No. 20-222

In the Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., ET AL., PETITIONERS

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.

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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Respondents seek to defend the indefensible. In the decision below, the Second Circuit held that a defendant in a multi-billion dollar securities class action may not rebut the presumption of classwide reliance recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the statements on which the claims are based. The Second Circuit categorically precluded that evidence on the ground that it is also relevant to the substantive element of materiality. That holding contravenes this Court's holding in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), that a defendant may rebut the *Basic* presumption at the class-certification stage with *any* relevant evidence, even if the evidence is also relevant at the merits stage. The Second Circuit fur-

ther held that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion, thereby perpetuating a circuit conflict.

None of that is open to reasonable debate. Yet in their 33-page brief in opposition, respondents engage in a protracted effort to distract from the serious legal defects and enormous practical implications of those holdings. In particular, respondents seek to recast petitioners' primary argument as a request for resolution at the class-certification stage of the merits issue of materiality. That is a transparent effort to take *Halliburton II* out of the equation and bring this case instead within the ambit of *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013).

But this case is controlled by *Halliburton II*, not *Amgen*, and the decision below renders *Halliburton II* a dead letter. As Judge Sullivan emphasized in dissent, the majority's approach would make class certification "all but a certainty" in every case brought under the inflation-maintenance theory, because it effectively prevents defendants from showing a lack of price impact on the "back end" as well as the "front end."

Respondents also assert that there is no circuit conflict on the burden-allocation question and that the question is insignificant. Respondents are incorrect on both scores: there is plainly a conflict, and the recent deepening of that conflict demonstrates its continued significance.

Without this Court's intervention, the errant decision from the most important court of appeals for securities litigation will have enormous practical consequences for public companies, as the amicus support from across the Nation's economy reflects. There is no valid defense of the decision below, and no valid impediment to this Court's review. The petition for a writ of certiorari should be granted.

A. The Decision Below Contravenes This Court's Prior Decisions And Perpetuates A Conflict Among The Courts Of Appeals

1. In *Halliburton II*, this Court held that courts may not "artificially limit" the evidence a defendant may use to rebut the *Basic* presumption by showing the absence of price impact, even if such evidence "is also highly relevant at the merits stage." 573 U.S. at 283. The decision below flouts that holding by barring a defendant from relying on a vital type of evidence: the nature of the statements on which a plaintiff's claim is based.

a. Respondents do not confront that clear conflict with *Halliburton II*; instead, they run screaming from it. Respondents try to recharacterize the Second Circuit's decision as a benign application of *Amgen*, insisting that the "legal" issue of materiality may not be considered as part of the "factual" assessment of price impact. See, *e.g.*, Br. in Opp. 1, 17, 18, 19-20. But petitioners are not asking for a ruling on the merits issue of materiality. Petitioners' submission is a more modest one concerning the scope of the evidence on which a defendant may rely when seeking to rebut the *Basic* presumption: specifically, that a defendant is entitled to point to the generic nature of the alleged misstatements as part of its showing of no price impact, even though that evidence is also relevant to the substantive element of materiality.

Respondents go so far as to reject the proposition that the statements on which they base their claims constitute a "form of evidence" at all. Br. in Opp. 17. That is plainly wrong. In a securities-fraud case, statements (or omissions) are the most basic form of evidence, without which no plaintiff could ever prove its claim. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); *Miller* v. *Thane International, Inc.*, 519 F.3d 879, 886-888 (9th Cir. 2008). As

Judge Sullivan put it, "[c]andidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact." Pet. App. 44a. Here, the statements at issue are exceptionally generic statements, such as that "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest" and that "[o]ur clients' interests always come first." *Id.* at 4a. Contrary to respondents' contention (Br. in Opp. 18), those statements are no less "concrete evidence" than any other form of evidence used to show the absence of price impact. Under a proper application of *Halliburton II*, defendants were entitled to point to the statements themselves, whatever their nature, in addition to any other relevant evidence.

