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.,

Respondents.

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

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law.

To that end, WLF often appears before this Court in cases raising the proper scope of the federal securities laws. *See, e.g.*, *China Agritech, Inc. v. Resh,* 138 S. Ct. 1800 (2018)*; Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.,* 137 S. Ct. 2042 (2017). And WLF's Legal Studies Division regularly publishes articles on the faithful interpretation of the federal securities laws and related topics. *See, e.g.*, Doug Greene, *et al., Private Securities Litigation: Making the 1995 Reform Act's "Safe Harbor" Safer*, WLF Working Paper (Nov. 16, 2018), https://bit.ly/2Ylugdm.

WLF is concerned that the decision below effectively strips defendants of any ability to rebut the *Basic* presumption of reliance in securities class actions premised on the inflation-maintenance theory. If affirmed, the Second Circuit's decision would encourage meritless suits and coercive settlements that harm shareholders. The Second Circuit's holding is an unwarranted drag on the U.S. economy at a time of financial turmoil and should be overturned.

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[1] No counsel for a party authored any part of this brief, in whole or in part, and no person other than WLF or its counsel made any monetary contribution to the preparation or submission of this brief. All parties consent to the filing of WLF's brief.

SUMMARY OF ARGUMENT

This case invites the Court to, once again, sensibly prune the "judicial oak" of federal private securities litigation. In class actions alleging securities fraud, price impact forms the basis for a rebuttable presumption of reliance under *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988) ("*Basic*"). That presumption allows those cases to proceed on a class-wide basis. Although *Basic* contemplated a situation in which a misstatement caused a stock's price to be fraudulently inflated or depressed (*id.* at 244-45), some courts have not limited the presumption to cases in which a plaintiff alleges that misstatements moved the price of the security at the time they were made. Instead, these courts have found that the *Basic* presumption also applies when a plaintiff alleges that a misstatement affected a security's price by preventing the price from decreasing from a preexisting inflated level (the "inflation-maintenance theory").

While a narrow circuit split exists over whether the inflation-maintenance theory is legally sustainable under the federal securities laws and this Court's jurisprudence, that issue is not directly before the Court. Instead, the questions presented here ask whether, even if the inflation-maintenance theory is ever valid, petitioners were properly allowed to rebut the *Basic* presumption. Petitioners correctly argue that they were improperly prevented from rebutting the *Basic* presumption by pointing to the generic nature of the alleged misstatements to show that they had no impact on the price of the security, especially because that evidence is necessary to challenge the critical assumption of the inflation-maintenance theory—that the later stock-

price drop is evidence of front-end price impact. They also correctly assert that a defendant seeking to rebut the *Basic* presumption has only a burden of production, not the ultimate burden of persuasion.[2]

The important issues raised by petitioners highlight more broadly that the Second Circuit's application of the inflation-maintenance theory contravenes this Court's precedents because it wrongly prohibits a full inquiry into price impact at class certification. Moreover, the Second Circuit's approach undermines Congress's intent—in passing the Private Securities Litigation Reform Act of 1995 ("PSLRA")—to limit the ability of plaintiffs to bring meritless securities class actions to force coercive settlements.

For these reasons, and as detailed below, WLF urges the Court to reverse the Second Circuit's decision or, in the alternative, to vacate the decision and remand for further proceedings.

ARGUMENT

I. An Analysis of Price Impact Under an Inflation-Maintenance Theory Must Consider the Substance of the Alleged Misstatements.

Price impact is "an essential precondition for any Rule 10b-5 class action" because it is almost always the basis for asserting class-wide reliance. *See Halliburton Co. v. Erica P. John Fund Inc.*

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[2] WLF agrees with petitioners that a defendant seeking to rebut the *Basic* presumption bears only a burden of production, not the ultimate burden of persuasion. Pet. Br. at 37. This brief focuses solely on the first question presented.

