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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

RICHARD H. KLAPPER
ROBERT J. GIUFFRA, JR.
DAVID M.J. REIN
BENJAMIN R. WALKER
JULIA A. MALKINA
JACOB E. COHEN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004

KANNON K. SHANMUGAM
Counsel of Record
STACIE M. FAHSEL
E. GARRETT WEST
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

AUDRA J. SOLOWAY
KRISTINA A. BUNTING
SARAH J. PROSTKO
CAROLINE S. WILLIAMSON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

QUESTIONS PRESENTED

1. Whether a defendant in a securities class action may 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 alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality.

2. Whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are The Goldman Sachs Group, Inc.; Lloyd C. Blankfein; Gary D. Cohn; and David A. Viniar. The Goldman Sachs Group, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are Arkansas Teacher Retirement System; West Virginia Investment Management Board; and Plumbers and Pipefitters National Pension Fund.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 955 F.3d 254. The earlier opinion of the court of appeals (Pet. App. 60a-78a) is reported at 879 F.3d 474. The opinions of the district court (Pet. App. 47a-59a, 79a-94a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. A petition for rehearing was denied on June 15, 2020 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on August 21, 2020, and was granted on December 11, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> >
> > (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> > (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Federal Rule of Evidence 301 provides:

> 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. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

STATEMENT

This case concerns the presumption of classwide reliance first recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)—a presumption that plaintiffs ordinarily must invoke for a private securities case to proceed as a class action. In *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), this Court held that a defendant must be able to rebut the *Basic* presumption by presenting evidence that the alleged misrepresentation did not affect the price of the relevant security. In so holding, the Court struck a careful balance between enabling securities plaintiffs to proceed on a classwide basis and providing defendants with a meaningful opportunity to defeat class certification. Since *Halliburton II*, however, lower courts have upended that careful balance and treated the *Basic* presumption as effectively irrebuttable in practice.

This case presents two exceptionally important questions concerning the operation of the *Basic* presumption: first, whether a defendant may rebut the *Basic* presumption by pointing to the generic nature of alleged misstatements to show they had no price impact, and second, whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.

Respondents, Goldman Sachs shareholders, brought suit under the federal securities laws against petitioners, Goldman Sachs and three former executives, seeking $13 billion in damages. Respondents alleged that petitioners had engaged in securities fraud by making certain general and aspirational statements of the sort that virtually every public company makes, such as "[o]ur clients' interests always come first" and "[i]ntegrity and honesty are at the heart of our business." Respondents further alleged that those generic statements—which had been repeated in company communications for years—were fraudulent because Goldman Sachs had undisclosed conflicts of interest.

Critically, respondents conceded that the challenged statements did not increase Goldman Sachs' stock price when made. Instead, respondents relied on the increasingly popular "inflation-maintenance" theory—a theory this Court has never endorsed—to assert that the statements maintained the stock price at a previously inflated level. Although respondents did not identify the original source of inflation, they claimed it could be inferred that the challenged statements maintained inflation in Goldman Sachs' stock price simply because the price later dropped following reports of government enforcement activity concerning alleged conflicts of interest in certain securities the firm sold.

Invoking the *Basic* presumption, respondents moved for class certification. Petitioners sought to rebut the presumption with substantial evidence that the statements did not affect the price of the security. Specifically, petitioners pointed to the exceptionally generic nature of the alleged misstatements, arguing that such statements, which are pervasive in company communications, do not move stock prices. Petitioners also presented uncontradicted evidence that Goldman Sachs' stock price did not decline on 36 separate dates when the press reported in detail on the alleged conflicts of interest. On top of that, petitioners presented evidence that the price later declined because the market reacted to reports of government enforcement activity, not the correction of the alleged misstatements.

Despite all of that evidence, the district court concluded that petitioners had failed to rebut the presumption and certified the class. On appeal, the court of appeals first held that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion to prove the absence of price impact. A divided court of appeals subsequently held that petitioners had failed to rebut the *Basic* presumption. In so doing, the court refused to consider the generic nature of the alleged misstatements, reasoning that petitioners were improperly seeking to "smuggl[e] materiality," a merits issue, into the price-impact inquiry at class certification.

The court of appeals erred in two respects. *First*, it erroneously held that petitioners could not point to the generic nature of the alleged misstatements to show the absence of price impact. That holding contravenes this Court's mandate in *Halliburton II* that a defendant is entitled to rebut the *Basic* presumption at class certification with *any* relevant evidence, regardless of whether that evidence is also relevant to the merits of plaintiffs' claims. *Second*, the court of appeals erroneously held that petitioners had the burden of persuasion to rebut the *Basic* presumption. The plain text of Federal Rule of Evidence 301, together with the silence of the federal securities laws, commands that a defendant seeking to rebut a presumption has only the burden of production.

Taken together, the court of appeals' holdings effectively guarantee class certification in virtually any securities class action based on the inflation-maintenance theory. Plaintiffs need only identify a drop in a company's stock price following a negative event, then assert that the stock price had been improperly maintained by a company's generic statements, without having to show when or how the inflation entered the company's stock price. That theory forecloses a defendant from rebutting the *Basic* presumption by pointing to the most obvious evidence of the absence of price impact in a traditional securities class action: evidence that the price did not increase when the alleged misrepresentation was made. Instead, the defendant must also show that the alleged "correction" of the challenged statement did not cause any part of the subsequent *decrease* in price.

The decision below further limits the evidence a defendant can use to show the absence of price impact—and imposes an almost impossible burden on defendants—rendering the *Basic* presumption effectively irrebuttable in putative securities class actions. The Court should overturn the court of appeals' erroneous holdings. And under an application of the correct legal standards, this is not a close case. To provide much needed guidance to lower courts on the operation of the *Basic* presumption, the Court should hold that class certification was improper here and reverse the judgment below.

A. Background

1. Section 10(b) of the Securities Exchange Act of 1934 prohibits the "use or employ[ment]" of any "deceptive device" "in connection with the purchase or sale of any security" in contravention of rules prescribed by the Securities and Exchange Commission (SEC). 15 U.S.C. 78j(b). SEC Rule 10b-5 forbids entities subject to the Act from "mak[ing] any untrue statement of a material fact" or "omit[ting] to state a material fact necessary in order to make the statements made * * * not misleading." 17 C.F.R. 240.10b-5(b).

This Court has inferred from those sources of law a private right of action permitting the recovery of damages for securities fraud. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975). The elements of such a claim are a material misstatement or omission; scienter; a connection with the purchase or sale of a security;

economic loss; loss causation (*i.e.*, that the misrepresentation caused the asserted loss); and, of particular importance here, reliance. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

2. To obtain class certification in a private action under Section 10(b) and Rule 10b-5, plaintiffs must satisfy the familiar requirements of Federal Rule of Civil Procedure 23. For a class seeking to recover damages, plaintiffs must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That requirement is a "demanding" one, and this Court has instructed lower courts to take a "close look" to ensure that common questions predominate over individual ones. *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33-34 (2013) (citation omitted). Plaintiffs must "affirmatively demonstrate" compliance with the predominance requirement "through evidentiary proof." *Id.* at 33 (citation omitted).

As the Court has repeatedly emphasized, class certification is proper only if a court is satisfied, after a "rigorous analysis," that the requirements of Rule 23 have been met. *Comcast*, 569 U.S. at 33 (citation omitted). That analysis will "frequently entail overlap with the merits of the plaintiff's underlying claim," because it "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 33-34 (internal quotation marks and citation omitted). The "most common example" of when a court must consider a "merits question at the Rule 23 stage" is in a securities class action. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 n.6 (2011).

Plaintiffs asserting Section 10(b) claims ordinarily could not satisfy Rule 23's predominance requirement because the element of reliance would require individualized inquiries into whether each potential class member purchased stock in reliance on the alleged misrepresentation. But in *Basic*, *supra*, the Court made it easier for plaintiffs to satisfy the predominance requirement by recognizing a "rebuttable presumption" of classwide reliance. 485 U.S. at 242, 250. That presumption is based on the "fraud-on-the-market" theory, under which the price of a company's stock traded in an efficient market is assumed to reflect all public information about the company. See *id.* at 247.

The fraud-on-the-market theory, in turn, allows a court to presume that investors relied on a public company's material misrepresentation in buying or selling the relevant security at the market price. See *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 461-462 (2013). To invoke the *Basic* presumption at class certification, plaintiffs must show that the alleged misrepresentation was public; that the stock traded in an efficient market; and that the plaintiffs traded between when the misrepresentation was made and when the truth was revealed. See *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 811 (2011) (*Halliburton I*).

