with defendants, the Second Circuit greatly weights the outcome of the rebuttal inquiry in plaintiffs' favor before the inquiry even begins. This case illustrates the point. The only theory respondents' expert could identify as to how the alleged misstatements affected the price of the stock contradicted respondents' theory of the case, and yet the class was still certified. *See supra* pp. 7-8.

Moreover, beyond the specific context of the *Basic* presumption, the Second Circuit's "sufficient link" test for determining whether the exception in Rule 301 is triggered will work mischief across the law. In cases involving other evidentiary presumptions, the allocation of the burdens will depend on an amorphous inquiry into the relationship between the presumption at issue and the pertinent statutory regime. Such inquiries would be counterproductive and lead to inconsistent results. This Court should review, and reverse, the court of appeals' seriously flawed holding on the burden issue.

II. THIS COURT SHOULD CLARIFY THE PROOF NECESSARY TO INVOKE THE FRAUD-ON-THE-MARKET PRESUMPTION

A. The Lower Courts Are Confused Regarding The Type of Proof Necessary To Invoke The Fraud-on-the-Market Presumption

In *Basic*, this Court held that "reliance is an element of a Rule 10b-5 cause of action," but endorsed allowing plaintiffs to invoke a presumption of reliance, "created by the fraud-on-the-market theory and subject to rebuttal." 485 U.S. at 243, 245. The "fundamental premise" underlying the presumption is that "an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." *Halliburton II*, 134 S. Ct. at 2414. The *Basic* presumption, in other words, is an "indirect proxy" for establishing price impact of the alleged misstatements. *Id.* at 2415. Absent the premise that the alleged misrepresentation is reflected in the price of the security, the presumption "collapse[s]." *Id.* at 2414.

In order to establish the presumption, a plaintiff bears the burden of "prov[ing]" that the price of the security generally incorporates "all public, material information," just as the plaintiff bears the burden of demonstrating that the other elements of the presumption exist. *Id.* at 2408, 2413. Indeed, a plaintiff's proof that the price of the subject security *generally* responded to new, material information is precisely what allows the inference that the *specific* material misrepresentations alleged in each case also affected the stock price. *Id.* at 2414.

In *Halliburton II*, this Court presumed that securities plaintiffs provide direct evidence of market efficiency by showing that the market reacts to new, material information, typically through econometric tools called "event studies." 134 S. Ct. at 2415; *see also, e.g.*, *Best Buy*, 818 F.3d at 779-82; *Schleicher* v. *Wendt*, 618 F.3d 679, 684 (7th Cir. 2010). Consistent with that view, the First and Fifth Circuits have indicated that direct evidence is necessary to show that the market for a given security is, in fact, efficient for purposes of the fraud-on-the-market presumption. *See Xcelera.com*, 430 F.3d at 512 (stating that, "[i]n the absence of such a [cause-and-effect] relationship, there is little assurance that information is being absorbed into the market and reflected in its price"); *Unger*, 401 F.3d at 324 (noting that "causal connection . . . goes to the heart of the 'fraud on the market' theory"); *see also Best Buy*, 818 F.3d at 779-82 (considering only cause-and-effect empirical evidence in assessing market efficiency); *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174, 182 (S.D.N.Y. 2012) (calling a cause-and-effect relationship the "*sine qua non*" of the *Basic* presumption).

In the decision below, the Second Circuit held that such direct evidence is unnecessary. *See* App., *infra*, 39a. The Eleventh Circuit has similarly held that direct proof is not an "unwavering evidentiary requirement." *Regions*, 762 F.3d at 1256. Those courts allow a plaintiff to establish the fraud-on-the-market presumption through various indirect factors enumerated in *Cammer*, a 1989 decision from the

District of New Jersey, *see* 711 F. Supp. 1264, and additional factors enumerated in *Krogman*, a 2001 decision from the Northern District of Texas, *see* 202 F.R.D. 467. *See supra* n.2.[3]

The resulting confusion among the lower courts is significant. District courts require guidance regarding whether (and, if so, under what circumstances) indirect indicators that a market may be efficient can substitute for a lack of direct evidence that the market is efficient.