("*Halliburton II*") 573 U.S. 258, 282 (2014); *Basic*, 485 U.S. at 245 (the "presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, [is] that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market"). Most securities class action plaintiffs rely on the *Basic* presumption to satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3). *See Halliburton II*, 573 U.S. at 281-82 ("without the presumption of reliance . . . [e]ach plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones.").

To invoke the *Basic* presumption, plaintiffs must show "(1) that the alleged misrepresentations were publicly known, (2) that they were material,[3] (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time that the misrepresentations were made and when the truth was revealed." *Id.* at 268 (citing *Basic*, 485 U.S. at 248, n.27). These showings, however, are merely an "indirect proxy for price impact," which is "*Basic*'s fundamental premise." *Id.* at 281, 283. This Court thus has recognized that if a defendant rebuts an inference of price impact with "[a]ny showing that severs the link" between the alleged misstatement and the security's price, the element of class-wide reliance is not met and class certification must be denied. *Id.* at 281.

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[3] Materiality, however, need not be proven by plaintiffs at the class certification stage. *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455 (2013) ("*Amgen*").

Establishing price impact may be straightforward when a false statement "causes a stock's price to rise, [and] the price [falls] when the truth comes to light." *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010). Some courts also have recognized, however, that a misstatement can "stop[] a price from declining" or maintain preexisting inflation if it prevents a decline that would have occurred "had the statement not been made." *Id.*

Those lower courts that have found an inflation-maintenance theory viable have done so in circumstances that are not present here. Generally, courts have permitted plaintiffs to proceed on an inflation-maintenance theory where an affirmative misstatement, directly on the topic at issue, prevents the market from learning the truth, which is later disclosed and causes the preexisting inflation to dissipate. *See Schleicher*, 618 F.3d at 683-84 (for example, when "a firm says that it lost $100 million, when it actually lost $200 million" and the actual number is disclosed later causing a stock price decline); *In re Vivendi SA Sec. Litig.*, 838 F.3d 223, 258-59 (2d Cir. 2016) (citing example in which a car company falsely states that its new car has passed all safety tests and later discloses that the new car failed the safety tests causing a stock price decline). It is *not* enough for a plaintiff to simply point to a stock price drop and assert that earlier alleged misstatements must have caused the drop. *In re Allstate Corp. Sec. Litig.*, 966 F. 3d 595, 605 (7th Cir. 2020) ("A sharp drop in share price alone is not enough for a class to be certified."); *Schleicher*, 618 F.3d at 684 ("Fraud depends on the state of events when a statement is made, not on what happens later.").

Limiting the application of the inflation-maintenance theory to affirmative misstatements that directly contradict a truth that is later revealed is logically required because the premise of the theory is that the alleged misstatements impacted the stock's price without changing it. *See* Resp. Br. in Opp. to Cert at 9 (respondents' theory is that misstatements did not "caus[e] an increase in Goldman's stock price"). Without a front-end price change, courts applying an inflation-maintenance theory will infer price impact based on back-end price deflation allegedly caused by a corrective disclosure. *See* Pet. Br. 27-28; Pet. App. 18a. But this inference only makes sense, if at all, when the "lie's positive effect on the share price" is "the additive inverse of the truth's negative effect." *Vivendi*, 838 F.3d at 255. In other words, an equal but opposite price impact may be presumed when a misstatement misleads in an equal but opposite way from the truth. But if the alleged misstatement does not mirror the corrective disclosure, then the premise for using back-end price change as a proxy for front-end price impact collapses.

