No. 17-1209

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

BRIEF FOR FORMER SEC OFFICIALS AND LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are a group of former Commissioners and officials of the United States Securities and Exchange Commission as well as law professors whose scholarship and teaching focuses on the federal securities laws. Amici have devoted substantial parts of their

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date. The parties' blanket consent to the filing of amicus briefs is noted on the docket.

professional careers to drafting, implementing, or studying the federal securities laws, including how those laws and rules should be interpreted to ensure the protection of investors and the promotion of efficiency, competition, and capital formation. The Second Circuit's decision in this case threatens to undermine many of those purposes.[2]

In alphabetical order, amici curiae are:

- The Honorable Paul S. Atkins, who served as Commissioner of the SEC from 2002 to 2008;
- Brian G. Cartwright, who served as General Counsel of the SEC from 2006 to 2009;
- Elizabeth Cosenza, who is Associate Professor and Area Chair, Law and Ethics, at Fordham University; and
- The Honorable Joseph A. Grundfest, who is the William A. Franke Professor of Law and Business at Stanford Law School, and served as a Commissioner of the SEC from 1985 to 1990.

SUMMARY OF ARGUMENT

In *Halliburton Co.* v. *Erica P. John Fund, Inc.* (*Halliburton II*), 134 S. Ct. 2398 (2014), the Court reaffirmed the holding of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)—that the element of reliance in a securities

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[2] While not every individual amicus may endorse every statement made in this brief, the brief nonetheless reflects amici's consensus that the Second Circuit erred in interpreting the standard set out in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), for rebutting the fraud-on-the-market presumption, making the presumption irrebuttable in practice in some of the weakest cases, where plaintiffs are unable to identify a price impact and instead allege "price maintenance."

fraud class action may be proven through the fraud-on-the-market doctrine. But the Court stressed that defendants must be given a meaningful opportunity "to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Halliburton II*, 134 S. Ct. at 2414. The Second Circuit's decision in this case threatens to render the Court's decision in *Halliburton II* a nullity by making the *Basic* presumption irrebuttable in practice.

First, the court of appeals erred by requiring Defendants to satisfy a "preponderance of the evidence" standard to rebut the *Basic* presumption of reliance. Pet. App. 40a. Federal Rule of Evidence 301, which is cited in *Basic* itself, makes clear that the burden of a party challenging the application of a presumption is to "*produc[e]* evidence to rebut the presumption … [b]ut this rule does not shift the burden of *persuasion*, which remains on the party who had it originally." Fed. R. Evid. 301 (emphasis added). This Court's discussion of the *Basic* presumption in both *Basic* and *Halliburton II* also makes clear that a defendant can rebut the presumption with "'*[a]ny* showing'" that would "'sever[] the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff'"; it need not *disprove* that link. *Halliburton II*, 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248) (emphasis added; ellipsis and first brackets in original). Furthermore, the Second Circuit's decision runs contrary to the requirements of Federal Rule of Civil Procedure 23(b)(3), under which a plaintiff bears the burden of establishing each prerequisite for class certification—including that common issues predominate over questions affecting only individual class members. *See id.* at 2412.

Here, Defendants presented evidence—including the testimony of Plaintiffs' own expert—showing that the alleged misstatements did not impact the price of Barclays' American Depositary Shares ("ADS"), which under Rule 301 should have shifted the burden of persuasion back to Plaintiffs. The Second Circuit, however, held Defendants to a more demanding requirement: to "disprov[e]" price impact by a "preponderance of the evidence." Pet. App. 40a. In so doing, the court misapplied *Basic*, *Halliburton II*, and Rule 301, and as a result improperly determined that Plaintiffs satisfied Rule 23's predominance requirement for class certification.

