No. 17-664

In the Supreme Court of the United States

PETRÓLEO BRASILEIRO S.A. – PETROBRAS, ET AL.,
Petitioners,

v.

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, ET AL.,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 27, 2017

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PETITIONERS' REPLY BRIEF

I. THE STANDARD FOR THE PRESUMPTION OF RELIANCE MERITS THIS COURT'S REVIEW

Respondents do not dispute that the decision below sows further confusion on an extraordinarily important issue that has vexed the lower courts for almost 30 years since *Basic* was decided.

Prior to the decision and the court's subsequent decision in *Waggoner v. Barclays PLC*, __ F.3d __, 2017 WL 5077355 (2d Cir. Nov. 6, 2017), courts throughout the Nation held that to draw an inference of reliance, plaintiffs in securities fraud cases must prove—at a bare minimum—that the price of a security reacted favorably to good news (and unfavorably to bad news).

Now, fundamentally misinterpreting *Halliburton II*, the Second Circuit has held that plaintiffs are entitled to an inference of reliance on a misrepresentation—and can shift the burden to defendants to disprove reliance—based solely on proof that the defendant has characteristics shared by all large companies: high trading volume, coverage by many analysts, multiple market makers, and eligibility to file simplified registration statements. The Circuit thus effectively eliminated the element of reliance in all cases involving large companies, made class certification all but automatic in such cases—as Respondents concede,

Brief in Opposition ("BIO") 23 n.4[1]—and effectively rendered Section 10(b) an insurance policy against losses. *But see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2005). In doing so, the decision portends devastating effects on the U.S. economy, which is already besieged by securities class actions despite the strictures imposed by this Court in *Halliburton II*, *Wal-Mart*, and *Comcast*.

Because circuit court decisions on the issue are increasingly rare—despite class certification's often dispositive impact on securities actions seeking up to billions of dollars—this case represents a unique opportunity for this Court to resolve the lower courts' ongoing distortion of *Basic* and its progeny.

A. The Second Circuit's Decision Conflicts with *Halliburton II*

The opposition brief underscores how dramatically the decision below fundamentally conflicts with *Halliburton II*.

1. *Halliburton II* held that "price impact" is "*Basic*'s fundamental premise." 134 S. Ct. 2398, 2416 (2014). Respondents' arguments cannot be reconciled with that holding.

a. Respondents assume that price impact is relevant only to defendants' rebuttal of the presumption of reliance, and irrelevant to market efficiency. BIO 17-18. But *Halliburton II* makes clear that "market efficiency" is a "proxy" for price

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[1] Capitalized terms have the definitions assigned in the Petition.

impact, *i.e.*, a market in which the security price increases with good news and decreases with bad news, "reflect[ing] all public, material information." 134. S. Ct. at 2408, 2415. In the absence of such evidence—which is the very foundation for the judicial creation of the *Basic* presumption in the first place—there is no basis to infer that a misrepresentation was reflected in the security price or that, by relying on that price, the plaintiff also relied on the misrepresentation. *Id.* at 2413-14.

b. Respondents quibble that *Halliburton II* does not literally state "directionally appropriate price movement." BIO 19. But the whole point of *Halliburton II* is that, to invoke *Basic*'s presumption, plaintiffs generally must demonstrate "price impact," which requires directionality—a price cannot be "impacted" in a way that causes investors to detrimentally rely if it moves in the wrong direction. *Halliburton II* held that *Basic* requires a showing that "false statements affect [a price of a stock], and *cause loss.*" 134 S. Ct. at 2410 (emphasis added). The "modest premise" the Court embraced, *id.* at 2410, was expressed in the Amicus Brief of Financial Economists—the "modest assumption that prices move reasonably promptly *in a predictable direction in response to favorable or unfavorable public information*." Brief of Financial Economists as Amici Curiae at 11, *Halliburton II*, 2014 WL 526436 (Feb. 5, 2014) (emphasis added). Indeed, in *Halliburton II*, plaintiffs introduced an event study showing directionally appropriate price movement. 134 S. Ct. at 2415.

2. The Second Circuit's new rule also guts the right under *Halliburton II* to rebut *Basic*'s presumption.

If plaintiffs need not demonstrate an "indirect" inference that the misrepresentation had price impact, it follows that defendants' "direct" evidence of the absence of price impact would not rebut any showing plaintiffs had made, rendering the right to rebuttal illusory. Indeed, the Circuit made that crystal clear—it has shifted the burden to *defendants* to prove that the alleged misstatements had a complete lack of price impact. *See Barclays*, 2017 WL 5077355, at *18-19. And it made that burden virtually impossible to satisfy by stating that "methodological constraints" limit the "utility" of directional event studies such as the one in *Halliburton II*. Pet. App. 64a-65a.