Accordingly, an analysis of the relationship between the substance of the alleged misstatements and the corrective disclosures is a logical prerequisite for using back-end price change as a proxy for front-end price impact. There is no reason to presume, for example, that general and aspirational corporate statements will have a price impact inversely correlated to unrelated or loosely related corrective disclosures. Thus, courts that have granted class certification based on an inflation-maintenance theory have done so when the alleged misstatements concern a specific

representation about a particular financial metric, product, or event and those misstatements are directly contradicted by a subsequent alleged corrective disclosure. *See, e.g.*, *Waggoner v. Barclays PLC*, 875 F.3d 79, 88 (2d Cir. 2017) (affirming class certification where plaintiffs alleged that defendant's statements about its high frequency trading systems were materially misleading because "contrary to its assertions, 'Barclays did not in fact protect clients from aggressive high frequency trading activity, did not restrict predatory traders' access to other clients' and did not 'eliminate traders who continued to behave in a predatory manner.'"); *Cooper v. Thoratec Corp.*, 2018 WL 2117337, at *4 (N.D. Cal. May 8, 2018) (certifying class when plaintiffs alleged that "[Defendant's] claimed misrepresentations led investors to believe that the HeartMateII was reporting thrombosis rates consistent with the clinical trials" even though the thrombosis rates were actually higher); *Baker v. SeaWorld Entm't, Inc.*, 2017 WL 5885542, at *2-3 (S.D. Cal. Nov. 29, 2017) (certifying class when plaintiffs alleged that defendant falsely asserted that a documentary on animal cruelty did not affect attendance at its theme parks even though negative publicity had affected its attendance).

The Second Circuit's application of the inflation-maintenance theory fails to recognize this important limitation. The required connection for purposes of the *Basic* presumption is "between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at fair market price." *Basic*, 485 U.S. at 248. Although evidence that "a [corrective] disclosure caused a reduction in a defendant's share price"

arguably supports an inference that "the price was inflated by the amount of the reduction" (Pet. App. at 18a), this is indirect evidence that does not necessarily establish price impact. *Halliburton II*, 573 U.S. at 281 ("an indirect proxy should not preclude direct evidence when such evidence is available"). On the contrary, *any* showing by a defendant that rebuts the price impact of the statements, such as if "the market price would not have been affected by the[] misrepresentations," will suffice to "sever[] the link." *Basic*, 485 U.S. at 248.

Here, petitioners established, with little or no opposition, that (a) Goldman's stock price did not decline in response to reports on 36 separate dates about the alleged conflicts of interest before the alleged corrective disclosures (*see* Pet. App. at 54a-55a ("Dr. Gompers claims, and Dr. Finnerty concedes, that Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed to the public")); (b) the stock price did not rise when the challenged statements were made;[4] (c) the challenged statements were general and aspirational—not the type of statements on which investors rely—and did not mirror the alleged corrective disclosures (J.A. at 596, 609, 612-35 (the challenged statements were not mentioned in any of the 800 analyst reports published during the class period)); and (d) news of government enforcement activity against Goldman, not new information about Goldman's alleged conflicts of interest, accounted for the decline of its

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[4] *See* Gompers Report, Joint Appendix at A-4820, *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020) (No. 18-3667).

stock price on the dates of the alleged corrective disclosures. J.A. at 568-71 (Dr. Choi's expert report).

This showing sufficed to sever the link between the alleged misstatements and the price paid by respondents. *Halliburton II*, 573 U.S. at 281-282; *see also IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 782 (8th Cir. 2016) (reversing grant of class certification because "what the district court ignored, in our view, is that defendants did present strong evidence on [the absence of price impact]—*the opinion of plaintiffs' own expert*").

Yet, in this case, the Second Circuit upheld the use of the *Basic* presumption merely because the stock price declined after reports of government enforcement activity, including the SEC's enforcement action against Goldman. The Second Circuit reasoned that a court could rely on the unsupported assertion of respondents' expert that the stock price decline must have resulted from artificial inflation that had been prevented from dissipating. Pet. App. at 33a–35a. In so doing, the Second Circuit incorrectly failed to credit petitioners' evidence directly rebutting the inference of price impact, which should have negated a finding of class-wide reliance. *See* Pet. App. at 44a (Sullivan, J., dissenting) ("Goldman introduced hard evidence that 'sever[ed] the link between the alleged misrepresentation and . . . the price . . . paid by the plaintiff.'") (citing *Waggoner,* 875 F.3d at 95).

