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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The questions presented in the petition have been the source of conflict and confusion among the courts of appeals, and this case presents an ideal vehicle in which to consider them. Respondents' primary response is that the Second Circuit correctly answered those questions. But that argument obviously goes to the merits, not to the need for further review.

In any event, the Second Circuit's decision cannot be reconciled either with this Court's precedents on the fraud-on-the-market presumption or with the Federal Rules of Evidence. And for the reasons given in the petition and in the amicus briefs, if the decision below is allowed to stand, it will render the fraud-on-the-market presumption effectively irrebuttable in the Nation's most important circuit for securities class actions. The petition for a writ of certiorari in this critically important case should be granted.

A. This Court Should Address the Burden for Rebutting the *Basic* Presumption

1. As petitioners have explained, the Second Circuit's decision creates a conflict with the Eighth Circuit's decision in *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (2016), regarding the burden of persuasion for the fraud-on-the-market presumption. *See* Pet. 12-14. Respondents seek to avoid that conflict by recharacterizing the Eighth Circuit's holding in *Best Buy*. *See* Br. in Opp. 28.

Respondents' effort is misguided. In *Best Buy*, the Eighth Circuit held that a defendant rebutting the fraud-on-the-market presumption need only meet a burden of production—*i.e.*, "come forward with evidence showing a lack of price impact." 818 F.3d at 782. Lest there be any doubt about what that language meant, the Eighth Circuit cited Federal Rule of Evidence 301 and parenthetically quoted the Rule's allocation of burdens: "the party against whom a presumption is directed has the burden of *producing* evidence to rebut the presumption." *Id.* (emphasis added). The Eighth Circuit's holding stands in stark contrast to the Second Circuit's contrary holding that Rule 301 does not apply to the fraud-on-the-market presumption, and that defendants "must demonstrate a lack of price impact by a preponderance of the evidence . . . rather than merely meet a burden of production." Pet. App. 44a.[1]

Parroting the decision below, respondents further contend that the Eighth Circuit's discussion of Rule 301 was dictum because the defendants had "overwhelming evidence" that there was no price impact. Br. in Opp. 28 (quoting *Best Buy*, 818 F.3d at 782). In so doing, however, respondents confuse a holding for dictum. How the Eighth Circuit articulated and applied the relevant legal rule is obviously a hold-

[1] In an effort to buttress the Second Circuit's position, respondents cite the Ninth Circuit's model jury instruction on the fraud-on-the-market presumption. *See* Br. in Opp. 30. But a model jury instruction is self-evidently not a substitute for an actual opinion, as the Ninth Circuit itself has warned. *See* Ninth Circuit Manual of Model Jury Instructions: Civil, at 3 (2007).

ing—even if the case might ultimately have come out the same way under a different rule. *See, e.g.*, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). District courts in the Eighth Circuit are bound to follow the Eighth Circuit's rule concerning the correct allocation of the burden when analyzing whether a defendant has rebutted the fraud-on-the-market presumption. And other courts that have followed *Best Buy* recognize that it adopted a rule imposing only a burden of production on defendants, not the ultimate burden of persuasion. *See, e.g.*, *Bing Li* v. *Aeterna Zentaris, Inc.*, 2018 WL 1147082, at *9 (D.N.J. Feb. 28, 2018).

2. The square circuit conflict created by the Second Circuit's decision provides a sufficient basis for the Court to grant review on the first question presented. In light of that conflict, respondents' many merits arguments on that question are largely premature at this stage. We address those arguments only briefly here, and defer a fuller response to the merits stage if certiorari is granted.

a. Respondents' principal submission appears to be that Rule 301, which is a binding enactment of Congress, should give way to their preferred interpretation of an ambiguous sentence from this Court's decision in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). *See, e.g.*, Br. in Opp. 18-19. Tellingly, respondents barely defend the Second Circuit's interpretation of Rule 301, arguing only that Rule 301 either does not apply to "a presumption created pursuant to federal statute" or may be ignored by courts "in order to implement 'statutory policy.'" Br. in Opp. 31.

