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 RESPONDENTS

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

Thomas A. Dubbs
James W. Johnson
Michael H. Rogers
Irina Vasilchenko
LABATON SUCHAROW LLP
140 Broadway, 34th Floor
New York, NY 10005

Spencer A. Burkholz
Joseph D. Daley
ROBBINS GELLER RUDMAN & DOWD LLP
655 W. Broadway, Ste. 1900
San Diego, CA 92101

QUESTIONS PRESENTED

This case presents two questions relating to the defendants' proof, at the class-certification stage of a securities fraud lawsuit, of a complete absence of "price impact."

1. How does a court properly account for the "generality" of the alleged misstatements?

2. Do defendants bear the burden of producing some evidence or the burden of persuasion?

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BRIEF OF RESPONDENTS

This case presents two questions regarding the certification of securities fraud lawsuits as class actions. Those questions arise when—in response to the plaintiffs' proof of market efficiency and publicity—the defendants claim that the alleged misstatements and omissions had no effect on the security's market price—*i.e.*, that they had no "price impact." If the defendants prove a complete absence of price impact, the plaintiffs could not have relied on the market price to transmit information that is material to the security's value. Without reliance as a common question, class certification is generally inappropriate.

The first question presented addresses how the court's determination of price impact should account for the "generality" of the challenged statements. Below and in the cert. petition, Goldman (the term we use for petitioners) argued that there can be no price impact as a matter of law if the statements were so general as to be legally immaterial—*i.e.*, if no investor could reasonably rely on them. Goldman now abandons that argument, no doubt because it is precluded by this Court's holding that materiality is determined at the merits stage, not at class certification, because it is a common question that is an element of the plaintiffs' claim. Goldman argues instead that the statements' generality can support other evidence of a lack of price impact. Further, Goldman argues, judges can make that determination as a matter of "common sense."

Goldman is correct that the statements' generality can be relevant to the price-impact determination, but wrong on the important detail of how courts should make that determination. Judges should rely on

actual evidence—principally, expert submissions—rather than their own commonsense intuitions.

The judgment should be affirmed because that is *already* the rule in the Second Circuit. That court holds that any evidence relevant to price impact can be considered, notwithstanding that it overlaps with materiality. In this very case, Goldman introduced expert testimony regarding the effect of the statements' generality, to which the plaintiffs forcefully responded with their own expert testimony. The district court did not exclude any of that evidence; the court merely (and correctly) weighed all the evidence and found Goldman's evidence insufficient to establish a complete absence of price impact. On appeal and in the cert. petition, Goldman then abandoned the fact-bound argument that the district court clearly erred in its evaluation of that testimony.

The second question presented asks what burden the defendants bear in seeking to disprove price impact. As the Second Circuit, Seventh Circuit, and United States have recognized, defendants have the burden to disprove price impact completely by a preponderance of the evidence. Only that rule is consistent with this Court's holding that defendants can defeat class certification by showing an absence of price impact, and the Court's concomitant holding that plaintiffs do not have the burden of proof.

Goldman argues that whenever the defendants produce some evidence, the burden of proof switches to the plaintiffs. Under Goldman's proposed rule, as a practical matter, plaintiffs would have the burden of proof in basically every case. Defendants will essentially always be able to identify "some evidence" that the statements did not affect the market price.

Indeed, according to Goldman, the court can simply rely on its own personal intuition that the statements are "generalized."

Goldman does not seriously seek to reconcile its position with this Court's precedents. Instead, it argues that the Court's hands are tied by Federal Rule of Evidence 301. That, unsurprisingly, is not so. Rule 301 does not apply to class-certification decisions. Even if it did, the Rule would not prohibit this Court from holding that a federal statute governing the litigation of claims is properly implemented through a burden-shifting regime.

The judgment accordingly should be affirmed.

STATEMENT OF THE CASE

1. This Court has long recognized, and Congress has subsequently ratified, a private right of action to enforce Securities and Exchange Commission (SEC) Rule 10b-5. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267, 269 (2014) (*Halliburton II*); *Stoneridge Inv. Partners, LLC v. Sci.-Atl., Inc.*, 552 U.S. 148, 165 (2008). Rule 10b-5 prohibits any false or misleading statement or omission in connection with the purchase or sale of a security. *See* 17 C.F.R. § 240.10b-5(b) (implementing 15 U.S.C. § 78j(b), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*). The elements of the 10b-5 cause of action are:

> (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or

> omission; (5) economic loss; and (6) loss causation.

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37-38 (2011) (citation omitted).

Where the argument is viable, defendants uniformly bring early motions to dismiss 10b-5 actions, arguing that the alleged misstatements or omissions are immaterial as a matter of law. The materiality inquiry does not directly address the statements' empirical effect on the market. Instead, a statement is legally material only if "a reasonable investor would have considered the information significant" in deciding whether to buy or sell a security. *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 388 (2014) (citing *Matrixx*, 563 U.S. at 38).

If the suit survives dismissal on materiality grounds, the plaintiffs generally seek class certification. Class-action treatment is appropriate where common questions predominate over individual issues. Fed. R. Civ. P. 23(b)(3). Securities suits are often natural fits to proceed as class actions, because each investor's proof with respect to each element of the claim is the same.

To establish reliance on the merits, plaintiffs generally invoke the "fraud on the market theory" endorsed by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). What "is called the *Basic* presumption actually incorporates two constituent presumptions." *Halliburton II*, 573 U.S. at 279. "First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Ibid.* Second, "if the plaintiff also shows

that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Ibid.*

At class certification, the plaintiffs must prove the *Basic* prerequisites that are not elements of the plaintiffs' 10b-5 claim: publicity and market efficiency. (Timing is a common issue because the class is always defined to include only those who purchased the security during the relevant period.) By contrast, the plaintiffs need not prove materiality, which is an issue common to the class that will be decided on the merits. *See Halliburton II*, 573 U.S. at 282 (reaffirming *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013)); *cf. Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) (plaintiffs need not prove loss causation at class certification, because that is a common element of the claim to be proved on the merits).

If the plaintiffs prove market efficiency and publicity, the court addresses price impact. *Halliburton II*, 573 U.S. at 282-83. Price impact resembles materiality in that both relate to investors' responses to statements and omissions. But there are important differences. Whereas materiality addresses whether a hypothetical investor could reasonably rely on the misstatements, price impact addresses the empirical question of how this particular market *actually* responded—*i.e.*, "whether the alleged misrepresentations affected the market price." *Id.* at 278 (citation omitted); *see also* U.S. Br. 18. And as noted, unlike materiality, price impact is litigated at the class-certification stage because it is not an element of the plaintiffs' claim on the merits.

If the defendants completely disprove price impact, the fraud-on-the-market theory cannot be established, and reliance is not a question common to the class. 573 U.S. at 278-79. By contrast, the plaintiffs need not themselves prove price impact. *Id.* at 279. Putting that burden on the plaintiffs "would take away [*Basic*'s] first constituent presumption" that material misstatements publicized in an efficient market will affect a stock's price. *Ibid.*

2. Plaintiffs in this case sued Goldman under Rule 10b-5. The complaint arises from Goldman's creation and sale of collateralized debt obligations (CDOs) and synthetic CDOs.[1] Goldman sells those products to clients on both sides of the transaction—gains to one group impose losses to the other and *vice versa*. Goldman also invests in the products itself. This practice is *exceptionally* profitable for Goldman. But its own financial interests are adverse to some of its clients', risking conflicts that, if not properly disclosed or otherwise addressed, could lead to legal liability, reputational harm, and lost business.

Goldman acknowledged in filings with the SEC that "[c]onflicts of interest are increasing and a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses." JA27. But it sought to reassure its stockholders that it had "extensive procedures and controls that are designed to identify and address conflicts of interest" and that

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[1] CDOs are securities that pool assets, such as mortgages and mortgage derivatives, that produce a cash flow. A "synthetic" CDO is a CDO that invests in credit default swaps or other non-cash assets to obtain an exposure to a portfolio of fixed-income assets without actually owning the underlying securities.