Moreover, this Court has never held that the price-impact inquiry is limited to a quantitative analysis. *Halliburton II*, 573 U.S. at 281, 284 (at class certification stage, defendants may make "any showing" that "an alleged misrepresentation did not

actually affect the market price of the stock."). In *Halliburton II*, this Court directed lower courts not to "artificially limit the inquiry at the certification stage to indirect evidence of price impact." *Id.* at 283. *Halliburton II* thus encourages defendants to test price impact at the certification stage, and the Court did not limit defendants to any single type of evidence.

The proper scope of evidence when assessing price impact includes evidence that (a) no change in stock price occurred when the alleged falsity was revealed to the market; (b) no change in stock price occurred when the alleged misstatements were made; and (c) the alleged misstatements are insufficiently connected to the alleged stock price decline (because they are too generic, would not be relied on by investors, or otherwise provide no basis for inferring front-end price impact). *Id.*; *see also Basic*, 485 U.S. at 248-249 (describing ways that the presumption of reliance can be rebutted); *Allstate*, 966 F.3d at 609 ("*Basic* line of cases imposes few if any limits" on the scope of evidence that defendants may use to rebut price impact). That these inquiries may overlap with materiality or loss causation is no reason to proscribe them at the class certification stage. *Halliburton II,* 573 U.S. at 283 ("[W]e see no reason to artificially limit" defendants' evidence of price impact "even [if] such proof is also highly relevant at the merit stage."); *Allstate,* 966 F.3d at 608 (even though such "evidence is likely to have obvious implications for the off-limits merits issues of materiality and loss causation . . . a district court may not use the overlap to refuse to consider the evidence."); *Grae v. Corr. Corp. of Am.*, 330 F.R.D. 481, 498 (M.D. Tenn. 2019) ("At the heart of this

confusing area of the case law is the fact that all three concepts addressed—loss causation, materiality, and price impact—are, in essence, slightly different takes on the same fundamental question: Did a statement matter?").

In sum, a court must be able to determine whether the statement indeed mattered—*i.e.*, whether it "stop[ped] a price from declining." *Schleicher*, 618 F.3d at 683. A court cannot do so if it artificially limits itself solely to evidence that a later stock price decline occurred without analyzing the statement itself and any other relevant evidence. Pet. App. at 44a–45a (Sullivan, J. dissenting) ("Candidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact.").

II. Limiting the Scope of the Inflation-Maintenance Theory Will Have Important Public Policy Benefits.

Allowing petitioners a full opportunity to rebut price impact at the class certification stage will have important public policy benefits far beyond this case. Nearly half of all securities class actions are filed in the circuits that have endorsed using the inflation-maintenance theory to satisfy the *Basic* presumption.[5] Limiting the impact of the inflation-

[5] In 2019, 48% of all U.S. securities class actions were filed in district courts in the Second, Seventh, and Eleventh Circuits. Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review*, 38 (Jan. 2020), https://bit.ly/3t8gWHz. And numerous district courts in other circuits have relied on decisions from the Second, Seventh, and Eleventh

maintenance theory therefore would ensure that the *Basic* presumption remains rebuttable, and vindicate Congress's intent to restrain the proliferation and *in terrorem* effect of meritless securities class actions. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 276 (2010) (Section 10(b) "area of law is replete with judge-made rules, which give concrete meaning to Congress' general commands . . . we deal with a judicial oak which has grown from little more than a legislative acorn.") (quotation omitted); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (warning against "permit[ting] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope").