Once plaintiffs make that showing, a defendant can rebut the *Basic* presumption with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by [a] plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248. Of particular relevance here, if a defendant "show[s] that the misrepresentation in fact did not lead to a distortion in price," it breaks the "causal connection" by eliminating "the basis for finding that the fraud had been transmitted through [the] market price." *Ibid.*

3. In three recent decisions, this Court has addressed the relationship between the *Basic* presumption of reliance and the substantive elements of a Section 10(b)

claim. In *Halliburton I*, *supra*, the Court held that plaintiffs seeking class certification need not prove the substantive element of loss causation at class certification, because loss causation "addresses a matter different from" reliance. 563 U.S. at 812. Specifically, loss causation requires plaintiffs to show that "a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Ibid.* And in *Amgen*, *supra*, the Court similarly held that plaintiffs seeking class certification need not prove the substantive element of materiality. See 568 U.S. at 474.

Then, in *Halliburton II*, *supra*, the Court held that a court must consider evidence a defendant offers to show that an alleged misrepresentation did not affect the price of the relevant security, even if that same evidence would be "highly relevant at the merits stage." 573 U.S. at 283. The Court reasoned that a defendant is entitled to rebut the *Basic* presumption through any evidence showing that "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." *Id.* at 280, 284. The Court observed that *Basic*'s requirements are an "indirect proxy" for price impact, and an indirect proxy should not "preclude direct evidence" that the market price was not, in fact, affected. *Id.* at 281.

As the Court explained, "in the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse." *Halliburton II*, 573 U.S. at 278. After all, the "fundamental premise" of the *Basic* presumption is that "an investor presumptively relies on a misrepresentation so long as it was reflected in the market price." *Ibid.* (internal quotation marks and citation omitted). "If it was not," the Court continued, there is "no grounding" for the conclusion that the investor "indirectly relied" on the misrepresentation through the investor's "reliance on the integrity of the market price." *Ibid.* (brackets and citation omitted).

In permitting a defendant to rebut the *Basic* presumption through evidence of the absence of price impact, the Court made clear that "price impact differs from materiality." 573 U.S. at 282. While materiality is a substantive element of a securities claim, "[t]he fact that a misrepresentation was reflected in the market price at the time of [the] transaction * * * has everything to do with the issue of predominance at the class certification stage." *Id.* at 283 (internal quotation marks and citation omitted). The Court thus prohibited a court from "artificially limit[ing]" the evidence at class certification and expressly permitted a defendant to "seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence." *Ibid.*

B. Facts And Procedural History

1. Petitioners are The Goldman Sachs Group, Inc., and three of its former executives. In 2010, respondents, Goldman Sachs shareholders, brought this securities class action against petitioners in the United States District Court for the Southern District of New York, alleging violations of Section 10(b) and Rule 10b-5 (as well as Section 20(a), the provision for "control person" liability).

Respondents alleged that petitioners made material misstatements concerning Goldman Sachs' aspirational goals and risks of conflicts of interest. Of relevance here, respondents relied on two categories of generic statements.

First, respondents challenged statements in (or relating to) Goldman Sachs' aspirational "Business Principles," which the firm provides to its employees and has published in its annual reports since 1999. For example:

- "Our clients' interests always come first."
- "Integrity and honesty are at the heart of our business."
- "We are dedicated to complying fully with the letter and spirit of the laws, rules, and ethical principles that govern us."

J.A. 31-33; Goldman Sachs, Annual Report 82 (1999) <tinyurl.com/annualreport-gs-1999>.

Second, respondents challenged Goldman Sachs' generic warnings about the risks of conflicts of interest, which have appeared in substantially similar form in the "Risk Factors" section of Goldman Sachs' annual SEC filings since at least 2003. For example:

- "As we have expanded the scope of our businesses and our client base, we increasingly have to address potential conflicts of interest."
- "Conflicts of interest are increasing and a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses."
- "We have extensive procedures and controls that are designed to identify and address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses."

J.A. 27-29; D. Ct. Dkt. 136, at 5-6; The Goldman Sachs Group, Inc., Annual Report (Form 10-K), at 20 (Feb. 27, 2003).

None of the challenged statements referred to any specific transaction. Nor did the statements represent that Goldman Sachs would (or could) successfully manage, much less avoid, all conflicts. To the contrary, the statements were accompanied by a cautionary statement:

> [A]ppropriately identifying and dealing with conflicts of interest is complex and difficult, and our reputation could be damaged * * * if we fail, or appear to fail, to identify and deal appropriately with conflicts of interest. In addition, potential or perceived conflicts could give rise to litigation or enforcement actions.

J.A. 29.

Goldman Sachs sells various types of financial instruments to sophisticated counterparties, including collateralized debt obligations (CDOs). Respondents alleged that the challenged statements were fraudulent because Goldman Sachs had conflicts of interest in four CDOs—named Abacus, Hudson, Timberwolf, and Anderson—that it sold in 2006 and 2007. Respondents further alleged that three "corrective disclosures" revealed to the market the falsity of the challenged statements by exposing the conflicts: (1) an April 16, 2010, SEC enforcement action alleging that Goldman Sachs committed fraud in sponsoring the Abacus CDO by not disclosing to purchasers of notes in the CDO that a hedge fund played a role in the asset-selection process; (2) an April 30, 2010, Wall Street Journal report that the Department of Justice (DOJ) was investigating Goldman Sachs for unspecified mortgage trading; and (3) June 10, 2010, reports that the SEC was investigating whether Goldman Sachs profited by selling the Hudson CDO when it knew the CDO would decline in value. J.A. 289-296.

In fact, DOJ never brought any criminal charges against Goldman Sachs regarding its mortgage trading. Nor were any of the challenged statements ever the subject of a government enforcement action, including the SEC action concerning the Abacus CDO that purportedly acted as one of the three "corrective disclosures." That action was focused on different statements made to sophisticated investors that purchased CDO notes, not any statements to Goldman Sachs shareholders. The SEC never brought an action regarding the Hudson CDO.

2. Petitioners moved to dismiss, and the district court denied the motion in relevant part. The court rejected petitioners' contention that the alleged misstatements were immaterial as a matter of law. Pet. App. 7a.

Respondents then moved to certify a class of purchasers of Goldman Sachs stock between February 5, 2007, and June 10, 2010, invoking the *Basic* presumption. Because respondents could not show that the challenged statements affected Goldman Sachs' stock price when made, they relied on an ambitious use of the so-called "inflation maintenance" or "price maintenance" theory—a theory previously recognized by lower courts in limited circumstances, but never by this Court. See, *e.g.*, *In re Vivendi, S.A., Securities Litigation*, 838 F.3d 223, 257 (2d Cir. 2016).

Under the inflation-maintenance theory, a misrepresentation can have an actionable price impact even if it does not cause the stock price to go up, simply by preventing an *already inflated* stock price from *decreasing*. Notably, unlike in other inflation-maintenance cases involving discrete financial or operational announcements, respondents here did not identify any inflation-creating conduct that caused the inflation in the relevant stock price in the first place. Instead, they alleged only that the three purported "corrective disclosures" resulted in stock-price drops attributable to the challenged statements. J.A. 164-165; C.A. App. 224-225.

Petitioners sought to rebut the *Basic* presumption with evidence that the alleged misstatements had no price impact. Of particular relevance here, petitioners argued that the "general, aspirational statements" alleged as misstatements could not have affected the stock price, and they contended that the nature of the statements was relevant evidence in assessing price impact despite any "overlap with the considerations relevant to the merits issue[] of materiality." D. Ct. Dkt. 142, at 17-18.

Petitioners also presented evidence that Goldman Sachs' stock price had not declined in response to news reports on 36 separate dates before the purported "corrective disclosures"—reports that appeared, among other places, on the front pages of the Wall Street Journal and the New York Times—even though those reports contained detailed allegations about Goldman Sachs' conflicts of interest. Indeed, respondents' first purported "corrective disclosure"—the SEC enforcement action regarding the Abacus CDO—was based on one of the very conflicts already disclosed in the press. J.A. 689-694.