3. Rather than address these arguments, Respondents misconstrue the question presented and the Second Circuit's holding.

a. Respondents argue that the opinion below and question presented are narrow and fact-bound, limited to the Second Circuit's acceptance of a "*particular type* of empirical evidence." BIO 21.[2] But the court held as *a matter of law* that reliance can be

[2] Petitioners' supposed "mischaracteriz[ation]," BIO 12, concerned whether plaintiffs need offer any empirical evidence at all, regardless of whether that evidence is meaningful—an issue the Circuit left open in *Petrobras* but subsequently closed in *Barclays.* Respondents' assertion also assumes away the question presented—whether price impact requires directionality.

presumed without evidence "that the price of the relevant securities predictably moved up in response to good news and down in response to bad news." Pet. App. 62a. Indeed, in a decision after the Petition was filed, the Second Circuit read *Petrobras* to hold that, to prove reliance, plaintiffs (i) need not offer any empirical evidence of "price impact," and (ii) need not offer any evidence whatsoever of "directional" price impact, as long as other non-empirical *Cammer* factors are satisfied. *Barclays*, 2017 WL 5077355, at *12-13 & n.28. But, the non-empirical factors are satisfied by every large company, *see* A-5104, and Respondents' own expert conceded that his empirical test could be satisfied even if the evidence showed price increases with bad news and decreases with good news. Pet. App. 101a; A-3290-94.

b. The legal standard evidence must satisfy—and the finding a court must make—for presumed reliance under *Halliburton II* is of paramount importance. Securities class actions impose dramatic costs on the economy—securities class action filings and settlement sizes are at record heights.[3] The Second Circuit's rule guts an important bulwark against the excesses of securities class actions and has given life to cases where plaintiffs are unable to prove that investors relied on alleged misstatements.

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[3] http://securities.stanford.edu/research-reports/1996-2017/Cornerstone-Research-Securities-Class-Action-Filings-2017-MYA.pdf.

4. Respondents' arguments that "Petitioners never sought to introduce empirical evidence" concerning directionality, BIO 19, and that the court can dispense with proof of reliance at class certification because plaintiffs will have to prove loss causation at trial, BIO 20-21, highlight the importance of the question presented.

a. Petitioners did not offer an event study to rebut the inference of price impact because—as the District Court found—plaintiffs had not presented evidence to infer price impact, Pet. App. 102a-103a, and, as the Court reiterated in *Halliburton II*, the *Basic* presumption "does not alter the elements of the Rule 10b–5 cause of action," and "[t]he burden of proving th[e] prerequisites [of the *Basic* presumption] still rests with plaintiffs," 134 S. Ct. at 2412.[4] If, as Respondents contend, the burden is on defendants to prove the absence of price impact even without plaintiffs showing indirect price impact, that issue merits this Court's review.

b. Respondents suggest that event studies should be discarded because they can be difficult to satisfy. BIO 19-20. But event studies have been used for years; that they may not always support the presumption is a reason to keep, rather than

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[4] Petitioners did present evidence, which the District Court credited, that the securities did not generally move in the appropriate direction. Pet. App. 102a-103a. Respondents claim the District Court "acknowledged" that their expert found directionally appropriate price responses, BIO 9, but the court explicitly eschewed such a finding, Pet. App. 104a, and both it and the Second Circuit held that such evidence was not required.

discard, them. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 253-54 (2d Cir. 2016) (affirming admissibility of directional event study as "standard operating procedure in federal securities litigation"); *cf. In re Fed. Home Loan Mortgage Corp. Sec. Litig.*, 281 F.R.D. 174, 182 (S.D.N.Y. 2012).[5]

c. Respondents' suggestion that the Court should not be concerned with price impact because they will have to prove loss causation at trial is inconsistent with this Court's holding that reliance and loss causation are independent elements of Section 10(b), *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011), and the requirement that district courts perform a "rigorous analysis" demonstrating that all of Rule 23's requirements are satisfied before certifying a class, *Comcast Corp. v. Behrend,* 569 U.S. 27, 33 (2013). Thus, plaintiffs' burden on loss causation at trial cannot relieve them of their burden to show price impact and reliance earlier. *See Halliburton II*, 134 S. Ct. at 2412 (*Basic*'s prerequisites "must be satisfied before class certification").