"[o]ur clients' interests always come first." JA29, 31. In turn, Goldman's stock traded at a "premium" compared to its peers based on Goldman's supposed ability to manage those conflicts effectively. JA826, 836, 858.

The complaint details how those statements were false and misleading, including by omitting that Goldman had structured enormous transactions to benefit itself and certain of its clients at the expense of other clients from whom it hid its massive conflicts of interest. JA171-88, 206-10, 214-98.

For example, in 2006, foreseeing the collapse of the subprime mortgage market (in which Goldman was heavily invested), the firm instructed its mortgage department to massively reduce its long position in that market. JA230. In response, the firm created the so-called Hudson synthetic CDO as a vehicle for its "structured exit" from some of its troubled investments. JA231-32. Goldman used the CDO to short $1.2 billion of mortgage-related assets from its own inventory, as well as another $800 million in other subprime residential mortgage-backed securities (RMBS). *Ibid.*

Goldman then proceeded to sell the opposite, long side of the security *to its clients*—without revealing that the CDO's purpose and structure was to reduce Goldman's proprietary risk. JA231-32. In fact, Goldman represented that the CDO was "sourced from the Street," and was "not a Balance Sheet CDO," implying that Goldman had obtained the assets from third parties when, in truth, the assets were entirely from Goldman's own inventory. JA235-36. Goldman's marketing booklet then represented that "Goldman Sachs has aligned incentives with the Hudson

program by investing in a portion of equity," without disclosing that this $6 million "long" position was a mere fig leaf, representing only *1/300th* the size of its short position. JA235. Goldman ultimately pocketed nearly $1.7 billion in gross revenues from its short position in Hudson at the direct expense of its Hudson-investor clients. JA240.

As another example, also in 2006, Goldman was asked by a favored client, hedge fund Paulson & Co., to structure a transaction that would allow Paulson to short certain RMBS. JA173. Goldman allowed Paulson to select underlying assets for the Abacus portfolio that Paulson believed were particularly unlikely to perform. JA174. Goldman then maneuvered to conceal that critical fact by appointing a third party, ACA Capital Management (ACA), as the nominal portfolio selection agent, and later convinced ACA to become the largest investor in Abacus. JA177, 184. Goldman deceived ACA about Paulson's short position in Abacus, leading it to believe that Paulson was investing in the Abacus equity and thus had aligned interests with ACA in the CDO. JA177, 183-85. And in marketing the resulting CDO to other investors, Goldman did not disclose Paulson's involvement in picking assets, much less that Paulson made those selections while intending to short Abacus. JA183. When, as expected, the underlying securities failed catastrophically, Goldman's customers lost more than $1 billion, while Paulson, as the CDO's sole short, reaped a corresponding profit of the same amount. JA185.

After the housing market crashed, some in the press began asking how Goldman could sell its clients securities that the firm was actually shorting.

Goldman responded by insisting that it had no undisclosed or otherwise improper conflicts with its clients. For example, one of the statements alleged to constitute securities fraud in this case came in response to a *New York Times* article about Goldman's profitable shorting of the mortgage market. *See* JA206-10, 217-18. The firm issued a press statement falsely representing, among other things, that its short position was "fully disclosed and well known to investors." JA209. In the absence of any concrete evidence that these denials were false, Goldman's stock price remained buoyed.

Plaintiffs' complaint alleges that through these denials and its earlier misstatements and omissions, Goldman artificially maintained its stock price above the value it would have had if the market had known the truth about Goldman's conflict-management practices. This is known as an "inflation-maintenance" claim.

The complaint further alleges that this artificial inflation dissipated, and Goldman's stock price fell precipitously, in April 2010, because of disclosures relating to governmental enforcement actions responding to Goldman's concealed conflicts of interest. JA289-301. The SEC sued Goldman for securities violations relating to its structuring of the Abacus CDO, citing never-before-seen internal Goldman communications. Pet. App. 5a-6a.[2] That day,

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[2] Goldman would later settle the SEC suit for $550 million and admit to misconduct—namely, that its representations regarding Abacus and Paulson's role were "incomplete" and "a mistake." JA139-40; *see* JA187-88. Moreover, a senior Goldman vice president, Fabrice Tourre, went to trial and was found liable

the stock price fell nearly 13%. *Id.* 6a. Subsequent news reports detailed investigations by the SEC and U.S. Department of Justice into the Hudson CDO and other conflicted CDOs. JA300-01. In response, the stock price fell even further. *Ibid.*[3]

3. The district court carefully considered but ultimately denied Goldman's motion to dismiss, which asserted that the misstatements and omissions identified by the complaint were immaterial as a matter of law. JA306, 329, 338. Goldman repeatedly reasserted its materiality objection; the court rejected it each time. JA339, 347-49.

The district court then granted plaintiffs' motion for class certification. Pet. App. 80a. Preliminarily, the court found that plaintiffs had established that the misstatements were publicly made and that Goldman's stock traded in an efficient market. *Id.* 89a.

The district court then addressed Goldman's attempt to completely disprove price impact. The court refused to consider testimony offered by Goldman's expert Dr. Paul Gompers that price impact was disproven by the market's failure to respond to news reports purportedly disclosing Goldman's lack of conflict management. Pet. App. 90a-91a. That evidence, the court concluded, could not be considered because it "speaks to the statements' materiality," which is irrelevant at the class-certification stage.

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on six of the SEC's seven counts of securities fraud, including aiding and abetting Goldman's fraud in connection with Abacus. *See* Verdict, *SEC v. Tourre*, No. 10-cv-3229, ECF No. 439 (S.D.N.Y. Aug. 1, 2013).

[3] Contrary to Goldman's assertion (at 13), plaintiffs have never specified a damage claim, much less one for $13 billion.

Ibid. After evaluating the parties' submissions, the court concluded that Goldman had failed to completely disprove price impact. *Id.* 92a.

The Second Circuit granted interlocutory review. *See* Pet. App. 70a; Fed. R. Civ. P. 23(f). The court rejected Goldman's principal contention that the statements were immaterial as a matter of law, and therefore necessarily could not have had price impact. That argument, the court recognized, was precluded by this Court's clear holding that courts should not determine materiality at class certification. Pet. App. 68a-69a n.6. The court of appeals further held that defendants have the burden to disprove price impact by a preponderance of the evidence, not merely the burden to produce some evidence. *Id.* 73a-75a.

Importantly, however, the court of appeals *agreed* with Goldman that evidence relating to price impact can be considered notwithstanding that it *overlaps* with materiality. It therefore held that the district court had erred in refusing to consider Gompers' report in relevant part. Pet. App. 76a-78a. The court of appeals vacated and remanded the case for further proceedings. *Id.* 76a.

4. On remand, the district court re-certified the class after receiving new briefing and additional expert reports, and holding a two-day evidentiary hearing. Pet. App. 49a. Goldman submitted a supplemental report by Gompers. Goldman also introduced the expert report of Dr. Laura Starks, who opined that the alleged misstatements were so generalized that they did not affect the market price for Goldman's stock, as evidenced principally by her review of analyst reports. *See* JA584, 596-605. In rebuttal, plaintiffs introduced their own expert

testimony refuting Starks' conclusions. JA647, 652-59. The court did not exclude any of that evidence.