The district court certified the class. Pet. App. 79a-94a. The court refused to consider petitioners' evidence about the nature of the challenged statements and about the failure of Goldman Sachs' stock price to decline in response to the news reports; it reasoned that the evidence related only to "the statements' materiality and not price impact." *Id.* at 90a-91a. The court ultimately determined that petitioners had not rebutted the *Basic* presumption, because they had not "conclusively" proven a "complete lack" of price impact. *Id.* at 89a, 92a.

3. On interlocutory appeal, the court of appeals vacated the district court's order. Pet. App. 60a-78a. The court of appeals held that the district court had erred by failing to apply the preponderance-of-the-evidence standard in determining whether petitioners had rebutted the *Basic* presumption. *Id.* at 78a. In articulating that standard, however, the court of appeals rejected petitioners' argument that, under Federal Rule of Evidence 301, a defendant bears only the burden of production to rebut the

Basic presumption and not the ultimate burden of persuasion. *Id.* at 75a-76a. The court explained that, while Rule 301 was the default rule governing presumptions, the *Basic* presumption had "altered" that rule and "imposed a burden of persuasion on defendants." *Id.* at 75a.

The court of appeals held that the district court had also erred by refusing to consider evidence that Goldman Sachs' generic statements had no price impact because the stock price had not declined in response to the news reports. Pet. App. 76a. The court of appeals observed that the district court had erroneously deemed the evidence to be "evidence of the statements' lack of materiality" not permitted at class certification. *Ibid.* As the court of appeals explained, "[a]lthough price impact touches on materiality, which is not an appropriate consideration at class certification, it 'differs from materiality in a crucial respect' " because it "refers to the effect of a misrepresentation on a stock price." *Id.* at 77a (quoting *Halliburton II*, 573 U.S. at 282).

4. a. On remand, petitioners again sought to rebut the *Basic* presumption by showing that the challenged statements had no price impact. In addition to pointing to the nature of the statements themselves, they presented extensive economic and empirical evidence that the challenged statements did not affect the stock price when they were made, and that the price decreases following the "corrective disclosures" were not attributable to any correction of the alleged misstatements.

First, petitioners demonstrated, and respondents conceded, that the market did not react when the alleged misstatements were made. J.A. 427-428; Pet. App. 68a; C.A. App. 4489.

Second, one of petitioners' experts, Dr. Paul Gompers, demonstrated that Goldman Sachs' stock price did not move on any of the 36 dates on which the press reported that Goldman Sachs had conflicts of interest. J.A. 442-453, 467-469. He thus concluded that the stock-price drops on the dates of the alleged "corrective disclosures" were not attributable to the alleged misstatements. J.A. 472-473.

Third, another of petitioners' experts, Dr. Stephen Choi, demonstrated that reports of government enforcement activity, not any "correction" of the alleged misstatements, "accounted for the full" amount of the declines in Goldman Sachs' stock price on the three alleged "corrective disclosure" dates. J.A. 526-530. As to the first alleged "corrective disclosure" date—when the SEC filed its enforcement action concerning the Abacus CDO—Dr. Choi found that the decline on that date was "not statistically different from" declines experienced by other companies facing similar SEC enforcement actions. J.A. 528. As to the other two alleged "corrective disclosure" dates, Dr. Choi relied on an analysis of market commentary and academic literature, together with Dr. Gompers' analysis, to conclude that the stock-price drops were attributable to the allegations that Goldman Sachs was the subject of DOJ and SEC investigations. J.A. 557-568.

Fourth, petitioners' final expert, Dr. Laura Starks, demonstrated that generic statements such as the ones at issue are pervasive in the market and that "analysts did not view [those] statements as containing information pertinent to an investment decision-making process." J.A. 599-605, 626. Indeed, Dr. Starks showed that the statements "were not mentioned" in any of the over 800 analyst reports on Goldman Sachs published during the class period. J.A. 612, 619-620.

b. In response, respondents put forward a single expert, Dr. John Finnerty, who opined that Goldman Sachs' stock price experienced statistically significant declines on the purported "corrective disclosure" dates. He speculated that those declines were substantially caused by "a series of revelations concerning Goldman's alleged fraudulent conduct related to the management of its Conflicts of Interest and its Business Principles." J.A. 642.

Remarkably, however, Dr. Finnerty conceded that he did not "do any work to assess whether any inflation entered Goldman Sachs' stock price prior to the start of the class period." J.A. 775. He also did not test whether the challenged statements maintained any inflation in the stock price. He conceded that he "d[id]n't know" whether "the stock price [would] have fallen" if Goldman Sachs "had not made the statements." J.A. 783. As to the stock drops following the alleged "corrective disclosures," Dr. Finnerty did not attempt to analyze whether those declines resulted from the market learning for the first time that the challenged statements were false. C.A. App. 3711-3722. And he made no effort to measure the effect that the reports of government enforcement activity had on the stock price on the three alleged "corrective disclosure" dates. J.A. 685.

c. The district court again certified the class, determining that petitioners had failed to rebut the *Basic* presumption by a preponderance of the evidence. Pet. App. 47a-59a. The court rejected petitioners' argument that the statements at issue were so generic that they "could not have impacted" the stock price. D. Ct. Dkt. 192, at 5 n.2, 12-13 & n.8; C.A. App. 8277, 8287.

The district court also rejected petitioners' "attempts to demonstrate the misstatements' complete lack of price impact" as "not persuasive," despite the uncontradicted evidence that the news reports of conflicts on 36 prior dates had not affected the stock price. Pet. App. 54a. That evidence, according to the court, "[was] not sufficient to sever the link between the first corrective disclosure and the subsequent stock price drop." *Id.* at 55a. The court also refused to credit petitioners' evidence that the stock price dropped because of the reports of government enforcement activity, not because of any "correction" of the alleged misstatements. *Id.* at 57a-59a.

5. On interlocutory appeal, a new panel of the court of appeals affirmed in a divided opinion. Pet. App. 1a-46a.

a. The court of appeals first rejected petitioners' argument that the inflation-maintenance theory requires evidence demonstrating that the alleged inflation has been induced by fraud. Pet. App. 17a. The court reasoned that the theory requires a court to find only that a corrective disclosure "caused a reduction in a defendant's share price." *Id.* at 18a. Upon making such a finding, a court can then "infer that the price was inflated by the amount of the reduction." *Ibid.*

The court of appeals then turned to petitioners' arguments about the generic nature of the statements. Despite the first panel's detailed discussion of *Halliburton II*, a majority of the second panel rejected petitioners' argument that the district court erred by refusing to consider the generic nature of the statements as evidence that the challenged statements did not affect the stock price. Pet. App. 19a-27a.

While the court of appeals recognized that "[p]rice impact * * * resembles materiality," it characterized petitioners' argument as an attempt to "smuggl[e] materiality into Rule 23." Pet. App. 22a, 23a. According to the court, whether misstatements are "too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate," because the issue of materiality is "common to all class members." *Id.* at 23a. The court noted that defendants could still challenge materiality in moving to dismiss or for summary judgment. *Id.* at 26a-27a.

Having refused to consider the generic nature of the alleged misstatements, the court of appeals proceeded to determine that petitioners had failed to rebut the *Basic* presumption by a preponderance of the evidence. Pet. App. 27a-35a. The court characterized petitioners' burden as a "heavy" one, explaining that petitioners could rebut the *Basic* presumption only by showing that the "entire price decline on the corrective-disclosure dates was due to something other than [their] alleged misstatements." *Id.* at 28a & n.18. The court repeatedly stressed that petitioners bore the burden of persuasion in rebutting the presumption. *Id.* at 11a, 28a & n.18, 29a, 32a-33a n.19.

The court of appeals discounted petitioners' evidence that the decline in Goldman Sachs' stock price was attributable not to investors learning of alleged conflicts of interest, but rather to reports of government enforcement activity. Pet. App. 29a-31a. The court acknowledged that it was "possible" that "Goldman's price declined *in part* because the market feared that Goldman would be fined." *Id.* at 30a. According to the court, however, that was "not enough" to rebut the *Basic* presumption. *Ibid.*

b. Judge Sullivan dissented. Pet. App. 39a-46a. He criticized the majority's approach for "miss[ing] the forest for the trees" and "essentially turning the [*Basic*] presumption on its head." *Id.* at 39a. In Judge Sullivan's view, petitioners had "offered persuasive and uncontradicted evidence" that Goldman Sachs' stock price was "unaffected" by the news reports of the alleged conflicts of interest—"thereby severing the link that undergirds the *Basic* presumption." *Ibid.* Respondents, for their part, "offered no hard evidence, expert or otherwise, to refute [that] proof." *Id.* at 44a-45a. Instead, respondents demonstrated only that Goldman Sachs' stock price declined in response to negative news about the firm, which merely illustrated that its "stock traded in an efficient market." *Id.* at 41a. Judge Sullivan reasoned that, under the majority's approach, "the *Basic* presumption is truly irrebuttable and class certification is all but a certainty in every case." *Id.* at 44a.