Those arguments require little by way of response. By its terms, Rule 301 applies "[i]n a civil case, unless a federal statute or [the Rules of Evidence] provide otherwise." As this Court has held, a statute "provides otherwise" to a rule only when the statute is actually "contrary" to the rule. *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013) (internal quotation marks and citation omitted). Here, there is no provision in any federal statute or in the Rules of Evidence that establishes a different allocation of burdens from that provided in Rule 301 for purposes of the fraud-on-the-market presumption. *See* Pet. 15-16.

In any event, the sentence from *Basic* on which respondents rely does not bear the weight they place on it. Respondents focus on the *Basic* Court's use of the phrase "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff," suggesting that the phrase somehow evinced the Court's desire to impose the burden of persuasion on defendants. Br. in Opp. 19 (quoting *Basic*, 485 U.S. at 248); *see Halliburton Co.* v. *Erica P. John Fund*, 134 S. Ct. 2398, 2415 (2014) (*Halliburton II*) (same). But the *Basic* Court itself cited Rule 301 in discussing how presumptions are used to "allocat[e] the *burdens of proof* between parties." 485 U.S. at 246 (emphasis added). Accordingly, when the *Basic* Court went on to use the phrase "any showing that severs the link," it was merely referring to *some evidence* that severs the link—that is, evidence that would be sufficient to carry a burden of *production*, consistent with the mandate of Rule 301. *See Celotex Corp.* v. *Catrett*,

477 U.S. 317, 322 (1986) (distinguishing between a "showing" and ultimate "proof at trial").

b. Contrary to respondents' claims, by imposing only a burden of production on defendants, the Eighth Circuit did not allow rebuttal of the presumption based on "any evidence, no matter how frail." Br. in Opp. 21. To rebut a presumption under Rule 301, a party must come forward with evidence from which "a reasonable person could draw . . . the inference of the existence of the particular fact to be proved." 2 Kenneth S. Broun, *McCormick on Evidence*, § 338 (7th ed. 2016). And contrary to respondents' view, when a defendant adduces such evidence, the plaintiff does not "lose the benefit of the presumption." Br. in Opp. 32. Rather, the plaintiff can reestablish its entitlement to the *Basic* presumption by providing evidence that the alleged misstatements did in fact impact the price of the security, even after the defendant produces evidence showing a lack of price impact. *See Halliburton II*, 134 S. Ct. at 2415.

In other words, under the Eighth Circuit's approach, the fraud-on-the-market presumption is simply treated like any other evidentiary presumption. A plaintiff bears the ultimate burden of proving the element of reliance. *See, e.g.*, *Halliburton II*, 134 S. Ct. at 2407. And where a plaintiff seeks to "satisfy the reliance element . . . by invoking a rebuttable presumption of reliance," *id.* at 2408, the burden of persuasion on that presumption "remains on the party who had it originally": the plaintiff. Fed. R. Evid. 301.

Contrary to respondents' suggestion, *see* Br. in Opp. 34, petitioners presented evidence in the district court that was more than sufficient to meet a burden of production. The expert reports and evidence presented to the district court demonstrated that the alleged misstatements did not affect the price of Barclays' ADS when they were made, and also demonstrated that the decline in the price of Barclays' ADS on the alleged corrective disclosure date was related to investor concerns about regulatory risk and fines, not any revelation of the allegedly concealed truth about how Barclays operated its trading system. *See* Pet. 28-29. Respondents complain that petitioners did not conduct an independent "price impact analysis," Br. in Opp. 35, but omit the fact that their "own expert" agreed with much of petitioners' evidence, which was "strong evidence" for petitioners. *Best Buy*, 818 F.3d at 782 (emphasis omitted).

c. Ultimately, respondents' objections to treating the fraud-on-the-market presumption like any other presumption flow from their view that the presumption should be "virtually insurmountable." Br. in Opp. 20. In support of that view, respondents, remarkably, cite private correspondence between two former members of this Court. *See id.* But this Court speaks through its opinions, and in *Basic*, the Court repeatedly stated that the presumption it was creating would be rebuttable. *See* 485 U.S. at 242, 245, 248-50. And the Court reaffirmed that proposition in *Halliburton II*. *See* 134 S. Ct. at 2414-17.