Second, the court of appeals erred by disregarding evidence rebutting Plaintiffs' so-called "price maintenance" theory, making it effectively impossible for Defendants to rebut the presumption of reliance. *See* Pet. App. 98a-99a. The event study prepared by Plaintiffs' own expert found no price impact on Barclays' ADS on any of the dates of Defendants' alleged misstatements in this case. Pet. App. 98a. Yet the Second Circuit dismissed that evidence because, under Plaintiffs' speculative "price maintenance theory," "statements that merely maintain inflation already extant in a company's stock price, but do not add to that inflation, nonetheless affect a company's stock price." Pet. App. 50a-51a (quoting *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 256 (2d Cir. 2016)). Under *Halliburton II*, however, such a speculative assumption of price impact through "price maintenance" cannot negate direct evidence of no price impact at the time alleged misstatements were made.

ARGUMENT

I. *HALLIBURTON II* REAFFIRMED THAT DEFENDANTS MUST BE PERMITTED TO REBUT THE *BASIC* PRESUMPTION AT THE CLASS CERTIFICATION STAGE

In *Halliburton II*, the Court reaffirmed the fraud-on-the market doctrine, which at the time was under attack from the defendants' bar. Scholars and commentators were concerned that, by making it easier for plaintiffs to obtain class certification in securities fraud cases, the *Basic* presumption had "generated a system of settlements that correspond[ed] to the threat of certification, not merit." Pet. Br. 40, *Halliburton II*, No. 13-317 (U.S. Dec. 30, 2013). And while the Court upheld *Basic*, it also reaffirmed that defendants can "defeat the presumption at the class certification stage." *Halliburton II*, 134 S. Ct. at 2414. In addition to "maintain[ing] the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23," this holding also ensures that plaintiffs cannot obtain class certification in the face of evidence "showing that the alleged misrepresentation did not actually affect the stock's market price." *Id.* at 2416-2417.

As *Halliburton II* noted, "*Basic* itself 'made clear that the presumption was just that'"—a presumption—"'and could be rebutted by appropriate evidence.'" 134 S. Ct. at 2414 (quoting *Erica P. John Fund, Inc.* v. *Halliburton Co.* (*Halliburton I*), 563 U.S. 804, 811 (2011)). Indeed, *Basic* also made clear that the evidentiary burden for rebutting the presumption was modest, stating that "*[a]ny* showing that severs the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff … will be sufficient to rebut the presumption of reliance." 485 U.S. at 248 (emphasis added).

Halliburton II went a step further than *Basic*, holding that a showing of "price impact"—*i.e.*, that the alleged misrepresentation actually affected the stock's price—is "an essential precondition for any Rule 10b-5 class action." 134 S. Ct. at 2416. As the Court explained, "[w]hile *Basic* allows plaintiffs to establish that precondition indirectly" through a presumption, "it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.*

Halliburton II further recognized that proof of price impact has "everything to do with the issue of predominance at the class certification stage." 134 S. Ct. at 2416. Absent a showing of price impact, a class may not invoke *Basic*'s presumption of reliance. *Id.* at 2415-2416. "And without the presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action[.]" *Id.* at 2416. Accordingly, "to maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23," *Halliburton II* held that "defendants *must* be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Id.* at 2417 (emphasis added).

Moreover, *Halliburton II* noted that there was no "dispute that defendants may introduce price impact evidence at the class certification stage … for the purpose of countering a plaintiff's showing of market efficiency." 134 S. Ct. at 2414-2415. This evidence most frequently comes in the form of "event studies," "regression analyses that seek to show that the market price of the defendant's stock tends to respond [or not] to pertinent

publicly reported events." *Id.* at 2415. The Court recognized that it made "no sense"—and could "lead to bizarre results"—if that same evidence could not also be introduced to "rebut[] the presumption altogether" by showing that the alleged misstatements had no price impact. *Id.* The Court illustrated the absurdity of such a result with an example:

> Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed.
>
> Such a result is inconsistent with *Basic*'s own logic.

Id.