Judge Sullivan also faulted the majority for refusing to "consider the nature of the alleged misstatements in assessing whether and why the misrepresentations did not in fact affect the market price of [the] stock." Pet. App. 44a (internal quotation marks and citation omitted). "Candidly," he said, "I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact." *Ibid.* Judge Sullivan posited that the generic nature of the statements provided the "obvious explanation" for the absence of a price decline in response to the news reports of the alleged conflicts. *Id.* at 44a-45a.

SUMMARY OF ARGUMENT

I. A defendant in a securities class action may rebut the presumption of classwide reliance established in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the alleged misstatements as evidence that the statements did not affect the price of the security.

A. In *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), this Court made clear that a defendant in a securities class action may introduce evidence of the absence of price impact to rebut the *Basic* presumption at class certification. A court may not "artificially limit" the evidence used to rebut the presumption, even if the same evidence is also "highly relevant" at the merits stage. As this Court explained, price impact is *Basic*'s "fundamental premise"; without it, there is no basis for concluding that plaintiffs indirectly relied on the alleged misrepresentations by purchasing at the market price. Outside the securities context, too, the

Court has recognized that the required inquiry under Federal Rule of Civil Procedure 23 will frequently overlap with the merits inquiry.

B. The generic nature of an alleged misstatement is powerful evidence of the absence of price impact. The more generic the statement, the less likely the statement is to move the market price of a security. The generic nature of an alleged misstatement is especially relevant when plaintiffs invoke the inflation-maintenance theory. In such a case, if an alleged "corrective disclosure" reduces the stock price, a court will infer that the original price was inflated by the amount of the reduction. But that inference is warranted only to the extent the original misstatement and the corrective disclosure have the same informational content. The nature of the alleged misstatement is critical to any defendant's efforts to dispute that inference.

C. This Court's decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Fund*, 568 U.S. 455 (2013), does not compel a contrary result. In *Amgen*, the Court held that a defendant in a securities class action could not rebut the *Basic* presumption by disproving materiality at class certification. Here, petitioners are not asking for a determination of the legal question whether the statements are material. Petitioners' submission is more modest: the generic nature of the alleged misstatements is simply *evidence* of the absence of price impact that must be considered at class certification. *Amgen* does not require a court to ignore such evidence merely because the price-impact inquiry overlaps with the materiality inquiry. Indeed, in *Halliburton II*, the Court squarely rejected the argument that *Amgen* prohibited a defendant from introducing evidence of the absence of price impact at class certification because such evidence was also relevant to a merits issue.

D. If upheld, the court of appeals' approach would have adverse consequences.

For starters, that approach would make it virtually impossible for a defendant to rebut the *Basic* presumption. The inflation-maintenance theory already hinders a defendant's ability to rebut the presumption by pointing to the absence of price movement at the time of the alleged misstatement. If the generic nature of the alleged misstatement is off-limits, a court cannot critically evaluate whether the connection between the alleged misstatement and the alleged "corrective disclosure" supports an inference that the back-end price drop is evidence of front-end price inflation.

The court of appeals' approach would also impose serious costs on public companies and their shareholders. Because most securities class actions that survive the motion-to-dismiss stage settle, a virtually irrebuttable *Basic* presumption would allow plaintiffs with meritless claims to force corporations to choose between costly litigation and a costly settlement. Those consequences are especially troubling in light of the increase in event-driven securities litigation, in which plaintiffs work backward from a stock drop following a negative corporate event to allege securities fraud. Because virtually all public companies make generic statements like those challenged here, plaintiffs need only identify such statements and assert that the statements "maintained" an inflated stock price before the negative event. The Court should reject the court of appeals' approach—which makes it all too easy to obtain class certification—and hold that a defendant may point to all relevant price-impact evidence to rebut the *Basic* presumption.

II. The plaintiffs in a securities class action retain the ultimate burden of persuasion to prove price impact when invoking the *Basic* presumption.

A. Federal Rule of Evidence 301 provides that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," and the burden of persuasion "remains on the party who had it originally." The only exception is when a federal statute or rule "provide[s] otherwise." That plain text imposes the burden of persuasion on plaintiffs. The *Basic* presumption is undoubtedly a presumption to which Rule 301 applies, and there is no statute or rule shifting the burden.

B. The court of appeals offered no valid response to that plain-text argument. The court of appeals suggested that an interpretation of *Basic* that imposes the burden of persuasion on the defendant has a "sufficient link" to Section 10(b), but Rule 301 applies unless a *statute*—not a "link" to a statute—provides otherwise. Even if a "link" could be sufficient, this one is too tenuous: no statute even creates the private right of action under Section 10(b), and *a fortiori* no statute creates the *Basic* presumption. And even if the Court has the authority to shift the burden of persuasion itself, it has not previously done so in the context of the *Basic* presumption and should not do so now.

III. The Court should apply the correct legal framework and reverse the judgment upholding class certification in this case. The court of appeals has rendered the *Basic* presumption effectively irrebuttable, and the lower courts sorely need guidance on how properly to apply that presumption.

Under a correct application of the *Basic* presumption, this is an easy case. The alleged misstatements conveyed anodyne sentiments that were unlikely to affect Goldman Sachs' stock price. That alone is weighty evidence of the absence of price impact. Petitioners also offered extensive economic evidence confirming that the alleged misstatements had no price impact when made and that the price drops following the "corrective disclosures" were not attributable to the misstatements. The only rational inference is that the statements did not affect the stock price, and the class thus should not have been certified. The Court should reverse the court of appeals' judgment and ensure that the *Basic* presumption remains just that—a presumption.

ARGUMENT

I. A DEFENDANT IN A SECURITIES CLASS ACTION MAY REBUT THE *BASIC* PRESUMPTION OF CLASS-WIDE RELIANCE BY POINTING TO THE GENERIC NATURE OF THE ALLEGED MISSTATEMENTS

The court of appeals erred by holding that a defendant cannot rebut the presumption of classwide reliance established in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the alleged misstatements as evidence that the statements did not affect the stock price. In *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), this Court made clear that such evidence must be considered. Adopting the court of appeals' approach would render the *Basic* presumption virtually irrebuttable and impose enormous costs on public companies and their shareholders.

A. In Determining Whether A Defendant Has Rebutted The *Basic* Presumption, A Court Must Consider Any Evidence Bearing On Price Impact

1. In *Halliburton II*, this Court held that a defendant must be "afforded an opportunity" to rebut the *Basic* presumption before class certification "with evidence that an alleged misrepresentation did not actually affect the market price of the stock." 573 U.S. at 284. As explained in *Basic* itself, "[a]ny showing that severs the link" between the alleged misrepresentations and the price paid by the plaintiffs is "sufficient" to rebut the presumption. 485

U.S. at 269. That is because the requirements of the *Basic* presumption are simply an "indirect proxy" for a showing that the challenged statements had price impact. *Halliburton II*, 573 U.S. at 281. Put another way, price impact is the "fundamental premise" underlying the *Basic* presumption that investors relied on the challenged statements by purchasing at the market price. *Id.* at 278, 282 (citation omitted). Accordingly, a defendant may rebut the *Basic* presumption with *any* evidence that an alleged misrepresentation did not in fact affect the stock price. *Id.* at 281-282.

In so holding in *Halliburton II*, the Court rejected the plaintiff's argument that the defendants could not rebut the *Basic* presumption with evidence showing a lack of price impact. See 573 U.S. at 280-281. In fact, the defendants sought to introduce the very same evidence that they had "earlier introduced to disprove loss causation"—before the Court held in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804 (2011) (*Halliburton I*), that plaintiffs are not required to prove loss causation at class certification—in order to show the absence of price impact. 573 U.S. at 265. Despite that overlap, the Court refused "artificially [to] limit" the evidence that a defendant may use to rebut the *Basic* presumption. *Id.* at 282, 283.