B. The Court of Appeals' Decision Is Incorrect

The decision below also warrants review because it is incorrect. Although this Court made clear in *Halliburton II* that the *Basic* presumption is meant to substitute for proof of a plaintiff's "direct reliance on a misrepresentation," 134 S. Ct. at 2407-08, the Second Circuit's decision eliminates the need for a plaintiff to prove that the market, in practice, promptly incorporated new, material information. That, however, is what many courts applying *Basic*

[3] Some courts are willing to consider still additional factors. *See, e.g.*, *Petrie* v. *Elec. Game Card, Inc.*, 308 F.R.D. 336, 356-58 (C.D. Cal. 2015) (considering a stock's "autocorrelation," "short interest," and the number of institutional investors holding the security); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 18 (1st Cir. 2005) (noting that the district court had looked only at "(1) the involvement of market professionals, (2) the degree to and fluidity with which information is disseminated, and (3) whether information affected stock market prices," and stating that these factors were "relevant" but not "exhaustive").

and its progeny have understood to be the essence of the fraud-on-the-market presumption. *See, e.g.*, *Xcelera.com*, 430 F.3d at 512; *Unger*, 401 F.3d at 324-25.

Under the reasoning of the decision below, a plaintiff is entitled to the *Basic* presumption—and a court can certify a class—as long as several "indirect factors" that are conducive to market efficiency are present. *See supra* pp. 10-11. Because those factors are common to almost all large, publicly traded companies, the decision below eviscerates the reliance requirement and creates a "presumption squared"—a presumption in favor of applying the *Basic* presumption—against those companies. Moreover, because the decision below discounts the value of direct evidence of efficiency, it renders a defendant's rebuttal right all but a nullity. In other words, the decision below "radically alter[s] the required showing for the reliance element of the Rule 10b-5 cause of action"—precisely what this Court warned against in *Halliburton II*. *See* 134 S. Ct. at 2414.

1. The Second Circuit's decision undoes the careful balance this Court struck in *Basic*. *Basic* allowed plaintiffs to presume the normally individualized question of reliance (and thus to treat that question as a common one for class-certification purposes), but assigned plaintiffs the "burden [of] proving the prerequisites for invoking the presumption," including the prerequisite of market efficiency. *Id.* at 2408, 2412. Despite acknowledging that direct evidence of a cause-and-effect relationship between new, material information and the security's price "has been considered the most important" evidence of efficien-

cy, the Second Circuit held that plaintiffs need only present such evidence in cases involving large companies where "the other four *Cammer* factors (and/or the *Krogman* factors) are less compelling in showing an efficient market." App., *infra*, 36a. By eschewing any need to show directly that the market for a defendant's securities was efficient, the decision below allows an investor to invoke the fraud-on-the-market presumption without any showing that the presumption's "fundamental premise"—that new, material information, including an alleged misrepresentation, is "reflected in the market price at the time of [the] transaction"—actually holds true for the particular security at issue. *Halliburton II*, 134 S. Ct. at 2414. At the same time, the Second Circuit's decision will place on many issuers the burden of *disproving* market efficiency—the precise opposite of the proper placement of the burden under this Court's precedents. *See id.* at 2412.[4]

In so doing, the decision below decouples the fraud-on-the-market presumption from the theory underlying it. The whole reason that market efficiency justifies the presumption of reliance is that, in an efficient market, "all publicly available information is rapidly incorporated into, and thus transmitted to investors through, the market price."

[4] That shift in the burden is especially troubling in light of recent Second Circuit authority calling the utility of event studies into question. *See In re Petrobras Sec.*, 862 F.3d 250, 278 (2d Cir. 2017). If a defendant cannot refute indirect evidence of efficiency with direct evidence of cause and effect (or lack thereof), the presumption will indeed become "largely irrebuttable." *Halliburton II*, 134 S. Ct. at 2424 (Thomas, J., concurring in judgment).

Amgen Inc. v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). Although *Halliburton II* observed that the *Basic* presumption is not dependent on "the precise *degree* to which stock prices accurately reflect public information," *Halliburton II*, 134 S. Ct. at 2409-10 (emphasis in original), it never suggested that the presumption can be invoked without *any* showing that the relevant market *actually* reflects material public information. Yet that is precisely what the Second Circuit's decision allows.