Indeed, Congress passed the PSLRA "to restrict abuses in securities class-action litigation, including . . . the practice of filing lawsuits against issuers of securities in response to any change in stock price, regardless of defendants' culpability." *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 531 (3d Cir. 1999) (citing H.R. Conf. Rep. No. 104-369, at 28 (1995), reprinted in 1995 U.S.C.A.A.N. 679, 748). Even after the passage of the PSLRA, however, many securities class actions are lawyer-driven

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Circuits in applying an inflation-maintenance theory. *See, e.g.*, *Cooper*, 2018 WL 2117337, at *4 (citing Second Circuit decision); *Willis v. Big Lots, Inc.*, 2017 WL 1734224, at *2-3 (S.D. Ohio May 4, 2017), *report and recommendation adopted*, 2017 WL 2493142 (S.D. Ohio June 8, 2017) (same).

exercises lacking clear merit. Several related statistical trends, which began in 2013 and have continued through 2019, support this conclusion.

First, the annual number of securities class action filings continues to increase, with a record 5.5% of all U.S. exchange-listed companies sued in 2019 alone (268 total cases). *Cornerstone*, at 5, 11 (all cited numbers from this report are for "core filings," which exclude merger and acquisition related cases). Second, just three plaintiffs' law firms have filed more than 50% of all securities class actions over this time. *Id.* at 39. Finally, the percentage of cases in which individual investors (rather than the institutional investors favored by the PSLRA) have been appointed sole lead plaintiff has increased to over 50% of all securities class actions. *Id.* at 18.

Taken together, these trends strongly suggest that a small group of plaintiffs' firms are bringing a host of securities class actions of questionable merit (as indicated by the decline in institutional investor support). What is the nature of these cases?

Securities class actions based on corporate financial disclosures, which used to form the backbone of securities litigation, have been declining. Indeed, the number of public company financial restatements, and related cases based on accounting allegations, have fallen sharply over the past few years, even as the overall number of securities class action filings has increased. *See* Don Whalen, Derryck Coleman, & Dennis Tanona, *2019 Financial Restatements: A Nineteen Year Comparison*, AUDIT ANALYTICS (July 2020), Table 1 at 5 (showing a decline in the annual number of financial restatements from 1,869 restatements in

2006 to 484 restatements in 2019), https://bit.ly/3t4k470; *Cornerstone* at 10 (the number of federal securities class action filings alleging accounting violations has fallen from 38% in 2015 to 23% in 2019).

The plaintiffs' bar has turned its focus instead to "event-driven" securities litigation, bringing securities class actions based on *external events* that drive down a company's stock price. These external events have included data security breaches, sexual harassment allegations, commercial litigation, allegations that a drug or product has side effects or caused injury, and regulatory investigations or enforcement actions.[6] A recent report shows that the number of event-driven securities class actions increased from 34 cases in 2018 to 47 cases in 2020. Elisa Mendoza & Jeffrey Lubitz, *Event-Driven Securities Litigation: The New Driver in Class Action Growth*, INSTITUTIONAL SHAREHOLDER SERVICES (December 2020), at 3, https://bit.ly/3t74QhC.

Even in the short time since the petition was filed here, shareholder plaintiffs have continued to

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[6] "Once, securities class actions were largely about financial disclosures (e.g., earnings, revenues, liabilities, etc). In this world, the biggest disaster was an accounting restatement. Now, the biggest disaster may be a literal disaster: an airplane crash, a major fire, or a medical calamity that is attributed to your product." John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions* (Jan. 22, 2019), https://bit.ly/3pDbeer.

file event-driven securities class actions at a torrid pace (including COVID-19 related cases). *See, e.g.*, *Monroe Cty. Emps.' Ret. Sys. v. AstraZeneca plc*, No. 1:21-cv-00722 (S.D.N.Y. Jan. 26, 2021) (alleging that biopharmaceutical company made misleading statements that it was progressing in its development of a COVID-19 vaccine without disclosing alleged defects in vaccine's clinical trials); *Bremer v. Solarwinds Corp.*, No. 1:21-cv-2 (W.D. Tex. Jan. 4, 2021) (alleging that software company failed to disclose risk that its software could be hacked by foreign intelligence agents); *Messinger v. Uber Techs., Inc.*, No. 3:21-cv-08610 (N.D. Cal. Dec. 5, 2020) (alleging that company made misleading statements about risk of sexual assaults against riders); *City of Riviera Beach Gen. Emps. Ret. Sys. v. Royal Caribbean Ltd.*, No. 1:20-cv-24111 (S.D. Fla. Oct. 7, 2020) (alleging that company failed to disclose inadequacy of its health and sanitation policies to contain outbreaks of COVID-19 aboard its ships).