Thus, the Court in *Halliburton II* made clear that defendants may use event studies to establish that "the

alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." 134 S. Ct. at 2416. An event study that addresses "the specific misrepresentation asserted by the plaintiffs" that "shows no price impact with respect to the specific representation challenged in the suit" is evidence that "the fraud-on-the-market theory does not apply," "common reliance … cannot be presumed," and the lawsuit should not "be certified and proceed as a class action," "with all that entails." *Id.* at 2415. Put another way, under *Halliburton II*, "evidence of no 'front-end' price impact rebut[s] the *Basic* presumption," because it constitutes "direct evidence … that sever[s] any link between the alleged … misrepresentations and the stock price at which plaintiffs purchased." *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775, 782-783 (8th Cir. 2016).

II. THE SECOND CIRCUIT'S DECISION THREATENS TO EFFECTIVELY NULLIFY *HALLIBURTON II*

This case raises crucial questions concerning whether *Basic*'s presumption will truly be rebuttable at the class certification stage—as *Halliburton II* held it must be. In this case, Defendants did precisely what this Court held would establish a lack of price impact: Defendants pointed out—and Plaintiffs conceded—that Plaintiffs' expert's event study showed that none of Barclays' alleged misstatements affected its stock price on the days those statements were made. Pet. App. 20a, 50a-51a. That is, Plaintiffs' event study "show[ed] no price impact with respect to the specific misrepresentation[s] challenged in the suit." *Halliburton II*, 134 S. Ct. at 2415. The Second Circuit nonetheless affirmed the district court's class certification order, employing

reasoning that, if accepted, would effectively nullify this Court's decision in *Halliburton II*.

The court of appeals erred in two fundamental ways. First, the court imposed a far more demanding standard for rebutting the *Basic* presumption than appropriate. Second, although Plaintiffs were unable to show that any of the alleged misstatements moved the price of Barclays' stock, the court of appeals allowed Plaintiffs to plead a so-called "price maintenance" theory of price impact and disregarded Defendants' compelling evidence rebutting it. Taken together, the Second Circuit's rulings make it impossible in practice for defendants to rebut the *Basic* presumption at the class certification stage, contrary to *Halliburton II*.

A. The Second Circuit Applied The Wrong Burden Of Proof

The Second Circuit held that Defendants "must rebut the *Basic* presumption by disproving reliance by a preponderance of the evidence." Pet. App. 40a. The court further rejected Defendants' evidence "that the price of Barclays' ADS did not move in a statistically significant manner on the dates that the purported misstatements … were made," because that evidence did not foreclose Plaintiffs' price maintenance theory. Pet. App. 50a. Thus, the court of appeals required Defendants to prove conclusively that fraud was not the cause of the price drop.

Under Federal Rule of Evidence 301, however, "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." Fed. R. Evid. 301. Accordingly, after Plaintiffs established

the prerequisites for the *Basic* presumption, Defendants had only to "produc[e] evidence to rebut the presumption." *Id.* "[T]he burden of persuasion" to establish that the market price of Barclays' ADS reflected the alleged misstatements—and thus that reliance can be established on a class-wide basis—"remain[ed] on the party who had it originally": Plaintiffs. *Id.*

Under Rule 301, a "presumption" is "an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts." Wright et al., *Federal Practice and Procedure* § 5124, at 489 (2d ed. 2005). However, a presumption "drops from the case" upon the proffer of contrary evidence. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 254-255 & n.10 (1981). In particular, a presumption is rebutted when the party opposing it introduces evidence that "raises a genuine issue of fact" or that is "legally sufficient to justify a judgment for" the party against whom the presumption runs. *Id.* "[T]he quantum of evidence needed to 'burst' [a] presumption's 'bubble' under Rule 301 is … minimal, given that the presumption's only effect is to require the party contesting it to produce enough evidence substantiating the presumed fact's absence to withstand a motion for summary judgment or judgment as a matter of law on the issue." *Cappuccio* v. *Prime Capital Funding LLC*, 649 F.3d 180, 189 (3d Cir. 2011) (internal quotation marks and brackets omitted). "[T]he ultimate risk of nonpersuasion must remain squarely on [the party invoking the presumption] in accordance with established principles governing civil trials." *Ruggiero* v. *Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991). In other words, a presumption in favor of the plaintiff places upon the defendant a "burden of production," but "[t]he plaintiff retains the burden of persuasion." *Burdine*, 450 U.S. at 256.