2. The Second Circuit's approach is particularly flawed because the indirect factors that it invoked do not show that a market is efficient. As numerous economists have observed, the "indirect" factors do not test for efficiency or help distinguish an efficient market from an inefficient one.[5] Rather, those fac-

[5] *See* Alon Brav & J.B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias*, 93 Wash. U. L. Rev. 583, 601 n.39 (2015); Paul A. Ferrillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 128 (2004) (calling the indirect *Cammer* factors "imprecise" and noting that they "certainly do not show or prove market efficiency" or "even go to the market behavior of a stock"); Alon Brav & J.B. Heaton, *Market Indeterminacy*, 28 J. Corp. L. 517, 535-36 (2003) (noting that these factors are not a "reliable means [of] distinguishing efficient from inefficient prices"); Brad M. Barber, et al., *The Fraud-on-the-Market Theory and the Indicators of Common Stocks' Efficiency*, 19 J. Corp. L. 285, 307, 310 (1994) (noting that many of the *Cammer* factors "either fail the significance test or yield results counter to our expectations," and that "the number of market makers and institutional holdings do not [even] marginally contribute to distinguishing efficient from inefficient firms").

tors merely test the size of the company and the liquidity of the market in which the company's securities trade. Indeed, some commentators have observed that securities that have satisfied *Cammer*'s indirect factors "traded in markets that were clearly inefficient over the relevant analysis periods." *See* Mukesh Bajaj, et al., *Assessing Market Efficiency for Reliance on the Fraud-on-the-Market Doctrine After Wal-Mart and Amgen*, 26 Law & Econ. of Class Actions 161,190 (2014). Other commentators have noted that the indirect factors are interrelated and cannot establish the efficiency of a market. *See* Barber, *Fraud-on-the-Market Theory*, *supra* n.5, at 293.

In fact, virtually every large company that trades on a national exchange has characteristics that match those factors. Geoffrey C. Rapp, *Proving Markets Inefficient: The Variability of Federal Court Decisions on Market Efficiency in Cammer v. Bloom and Its Progeny*, 10 U. Miami Bus. L. Rev. 303, 322 (2002) (noting that "the *Cammer* factors . . . are clearly biased towards suggesting efficiency for large companies traded on major national exchanges"). Such large companies have "an average weekly trading volume many times higher than the volume found to create a 'strong presumption' of market efficiency in *Cammer*" and are "closely followed by many analysts." App., *infra*, 38a. But the stock of such companies does not always trade in an efficient market, as the court of appeals recognized. *See id.* at 39a n.29. For example, in times of sudden economic downturn, the market for the stock of such companies may become inefficient.

3. This case constitutes an excellent vehicle for this Court to clarify the standard for proving market efficiency under *Basic* and *Halliburton II*. This case cleanly presents the question of whether direct evidence of market efficiency is necessary to establish the *Basic* presumption. The district court explicitly refused to consider direct evidence in determining that the market for Barclays' ADS was efficient, and the Second Circuit held that no showing of direct evidence was necessary as long as the other, indirect factors are present. App., *infra*, 36a. This Court can thus rule without weighing the competing evidence that parties' experts typically adduce in contesting the applicability of the *Basic* presumption.

Furthermore, questions with respect to the *Basic* presumption are rarely appealed, because most securities class actions are settled after the class-certification decision, and district court orders on class certification can be reviewed only on an interlocutory basis if a court of appeals grants discretionary review under Federal Rule of Civil Procedure 23(f). This case presents a rare chance for the Court to provide guidance to the lower courts by delineating a clear standard for courts to apply in assessing whether a plaintiff has met his burden to prove market efficiency and thus to benefit from the *Basic* presumption of reliance.

III. THE DECISION BELOW DRASTICALLY LOWERS THE REQUIREMENTS FOR CLASS CERTIFICATION IN CASES INVOLVING COMPANIES LISTED ON NATIONAL EXCHANGES AND WILL UNDERMINE THE U.S. CAPITAL MARKETS

This Court should also review the decision below because, by the admission of respondents' counsel, the decision marks a "pivotal point" in which the Second Circuit has created a class-certification regime that is "far easier" for plaintiffs. Marc I. Gross & Jeremy A. Lieberman, *Back to Basic(s): Common Sense Trumps Econometrics*, N.Y.L.J. (Jan. 8, 2018).[6] The decision below allows plaintiffs to invoke the *Basic* presumption with little more than proof that the defendant's stock traded on a national exchange. Defendants seeking to rebut the presumption, on the other hand, must prove a complete lack of price impact by a preponderance of the evidence. Accordingly, it is unclear in the Second Circuit whether defendants in most securities cases will have any realistic opportunity to meet their new burden of persuasion in rebutting *Basic*.