To the extent respondents are arguing that *Amgen* bars the use of any price-impact evidence that may also be used to establish the element of materiality (Br. in Opp. 17), that is also plainly wrong. As Judge Sullivan correctly observed, the "rigid compartmentalization" of the evidence relevant to materiality and price impact is not "possible, much less required by" *Amgen* and *Halliburton II*. Pet. App. 45a. To the contrary, *Halliburton II* made clear that evidence pertaining to a "prerequisite" for invoking the *Basic* presumption, such as loss causation or materiality, *can* be used to show lack of price impact. See 573 U.S. at 281-284. As a recent Seventh Circuit panel explained in an opinion written by Judge Hamilton (joined by Judge Kanne and then-Judge Barrett), a court may not refuse to consider price-impact evidence simply because "the same evidence is likely to have obvious implications for the off-limits merits issues of materiality and loss causation." *In re Allstate Corp. Securities Litigation*, 966 F.3d 595, 608 (2020). Exactly so.

b. Respondents further contend (Br. in Opp. 16) that the Court should deny review on the first question presented because of the absence of a clear circuit conflict. But consistent with Rule 10(c), the Court frequently grants review—including several times this Term alone—when a lower-court decision conflicts with a decision of this Court on an important question. See, *e.g.*, *FCC* v. *Prometheus Radio Project*, No. 19-1231, cert. granted, 2020 WL 5847134 (Oct. 2, 2020); *United States Fish and Wildlife Service* v. *Sierra Club, Inc.*, No. 19-547, cert. granted, 140 S. Ct. 1262 (2020); *Tanzin* v. *Tanvir*, No. 19-71, cert. granted, 140 S. Ct. 550 (2020).

Review on such a question is especially appropriate where, as here, the decision below is from the preeminent court of appeals on the subject matter. Cf. *United States* v. *Arthrex, Inc.*, No. 19-1434, cert. granted, 2020 WL 6037206 (Oct. 13, 2020). The Second Circuit has hosted more than one in every three securities class actions since 2017, see Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* 38 (2020) <tinyurl.com/sec-classactions2019>, and this Court has recognized its strong influence on other courts, see, *e.g.*, *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 260 (2010).

2. In any event, the Second Circuit's decision implicates a conflict among the courts of appeals on the second question presented: namely, whether a defendant seeking to rebut the *Basic* presumption bears only a burden of production or also the burden of persuasion. Compare *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016), with *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 103 n.36 (2d Cir. 2017), cert. denied, 138 S. Ct. 1702 (2018), and *Allstate*, 966 F.3d at 610. In that respect, the petition in this case is exactly like the petition in *Halliburton II*—which also presented two important questions for this Court's review, only one of which implicated

a circuit conflict. See *Halliburton II*, *supra*, No. 13-317, cert. granted, 571 U.S. 1020 (2013).

a. Respondents contend that there is no conflict on the second question (Br. in Opp. 27-29), parroting the Second Circuit's characterization of the relevant language in *IBEW* as mere dictum. See *Waggoner*, 875 F.3d at 103 n.36. That is incorrect. In *IBEW*, the Eighth Circuit unambiguously applied Federal Rule of Evidence 301, which places only the burden of production on the defendant. See 818 F.3d at 782. The Eighth Circuit's decision has widely been understood to establish a legal rule that the plaintiff bears the ultimate burden of persuasion on the *Basic* presumption, see Pet. 23 (citing cases), and that rule will govern future cases in that circuit.