Rule 301's burden-shifting scheme applies in all civil cases, "unless a federal statute or [the Federal Rules of Evidence] provide otherwise." Fed. R. Evid. 301. In rejecting the burden-shifting scheme of Rule 301, the Second Circuit reasoned that "[t]he *Basic* presumption was adopted by the Supreme Court pursuant to federal securities laws" and, "[t]hus, there is a sufficient link to those statutes to meet Rule 301's statutory element requirement." Pet. App. 48a. But Rule 301 does not say that its scheme does not apply to presumptions founded in statutes. Rule 301 is applicable "unless a federal statute … provide[s] otherwise." Fed. R. Evid. 301; *cf.* 15 U.S.C. § 77f(a) (creating presumption that signature was written by authority of the person whose name is signed, and placing "burden of proof … upon the party denying the same"); *Cappuccio*, 649 F.3d at 189-190 (burden-shifting scheme of Rule 301 governs a presumption created by the Truth in Lending Act because there is "no language in [the Truth in Lending Act] or any other act that would demonstrate Congress's intent to create a stronger presumption"). The federal securities laws do not provide otherwise.

Basic and *Halliburton II* also demonstrate the applicability of Rule 301. In endorsing the fraud-on-the-market presumption, *Basic* specifically cites Rule 301 in explaining that presumptions allocate burdens of proof between parties. 485 U.S. at 245.[3] And both

[3] The Second Circuit dismissed *Basic*'s citation to Rule 301, saying that this Court "relied on Rule 301 merely for the proposition that 'presumptions are … useful devices for allocating the burdens of proof between parties.'" Pet. App. 49a n.35 (alteration in the original). But it would be odd, indeed, for the Court to rely on Rule 301 for the proposition that presumptions allocate burdens of proof between parties, while intending to allocate burdens directly contrary to those established by Rule 301.

Basic and *Halliburton II* describe the burden of rebutting the presumption in terms consistent with Rule 301, recognizing that "'*[a]ny* showing that severs the link'" between the alleged misrepresentation and the price paid by the plaintiff is "'sufficient to rebut the presumption of reliance.'" *Halliburton II*, 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248) (emphasis added; brackets in original). Thus, contrary to the Second Circuit's holding here, Defendants were not required under *Basic* and Rule 301 to rebut the fraud-on-the-market presumption "by a preponderance of the evidence." Pet. App. 40a. In effect, the court of appeals improperly shifted the ultimate burden of persuasion to Defendants.

The Second Circuit's approach also runs afoul of the requirements of Federal Rule of Civil Procedure 23. This Court has made clear that plaintiffs "must actually prove—not simply plead—that their proposed class satisfies each requirement of [that rule]." *Halliburton II*, 134 S. Ct. at 2412 (citing *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551-2552 (2011)); *see also Pennsylvania Pub. Sch. Emps.' Ret. Sys.* v. *Morgan Stanley & Co.*, 772 F.3d 111, 119 (2d Cir. 2014) ("The party seeking class certification must establish the Fed. R. Civ. P. 23 requirements by a preponderance of the evidence."). In particular, the Court has made clear that the plaintiff bears the burden of establishing the Rule 23 requirements when alleging a violation of the federal securities laws. *See Halliburton II*, 134 S. Ct. at 2412 ("The *Basic* presumption does not relieve plaintiffs of the burden of proving—before class certification—that [the predominance requirement of Rule 23(b)(3)] is met."). The Second Circuit's approach, in contrast, places the burden of proving predominance upon the plaintiff only until it establishes the prerequi-

sites for the *Basic* presumption, at which point the burden shifts to the defendant to prove that common questions of fact do not predominate. That approach is inconsistent with Rule 23 and how that rule was applied in *Halliburton* and *Basic*.