Respondents' ambitious search for support only betrays the weakness of their merits position. The

circuit conflict created by the Second Circuit's decision on the first question presented warrants the Court's review. The Court should grant review on that question and reverse the Second Circuit's blatantly erroneous holding.

B. This Court Should Clarify the Proof Necessary To Invoke the Fraud-On-The-Market Presumption

1. As petitioners have shown, the Second Circuit's decision also adds to the confusion in the lower courts regarding the type of proof necessary to invoke the fraud-on-the-market presumption in the first place. *See* Pet. 19-21. Respondents' answer is to claim that two of those courts—the Fifth Circuit in *Unger* v. *Amedisys Inc.*, 401 F.3d 316 (2005), and the First Circuit in *In re Xcelera.com Sec. Litig.*, 430 F.3d 503 (2005)—considered direct evidence of market efficiency only because the plaintiffs had failed to establish the presence of "indirect factors" conducive to market efficiency. *See* Br. in Opp. 25-27.

Once again, respondents are mistaken. In both cases, the courts considered direct evidence to be *necessary* in demonstrating market efficiency. *See Unger*, 401 F.3d at 324 (noting that proof of causation "goes to the heart of the 'fraud on the market' theory"); *Xcelera.com*, 430 F.3d at 512 (describing direct evidence as "the most important *Cammer* factor" for showing market efficiency). Accordingly, while the Second Circuit held here that a court could deem a market to be efficient without any direct evidence of market efficiency, the First and Fifth Circuits indicated that direct evidence is necessary because a court can have "little assurance that infor-

mation is being absorbed into the market and reflected in its price" without such evidence. *Xcelera.com*, 430 F.3d at 512. Absent intervention by this Court, lower courts are likely to continue to take radically different approaches to the centrally important question of market efficiency—the "fundamental premise" for application of the fraud-on-the-market presumption. *Halliburton II*, 134 S. Ct. at 2414.

Respondents contend that many district courts have coalesced around the factors for evaluating market efficiency established by a New Jersey district court in *Cammer* v. *Bloom*, 711 F. Supp. 1264 (1989). *See* Br. in Opp. 15-16. Even those courts, however, apply those factors in different ways. For example, some courts recognize that direct evidence of efficiency (the fifth factor identified in *Cammer*) is the focus of the market-efficiency analysis, and address the presence of direct evidence extensively. *See Smilovits* v. *First Solar, Inc.*, 295 F.R.D. 423, 434-37 (D. Ariz. 2013); *Petrie* v. *Elec. Game Card, Inc.*, 308 F.R.D. 336, 352-56 (C.D. Cal. 2015). Other courts, by contrast, have determined that markets are efficient without considering the presence of direct evidence at all. *Aranaz* v. *Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 669 (S.D. Fla. 2014); *In re Computer Sci. Corp. Sec. Litig.*, 288 F.R.D. 112, 120 (E.D. Va. 2012). Even the cases cited by respondents, then, are emblematic of the lower-court confusion that is crying out for this Court's attention.

2. Respondents further contend that *Halliburton II* does not "obligate" them to introduce an event study as direct evidence of efficiency. *See* Br. in

Opp. 17. If anything, however, this Court assumed in *Halliburton II* that plaintiffs "can and do" use event studies as direct evidence of the market for a security's reacting to new, material information. 134 S Ct. at 2415. That assumption was warranted, because the most natural way to "prov[e] the prerequisites" for the fraud-on-the-market presumption—including "market efficiency," *id.* at 2412—is direct evidence that the market was in fact efficient. Respondents do not contest that event studies are the best means of directly testing market efficiency for a security. Nor do they contest that direct evidence of efficiency, as shown through event studies, has been used reliably in securities-fraud litigation for decades—though the Second Circuit has seemingly now dispensed with the need for such studies.[2]

As the Court confirmed in *Halliburton II*, it is that type of direct evidence that is "the very foundation of *Basic*." Br. in Opp. 17. The "efficient market hypothesis," on which the fraud-on-the-market presumption rests, is meant to gauge whether "all pub-