Ultimately, after reviewing all of the evidence, the district court concluded that Goldman had failed to prove by a preponderance of the evidence that the misstatements and omissions had no effect on the market price. Pet. App. 54a. After personally reviewing each media report Goldman cited, the court concluded that most of the articles contained "generic reports on conflicts" but contained no proof of improper conflicts that Goldman had failed to manage appropriately. *Id.* 55a & n.6; *see also ibid.* (noting that some "were not damaging or revelatory, but rather commendatory"). A few articles may have suggested Goldman might have engaged in undisclosed or otherwise improper conflicts. But those articles lacked the "hard evidence," details, and credibility reflected by the subsequent corrective disclosures. The market's lack of reaction to the articles therefore did not demonstrate that investors were indifferent to whether Goldman was engaged in improper conflicts with its clients. *Id.* 56a. Far more likely, the court found, was that the market did not react because in the same group of reports, Goldman repeatedly and vociferously *denied* that it had engaged in improper, undisclosed conflicts. *Ibid.*

The district court further found that the statistical analysis from Goldman's expert Dr. Stephen Choi was "unreliable for four reasons" (Pet. App. 57a), ranging from the expert's "arbitrary" method of selecting events for the study (*ibid.*), to his failure to account for the nature of the misconduct alleged in prior enforcement actions (*id.* 58a), to

serious methodological errors in his statistical analysis (*id.* 58a-59a).

The Second Circuit granted interlocutory review again and affirmed, this time by a divided vote. Pet. App. 3a. The court unanimously rejected Goldman's principal contention that inflation-maintenance cases in particular cannot be certified as class actions absent proof that the misstatements were material as a matter of law. Just like Goldman's argument in the first appeal, the court explained, that contention could not be reconciled with this Court's holding that materiality is not determined at class certification. *Id.* 15a-25a. Goldman's attempt to narrowly prescribe inflation-maintenance cases was simply arguing "materiality by another name," because it raised the *exact* same objection as a materiality challenge. *Id.* 24a.

But the Second Circuit again distinguished improper reliance on the standard for determining materiality from the permissible reliance on *evidence* that overlaps with materiality: "just because something looks like materiality does not mean it is materiality. Price impact also resembles materiality, but defendants may attempt to disprove it at class certification." Pet. App. 23a; *see also id.* 27a ("even though defendants may not challenge materiality at the Rule 23 stage, they may present evidence to disprove price impact").

Goldman further argued that the district court had erred by failing to find that Goldman had completely disproved price impact. Critically, however, Goldman did not argue that the district court had failed to consider any evidence. Nor, importantly, did Goldman argue that the district court had failed to

correctly evaluate the Starks report regarding the effect of the statements' generality. And Goldman did not argue that the court of appeals *itself* should weigh the statements' supposed generality in its overall assessment of the price-impact evidence. Addressing the arguments Goldman *did* make—which related to the Gompers and Choi reports—the majority found no clear error in the district court's assessment of the parties' competing proof. Pet. App. 27a-35a.

Judge Sullivan filed a dissenting opinion, to which the majority responded. The dissent was generally persuaded that Goldman's experts Gompers and Choi—not Starks, whom Goldman referenced only in passing—had disproven price impact. Pet. App. 40a-44a. In addition, the dissent *sua sponte* undertook "to consider the nature of the alleged misstatements in assessing" price impact. *Id.* 44a. On that question, the dissent did not rely on any evidence or address the particular context of the case, such as the importance of conflicts of interest to the price of Goldman's stock in particular. Instead, explicitly applying the standard for determining materiality as a matter of law, the dissent deemed it "obvious" that "no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based." *Id.* 44a-45a. The dissent concluded that excluding the materiality inquiry from the determination of price impact amounted to "rigid compartmentalization" that was not "possible, much less required." *Id.* 45a.

In response, the majority rejected the dissent's view that it was appropriate to deny class certification based on the "assertion that th[e] statements are too general as a matter of law." Pet. App. 37a. In the

majority's view, "[w]hat the dissent really wants to do is to revisit the question of whether the statements are too general as a matter of law to be deemed material." *Ibid.* "[T]his argument is just a redux of Goldman's unsuccessful Rule 12(b)(6) argument to dismiss and its motion to reconsider that loss in the district court." *Id.* 37a n.24.

SUMMARY OF ARGUMENT

I. The parties agree that in assessing price impact, courts may account for statements' "generality." They disagree on how. Goldman argues that courts may conclude as a matter of "common sense" that a statement's generality supports the conclusion that it had no effect on the share's price. The better view is that courts should consider only actual evidence—particularly, expert testimony—regarding whether the statements were so generalized that the market in fact did not account for them.

That conclusion follows from how price impact is actually litigated in securities cases. By the time it considers that issue, the district court has already rejected the argument that the statements are immaterial as a matter of law. After the plaintiffs prove market efficiency and publicity, the defendants try to disprove price impact. Most often, they attempt to prove that the misstatements did not affect the price, but some other cause did. The parties generally dispute those questions through expert reports that provide "event studies" of the misstatements and the allegedly confounding causes.

Goldman is correct as a commonsense matter that usually—although not always—a more-general statement will affect a security's price less than a more-specific statement on the same question. But

that truism is not very helpful here. In assessing price impact, the court does not determine in the abstract whether a misstatement had less of an effect than some other, hypothetical statement that was never made. Instead, it decides the empirical, context-dependent question whether the statement that was actually made (or the information that was not disclosed) had no effect on price. That question is properly considered through the submissions of professionals who are qualified by training and experience to opine on whether the market regarded the statements as too generalized to matter to investors' decisions. Goldman's own expert economist *amici* strenuously make that very point. Whether those expert submissions are persuasive will vary according to the case, and Goldman has not preserved any challenge to the district court's assessment of the expert testimony here. But that testimony will be far more reliable than judicial intuition.

Goldman's position would also require courts to decide price impact as a matter of intuition in the worst possible posture. The district court would have already eliminated the easy cases that are most susceptible to commonsense judgments: It will have deemed the most-generalized statements to be immaterial as a matter of law. In the remaining cases, Goldman's rule will only apply if the defendants will have been unable to find any qualified expert willing to opine that the market regarded them as too generalized to matter. In that situation, judges are especially ill-suited to use their own personal opinions to find a complete absence of price impact.

As the dissent in this case demonstrates, appellate judges tasked with assessing price impact

based on their own sense of the likely effects of a general statement are likely to revert to the standard for legal immateriality—*i.e.*, whether the statements were so vague that no investor could reasonably rely on them. But this Court's precedents correctly deem that question to be off-limits at the class-certification stage, because it is both common to the class and an element of the plaintiffs' claim. Goldman's proposed rule would therefore create considerable confusion as courts seek to navigate this Court's holdings that the determination of legal immateriality is simultaneously irrelevant to class certification and potentially dispositive under the guise of price impact. And it would moreover effectively allow defendants improperly to take interlocutory appeals on the question of materiality.

No matter what rule the Court adopts, it should affirm. The Second Circuit already applies the correct legal rule. That is why Goldman was able to introduce its expert report addressing the statements' generality in the district court, without objection. The district judge correctly found that Goldman had not carried its burden of proof.

The district court did not refuse to consider any evidence regarding the statements' generality. Goldman then forfeited the issue in the Second Circuit by failing to argue that the district court erred in its analysis of Goldman's expert testimony on the statements' generality. Nor did Goldman even ask the court of appeals to make its own supposedly commonsense assessment of that question. And in turn, it preserved none of those points in its cert. petition.

II. Goldman is also wrong in arguing that defendants need only satisfy a burden of production on price impact. This Court's decisions make clear that a defendant must *prove* an absence of price impact. Further, in *Halliburton II*, this Court refused to put the burden of persuasion on price impact on the plaintiffs. Because the burden of production is not heavy, Goldman's proposal is little different from the one *Halliburton II* rejected. And it is just as inconsistent with *Basic*'s purpose of making it possible to litigate securities cases as class actions, which the Court and Congress have recognized is frequently the best way to resolve claims of securities fraud.

Goldman nonetheless insists that this Court had no say in the matter. Instead, it claims, Federal Rule of Evidence 301 only permitted the Court to shift the burden of production to defendants. But this Court rejected that interpretation of Rule 301 nearly three decades ago, explaining that the Rule "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible." *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983), *abrogated in part on other grounds by Dir. v. Greenwich Collieries*, 512 U.S. 267 (1994). And courts have long had the authority, quite apart from any Rule of Evidence, to adopt burden-shifting regimes to implement federal statutes.