There is every reason to believe that the Second Circuit's error affected the ultimate outcome of Plaintiffs' class certification motion. Under a proper application of Federal Rule of Evidence 301 and Federal Rule of Civil Procedure 23, the burden of persuasion here should have shifted back to Plaintiffs. As the Eighth Circuit's recent opinion in *Best Buy* explained, "when plaintiffs present[] a *prima facie* case that the *Basic* presumption applies to their claims, defendants ha[ve] the burden to come forward with evidence showing a lack of price impact." 818 F.3d at 782 (citing Fed. R. Evid. 301). The Defendants certainly did that here, and once they did so, Rule 301 and Rule 23 required that Plaintiffs establish Rule 23's predominance requirement—including the requirement of price impact—by a preponderance of the evidence. Plaintiffs did not satisfy that standard; as even the district court acknowledged, their evidence of "price impact" was neither "strong" nor "compelling." Pet. App. 103a.

B. The Second Circuit's Decision Disregarded Evidence Challenging Plaintiffs' Speculative "Price Maintenance" Theory

The Second Circuit and district court also disregarded Defendants' extensive evidence of a lack of price impact in light of Plaintiffs' so-called "price maintenance" theory, under which Plaintiffs speculated that Defendants' alleged misstatements somehow "maintained" an "inflated" stock price. The Second Circuit's deference to that speculative theory led it to

improperly neglect Defendants' evidence of a lack of price impact, making it effectively impossible for Defendants to rebut the presumption of reliance at the class certification stage.

First, the Second Circuit treated as irrelevant the fact that Plaintiffs' own expert's event study found that "the price of Barclays' ADS did not move in a statistically significant manner on the dates that the purported misstatements … were made." Pet. App. 50a. The court's dismissal of that evidence is contrary to this Court's precedent, which holds that the presumption of reliance is rebutted precisely when it is shown that "the misrepresentation in fact did not lead to a distortion of price." *Basic*, 485 U.S. at 248. And this Court has held that an event study can constitute "direct [and] salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price" and thus demonstrate "that the *Basic* presumption does not apply." *Halliburton II*, 134 S. Ct. at 2416.

The Second Circuit dismissed this evidence because Plaintiffs invoked a "price maintenance theory." Pet. App. 50a-51a. Under this convenient supposition, which this Court has never endorsed, plaintiffs can allege that purported misstatements "affect[ed] a company's stock price" by "merely maintain[ing] inflation already extant in a company's stock price," even though they "d[id] not add to that inflation." Pet. App. 50a-51a (quoting *Vivendi*, 838 F.3d at 256). If a stock's price drops at the end of a class period, a court must *assume* a price impact. The result is a Catch-22 for defendants: It means that whenever a plaintiff speculates that a misstatement "maintained" an "inflated" stock price, a court must ignore the most direct evidence of no price impact—that there was no increase in a stock price "on

the dates that the purported misstatements … were made." Pet. App. 50a.

Courts have properly recognized that "price maintenance" theories like the one advanced here are particularly prone to being "speculative and hypothetical." *In re Northern Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000); *see also In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008) (rejecting "price maintenance theory" that was "based not on facts but on speculation"). Under *Halliburton II*, such a speculative assumption of price impact through "price maintenance" cannot negate direct evidence of no price impact at the time alleged misstatements were made.