Contrary to respondents' suggestion that it is somehow "awkward" for petitioners to rely on the conflict on the second question (Br. in Opp. 16), the way in which that conflict has emerged illustrates just how other courts tend to "defer[]" to the Second Circuit in the securities context. See *Morrison*, 561 U.S. at 260. After the Eighth Circuit first addressed the question in *IBEW*, the Second Circuit reached its contrary conclusion in *Waggoner*. Since then, the Seventh Circuit and multiple district courts have followed the Second Circuit with little analysis of their own. See *Allstate*, 966 F.3d at 610; see also, *e.g.*, *Levy* v. *Gutierrez*, 448 F. Supp. 3d 46, 57, 63 (D.N.H. 2019); *In re Finisar Corporation Securities Litigation*, Civ. No. 11-1252, 2017 WL 6026244, at *6 (N.D. Cal. Dec. 5, 2017). That history reflects the Second Circuit's outsized influence on securities law and underscores the need for the Court's intervention on the questions presented.

b. Respondents' argument on the merits of the second question is also deeply flawed. Respondents concede that Rule 301 "provides a default rule that applies when the law does not otherwise establish what a party must

prove to overcome a presumption." Br. in Opp. 30-31. But rather than point to any "federal statute" that overrides the default rule that the plaintiff bears the burden of persuasion (as Rule 301 requires), respondents insinuate that this Court resolved the issue in *Halliburton II*. See *id.* at 29-30. The Court plainly did not do so, and respondents' aggressive reading of *Halliburton II* cannot be squared with their cramped reading of the Eighth Circuit's decision in *IBEW* (which, unlike *Halliburton II*, actually addressed Rule 301). When it comes to the language of Rule 301, respondents have nothing to say. Because no "federal statute" "provide[s] otherwise," the Second Circuit should have held that respondents, not petitioners, bore the ultimate burden of persuasion. The conflict on that question warrants the Court's review.

B. The Questions Presented Are Exceptionally Important And Warrant The Court's Review In This Case

1. If the decision below is permitted to stand, it will have devastating practical consequences for public companies facing securities class actions premised on the inflation-maintenance theory—an increasingly popular plaintiff-friendly theory that this Court has never endorsed. The Second Circuit's distortion of the *Basic* framework creates a near-automatic path to class certification in inflation-maintenance cases: securities plaintiffs need only identify public allegations of company misconduct and, after the stock price goes down, assert that the stock price had been improperly "maintained" by generic statements of the sort that virtually all companies make. See SIFMA Br. 6-7 (listing similar statements from Fortune 500 companies). That is particularly troubling given that the vast majority of securities class actions—especially inflation-maintenance actions—settle before summary judgment. See RLC Br. 8-10.

Respondents attempt to sidestep those real-world consequences, saying next to nothing about the inflation-maintenance theory. Respondents' efforts to minimize the importance of the questions presented are unavailing.

a. To begin with, respondents' repeated assertions that the questions presented have "no recurring importance" (Br. in Opp. 21, 31) are belied by the numerous amici curiae that support the petition in this case—as well the numerous amici that supported *respondents* before the Second Circuit. As petitioners' amici point out, many securities class actions settle following class certification on the basis of generic and aspirational statements like the ones at issue here. See Society for Corporate Governance Br. 11-12. And the volatility in the markets during the ongoing COVID-19 pandemic creates a "heightened" risk of such lawsuits: many companies will face the prospect of securities class actions after drops in their stock prices if their generic statements can be "weaponized" against them. See Former SEC Officials and Law Professors Br. 12-13. The practical significance of the questions presented here thus cannot be overstated.

b. Respondents wrongly suggest that, if the decision is permitted to stand, defendants would still have "fulsome opportunities" to avoid class certification on the basis of generic and aspirational statements. Br. in Opp. 21.

Respondents first contend (Br. in Opp. 21-22) that the opportunity to move to dismiss for lack of materiality is an adequate safeguard. That proves too much: if it were true, it would preclude *any* price-impact evidence that overlaps with a merits issue, whether that issue is materiality, loss causation, or something else. The introduction of such evidence is precisely what *Halliburton II* permits at the class-certification stage. And as any experienced securities litigator knows, because the element of materiality often "presents a mixed question of law and fact," it

"rarely [is] dispositive in a motion to dismiss." *In re Morgan Stanley Information Fund Securities Litigation*, 592 F.3d 347, 360 (2d Cir. 2010). At the class-certification stage, by contrast, a defendant is free to point to *any* evidence tending to show the absence of price impact—including evidence of the generic nature of the alleged misstatements.