Further, Rule 301 is inapplicable because when *Basic* is invoked at the class-certification stage—as opposed to the merits—the court does not in fact "presume" anything about reliance or price impact. The court merely concludes that common issues predominate, such that the case is suitable for

collective litigation. To decide that question, the court does not resolve the factual question of whether the plaintiffs relied on the defendants' misstatements—whether through a presumption or otherwise. That is why the court does not decide whether the defendants' statements are material, even though materiality is an essential prerequisite for any rational presumption of reliance. *See Amgen*, 568 U.S. at 466-67. Instead, the Court has held that if a plaintiff proves the defendant's statement was publicized in an efficient market, the case is appropriate for class adjudication unless a defendant can prove a lack of price impact. That framework for deciding the class-certification question does not implicate Rule 301.

ARGUMENT

I. Courts May Rely On Evidence Such As Expert Testimony To Address Whether Statements Were So Generalized That They Did Not Affect The Market Price.

The first question presented asks, in essence, whether and how a court's evaluation of price impact should account for the misstatements' "generality." The parties have substantially narrowed their arguments in their merits briefs. So there is now more common ground than territory to be fought over.

Most important, Goldman has abandoned the contention that a court may find no price impact by holding that the misstatements are immaterial as a matter of law. That had been Goldman's theory on appeal and in all but two sentences of the cert. petition.

For our part, plaintiffs have elected to defend the Second Circuit's rule, rather than seek to limit further

the evidence that is relevant to price impact. We are not pressing the argument—which we unsuccessfully made in the initial appeal to the Second Circuit—that evidence should be excluded at class certification to the extent it overlaps with materiality.

The parties (along with the government) have therefore landed on substantial common, middle ground. They agree that evidence of the statements' generality can be relevant to price impact, notwithstanding that it overlaps with materiality. That is already the rule in the Second Circuit. But Goldman devotes most of its argument to kicking in that open door. The disagreement is instead over process—*i.e.*, *how* may a court assess the effect of the statements' generality on price impact? Goldman only barely addresses that issue.

There are two possibilities. Everyone agrees that the court can consider evidence (particularly, expert submissions), which is how the court conducts the rest of the price-impact inquiry. Importantly, that rule is entirely consistent with the Second Circuit's decisions in this case. Goldman introduced expert testimony on that issue, to which plaintiffs responded, and which the district court ultimately rejected in finding that Goldman did not completely disprove price impact. Goldman did not seek review here on that fact-bound question.

More controversially, Goldman now argues that the court can rely on the judge's personal, "commonsense" view—untethered from any evidence—of whether the statements were too general to affect the security's price. It provides only two sentences of explanation: "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." Petr. Br. 27.

For the reasons that follow, Goldman's argument lacks merit. Here, as in certain other contexts, "common sense is a much less useful criterion than it sounds," as it can unhelpfully "devolv[e] into guesswork and intuition." *Johnson v. United States*, 576 U.S. 591, 599-600 (2015).

A. Goldman Fails To Account For How Price Impact Is Actually Litigated In Securities Fraud Cases.

Invariably, price impact is litigated in securities fraud cases that involve some price movement, whether when the statements were made or at the time of the corrective disclosure. Without price movement, the plaintiffs do not file suit. Also, the plaintiffs' complaint will have survived the rigorous screens that Congress enacted to curb abusive suits in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737.

Further, the court will address price impact only after rejecting the argument that the statements or omissions were immaterial as a matter of law. Defendants uniformly raise any viable materiality argument early in the litigation through a motion to dismiss.[4] Before class certification, the court accordingly

[4] For very recent examples of suits being dismissed on that basis, *see, e.g.*, *Okla. Law Enf't Ret. Sys. v. Papa John's Int'l, Inc.*, 2021 WL 371401, at *7 (S.D.N.Y. Feb. 3, 2021) (alleged misstatement in company's code of conduct is "vague, broad, and merely aspirational: it makes no promises as to what Papa John's

will have concluded that investors could reasonably have relied on the statements. That means that the most obviously "general" statements are already out of the case, if the complaint has not been dismissed altogether.

Such a case is ordinarily a natural fit for class certification. The remaining issues to be litigated on the merits—for example, the statements' materiality and falsity, and the defendants' state of mind—affect all the class members equally. It would make little practical sense for each shareholder to pursue such a claim in an individual lawsuit. Class certification is therefore not a natural tool to weed out supposedly abusive securities cases; that is not Rule 23's role. If the case lacks merit, it is better to resolve all the shareholders' claims together. Although defendants regularly complain about the prospect of extortionate class-action demands, Congress heard those concerns, studied them, and addressed them through the carefully crafted, demanding procedural and substantive requirements of the PSLRA.

Even then, class-action treatment is not appropriate for every case involving even public misstatements relating to securities traded on

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would do to prevent or respond to workplace sexual harassment[.] In light of these circumstances, no reasonable investor could have relied on the Code's vague assurances in making investment decisions."); *Constr. Laborers Pension Tr. v. CBS Corp.*, 433 F. Supp. 3d 515, 533-34 (S.D.N.Y. 2020) (alleged misstatements "come close to being statements of fact; but they are nonetheless too general and disconnected from Plaintiffs' central theory of securities fraud to be material. ... No reasonable investor would rely on these statements as assurance that CBS had no high-level executive who was vulnerable to a '#MeToo moment.'").

efficient markets. If the defendants *completely* disprove price impact, they disprove class-wide reliance, such that individualized issues will predominate in the case. Statements or omissions that have no effect on the market price are not conveyed to investors through that mechanism. And because price impact (unlike materiality) is not an element of the plaintiffs' case, it is not reserved for the merits instead.

The context in which price impact is litigated informs the arguments that defendants make to disprove it, and in turn the proof that courts properly consider. Defendants generally try to show one or both of two things. First, the statements or omissions were not related to the change in the security's price. Second, some other, confounding cause was. The plaintiffs and defendants generally dispute those issues through competing expert reports, which often take the form of "event studies" examining the empirical question of how the market responded to the statements and to the supposed confounding causes.

This case followed the usual litigation pattern. Here is Goldman's novel, two-part argument to the Second Circuit that the defendants' statements about their conflict policies and business practices did not affect the security's price: Goldman's expert Gompers opined that an absence of price impact was proved by the fact that Goldman's stock price did not react to the purported revelations of Goldman's conflicts of interest in more than thirty-five different publications. But few if any "irrelevant" issues get such prominently recurring attention in, for example, *The Wall Street Journal*.

Goldman further argued that the price declines were attributable *entirely* to a different cause: the market's reaction to the mere news of the governmental enforcement actions, as opposed to the ensuing disclosures about Goldman's unaddressed conflicts. Goldman's expert Choi opined that similar stock declines had occurred in response to similar enforcement actions. But even if true, it is hard to see how that makes any legal difference. The decline in Goldman's stock price is naturally attributable (at least in part) to Goldman's misstatements that it had extensive controls in place to manage conflicts, which is what maintained the market's inflated (but subsequently dashed) expectation that there would be no such governmental enforcement action.

The district court unsurprisingly certified the class. By the time the court reached that question, it had (repeatedly) rejected Goldman's materiality challenge that the statements were too general and aspirational to induce reasonable reliance by investors. The court also found that the statements were public and that the market for Goldman's stock efficiently accounts for material information.

The district court received extensive submissions and held an evidentiary hearing. It found that Goldman had not satisfied its burden to completely disprove price impact. The court found that Gompers' reliance on the discussions of Goldman's conflicts in various publications was unpersuasive, both because they were accompanied by Goldman's repeated denials that it had unaddressed conflicts and because the disclosures accompanying the enforcement actions were far more detailed and therefore were more likely to affect share prices. The disclosures for the first time

"expose[d] hard evidence of Goldman's client conflicts" including "direct quotes from damning" internal documents, and therefore were more "reliable and credible" than the prior "generic" media reports on Goldman's potential conflicts. Pet. App. 55a-56a. To this day, Goldman never accounts for the district court's factual finding, made after a careful review of all the articles, that "the tenor and quality of [the] 36 [news] reports vary significantly," with many suggesting only "possible or theoretical conflicts" and "others were not damaging or revelatory, but rather commendatory: they praised Goldman for managing its conflicts and still outperforming competitors." *Id.* 55a n.6.