B. The Disarray in the Lower Courts Should Be Addressed by the Court

1. Respondents contend there is no circuit split. But they cannot reconcile the circuit decisions that

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[5] Respondents' counsel have touted that the Second Circuit's decisions "provid[e] a far easier . . . path for securities class actions plaintiffs going forward." https://globenewswire.com/news-release/2017/11/06/1175433/0/en/Pomerantz-Achieves-Significant-Victory-in-Securities-Class-Action-Against-Barclays-PLC-BCS.html.

have unequivocally held that empirical evidence is the "*most important*" factor in establishing price impact, with the decisions holding that such evidence may be unnecessary. *Compare In re Xcelera.Com Sec. Litig.*, 430 F.3d 503, 512 (1st Cir. 2005), *with Barclays*, 2017 WL 5077355, at *12, *and Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1256 (11th Cir. 2014).

2. Respondents also do not deny that case law regarding market efficiency is "inconsistent and largely self-referential." Pet. 24-26. Without any clearly-established standard to measure the evidence, the courts are in disarray regarding the relevant factors and their weight. Whether a defendant will be put to defending "a class action (with all that entails)," *Halliburton II*, 134 S. Ct. at 2415, even without a statement on which anyone relied, is an accident of judicial assignment rather than a result of the evidence.

3. In the almost 30 years since *Basic*, courts have struggled with the standard to apply, making largely unreviewable decisions. The Court need not await further percolation. To the contrary, because this Court's review is limited to cases from the circuit courts, which rarely grant review under Rule 23(f), this case presents a perfect vehicle to address the disarray in district courts on an issue with enormous implications for the global economy. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) (certiorari granted "because of the disarray among the Federal District Courts").

4. Finally, Respondents incorrectly assert that Petitioners waived this argument and "this case presents no opportunity to address the[] [*Cammer*] factors" because "each and every factor" supposedly was satisfied here. BIO 23. But Petitioners have consistently argued that the "indirect" *Cammer* factors are not sufficient to invoke the presumption and plaintiffs must submit evidence of directionally appropriate price movement. *See*, *e.g.*, A-3788-89; ECF No. 114 at 10, 17-20, No. 16-1914 (2d Cir.). Thus, these issues were preserved and the Petition provides an appropriate vehicle to consider the *Cammer* factors.

II. THE COURT SHOULD DETERMINE WHETHER RULE 23 AND DUE PROCESS REQUIRE AN ADMINISTRATIVELY FEASIBLE MEANS OF ASCERTAINING CLASS MEMBERSHIP

A. The Circuits Are Divided[6]

1. Respondents do not deny that circuits disagree whether, at class certification, class membership must be ascertainable through "administratively feasible" means. Pet. 30-32. And Respondents' principal response—that the disagreement might be cured through the circuits' "growing consensus," BIO 13-14, 25-29—is divorced from reality. The Third Circuit doctrine requiring "administrative feasibility" is firmly entrenched: Although some of its judges disfavor that

[6] The Underwriter Defendants only petition for certiorari on the ascertainability issue.

requirement, their dissenting views have been consistently rejected, including recently. *See City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434 (3d Cir. 2017).

2. Respondents' analysis of Fourth and Eleventh Circuit law, BIO 28-29, is similarly unpersuasive. Courts recognize that settled precedent in these circuits requires class certification proponents to demonstrate administratively feasible means of ascertaining class membership.[7] Respondents' argument that the Eleventh Circuit's opinion was authored by a member of the U.S. Court of International Trade, BIO 29, illustrates the thinness of their position.

B. This Case Presents an Excellent Vehicle

1. The proceedings below defy Respondents' assertion that "the administrative-feasibility requirement is unlikely to make a difference" in this case. BIO 34. The Second Circuit affirmed the District Court under its narrow legal view that ascertainability does not require administrative feasibility. Were this Court to review and correct that determination, the case would be remanded to

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[7] *See, e.g.*, *Plotnick v. Comp. Scis. Corp. Deferred Comp. Plan for Key Execs.*, 182 F. Supp. 3d 573, 586 (E.D. Va. 2016) ("it must be 'administratively feasible . . . to determine whether a particular individual is a member' of the class"); *Stein v. Monterey Fin. Servs., Inc.*, No. 13 CIV. 01336, 2017 WL 412874, at *3-4 (N.D. Ala. Jan. 31, 2017) (denying certification in part for lack of "administratively feasible method for identifying class members"); *see also Mullins v. Direct Dig., LLC*, 795 F.3d 654, 661 n.2 (7th Cir. 2015) (discussing the Eleventh Circuit's "strong version" of ascertainability).

the Second Circuit to apply the proper heightened standard to the District Court's determination.[8]

Respondents cherry-pick an uncorroborated statement by the District Court that the domesticity of a transaction was "highly likely to be" capable of routine bureaucratic determination. BIO 33. Yet they fail to acknowledge that this analysis not only contradicted the record—well-represented plaintiffs, with access to third-party records, had difficulty producing evidence of domesticity even on motions to dismiss—but also did not survive the Second Circuit's review. Pet. App. 46a-55a.