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[6] *See* Press Release, Pomerantz LLP, *Pomerantz Achieves Significant Victory in Securities Class Action Against Barclays PLC* (Nov. 6, 2017), *available at* https://globenewswire.com/news-release/2017/11/06/1175433/0/en/Pomerantz-Achieves-Significant-Victory-in-Securities-Class-Action-Against-Barclays-PLC-BCS.html (summarizing decision as "providing a far easier and more predictable path for securities class actions going forward").

Under the Second Circuit's standard, class certification will be all but a formality in securities-fraud cases against companies listed on a national exchange. Moreover, the decision below will lead to substantially inflated damages coming out of class certification, because plaintiffs will not be required to show why limitations that exist on their theory of price impact—and thus the supposed loss plaintiffs suffered—are not outweighed by defendants' evidence that no such impact exists. The result is an inevitable and deleterious effect on U.S. capital markets.

1. The facts of this case underscore how low the court of appeals' opinion sets the bar. The district court allowed respondents to presume reliance based on the *Basic* presumption without considering any direct evidence that the price of Barclays securities reacted to new, material information. App., *infra*, 92a.

At the same time, the district court held petitioners to an impossible standard for rebutting the *Basic* presumption. Respondents allege that petitioners made false statements regarding the operation of Barclays' dark pool, LX, and that those alleged misstatements were revealed when the New York Attorney General filed suit against Barclays concerning the marketing of LX to clients and potential clients. Petitioners presented evidence—with which respondents' expert agreed—that the alleged misstatements had no impact on the price of Barclays' ADS when they were made. *See supra* p. 8. Petitioners also presented evidence that the decline in the price of Barclays' ADS was the result of investor concerns about the risk of a regulatory lawsuit and resulting fines, as opposed to alleged concerns about Barclays' financials or the LX business. *See* Pets. C.A. Br. at 40-41.

The district court nevertheless held that petitioners had not "met their burden of proving *lack of* price impact," App., *infra*, 103a (emphasis in original), because they had not proven that *no* portion of the price decline on the alleged corrective disclosure date was caused by the alleged fraud. To rebut the *Basic* presumption and prevent class certification, in other words, petitioners would have needed to prove a (virtually impossible) negative.

2. Accordingly, under the Second Circuit's decision, courts will have little choice but to find the *Basic* presumption applicable to the securities of large companies, making class certification in such cases all but a foregone conclusion. Such a rule, especially in the Second Circuit, will undermine the U.S. capital markets by creating *in terrorem* pressure on defendants to settle even frivolous claims where there is no proof that any investor relied on any misstatements. *See Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005).

The Second Circuit has long been recognized as the "'Mother Court' of securities law." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 276 (2010) (Stevens, J., concurring). This status stems, no doubt, from the Second Circuit being home to the nation's largest securities exchanges. The New York Stock Exchange alone lists more than 2,400 companies representing a total market capitalization of

$27 trillion. Jeffrey C. Sprecher, *2016 Letter to Shareholders* (Mar. 27, 2017), *available at* http://ir.theice.com/annual-and-quarterly-reports/2016-letter-to-shareholders. As a result, the Second Circuit considers as many or more securities class action filings on average than any other court of appeals, and those actions allege greater average losses than in any other circuit. *See* Cornerstone Research, *Securities Class Action Filings: 2016 Year in Review* at 32, 39 (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR.

Accordingly, the "far easier" standard created by the decision below will have further reaching consequences than other decisions. The greater likelihood of cases being certified, and the resulting *in terrorem* pressure to settle, creates a disincentive for corporations to list stock on the exchanges found in New York that are the heart of U.S. capital markets.

None of that is necessary. This Court should grant the petition, and resolve the uncertainty that is affecting participants in the capital markets.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 26, 2018