2. The Court's holding in *Halliburton II* was necessary to "maintain the consistency of the presumption with the class certification requirements" of Rule 23. 573 U.S. at 284. Even before *Halliburton II*, the Court admonished that a court considering class certification should "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 35 (2013). It "cannot be helped," the Court has explained, that the analysis of the requirements for class certification "[f]requently" will

"entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011).

That principle applies with equal force here. It does not matter if a defendant seeking to defeat the *Basic* presumption asks the court to consider evidence that is also relevant to a merits inquiry. In conducting the "rigorous analysis" required by Rule 23, *Wal-Mart*, 564 U.S. at 351 (citation omitted), a court must consider *any* evidence bearing on price impact to "ensure that questions of law or fact common to the class will 'predominate.'" *Halliburton II*, 573 U.S. at 283 (citation omitted).

This Court's decisions thus establish a framework for applying the *Basic* presumption: plaintiffs are entitled to invoke that presumption to establish classwide reliance on an alleged misrepresentation, but a defendant is entitled to rebut it at class certification. The defendant may do so by presenting any evidence that the alleged misrepresentation did not affect the stock price, even if that evidence is also relevant to a merits inquiry.

B. The Generic Nature Of An Alleged Misstatement Is Evidence That Is Highly Relevant To The Price-Impact Inquiry

If the generic nature of an alleged misstatement is relevant to the price-impact inquiry, then a court must consider that evidence when a defendant seeks to rebut the *Basic* presumption. In fact, the generic nature of a statement is powerful evidence of the absence of price impact.

1. As this Court has explained, "price impact" refers to "whether the alleged misrepresentations affected the market price." *Halliburton II*, 573 U.S. at 278 (citation omitted). Accordingly, evidence is relevant to show the absence of price impact if it tends to show that the alleged misrepresentation did—or did not—affect a security's

market price. Cf. Fed. R. Evid. 401. While the generic nature of an alleged misstatement may not be dispositive in rebutting the *Basic* presumption, it is weighty evidence that the statement did not affect the market price.

a. The general, aspirational quality of an alleged misstatement tends to disprove price impact because the more generic the statement, the less likely that statement will contain the type of information that is incorporated into the market price of a stock. See *Halliburton II*, 573 U.S. at 278. As one of petitioners' experts explained, general and aspirational statements such as the ones at issue here are "pervasive in company communications." J.A. 599-605. And analysts and institutional investors are unlikely to rely on such statements, as reflected by the fact that the challenged statements here were not mentioned in any of the over 800 analyst reports published during the class period. J.A. 596, 609, 612-635.

It is simply intuitive that, the more generic the challenged statement, the less likely it is to affect the price of the stock. A judge is not required to set aside common sense in addressing the *Basic* presumption.

b. The nature of an alleged misstatement—and its relationship to an alleged corrective disclosure—is especially important evidence when plaintiffs invoke the inflation-maintenance theory.

The court of appeals explained that, in an inflation-maintenance case, a defendant cannot rebut the *Basic* presumption by showing that the stock price did not move at the time of the alleged misstatement. See Pet. App. 18a-19a. As the court of appeals put it, "if a court finds a disclosure caused a reduction in a defendant's share price, it can infer that the price was inflated by the amount of the reduction." *Id.* at 18a. In other words, "back-end" price deflation is treated as a proxy for showing "front-end" price inflation; plaintiffs need not even specify the event that caused the front-end inflation in the first place. In this case, respondents' sole expert never attempted to identify when the alleged inflation entered Goldman Sachs' stock price, or to isolate the incremental price effect of the reports of government enforcement activity in the alleged corrective disclosures. See p. 17, *supra*.

Relying on the inflation-maintenance theory, plaintiffs often point to negative news about a company that caused the company's stock to drop and then assert that, at a high level of generality, the news corrected an earlier generic statement. Under that approach, a report of any kind of wrongdoing can be said to correct a nebulous statement of the type challenged here, even if the connection between the two is tenuous.

But the inflation-maintenance theory turns on the "assumption" that the "lie's positive effect on the share price" is equal to "the additive inverse of the truth's negative effect." *In re Vivendi, S.A., Securities Litigation*, 838 F.3d 223, 255 (2d Cir. 2016) (citation omitted). And that assumption makes sense only where the alleged misstatement closely aligns with the "corrective disclosure." If there is a mismatch in the content of those two statements—if the alleged "lie" on the front end and the alleged "corrective disclosure" on the back end do not have the same informational content—there is far less reason to infer from the subsequent price drop that the alleged misstatement actually maintained any existing price inflation.

In applying the *Basic* presumption, then, a court must closely examine whether the alleged corrective disclosure truly "reveal[ed] to the market the falsity" of the generic statement or instead contained other negative news that led to the price drop. Pet. App. 6a. The more general and aspirational the alleged misstatement, the less likely the alleged "corrective disclosure" in fact corrected that statement. Indeed, that is why the inflation-maintenance theory at most makes sense where plaintiffs identify specific misstatements—such as those about a discrete financial or operational metric—that the alleged corrective disclosure directly corrects. See, *e.g.*, *FindWhat Investor Group* v. *FindWhat.Com*, 658 F.3d 1282, 1293-1294 (11th Cir. 2011), cert. denied, 568 U.S. 814 (2012).

c. In sum, the nature of the challenged statement is highly relevant at both the "front end" and the "back end" in an inflation-maintenance case. As to the front end: the more generic a statement, the less likely it is to have affected the stock price. And as to the back end: the more tenuous the connection between the information in the alleged misstatement and the corrective disclosure, the less probative the back-end price drop is of front-end price inflation.

2. Respondents have disputed that an alleged misstatement is evidence of price impact not by challenging its relevance, but rather by advancing the remarkable claim that the nature of the statement is not a "form of evidence" at all. Br. in Opp. 17-18 (internal quotation marks omitted).

It cannot seriously be challenged, however, that an alleged misstatement constitutes evidence in a securities case. Plaintiffs could never prove a securities claim without identifying—and introducing into evidence—the alleged misstatement. The nature of the statement is also clearly relevant evidence at class certification: plaintiffs invoking the *Basic* presumption may rely on a statement to establish that the "misrepresentation[] w[as] publicly known," *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 471 (2013) (citation omitted), and a defendant may submit an "event study" in which one of the events is "the specific misrepresentation asserted by the plaintiffs" to prove that the alleged misstatement did not affect the price, *Halliburton II*, 573 U.S. at 281. This Court should reject the court of appeals' "artificial[]" restriction on the kind of evidence a court may consider in evaluating price impact at class certification. See *id.* at 283.

C. This Court's Decision In *Amgen* Does Not Require A Contrary Approach

Contrary to the court of appeals' conclusion, this Court's decision in *Amgen*, *supra*, does not require a court to ignore the nature of the alleged misstatement when examining price impact at class certification.

1. Relying on *Amgen*, the court of appeals reasoned that allowing petitioners to point to the generic nature of the statements would "smuggl[e] materiality into Rule 23." Pet. App. 21a-22a. That reasoning misapprehends *Amgen* and overlooks *Halliburton II*.

In *Amgen*, the Court held only that "plaintiffs are not required to prove materiality" (a substantive element of a securities claim) at class certification, and thus that a defendant cannot rebut the presumption by showing a lack of materiality. 568 U.S. at 468. That conclusion accords with *Halliburton I*, *supra*, which similarly held that plaintiffs seeking class certification need not prove the element of loss causation. See 563 U.S. at 815. Together, those two cases stand for the unremarkable proposition that plaintiffs need not prove their case on the merits at class certification.

In *Halliburton II*, the Court squarely rejected the argument that *Amgen* prohibited a defendant from introducing evidence to show the absence of price impact at class certification. See 573 U.S. at 282. The plaintiff in *Halliburton II* had argued that price impact should not be adjudicated at class certification because evidence of price impact "necessarily establishes materiality." Resp.

Br. at 52, *Halliburton II*, *supra* (No. 13-317). But as the Court explained, the "common issue of materiality," unlike price impact, "can be left to the merits stage without risking the certification of classes in which individual issues will end up overwhelming common ones." 573 U.S. at 282. "Price impact is different": it goes to *Basic*'s "fundamental premise" and "has everything to do with the issue of predominance at the class certification stage." *Id.* at 283 (citation omitted).