The district court further found that, even assuming that one cause of the price drops was the market's reaction to the costs associated with governmental enforcement, that could not explain the entire decline. Some inevitably related directly to the market's view that Goldman's reputation had been seriously harmed, making it less valuable as a company, given that it failed to manage such serious conflicts. The court concluded that the report of plaintiffs' expert—which included its own event study and assessment of analyst reports and other market commentary—"at the very least, establishes a link between the news of Goldman's conflicts and the subsequent stock price declines." Pet. App. 12a (quoting *id.* 54a).

The district court found that Choi's report arguing to the contrary was rife with serious methodological flaws. For example, Choi relied on a statistically unsound sample of only four, cherry-picked enforcement actions. Further, because Choi did not

conduct *any* event study with respect to the second and third corrective disclosures, the court found that "there is no good reason to extend Dr. Choi's findings on the first price decline to those second and third price declines." Pet. App. 57a.

Goldman now argues that a court is obligated to assess whether as a matter of "common sense" the statements' generality means that they lacked price impact. That argument lacks merit. For the reasons that follow, almost without exception, judges should consider the statements' generality by evaluating evidence such as expert testimony rather than applying their own intuitions. The district court received and evaluated that evidence, consistent with the Second Circuit's existing rule. Goldman did not ask the court of appeals to decide, or preserve for review in this Court, the question whether the district judge's fact-finding on that issue was clearly erroneous.

B. Courts Should Rely On Evidence, Not Personal Intuition, About How The Statements' Generality Affected The Market Price.

Goldman's entire argument rests on two sentences it presents as a truism about intuition and "common sense," without any supporting authority or analysis. *See supra* at 20-21. Goldman is correct, to the extent it is merely asserting that, as an abstract matter in most cases, a more-general statement is relatively less likely to affect a security's price than a more-specific statement on the same topic in the identical context. But for four reasons, that is not a basis to hold that, in the mine run of cases, it is appropriate for judges to determine price impact on

the basis of their personal view of the statements' generality.

First, the price-impact inquiry is not relative, hypothetical, and abstract in the way that Goldman's truism supposes; it is absolute, empirical, and context-specific. The question at class certification is not whether the defendants' statements were less likely to move the price than an imagined, more-specific statement that the defendants never made. Instead, the question is whether the *actual statements* affected the market price at all. If so, then that price transmitted information to the market and the question whether the shareholders relied on it is common to the class as a whole.

Here is an illustration about how abstract, relative intuitions may not be useful. As a matter of common sense, Tesla stock will perform worse if demand for electric cars goes down than if demand goes up. So, a judge could reasonably conclude without expert testimony that Tesla stock will probably do worse if demand for electric cars goes down 5% than up by 5%.

But what if the judge instead must decide an empirical question that parallels securities defendants' attempts to disprove price impact: Did Tesla stock go down in response to an announced 5% decrease in the demand for electric cars, or instead because the market learned of facts that called into doubt important representations by Tesla executives about anticipated demand? The abstract, relative truism now provides little help. The question the judge must decide depends on context-specific factors about the statement, including by whom it was made and when, on what topic, and how it compared to other

statements. It also depends on context-specific factors about Tesla's business, including whether Tesla's sales faced the same 5% decline as the broader industry, and how much of Tesla's revenue or profit was expected to come from new car sales in the first place. A court would not decide the question based on personal intuition; it would look to evidence, likely including expert testimony.

So too with a judge's ruling on whether statements and omissions had no price impact. That is not a "commonsense," relative determination, unlike the question whether statements would have had *more* effect on the security's price if they had been even more specific. Price impact is also context-dependent. It can turn tremendously on factors that include but are not limited to: the particular corporation; the subject of the statements; their timing; the precise speaker; what was omitted; why the statements were false; and how the statements relate to earlier ones by the company on the same subject.

Further, as the government points out (at 16-17), even Goldman's abstract truism is not always true. Sometimes, a generalized statement can be *more* likely to affect market prices. That may be so when, for example, a general statement departs from prior, repeated specific assurances to the contrary. Further, a statement that in one context might be "generalized" and dismissed by the market may closely resemble in another context one that is "categorical and sweeping" and therefore extremely important to shareholders. Judges are poorly positioned to distinguish one case from the other by intuition.

Even if Goldman's truism could be applied accurately in cases involving a single misstatement,

many cases do not fit that model. As here, the plaintiffs will often argue that a diverse set of statements—some more specific than others—improperly maintained an already-inflated share price. The plaintiffs will also argue that the statements created an obligation for the defendants to address the implied falsehoods that resulted from any generalization. A court is poorly positioned to simply intuit that the statements and omissions had zero effect on market prices.

Take this case. Plaintiffs argue that Goldman's stock uniquely traded at a premium to its competitors because the market placed special value on its ability to create highly profitable investment products that it could sell to customers on both sides of the transaction, while successfully navigating potential conflicts of interest.[5] A judge cannot determine the effect of those misstatements and omissions as an abstract matter based on a personal sense of how much markets usually care about general statements. Plaintiffs also rely on the combined effect of multiple statements and omissions on maintaining Goldman's inflated market price. Mere "common sense" cannot tell the court how market participants regarded their effect, taken together.

Second, courts have no special experience with, or knowledge about, how much importance markets attribute to the various types of statements and

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[5] Plaintiffs' argument was supported by their expert's testimony and numerous analyst reports and market commentary discussing this Goldman reputational "premium," which "dissolved" upon revelation of Goldman's conflicts in the corrective disclosures. JA954-57.

omissions that often underlie securities fraud claims. When Goldman argues that its position is "common sense," it simply means "not counterintuitive." But that could be said of many other factual questions embedded in the price-impact inquiry that everyone agrees are addressed instead by experts' event studies—not intuition. In this case, for example, Goldman argues that the market reacted negatively to the prospect of costs arising from the governmental enforcement actions. That is intuitively correct, but it is also not the issue. One can say as a commonsense matter that the enforcement actions *contributed* to the price decline, but not that they caused *all* of it.

Courts also confront the question of price impact in a posture that makes it least susceptible of an intuitive answer. The easy cases—those in which the statements are so vague that a reasonable investor could not rely on them—have already been dismissed on the ground that they are immaterial as a matter of law. It is hard to see how a district judge would refuse to dismiss the statements on that ground, but then promptly turn around and deem them intuitively so generalized that they had no effect on price. If the district court does not reverse itself, then on appeal it is hard to understand how appellate judges could find that their own "commonsense" view of the statements renders clearly erroneous the contrary "commonsense" view of the district judge, who is substantially more familiar with the statements and their context.

Third, it is unnecessary for judges to apply their own personal views. Every time the argument has merit, the defendants can easily produce actual evidence—particularly, expert testimony—for the court to evaluate. Almost every price-impact dispute is

framed by expert testimony through event studies. Generally, the defendants argue that the statements or omissions were not relevant to the market price. Qualified experts on both sides should be well-positioned to address, by applying their professional experience to the facts of the case, whether the statements were so generalized that the market regarded them as irrelevant.

Indeed, as discussed, Goldman retained an expert to make essentially that argument *in this case*, to which plaintiffs provided a detailed response of their own expert. Goldman then made the choice not to seriously pursue that evidence and that argument on appeal. It is passing strange for Goldman to have cast aside its own expert's opinions, in order to rely on judges' intuitions on the identical question in this Court.