2. This case presents a superior vehicle for considering ascertainability. Membership in a consumer class turns on the well-understood, readily-determined act of purchasing a product, so any "uncertainty" about membership is "purely theoretical." *See* Pet. 38-39. Not so here: Potential class members frequently *cannot* know whether their transactions qualify as "domestic," and the needed evidence, if it exists, likely rests in the hands of third parties. *See* Pet. 33-35.

Indeed, the fact that Respondents seek to represent an expansive class of worldwide purchasers underscores the importance of

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[8] Respondents take out of context Petitioners' statement about determining the transaction location. BIO 31. Petitioners were contrasting the well-established process of determining where title transfers with plaintiffs' unworkable proposal to focus on the "transfer of beneficial interest," and never argued that class members could readily determine whether transactions were domestic.

ascertainability to the core principle that U.S. courts must not become the "Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Morrison v. National Australia Bank*, 561 U.S. 247, 270 (2010). Nor are securities laws the only area where unascertainable classes can open the floodgates to extraterritorial claims.[9]

C. The Question is Recurring and Important

1. The scope of the ascertainability requirement is a ubiquitously recurring issue. Respondents' efforts to understate its importance do not withstand scrutiny.

The course of opt-out litigation in this case belies Respondents' argument: Sophisticated financial institutions—who believed they purchased in domestic transactions and therefore opted out of the class—turned out to lack evidence sufficient to *allege* (much less prove) that they purchased in domestic transactions, and their claims were therefore dismissed. *See* A-7123-25; A-5728-31. Indeed, even now, Respondents can only guess—with no specificity—that a "significant percentage"

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[9] *See, e.g.*, *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16 CIV. 5263, 2017 WL 3600425, at *14-15 (S.D.N.Y. Aug. 18, 2017) (considering *Morrison* issues under Racketeer Influenced and Corrupt Organizations Act); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (antitrust laws); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185-87 (2d Cir. 2014) (Alien Tort Statute); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 CIV. 7789, 2016 WL 5108131, at *26-27 (S.D.N.Y. Sept. 20, 2016) (Commodities Exchange Act).

of initial purchases and "many" aftermarket purchases were domestic. BIO 3.

2. Nor can Respondents undermine the significance of the ascertainability requirement by suggesting that its objectives might be addressed by one of the Rule 23(b) factors—superiority, predominance, and manageability. BIO 25-26. None of these speaks directly to the ascertainability of class membership or the due process concerns animating the ascertainability requirement, as the Second Circuit acknowledged. Pet. App. 37a-41a.[10]

Contrary to Respondents' assertions, BIO 31, ascertainability does not require *identifying* all class members during class certification. But those members must be *identifiable* in an administratively feasible way.[11] And Respondents' claim that defendants may "present [their] defenses" at the "appropriate juncture," BIO 32, is inapposite: Whether each plaintiff meets *Morrison*'s domesticity requirement is not a "defense"; it is a threshold

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[10] Respondents miss the point in arguing that "defendants always must prove the elements of res judicata," so unascertainable classes "hardly" violate due process. BIO 32. Forcing a defendant who prevails against *a certified class* at trial to litigate individual mini-trials *about class membership* to enforce that judgment defies both due process and Rule 23.

[11] That *Siskind* involved an uncertified class, BIO 31, does not diminish the principle entitling defendants to notice of potential exposure as a matter of "fundamental fairness." *Siskind v. Sperry Ret. Program*, 47 F.3d 498, 503 (2d Cir. 1995). *Tyson Foods, Inc. v. Bouaphakeo*, addressed damages for uninjured class members, not class membership. 136 S. Ct. 1036, 1049-1050 (2016).

"merits" element, Pet. App. 46a, that Respondents must prove. Therefore, Respondents are seeking to certify an impermissible "fail safe" class by embedding the phrase "domestic transaction" into the class definition, thereby making membership "depend on the liability of the defendant." BIO 32.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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