As *Halliburton II* makes clear, nothing in *Amgen* precludes courts from considering evidence relevant to price impact at class certification. To the contrary, the Court expressly contemplated in *Amgen* that a court conducting the class-certification inquiry would consider evidence that is also relevant to the merits inquiry: "[m]erits questions may be considered *to the extent * * * they are relevant* to determining whether the Rule 23 prerequisites for class certification are satisfied." 568 U.S. at 466 (citing *Wal-Mart*, 564 U.S. at 351 n.6) (emphasis added).

The Court's recent trio of cases regarding the *Basic* presumption—*Halliburton I*, *Halliburton II*, and *Amgen*—and its Rule 23 cases more generally compel the following conclusion: plaintiffs are not required to prove materiality or loss causation in order to invoke the *Basic* presumption at class certification, but a court must consider *all* evidence offered by the defense showing that the alleged misrepresentations did not actually affect the stock price. A court may not refuse to consider evidence relevant to price impact merely because it is also relevant to materiality and loss causation. See *In re Allstate Corp. Securities Litigation*, 966 F.3d 595, 606-609 (7th Cir. 2020). That is the careful balance established by this Court's precedents.

2. In their brief in opposition, respondents repeatedly insisted 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 do not dispute that the ultimate legal question of whether a statement is material must be confined to the merits stage. Instead, petitioners are making the more modest submission that the generic nature of the alleged misstatements is *evidence* of the absence of price impact that must be considered at class certification. See pp. 24-30, *supra*.

Nor would petitioners' approach effectively allow a defendant to relitigate materiality by labeling "that argument a 'price impact,' rather than a 'materiality,' defense." Br. in Opp. 1. The materiality and price-impact inquiries are distinct, even if related. The materiality inquiry asks whether there is a "substantial likelihood" that the alleged misrepresentation "would have been viewed by the *reasonable investor* as having significantly altered the total mix of information made available." *Basic*, 485 U.S. at 231-232 (internal quotation marks and citation omitted; emphasis added). The price-impact inquiry, by contrast, asks whether the alleged misrepresentation "*actually* affect[ed] the stock's price." *Halliburton II*, 573 U.S. at 263-264 (emphasis added).

Indeed, the Court recognized in *Halliburton II* that the two inquiries are not always coextensive. As the Court explained, "a public, material misrepresentation might not affect a stock's price even in a generally efficient market." 573 U.S. at 279. In other words, even if a court determines that a reasonable investor would likely have viewed a statement as significant, it may turn out that the statement did not, in fact, have price impact—perhaps because of how investors actually evaluated the information in context, or how the information was disseminated, or any number of other reasons.

To be sure, the evidence used to prove (or disprove) materiality and price impact may overlap, but that is inevitable: the *Basic* presumption "incorporates" the assumption that a "public and material" misrepresentation "affect[s] the stock price," and thus materiality is one of the "prerequisites" for the presumption of price impact (though it need not be proved before class certification). *Halliburton II*, 573 U.S. at 276, 279. For that reason, a defendant's efforts to disprove price impact may resemble the evidence used to show a lack of materiality, one of the bases for the price-impact assumption. But that does not provide license for a court to carve out such evidence from consideration at class certification. Instead, a court must consider *all* of the evidence relevant to price impact, even if it overlaps with the evidence relevant at the merits stage. That is not only consistent with *Amgen*, see 568 U.S. at 465-466, but affirmatively mandated by this Court's other precedents, see pp. 24-26, *supra*.

D. The Court Of Appeals' Contrary Approach Would Have Serious Adverse Consequences For Public Companies

A straightforward application of this Court's precedents suffices to reject the court of appeals' interpretation of the *Basic* presumption. But the adverse "practical consequences of an expansion" of the presumption provide another reason to do so. *Stoneridge Investment Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). If upheld, the court of appeals' approach would render the presumption effectively irrebuttable and impose enormous costs on public companies and their shareholders.

1. Under the court of appeals' approach, defendants would virtually never be able to rebut the *Basic* presumption in inflation-maintenance cases such as this one, even with the weightiest economic evidence corroborating the

intuition that exceptionally generic statements are unlikely to affect the stock price.

Though this Court has never endorsed the inflation-maintenance theory, several courts of appeals have. See pp. 28-29, *supra*. And the theory is becoming increasingly popular; according to one estimate cited by the court below, plaintiffs have asserted that theory in some 71% of recent district-court cases involving the *Basic* presumption—and have successfully established price impact in *every one* of those cases. See Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077 (2019); Pet. App. 19a n.9.

The inflation-maintenance theory already seriously impedes a defendant's ability to rebut the *Basic* presumption. The theory allows plaintiffs to rely on the presumption even if there is no evidence that a misstatement increased the stock price when it was made. Nor do plaintiffs need to identify what statement (if any) inflated the price in the first place. See Pet. App. 17a-19a. Instead, a court need only focus on the back-end price impact of a corrective disclosure, then work backward from that price decrease, inferring from it that the alleged misstatement maintained price inflation. See *id.* at 18a. If the defendant bears the ultimate burden of persuasion, but see pp. 37-43, *infra*, it will face the daunting task of proving that the "entire price decline" was caused by something other than the alleged misstatement. Pet. App. 28a.

The inability to point to the generic nature of the alleged misstatement would further hinder defendants in inflation-maintenance cases by closing off yet another avenue to disprove price impact, thereby making it virtually impossible to rebut the supposedly rebuttable *Basic* presumption. The data bear out that concern. More than

2,000 securities class actions have been filed since *Halliburton II*. See Stanford Law School, Securities Class Action Clearinghouse, *Filings by Year* (last visited Jan. 25, 2021) <tinyurl.com/filingsbyyear>. Yet petitioners have identified only *one* case in which a court of appeals has concluded that the defendants successfully rebutted the *Basic* presumption by showing no price impact, see *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016), and only *four* district court cases in which defendants rebutted the presumption (even in part), see *Ohio Public Employees Retirement System* v. *Federal Home Loan Mortgage Corp.*, Civ. No. 08-160, 2018 WL 3861840 (N.D. Ohio Aug. 14, 2018); *In re Finisar Corp. Securities Litigation*, Civ. No. 11-1252, 2017 WL 6026244 (N.D. Cal. Dec. 5, 2017); *In re Intuitive Surgical Securities Litigation*, Civ. No. 13-1920, 2016 WL 7425926 (N.D. Cal. Dec. 22, 2016); *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 309 F.R.D. 251 (N.D. Tex. 2015). Notably, in the 20 district-court cases since *Halliburton II* in which plaintiffs have invoked the inflation-maintenance theory, defendants have *never once* rebutted the *Basic* presumption. See Pet. App. 19a n.9.

However the *Basic* presumption is supposed to work in theory, it is a mean feat to rebut it in practice. The court of appeals' approach would exacerbate that problem by precluding defendants from relying on critical evidence to show the absence of price impact. See pp. 26-30, *supra*.

2. The court of appeals' approach would also impose serious costs on public companies and their shareholders. As this Court has long recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that the defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). The fact of certification gives class-

action plaintiffs and their lawyers enormous leverage, putting "hydraulic pressure" on defendants to settle. *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004). Little wonder, then, that class certification in a securities action almost always leads to the "extort[ion]" of a settlement by "plaintiffs with weak claims" but massive potential damages. *Stoneridge*, 552 U.S. at 163-164.

The court of appeals' approach also exacerbates the phenomenon of "event-driven securities litigation"—*i.e.*, a securities action filed reflexively in the "immediate wake of a stock drop" caused by some unanticipated event. John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions*, CLS Blue Sky Blog (Jan. 22, 2019) <tinyurl.com/changingcharactersecurities>. If plaintiffs and their lawyers can obtain certification for the sort of exceptionally generic statements that companies make all the time, see SIFMA Cert. Br. 6-8, then they will virtually *always* manage to find some earlier statement with a tenuous connection to a "corrective" corporate misstep that causes a stock drop. Such event-driven securities lawsuits threaten to "convert Rule 10b-5 into a scheme of investor's insurance." *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005) (citation omitted).

Investors on the whole do not benefit from a regime of constant event-driven class actions. Large class-action settlements often simply transfer wealth from current shareholders to former ones, with the plaintiffs' bar collecting a sizable tax on the transfer. See, *e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503, 1507 (1996). Whatever value securities class actions might have in deterring false statements about, say, specific financial or operational metrics, it makes little sense to encourage lawsuits where the plaintiffs work backward from a price drop to allege securities fraud based on commonplace corporate statements.