Goldman's own *amici* provide strong support for the proposition that experts rather than judges should opine on the effect of the statements' generality. The *amici* are "financial economists" who have "served as testifying and consulting experts in ... securities class action cases." Financial Economists Amicus Br. 1. The economists explain that *they* are the ones actually qualified to address this issue: "[A]n analysis of the content of alleged misstatements is a key part of an *economic assessment* of price impact." *Id.* 4 (emphasis added). Specifically, "in a situation in which a company is alleged to have made only generalized statements regarding business principles that were not met with any stock price reaction when they were made, *an economist should test* whether such statements had a price impact." *Id.* 7 (emphasis added); *see also id.* 10, 11, 12, 13, 14 (explaining over

and over why the judgment about the statements' generality should be made by a qualified "economist").

Goldman argues that judges should make their own "commonsense" judgment in the cases in which the defendants by hypothesis will not have been able to produce any supporting expert testimony. The court is thus flying blind, into the headwind that the statements are material. It is being asked to make the personalized judgment that material statements had zero effect on market prices, when the defendants could not find anyone with relevant experience willing to submit testimony backing up that claim. The court's common sense cannot supply that judgment.

Fourth, Goldman's proposal would regularly put courts in untenable dilemmas as they attempt to navigate among *Amgen*, *Halliburton II*, and the ruling Goldman asks the Court to adopt here. These issues are difficult enough as it is. *See In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 608-09 (7th Cir. 2020). *Amgen* and *Halliburton II* hold that courts may not determine materiality on class certification. But Goldman's proposal would essentially require them to do just that.

As discussed, there are important differences between a statement's materiality to a hypothetical reasonable investor and the judgment that the statement was so generalized that it did not in fact affect market prices. But appellate judges are nonetheless overwhelmingly likely to use the identical test to decide both questions, if forced to decide the issues as an intuitive matter. Judges have no expertise with which to make the latter, empirical judgment. So they inevitably will resort to materiality case law and find no price impact when they disagree with the

district court's finding of materiality. Importing materiality back into the class-certification inquiry would render this Court's decisions in *Halliburton II* and *Amgen* a nullity.

Judge Sullivan's dissent in this case—which is the source of Goldman's proposal—proves the point. The dissent relied exclusively on the legal standard for materiality in opining that the statements underlying plaintiffs' claims were too generalized to have price impact. He explained that, in his view, "no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based." Pet. App. 44a-45a.[6] Of note, not even *the dissent* located in Goldman's appellate argument any reliance on Starks' expert testimony regarding the statements' generality. The dissent instead reached its own conclusions based on its own intuition, without addressing the particular context in which these statements about this aspect of this specific company are alleged to have maintained the inflated market price.

Goldman's proposal would thus deny class certification based on a common question that will later be resolved at trial. It would also permit defendants effectively to take an improper interlocutory appeal of district courts' denials of motions to dismiss on the question of materiality—a

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[6] *See also, e.g.*, *In re Signet Jewelers Ltd. Sec. Litig.*, 2019 WL 3001084, at *18 (S.D.N.Y. July 10, 2019) ("This argument tracks ... the same 'puffery' argument advanced by Defendants' in their recent Rule 12(c) motion. … For the reasons discussed in the Court's recent Decision Denying Defendants' Motion for Judgment on the Pleadings …, the Court finds this argument unpersuasive.")

transparent goal of Goldman's—when that issue is not part of the class-certification determination and not subject to interlocutory appellate review under Rule 23(f).

C. This Court Should Affirm The Second Circuit's Judgment.

If this Court agrees with Goldman that judges may freely make "commonsense" judgments that material statements have no price impact, it should nonetheless affirm because Goldman has waived that claim. It did not make that argument in the Second Circuit, where it instead made the categorical claim that it abandoned in its merits briefing in this Court: that defendants may relitigate materiality at class certification, at least in inflation-maintenance cases.[7] It then raised the issue in merely two sentences of the cert. petition. But if the Court is uncertain, it should vacate and remand for the Second Circuit to determine whether Goldman preserved that argument below and, if so, to address it. *See* U.S. Br. 26.

If this Court instead agrees with us that judges should rarely if ever depart from the practice of using actual *evidence* to determine the price effect of the statements' generality, it should affirm. There is no basis to remand for the Second Circuit to apply that standard, because Goldman waived that argument too, and because the court of appeals already applies the correct rule.

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[7] The lower courts have uniformly recognized inflation-maintenance as a valid basis to bring securities fraud claims. *See, e.g.*, Pet. App. 15a-17a; *Allstate*, 966 F.3d at 610-12. Goldman does not challenge that view. We therefore do not address that issue.

As discussed above, Goldman did not argue before the Second Circuit panel or in the cert. petition that courts should consider evidence such as expert testimony to the effect that the statements were supposedly too general to affect the market price. Goldman had earlier submitted an expert report making that argument. But for whatever reason, it decided to abandon that approach on appeal. It did not rely on that testimony to support that argument in the Second Circuit.[8] Applying the correct "clearly erroneous" standard, the Second Circuit considered and rejected the challenge Goldman *did* make to the district court's assessment of the evidence relevant to price impact.

Goldman likely did not pursue this argument because plaintiffs thoroughly refuted it. Plaintiffs submitted a rebuttal declaration from their own expert, who explained that the Starks report "fails to consider" that "investors would be likely to utilize" disclosures about Goldman's conflicts of interest "in assessing the riskiness of investing in the company's securities." JA647. Further, the Starks report relies on faulty methodology by examining analyst reports only for express references to Goldman's statements. That fails to account "for references to the same *subject matter* of the alleged misstatements and omissions, or references that paraphrase Defendants' misleading statements." *Ibid.* Given those flaws, the report is

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[8] Goldman never cited the Starks report to the Second Circuit in support of the argument it makes now. Indeed, it barely referenced the report *at all* in its argument (as opposed to as background facts). *See* Petr. C.A. Br. 50 n.11; C.A. Reply Br. 18. So too in the cert. petition, which cited the Starks report only once—and then only in the statement of facts. Pet. 10.

"unreliable and irrelevant." *Ibid.*; *see generally* JA652-59 (detailing these errors).

Further, Starks made critical concessions at her deposition. For example, when shown an analyst report issued after the first alleged corrective disclosure, JA881-90, discussing the "reputation damage" and potential "client fallout due to this [SEC] case" from the "current public outrage against the firm," Starks admitted that "the public outrage would have been against the underlying actions" alleged in the SEC suit, which "could have a negative" "effect on Goldman's stock price," JA667-68.

Goldman then waived the argument in this Court as well, by not raising it in its petition for certiorari. The petition almost exclusively raises the argument that Goldman has now abandoned: that courts may find a lack of price impact on the ground that statements are immaterial as a matter of law. Further, in seeking certiorari, Goldman did not ever even *remotely* suggest that it was asking this Court to re-evaluate the evidence that was before the district court and apply the clearly erroneous standard itself. If Goldman had made that wholly fact-bound request, it is all-but certain that certiorari would have been denied.

There also is no basis to reverse, because the Second Circuit already applies the correct rule. The court of appeals squarely held, in its first decision in this case, that evidence relevant to price impact is admissible *notwithstanding* its overlap with materiality. When plaintiffs first moved for class certification, Goldman sought to disprove price impact in part based on various articles discussing Goldman's conflicts of interest. Goldman pointed to the fact that

its stock price did not change in response to the articles. It argued that the market therefore did not care about Goldman's conflicts. According to Goldman, if the articles had no price impact, then neither did the misstatements. The district court excluded that evidence on the ground that it overlapped substantially with materiality.

On Goldman's appeal, the Second Circuit reversed. The court of appeals agreed with *Goldman* that the overlap between price impact and materiality was *not* a basis to exclude the evidence. On remand, the district court evaluated the evidence and found that Goldman did not completely disprove price impact. In particular, the court recognized that the corrective disclosures through the government's enforcement actions were much more credible and specific, supported by "hard evidence" of Goldman's conflicts, than the articles' "generic" and uncorroborated discussions of merely "possible or theoretical" conflicts. *See supra* at 12, 24-25. In addition, the court found that many of the news articles were accompanied by Goldman's denials that it had unaddressed conflicts of interest and other rebuttals, and that "other[] [articles] were not damaging or revelatory, but rather commendatory: they praised Goldman for managing its conflicts and still outperforming competitors." Pet. App. 55a n.6.