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[2] Respondents argue that event studies of individual companies have "pitfalls" that make them "unreliable" in assessing efficiency, Br. in Opp. 4-5, although they simultaneously (and contradictorily) argue that event studies are "sometimes necessary" and that petitioners failed to rebut the presumption because they did not produce an "event study of their own," *id.* at 34-35. In support of the former proposition, respondents (quoting the district court) cite a single law-review article, but one of the authors of that article, J.B. Heaton, has appeared in this Court as an amicus curiae in support of petitioners. *See* Financial Economists & Legal Scholars Br. 2. Indeed, that brief endorses the view that only direct evidence can show market efficiency—and, as explained above, the best method for testing efficiency directly is through an event study.

licly available information is rapidly incorporated into, and thus transmitted to investors through, the market price." *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). Direct evidence that the price of a security responds to new, material information in the marketplace is the best evidence that the market is efficient in the sense contemplated by *Basic* and this Court's other cases. And the efficient market, in turn, is an "indirect proxy" for proof that an alleged misstatement actually impacted the price of a given security. *Halliburton II*, 134 S. Ct. at 2415.

Respondents contend that an approach that focuses on the existence *vel non* of direct evidence would "obviate the need to ever consider any of the other seven factors" identified by the district courts in *Cammer* and *Krogman* v. *Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001). Br. in Opp. 15. But the onus should be on respondents to show why consideration of such "indirect factors" is appropriate, not vice versa. And respondents never explain what is wrong with not considering those factors—at least where there is sufficient information directly to measure whether the market at issue is efficient. Those other factors are concededly only "indirect" indicators of market efficiency, which cannot "establish whether a security actually trades in an efficient market." Financial Economists & Legal Scholars Br. 5. If the Second Circuit's decision is allowed to stand, it will create a presumption in favor of the fraud-on-the-market presumption for large, publicly listed companies, under which the (nearly universal) presence of such "indirect factors" is presumptively sufficient to establish the presumption and ensure class certification.

3. Respondents contend that review is unwarranted on the second question presented because the "same result would ensue" if a court were to consider the event study they proffered. Br. in Opp. 34. But neither of the lower courts considered that study. *See id.* at 5, 8. In the case of the district court, that is presumably because, after devoting considerable attention to the study during the evidentiary hearing on class certification, the court harbored doubts about the study's probative value. *See* Pet. 7; Pet. App. 92a. It would be irregular for this Court to conclude that review is unwarranted based on respondents' unsupported assumption that evidence they produced in the district court proceedings (but on which the lower courts did not rely) would necessarily dictate the same result on remand.

C. The Decision Below Will Undermine the U.S. Capital Markets

Finally, respondents do not contest that the Second Circuit's virtually irrebuttable version of the fraud-on-the-market presumption will have a substantial effect on securities class-action litigation and, therefore, on the U.S. capital markets. Quite to the contrary, respondents' counsel has touted that as a virtue. *See* Pet. 27. By simultaneously lowering the proof necessary to show that a market is efficient and placing the ultimate burden on defendants to rebut the *Basic* presumption, the Second Circuit's decision will lead courts routinely to rubber-stamp class-certification motions in cases involving large, publicly listed defendants.

That may be how respondents think this Court intends the fraud-on-the-market presumption to operate. *See* Br. in Opp. 16, 20. But all available evidence—at least from the Court's opinions—indicates otherwise. And more broadly, the threat of class actions already leads domestic and foreign companies alike to refrain from listing on U.S. exchanges. *See* Chamber of Commerce & SIFMA Br. 10-12. The decision below will only exacerbate that concern and further disincentivize companies from accessing the U.S. capital markets. *See* Former SEC Officials & Law Professors Br. 17.

In short, the petition for certiorari in this case presents important questions regarding federal securities litigation on which the courts of appeals are divided. And there is no threshold obstacle to the Court's consideration and resolution of those questions in this case, which arises from the Nation's most important circuit for securities class actions. Further review is plainly warranted.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

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