Respondents have suggested (Br. in Opp. 22-23) that the possibility that a defendant can still challenge materiality at the motion-to-dismiss and summary-judgment stages will prevent abusive litigation. But the element of materiality will "rarely be dispositive" at the motion-to-dismiss stage. *In re Morgan Stanley Information Fund Securities Litigation*, 592 F.3d 347, 360 (2d Cir. 2010). At that stage, a court will evaluate the statement's materiality based only on the plaintiffs' allegations and the court's expectations about investor behavior, and it will grant a motion to dismiss only if the statement is "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of [its] importance." *ECA & Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009). And most securities class actions never reach summary judgment, given the cost of discovery and inordinate pressure to settle following class certification. See RLC Cert. Br. 8-10. The Court should not sanction a regime in which the *Basic* presumption is effectively irrebuttable and a motion to dismiss is a defendant's only protection against abusive litigation.

II. THE PLAINTIFFS IN A SECURITIES CLASS ACTION RETAIN THE ULTIMATE BURDEN OF PERSUASION WHEN INVOKING THE *BASIC* PRESUMPTION

Stacking the deck even further in favor of securities plaintiffs, the court of appeals held that a defendant bears the burden of persuasion to rebut the *Basic* presumption. Under Federal Rule of Evidence 301, however, a defendant attempting to rebut the *Basic* presumption bears only the burden of production; the plaintiffs bear the ultimate burden of persuasion on the issue of price impact. Accordingly, to rebut the presumption, a defendant need only produce evidence that the alleged misrepresentation did not affect the stock's price; the defendant need not establish the absence of price impact.

A. Federal Rule of Evidence 301 establishes that the burden of persuasion in a securities class action does not shift to the defendant when the plaintiffs successfully invoke the *Basic* presumption.

1. Rule 301 states: "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. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." Because the Federal Rules of Evidence are a "legislative enactment," they are interpreted according to the "traditional tools of statutory construction." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 163 (1988) (citation omitted).

The text of Rule 301 reflects this Court's case law on burdens and presumptions. The Court has long distinguished between the "burden of production" and the "burden of persuasion." *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U.S. 267, 274-275 (1994) (citing cases); see 2 Kenneth S. Broun et al., *McCormick on Evidence* § 336, at 691-694 (8th ed. 2020) (McCormick). The burden of production refers to a party's obligation to "come forward with evidence to support its claim." *Greenwich Collieries*, 512 U.S. at 272. The burden of persuasion refers to a party's obligation to "persuade the trier of the facts * * * of the truth of a proposition which he has affirmatively asserted." *Id.* at 275.

This Court has explained that a "presumption" is a rule that a "finding of [a] predicate fact" produces a "required conclusion in the absence of explanation." *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506 (1993); see 2 McCormick § 342, at 724. A presumption "assist[s] courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult." *Basic*, 485 U.S. at 245. As this Court has also explained, "all presumptions" operate in the same manner: they shift the burden of production to the opposing party, but leave the "ultimate burden of persuading the trier of fact" with the party that ordinarily bore that burden. *Hicks*, 509 U.S. at 507.

Accordingly, under the plain terms of Rule 301 and this Court's case law, the "burden of persuasion" does not shift but instead "remains on the party who had it originally." Fed. R. Evid. 301.

2. Rule 301 plainly applies to the *Basic* presumption. To begin with, *Basic* established a "presumption": if the plaintiffs show that "the defendant's misrepresentation was public and material," that "the stock traded in a generally efficient market," and that they "purchased the stock at the market price," then they are entitled to a "presumption" that "the misrepresentation affected the stock price" and a "further presumption" that they "purchased the stock in reliance on the defendant's misrepresentation." *Halliburton II*, 573 U.S. at 279.

The burden of persuasion at class certification, moreover, is "originally" on the plaintiffs. Plaintiffs "seeking to maintain" a class action "'must affirmatively demonstrate [their] compliance' with Rule 23." *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). Indeed, the Court in *Halliburton II* expressly reaffirmed that the *Basic* presumption "does not relieve plaintiffs of the burden of proving" predominance under Rule 23(b)(3). 573 U.S. at 276.

Finally, no statute or Federal Rule of Evidence "provide[s]" that Rule 301's burden-shifting framework is inapplicable to the *Basic* presumption. Rule 301 therefore applies.

B. The court of appeals offered no valid answer to Rule 301's text. Instead, it posited that the *Basic* presumption is a "substantive doctrine of federal law" that "altered the default rule and imposed a burden of persuasion on defendants seeking to rebut it." Pet. App. 75a. That is incorrect.

1. In an earlier decision, the court of appeals reasoned that, because the *Basic* presumption was "adopted by the Supreme Court pursuant to federal securities laws," there is a "sufficient link" to those laws to "meet Rule 301's statutory element requirement." *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 103 (2d Cir. 2017), cert. denied, 138 S. Ct. 1702 (2018); see pp. 14-15, *supra*. But a "link" to a federal statute is not a "federal statute," and the court of appeals' interpretation bends Rule 301's text past breaking.

In any event, the supposed "link" between the *Basic* presumption and a federal statute is extremely weak. No statute expressly allocates the burdens of proof. No statute establishes the presumption; it was a judicial creation. See *Basic*, 485 U.S. at 242. And no statute even creates the civil cause of action for securities fraud; that too is a judicial creation. See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, n.9 (1971). Accordingly, the burdens of proof for the presumption are at least three steps removed from being "provide[d]" by a statute. Even if a "link" to a statute were all that Rule 301 required, that tenuous link would not suffice.

2. Even assuming that the Court could deviate from the dictates of Rule 301, none of its decisions applying the *Basic* presumption indicates that it has done so.

a. The court of appeals justified its departure from Rule 301 by pointing to isolated language from *Halliburton II* that, the court claimed, put the burden of persuasion on defendant. See *Waggoner*, 875 F.3d at 101. In

Halliburton II, the Court stated that a defendant could rebut the presumption with "*any showing* that severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff." 573 U.S. at 281 (quoting *Basic*, 485 U.S. at 248) (emphasis added; alterations omitted). But that language supports the opposite conclusion. A party obligated to make "any showing" bears only a burden of production, not the ultimate burden of persuasion. See, *e.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).

Regardless, a few passing statements in an opinion—which is not "to be parsed [like] language of a statute"—is scant evidence that the Court intended somehow to shift the burden of persuasion. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979). Indeed, the court of appeals' parsing of *Halliburton II* ignores more obvious clues that undermine its claim: in *Basic* itself, the Court cited Rule 301 in describing the "presumption" at issue, and the Court never indicated that its novel presumption would operate differently from presumptions covered by the rule. See 485 U.S. at 246-247. In fact, just a few years later, the Court explained that "all presumptions" operate as described in Rule 301. *Hicks*, 509 U.S. at 507.

In a similar vein, respondents claim that petitioners' argument conflicts with the Court's refusal in *Halliburton II* to require plaintiffs to "prove" price impact. See Br. in Opp. 30. But under the rule rejected in *Halliburton II*, plaintiffs would have been *required* to come forward with price-impact evidence in every case, and a defendant could simply criticize the plaintiffs' evidence without producing any evidence of its own. By contrast, under a proper application of Rule 301, a defendant must still produce evidence tending to show the absence of price impact; once it does, the ultimate burden of persuasion lies with the plaintiffs. That regime creates incentives for defendants to produce evidence of the absence of price impact without "impos[ing] [a] heavy toll on securities-fraud plaintiffs with tenable claims." *Halliburton II*, 573 U.S. at 284 (Ginsburg, J., concurring).

b. The court of appeals also suggested that it was "consistent with the purpose of the presumption" to impose the burden of persuasion on the defendant. Pet. App. 75a. That, too, is wrong. The *Basic* presumption "assist[s] courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult." *Basic*, 485 U.S. at 245. Specifically, that judge-made presumption allows plaintiffs to rely on an "indirect proxy for price impact," rather than "requiring them to prove price impact directly." *Halliburton II*, 573 U.S. at 281. But if the defendant actually comes forward with evidence that rebuts the "indirect proxy," the presumption has served its purpose by compelling the defendant to introduce evidence that "sharpen[s] the inquiry" on the question of price impact. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.8 (1981).