Second, the court of appeals improperly rejected evidence Defendants presented to rebut Plaintiffs' "price maintenance" theory. For example, the court disregarded Defendants' expert testimony demonstrating that the June 26, 2014 price decline was likely due to investor concerns regarding regulatory scrutiny and litigation risk. Courts have recognized that in supposed "price maintenance" cases it is essential to "rule out causes for that maintenance other than the defendants' purported failure to disclose certain information." *Northern Telecom*, 116 F. Supp. 2d at 461. Here, however, Plaintiffs failed to do so, and their expert admitted that news of a regulatory investigation can, on its own, cause a stock's price to decline. C.A.J.A. 660-661. Indeed, Plaintiffs' expert cited a drop in Barclays' ADS price on October 31, 2012 as an indication of an efficient market because Barclays disclosed two government investigations on that date. C.A.J.A. 441. Plaintiffs' expert also relied on analyst reports and news stories to infer that the market reacted to information regarding Barclays' alleged misconduct related to LX, and all of

these publications attribute the decline in Barclays' stock price to factors other than the alleged misstatements or concerns about Barclays' "integrity." *See* C.A.J.A. 460, 750-754.

Ultimately, even the district court acknowledged that the price drop in this case may have been in reaction not "to the particular fraud alleged but to the fact that Barclays was being sued by a regulator," C.A.J.A. 173 n.121, and recognized that Plaintiffs' evidence "does not support a strong inference or provide compelling evidence of price impact." Pet. App. 103a. The court nonetheless concluded that the *Basic* presumption was unrebutted because Plaintiffs allegedly "asserted a tenable theory of price maintenance." Pet. App. 101a. By relying on Plaintiffs' unsupported speculation and dismissing Defendants' evidence for not "proving lack of price impact," Pet. App. 103a (emphasis omitted), the court failed to require Plaintiffs to "prove—not simply plead—that their proposed class satisfies each requirement of Rule 23," *Halliburton II*, 134 S. Ct. at 2412.

III. THIS CASE WARRANTS REVIEW

The practical effect of the Second Circuit's errors is to render the fraud-on-the-market presumption effectively irrebuttable at the class certification stage. That result is not only contrary to the mandate of *Halliburton II*, but also promises to be extremely costly for defendants facing weak securities fraud suits. Every year, numerous putative securities fraud cases are filed in which many billions of dollars are potentially at stake. These cases are generally won and lost at the class certification stage due to the "*in terrorem* character of a class action." *Kohen* v. *Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677-678 (7th Cir. 2009). It would be ironic

indeed if the least meritorious plaintiffs, who cannot present actual evidence of price impact, can automatically prevail at the class certification stage by simply speculating that an alleged misstatement "maintained" an "inflated" price. By indulging the price maintenance theory while shifting the burden of persuasion to defendants, the Second Circuit has enabled such speculation to clear the bar for class certification.

Securities fraud litigation has far-reaching effects even beyond the parties to the litigation. For example, foreign private issuers often cite fears of large securities class actions as a primary reason for avoiding participation in U.S. public capital markets. *See* NYSE Euronext Amicus Br. 28-29, *Morrison* v. *National Austl. Bank Ltd.*, No. 08-1191 (U.S. Feb. 26, 2010); *see generally* Guseva, *Cross-Listings and the New World of International Capital*, 44 Geo. J. Int'l L. 411 (2013) (discussing the role of private securities litigation in a foreign private issuer's decision whether to cross-list its securities on U.S. markets). And the U.S. Department of the Treasury recently concluded that "[t]he potential for class action securities litigation may discourage companies from listing their shares on public markets and encourage companies that are already public to 'go private' rather than face the cost and uncertainty of securities litigation." U.S. Dep't of Treasury, *A Financial System that Creates Economic Opportunities – Capital Markets* 33 (Oct. 2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf. Allowing the Second Circuit's opinion in this case to stand will only exacerbate these problems.

The Court should grant Defendants' petition to clarify its decision in *Halliburton II* and ensure that defendants are effectively able to rebut the *Basic* pre-

sumption with evidence that alleged misstatements had no impact on the price of a security.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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