Ignoring the Second Circuit's initial decision, Goldman asserts that the court sweepingly held in its second ruling that the statements' generality is irrelevant to price impact because it overlaps with materiality. That characterization is not correct, and such a holding would have been flatly inconsistent with its prior ruling in this same case. Goldman

cannot seriously argue that the Second Circuit held that expert testimony regarding the statements' generality is inadmissible on class certification, when Goldman successfully introduced exactly that kind of evidence—with no objection by plaintiffs in either the district court or on appeal.

Goldman thus seriously mischaracterizes the litigation below when it asserts that "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." Petr. Br. 18. Goldman did not make that argument below and the Second Circuit thus did not reject it, which is why Goldman does not cite its briefs on appeal and just generally cites 9 pages of the opinion below without any specific reference.

Although the Second Circuit majority "characterized petitioners' argument as an attempt to 'smuggl[e] materiality into Rule 23,'" Petr. Br. 18 (quoting Pet. App. 22a), that was a response to an *entirely different* argument: Goldman's assertion that the court should modify "our inflation-maintenance doctrine" to permit such claims only if plaintiffs prove the statements were not "generalized" in the sense that they were material as a matter of law. Pet. App. 21a-22a; *see also id.* 19a ("Although these findings satisfy the inflation-maintenance doctrine, Goldman asks us to narrow the doctrine's focus.").

The Second Circuit majority also did not "refuse[] to consider the generic nature of the alleged misstatements" in determining price impact (Petr. Br. 19 (citing nothing)), something it was never asked to do. Specifically, Goldman did not preserve the

argument that the Second Circuit should reverse on either (1) the fact-bound ground that the district court erroneously failed to find an absence of price impact in light of the Starks report, or (2) the legal ground that the district court erroneously excluded evidence relating to the statements' generality. Instead, Goldman argued that plaintiffs must prove materiality in inflation-maintenance cases. Petr. C.A. Br. 49-50.

The court of appeals majority merely rejected Judge Sullivan's invocation of his own view of the statements' generality that he based on the standard used for determining materiality as a matter of law. The dissent found persuasive Choi's testimony regarding the market effect of governmental-enforcement actions. The dissent also went further and concluded *sua sponte* that the statements' generality confirmed Choi's conclusions. Judge Sullivan relied not on expert testimony regarding the statements' generality (no doubt, because Goldman did not ask the court to), but instead on *his own view* that the statements were immaterial as a matter of law. In response, the majority reiterated its ruling that materiality is a merits question, and reaffirmed its conclusion that the district court's view of the evidence was not clearly erroneous.

In sum, this Court can and should issue an opinion that announces the correct legal rule without vacating the judgment below and remanding, and thereby incorrectly suggesting that the lower courts erred. Goldman litigated class certification before both the district court and the Second Circuit—twice. Plaintiffs addressed, and the district judge and the Second Circuit majorities resolved, the arguments

that Goldman actually made and the evidence it cited. There is no basis to require the parties and the courts do it all over yet a *third* time, or even to send the confusing signal of requiring the court of appeals to reconsider the case when it already applies the correct rule. Doing so in order to save Goldman from its own litigation choices would be a substantial disservice to the judges who have considered class certification in this case repeatedly over the past *five* years, in this already *eleven*-year-old case. It would also invite parties to regularly smuggle wholly fact-bound questions into cases before this Court, after purporting to present pure questions of law for its review.

II. Defendants Bear The Burden Of Persuasion On Price Impact.

Goldman also claims the court of appeals erred in holding that a defendant seeking to rebut the *Basic* presumption of reliance bears the burden of persuasion, rather than merely the burden of production. Petr. Br. 37-43. As explained by the United States and every court of appeals to have given reasoned consideration to the question, that is incorrect. *See* U.S. Br. 27-33; *Allstate*, 966 F.3d at 610-11; *Waggoner v. Barclays PLC*, 875 F.3d 79, 99-103 (2d Cir. 2017).

A. *Basic* And *Halliburton II* Assigned Defendants The Burden Of Persuasion.

In *Basic*, the Court directly addressed what is “sufficient to rebut the presumption of reliance,” holding that the defendant must “*show* that the misrepresentation *in fact* did not lead to a distortion of price or that an individual plaintiff traded or would have traded despite his knowing the statement was

false." 485 U.S. at 248 (emphasis added). "For example," the Court explained, "if petitioners could *show* that the 'market makers' were privy to the truth ... and thus that the market price *would not have been affected* by their misrepresentations ... the basis for finding that the fraud had been transmitted through market price *would be gone*." *Ibid*. (emphasis added).[9]

In *Halliburton II*, the Court applied the same rule to price impact, holding that a defendant "rebut[s] the presumption *by showing* ... that the particular misrepresentation at issue did not affect the stock's market price." 573 U.S. at 279 (emphasis added). The Court used the same formulation in describing the plaintiffs' burden of establishing the *Basic* prerequisites, which the plaintiffs must prove by a preponderance of the evidence. *See id*. at 268.

In addition, the Court has always treated rebutting the *Basic* presumptions as precluding class certification. *See, e.g.*, *Halliburton II*, 573 U.S. at 281. That makes perfect sense if the defendant proves that its statements had no price impact—the premise of the fraud-on-the-market theory "would be gone," *ibid*. (citation omitted), and individualized proof of reliance would predominate. But precluding class certification would make no sense at all if defendants bore only the burden of production. *See Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254 (1981) (to satisfy burden of

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[9] Goldman's reliance (at 41) on *Basic*'s passing citation to Rule 301 is misguided. *See* U.S. Br. 31. Notably, the Court conspicuously cited to the Advisory Committee Notes that accompanied the *original* version of the Rule, which had proposed that presumptions shift the burden of persuasion. *See Basic*, 485 U.S. at 245.

production, a "defendant need not persuade the court").

Perhaps for this reason, Goldman seemingly contemplates that meeting the burden of production simply shifts the burden of persuasion on price impact to the plaintiffs. *See, e.g.*, Petr. Br. 39. But Goldman itself argues that under settled law, a presumption has no effect on the burden of persuasion, which is left with "the party who had it originally." *Ibid.* (quoting Fed. R. Evid. 301). Accordingly, a defendant's satisfaction of a burden of production could only saddle plaintiffs with the burden of proof on price impact if the plaintiffs had been assigned the burden of persuasion on that issue "originally." In *Halliburton II*, however, this Court expressly declined to put the burden of proof of price impact on the plaintiffs in the first instance. *Halliburton II*, 573 U.S. at 278-79. To say that plaintiffs nonetheless end up with the burden of proof once the defendant meets a burden of production requires either overruling *Halliburton II* or adopting a kind of presumption that Goldman insists is unknown to the law (*i.e.*, one in which the initial burden of proof is assigned to *no one*, but falls upon the plaintiffs after the defendants sustain a burden of production).[10]

Even setting aside the doctrinal incoherence it would attribute to this Court's decisions, Goldman

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[10] Goldman observes that plaintiffs bear the burden of persuading the court that they meet the requirements of Rule 23. Petr. Br. 39. But *Basic* does not establish a presumption about compliance with the Rules. The price impact rebuttal is directed instead at *Basic*'s "'presumption' that 'the misrepresentation affected the stock price.'" *Ibid.* (quoting *Halliburton II*, 573 U.S. at 279). On *that* question, plaintiffs bear no original burden.

cannot explain why the Court would have refused to put the burden of proof on price impact on plaintiffs in the first instance in *Halliburton II*, yet have intended them to bear that burden in every case in which a defendant is able to introduce *some* evidence suggesting its statements had no price impact. *See* U.S. Br. 29. In actual litigation, there would be little difference between Goldman's and Halliburton's proposals. The burden of production is not heavy. *See* *Burdine*, 450 U.S. at 254 (defendant need only present enough evidence to raise "a genuine issue of fact"). In this context, defendants will surely argue that their burden is met by producing an expert report purporting to disprove price impact, or a news report a jury could believe disclosed the truth before the stock price fell. *See, e.g.*, Petr. Br. 45-46; *Allstate*, 966 F.3d at 610. Indeed, Goldman would seemingly deem it sufficient for a defendant to point to the allegedly general nature of its statements and argue that such statements are unlikely to affect stock prices.