3. Finally on this score, respondents have argued that the Court retains the "authority to establish burden-shifting frameworks consistent with its understanding of a federal statute." Br. in Opp. 31. But respondents' only authority for that proposition is a footnote in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), which reached a "cursory answer to an ancillary and largely unbriefed question." *Greenwich Collieries*, 512 U.S. at 277. Even if the Court retains the "authority" to establish burden-shifting frameworks that are not dictated by a statute or rule—contrary to Rule 301's plain text—there is no good reason to exercise that authority in the *Basic* context. To the contrary, consistent with Rule

23 and *Basic* itself, the Court should make clear that Rule 301's framework applies. See pp. 38-39, *supra*.

III. THE COURT SHOULD REVERSE THE JUDGMENT BELOW

For the foregoing reasons, the court of appeals erred by holding that it could not consider the generic nature of the alleged misstatements and by imposing the burden of persuasion on petitioners. If this Court agrees that either holding was erroneous, it should proceed to apply the correct legal framework and reverse the judgment upholding class certification in this case. The evidence here "permits only one resolution of the factual issue," and the Court should not give respondents a third—and futile—bite at the apple. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). Under the correct legal framework, petitioners met their burden of production and, if applicable, their burden of persuasion to prove the absence of price impact. The court of appeals' judgment should therefore be reversed.

A. Petitioners rebutted the *Basic* presumption by producing direct, uncontradicted evidence that the challenged statements had no price impact.

1. Properly considered, the nature of the challenged statements here is powerful evidence that they did not affect the stock price. See pp. 26-30, *supra*. Those statements conveyed the most general and aspirational of sentiments, such as "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest" and "[o]ur clients' interests always come first." Pet. App. 4a. Indeed, many of the statements were repeated in company communications for years both before and after the class period. J.A. 587-589; Goldman Sachs, Annual Report 10 (2019) <tinyurl.com/annualreport-gs-2019>. As Judge Sullivan recognized, the statements

were so generic that "no reasonable investor would have attached any significance" to them. Pet. App. 44a-45a.

The nature of the challenged statements is especially strong evidence of the absence of price impact here because respondents are relying on the inflation-maintenance theory. As explained above, the exceptionally generic nature of the statements casts doubt on whether, as respondents assert, the alleged "corrective disclosures" were truly corrective of the statements, and thus on whether the corresponding stock-price drops revealed the statements' impact. See pp. 27-29, *supra*.

For example, take the challenged statement that Goldman Sachs has "extensive procedures and controls that are designed to identify and address conflicts of interest." Pet. App. 4a. Plaintiffs do not claim that there was a disclosure revealing that Goldman Sachs did not in fact have such *procedures and controls*. Rather, respondents rely on a disclosure of allegations that Goldman Sachs had isolated *conflicts* in one part of its mortgage business. There is a glaring disconnect between the informational content of the alleged statement and of that disclosure. The same can be said for all of the other statements. J.A. 214-217, 222-226. The obvious inference is thus that confounding information in the "corrective disclosures"—*i.e.*, the reports of government enforcement activity—caused the back-end price drop.

2. Because the highly generic nature of the challenged statements here is strong evidence that they did not affect the stock price, the additional evidence necessary for petitioners to rebut the *Basic* presumption is correspondingly reduced. Given the nature of the statements, petitioners' overwhelming economic and empirical evidence is plainly sufficient to show that the statements had no price impact.

It was undisputed that the challenged statements did not affect the stock price when made. Pet. App. 68a. Thus, respondents' theory of price impact relied solely on Dr. Finnerty's opinion that Goldman Sachs' stock price decreased in a statistically significant manner on the alleged "corrective disclosure" dates. J.A. 373-374.

In response, petitioners presented overwhelming evidence that the price decreases following the "corrective disclosures" were not attributable to any correction of the alleged misstatements.

First, one of petitioners' experts, Dr. Gompers, testified that "36 news reports * * * had in fact already revealed the supposed falsity of the alleged misrepresentations prior to the three 'corrective disclosure' dates, with no discernible impact on the price of Goldman's shares." Pet. App. 40a (Sullivan, J., dissenting). Some of those news reports discussed the conflict involving the Abacus CDO, which was later identified in the SEC's enforcement action (respondents' principal corrective disclosure), and also the conflict involving the Hudson CDO, which was the focus of respondents' third corrective disclosure. See J.A. 689-694; C.A. App. 142-143, 146-147. The lack of movement in the share price on the dates of the news reports "proved that the later drop was caused by something *other* than the disclosure of the alleged conflicts." Pet. App. 41a-42a (Sullivan, J. dissenting).

Second, petitioners established what *did* cause the stock-price drops on respondents' "corrective disclosure" dates. Specifically, another of petitioners' experts, Dr. Choi, conducted an analysis and concluded that reports of government enforcement activity and the uncertainties associated with such activity—not any correction of the alleged misstatements—"accounted for the full" amount of the price drop. J.A. 529-530, 557-571. As Judge Sullivan explained, Dr. Choi's analysis confirmed the "most obvious explanation" for the price drop: it was "caused by news that the SEC and DOJ were pursuing enforcement actions against Goldman." Pet. App. 45a.

Third, Dr. Choi's findings were corroborated by the last of petitioners' experts, Dr. Starks, who showed that Goldman Sachs' Business Principles and conflicts warnings "were not mentioned" in any of the over 800 analyst reports on Goldman Sachs published during the class period. But the analyst reports did "discuss[] the SEC enforcement action and other enforcement activities." J.A. 612, 619-620. Thus, Dr. Starks' analysis confirmed that investors did not consider the challenged generic statements in making investment decisions, but did consider the reports of government enforcement activity.

Taken together, petitioners' evidence "clearly compels the conclusion that the stock drop following the corrective disclosures was attributable to * * * news that the SEC and DOJ were pursuing enforcement actions against Goldman," not any correction of the alleged misstatements. Pet. App. 45a (Sullivan, J., dissenting).

3. Respondents "offered no hard evidence, expert or otherwise, to refute [petitioners'] proof" that the price drops following the "corrective disclosures" were not attributable to the misstatements. Pet. App. 45a-46a (Sullivan, J., dissenting). Dr. Finnerty, respondents' sole expert, conceded that he did not "do any work to assess whether any inflation entered Goldman Sachs' stock price prior to the start of the class period" and "d[id]n't know" whether "the stock price [would] have fallen" if Goldman Sachs "had not made the statements." J.A. 775, 783. He demonstrated only that Goldman Sachs' stock price (unsurprisingly) declined in response to negative news about the firm. See Pet. App. 41a-42a (Sullivan, J., dissenting); C.A. App. 3715, 3717, 3721. But Dr. Finnerty made no

"attempt to measure th[e] incremental impact" that reports of government enforcement activity had on the stock price. J.A. 685.

4. Put simply, a defendant could hardly present more powerful evidence than petitioners did here, and a plaintiff could barely present less than respondents. When a defendant produces direct economic evidence that general, aspirational statements did not affect the stock's price, the defendant has easily met its burden of production to rebut the *Basic* presumption. The only evidence respondents presented is that the stock price fell at the end of the class period. But that happens in every securities-fraud case. If a stock-price drop were enough to certify a class, as the court of appeals effectively held here, then the *Basic* presumption is irrebuttable—and *Halliburton II* is a dead letter. And if the *Basic* presumption is not overcome on this record, it is difficult to envision a case in which it could be.

B. The Court should reverse the court of appeals' judgment even if it concludes that petitioners bear the ultimate burden of persuasion. As discussed above, respondents did not offer *any* evidence to counter petitioners' powerful evidence that the price decreases were not attributable to a correction of the alleged misstatements. See pp. 46-47, *supra*. Instead, respondents merely criticized the conclusions of petitioners' experts (without merit) and offered unsupported speculation. That criticism is not evidence and does not tip the scales under the preponderance-of-the-evidence standard, which "goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it." *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 137 n.9 (1997).

Regardless of where the burden of persuasion lies, therefore, reversal is necessary to provide much-needed guidance to the lower courts and to ensure that defendants have a meaningful opportunity to rebut the *Basic* presumption.

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted.

RICHARD H. KLAPPER
ROBERT J. GIUFFRA, JR.
DAVID M.J. REIN
BENJAMIN R. WALKER
JULIA A. MALKINA
JACOB E. COHEN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004

KANNON K. SHANMUGAM
STACIE M. FAHSEL
E. GARRETT WEST
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

AUDRA J. SOLOWAY
KRISTINA A. BUNTING
SARAH J. PROSTKO
CAROLINE S. WILLIAMSON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

JANUARY 2021