Respondents next argue (Br. in Opp. 22-23) that the Second Circuit's approach would still account for instances in which generic and aspirational statements in fact have no price impact. That argument completely ignores that, unlike in a conventional securities class action, a defendant in an inflation-maintenance case cannot rebut the *Basic* presumption with evidence that the price did not increase on the "front end" as a result of the alleged misstatement. The Second Circuit's decision effectively strips defendants of any meaningful defense on the "back end" as well, artificially narrowing the scope of permissible evidence of the absence of a price impact and thereby rendering certification "all but a certainty" in inflation-maintenance cases. Pet. App. 44a (Sullivan, J., dissenting).

c. Respondents further assert that the difference between the burden of production and the ultimate burden of persuasion "rarely matters" in securities class actions. Br. in Opp. 31. But as a general matter, that distinction—a familiar one in the law—was plainly significant enough for Rule 301 to draw it. Respondents have identified no reason why it would be any less significant in the securities context. And the fact that the circuit conflict on the burden-allocation question continues to grow illustrates that the distinction matters.

2. This case is an optimal vehicle for the Court's review of the questions presented. Respondents' contrary arguments lack merit.

a. Respondents bizarrely claim (Br. in Opp. 24-25) that petitioners forfeited the argument that a defendant can point to the generic nature of the alleged misstatements as evidence to show the absence of price impact. Yet petitioners extensively briefed the issue before the district court and the court of appeals, relying on the generic and aspirational nature of the statements and on additional evidence in rebutting the *Basic* presumption. See Pet. 11, 13; Pet. C.A. Br. 43-49; Pet. C.A. Reply Br. 18-28. At oral argument, moreover, counsel for petitioners expressly stated that the court of appeals should not "ignore what the statements say," because "[t]he statements are evidence" that "needs to be considered." C.A. Oral Arg. Tr. 28-29. In any event, the court of appeals addressed the question at length in both the majority and dissenting opinions. Pet. App. 19a-27a, 44a-45a; see *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (noting that an issue pressed *or* passed upon below is preserved for this Court's review).

b. If petitioners had been permitted to rely on the generic nature of the statements at issue, the outcome would have been different: as Judge Sullivan correctly noted, that evidence provides the "obvious explanation" for the lack of a price decline in response to the numerous press reports concerning the alleged conflicts of interest. Pet. App. 44a-45a. Resisting that reality, respondents accuse petitioners of "ignor[ing]" a statement made in response to a New York Times article. Br. in Opp. 25. But respondents did not base their motion for class-certification on that statement; accordingly, the Second Circuit did not rely on it. See Pet. App. 4a-5a.

c. Finally, and contrary to respondents' peculiar assertion (Br. in Opp. 32), the district court did not effectively impose the burden of persuasion on respondents

simply by starting its analysis with an assessment of respondents' evidence, rather than petitioners' evidence. The district court expressly required petitioners to "bear the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence." Pet. App. 50a (internal quotation marks and citation omitted). And as the Second Circuit explained, the order in which the district court considered the parties' evidence did "not obscure" that the court had placed the ultimate burden of persuasion on petitioners. *Id.* at 32a n.19. Indeed, in concluding that petitioners had not rebutted the *Basic* presumption, the Second Circuit heavily relied on that allocation; if the burden of persuasion had been correctly allocated, this would have been an easy case. See Pet. 23-24.

* * * * *

This is an extraordinarily important case, not only for petitioners (who are facing a potential $13 billion in damages) but for other public companies facing securities class actions. The Second Circuit's reasoning cannot be defended. And such a deeply flawed decision from the preeminent court of appeals for securities litigation cannot be allowed to stand. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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