In the typical scenario (as in this case, where the company's stock price declined after reports of government enforcement activity), the plaintiffs' bar works their way backwards. First, they identify the event and associated stock price drop. Second, they look for generic corporate statements (*e.g.*, risk factors or aspirational goals) that they allege were rendered false or misleading by failing to disclose either the existence of the underlying alleged conduct (no matter whether it actually happened) or the company's vulnerability to the external event. As in this case, the plaintiff only needs to establish that the stock traded in an efficient market to stand a strong chance of achieving class certification. If

that requirement is met, the plaintiff may be able to simply allege inflation maintenance.

Adding to the burden on companies facing event-driven securities litigation is that courts often decline to rule on the materiality of the generic statements (*i.e.*, would the statements have been important to a reasonable investor in making an investment decision) at the motion to dismiss stage. Coffee, *supra*. A survey of cases decided just in the past few months suggests that these decisions are highly judge-dependent, with many courts unwilling (given the materiality standards of this Court's decision in *Matrixx*[7]) to assess materiality without factual discovery. *See, e.g.*, *St. Clair Cty. Emps.' Ret. Sys. v. Acadia Healthcare* Co., 2021 WL 195370, at *6 (M.D. Tenn. Jan. 20, 2021) (declining to find the defendants' statements that it provided high-quality services and adequately staffed its facilities to be immaterial as a matter of law); *Cambridge Ret. Sys. v. JELD-WEN Holding, Inc.*, 2020 WL 6270482, at *4 (E.D. Va. Oct. 26, 2020) (declining to find immaterial a company's statements about its "pricing optimization," "pricing discipline," "strategic pricing," and "favorable pricing"); *Holwill v. Abbvie Inc.*, 2020 WL 5235005, at *3-4 (N.D. Ill. Sept. 1, 2020) (declining to find a company's statement that its "promotional programs" were responsible for its pharmaceutical drug's success to be immaterial).

Given this background, it is no surprise that the plaintiffs' bar has come to rely heavily on the inflation-maintenance theory. Generic or

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[7] *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 43 (2011) (assessing materiality "is fact-specific inquiry") (quotations omitted).

aspirational statements will not increase a company's stock price, so the plaintiffs' bar has turned eagerly to a pleading theory that hinges on later stock price declines. Indeed, a recent study states that in 71% of cases when defendants tried to rebut the *Basic* presumption, plaintiffs have asserted that the statements merely maintained the company's stock price at inflated levels and that the price then dropped when the alleged fraud became public. And in every one of those cases the plaintiff succeeded in certifying a class. Pet. Br. at 34; *cf. In Re Finisar Corp. Sec. Litig.*, 2017 WL 6026244 (N.D. Cal. Dec. 5, 2017) (denying class certification where defendants' expert showed that alleged misstatements failed to inflate stock price and plaintiffs did not specifically allege existence of price maintenance).

The decision below, if ratified by the Court, would ensure the proliferation of event-driven securities litigation by virtually guaranteeing class certification in any securities class action that invokes the inflation-maintenance theory. The Second Circuit's holding also creates undue settlement pressure by improperly lowering the standard for class certification. Pet. Br. at 35-36; *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163-64 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."); *Schleicher*, 618 F.3d at 683-84 ("[C]ertification substantially increases the settlement value of a securities suit."); *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) ("Moreover, numerous courts and scholars have

warned that settlements in large class actions can be divorced from the parties' underlying legal positions.").

In sum, the Second Circuit's application of the inflation-maintenance theory undermines Congress's statutory scheme for private securities litigation, which includes express measures to limit the ability of plaintiffs to bring meritless cases and extort settlements. For these reasons, this Court should prevent the inflation-maintenance theory from swallowing the fundamental premise of the *Basic* presumption of price impact and prune the ever-growing judicial oak of Section 10(b) liability.

III. The Court Need Not Address Whether the Inflation-Maintenance Theory Is Viable Under the Federal Securities Laws.

Only a handful of circuits have directly addressed the inflation-maintenance theory and its impact on class certification in securities fraud cases. These decisions have created a narrow circuit split on the issue. At least three circuit courts, the Second Circuit, the Seventh Circuit, and the Eleventh Circuit, have found that plaintiffs may invoke the *Basic* presumption by asserting that an alleged misstatement maintained preexisting inflation in the company's stock price. Pet. App. at 27a; *Allstate*, 966 F.3d at 612; *Local 703, I.B. of T. Grocery and Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1259 (11th Cir. 2014).[8]

[8] In *Alaska Elec. Pension Fund v. Pharmacia Corp.*, a case decided prior to the *Amgen* and *Halliburton II* decisions, the Third Circuit considered and rejected the defendant's argument that plaintiffs failed to

Under these decisions, even if the alleged misstatement merely confirms information already available to the market and incorporated into the stock's price and does not move the stock price at the time it is made, the plaintiff can claim a price impact because the confirmatory misstatement prevented the stock price from declining. Pet. App. at 16a; *Allstate*, 966 F.3d at 612 and n.5; *Local 703*, 762 F.3d at 1259.

In contrast, at least two other circuits, the Fifth Circuit and the Eighth Circuit, appear to have rejected the inflation-maintenance theory. *Greenberg v. Crossroads System, Inc.*, 364 F.3d 657, 663 (5th Cir. 2004); *IBEW Local 98 Pension*, 818 F.3d at 782-83. In *Greenberg*, the Fifth Circuit held that a confirmatory misstatement that does not precipitate a change in stock price does not cause a price impact "[b]ecause the presumption of reliance is based upon *actual movement* of the stock price." 364 F.3d at 665-66 (emphasis in original). Similarly, in *IBEW Local 98 Pension*, the Eighth Circuit found that the plaintiffs could not invoke the *Basic* presumption as to two corporate statements that merely repeated earlier disclosures because the

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establish the existence of material misstatements at class certification because the alleged misstatements did not cause the company's stock price to increase when they were made. 554 F.3d 342, 351-52 (3d Cir. 2009). The court did not discuss, however, the *Basic* presumption and its price impact requirement. Accordingly, it is not clear if the Third Circuit would adopt the inflation-maintenance theory should it be presented by a plaintiff in support of invoking the *Basic* presumption.

statements "had no immediate impact on [the stock] price, impact the *Basic* presumption would otherwise presume." 818 F.3d at 782-783; *see also id.* at 784 (Murphy, J., dissenting) ("The majority has thus not joined the circuit courts that have recognized price maintenance theories to be cognizable under the Securities Exchange Act.").

Whether the inflation-maintenance theory is legally cognizable under the federal securities laws and this Court's jurisprudence is not the subject of this appeal. Although the Court may one day need to decide whether the inflation-maintenance theory can ever be used to support a finding of price impact, it need not do so now. Instead, at issue here are the related, but distinct, questions of whether (a) a defendant may rebut the *Basic* presumption when the inflation-maintenance theory is invoked by pointing to the generic nature of the alleged misstatements to show the absence of price impact, and (b) whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion. The Court can answer those questions while assuming that the inflation-maintenance theory may sometimes be viable, leaving the underlying issue for a future case in which it is directly presented.

CONCLUSION

The judgment of the Court of Appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded with guidance on the appropriate standards for rebutting price impact under the *Basic* presumption.

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