"The presumption of reliance would ... be of little value if it were so easily overcome." *Waggoner*, 875 F.3d at 100-01. Goldman argues to the contrary that its rule would create "incentives for defendants to produce evidence of the absence of price impact" and "'sharpen the inquiry' on the question of price impact." Petr. Br. 42 (quoting *Burdine*, 450 U.S. at 255 n.8) (alteration omitted). But the Court did not create the *Basic* presumption out of concern that defendants had unique access to evidence regarding price impact. Nor does *Basic* exist to progressively sharpen an inquiry into an "elusive factual question" like an employer's state of mind. *Burdine*, 450 U.S. at 255 n.8.

Instead, the presumption's fundamental purpose is to facilitate securities class actions, a type of claim both the Court and Congress have recognized is frequently appropriate for collective adjudication. *See Halliburton II*, 573 U.S. at 268; 15 U.S.C. § 78u-4 (establishing rules specific to securities class actions). Goldman's rule would greatly diminish *Basic*'s ability to perform that important function.

B. Federal Rule Of Evidence 301 Does Not Preclude This Court From Assigning Defendants The Burden Of Persuasion On Price Impact.

In the end, Goldman does not seriously attempt to show that the Court actually intended for defendants to rebut the *Basic* presumption by doing nothing more than producing some evidence suggesting a lack of price impact. Instead, Goldman's principal argument is that it does not matter what the Court intended because the Court had no choice in the matter because Rule 301 of the Federal Rules of Evidence limited the Court to imposing only the burden of production on defendants. Petr. Br. 38-40.[11] The defendant in *Halliburton II* made the same argument.[12] This Court necessarily rejected that interpretation of the Rule

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[11] Rule 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.

Fed. R. Evid. 301.

[12] *See Halliburton II* Reply Br. 23.

when, as just explained, it imposed the burden of persuasion on defendants. The Court was right then and Goldman is wrong now.

1. Not everything that could be (or has been) described as a "presumption" is subject to the Rule. *See, e.g.*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 104 n.6 (2011) (refusing to apply Rule 301 to a statute that created a "presumption of patent validity," explaining that the "word 'presumption' has often been used when another term might be more accurate").

In particular, Rule 301 "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible." *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983), *abrogated in part on other grounds by Dir. v. Greenwich Collieries*, 512 U.S. 267 (1994). In *Transportation Management*, the National Labor Relations Board (NLRB)—whose administrative proceedings are governed by the Rules of Evidence, *see id.* at 403 n.7—had adopted the rule that if an employee "carrie[s] the burden of persuading the Board that antiunion animus contributed to the employer's decision to discharge," the illegal animus would be presumed to have caused the employee's termination unless the employer proved "by a preponderance of the evidence" that it would have fired the worker regardless of her union involvement. *Id.* at 395. Like Goldman here, the employer argued that because the NLRB's rule established a presumption, Rule 301 precluded "shifting the burden of persuasion onto the employer." *Transp. Mgmt.* Resp. Br. 20 n.6, 35-36. This Court rejected the employer's reading of the Rule. It explained that the provision "merely defines the term

'presumption'" and does not limit an agency or court's power to use other sources of authority to establish burden-shifting regimes that shift the burden of persuasion upon proof of predicate facts. 462 U.S. at 404 n.7.[13]

That interpretation aligns with the Rule's text. By its terms, Rule 301 addressed the effect of (1) a *presumption* on (2) the *burden of production*. The Rule does not purport to preclude (1) *other* sources of law from (2) shifting the *burden of persuasion*. *See* Fed. R. Evid. 301 ("But *this rule* does not shift the *burden of persuasion*[.]") (emphasis added).

The text, in turn, is consistent with the traditional understanding of presumptions. For example, Professor Thayer—proponent of the "bursting bubble" approach to presumptions—explained in his influential treatise that the "characteristic and essential work of the presumption" is to fix "the duty of going forward with proof." James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 337 (1898). But he also explained that "substantive law" may "fix the rule about the strength of conviction that must be produced in the mind of the tribunal" to overcome the presumption. *Ibid.*; *see also Microsoft*, 564 U.S. at 103 (explaining that a "rule as to the

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[13] Goldman's only response to *Transportation Management* is to accuse the Court of providing a "cursory answer to an ancillary and largely unbriefed question." Petr. Br. 42 (quoting *Greenwich Collieries*, 512 U.S. at 277). But the proper distribution of burdens was the only question in the case. 462 U.S. at 395. And a principal reason the employer gave there for why the "burden of persuasion never shifts to the employer," *Transp. Mgmt.* Resp. Br. 33, was that Rule 301 forbade it, *id.* 33-36; *see also Transp. Mgmt.* Council on Labor Law Equality Amicus Br. 34-36 (same).

amount of evidence which is needed to overcome the presumption" can be "superadded to the rule of presumption" by other sources of substantive law) (quoting *Thayer*, *supra*, at 336-37).

This makes perfect sense. When a statute is silent on the subject, courts may assign initial burdens of proof without regard to Rule 301, according to the courts' sense of "policy and fairness based on experience in the different situations." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)). That same context-specific assessment may sometimes lead courts to conclude that a law is best implemented by shifting the burden of persuasion after a party makes a preliminary showing. *See ibid*. It would be strange if Congress intended a Rule of Evidence to preserve courts' ability to assign the *initial* burden of proof, but to forbid courts from adopting more sophisticated burden-shifting regimes that transfer the burden of persuasion upon a prima facie showing, as was commonplace before and after Rule 301 was enacted. *See, e.g.*, *id*. at 208-09.

Here, defendants have the burden of proof on price impact not because *Basic* imposed a "presumption," but because this Court adopted this distribution of burdens as "a substantive doctrine of federal securities-fraud law." *Halliburton II*, 573 U.S. at 274 (citation omitted). Rule 301 says nothing about the Court's authority to assign that burden as part of the work of implementing the 10b-5 cause of action. *See* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Fed. Evid.* § 3:8, Westlaw (database updated May 2020) (some "court-made presumptions closely associated with statutory schemes ... are largely substantive

because they seek to implement those schemes, and these [rules] are beyond reach of Rule 301").

Goldman's contrary claim conflicts not only with *Transportation Management*, but with numerous other cases from this Court and others that have devised burden-shifting regimes that transfer the burden of persuasion upon a prima facie showing. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45, 362 (1977) (shifting burden of persuasion through a "rebuttable presumption" of individualized discrimination in pattern-or-practices cases); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 & n.32 (1976) (same); *United States v. White*, 466 F.3d 1241, 1248-49 (11th Cir. 2006) (burden of proving inaccuracy of tax assessment shifted to taxpayer in government tax collection case); *Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998) (burden shifting in bankruptcy cases); *In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 113-14 (3d Cir. 1996) (admiralty); *Plough, Inc. v. Mason & Dixon Lines*, 630 F.2d 468, 470 (6th Cir. 1980) (transportation).

2. When, as here, *Basic* is invoked at class certification, Rule 301 is inapplicable for the even more fundamental reason that nothing about reliance or price impact is even being presumed.[14]

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[14] Goldman assumes that the Rules of Evidence apply to class-certification proceedings. But that is an open question in this Court. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 32 n.4 (2013) (granting certiorari to decide, but ultimately not reaching, question whether class certification must be decided on basis of admissible evidence); Fed. R. Evid. 1101(c) (only "rules on privilege apply to all stages of a case or proceeding"); Fed. R. Evid. 1101(d) (providing that other rules do not apply to "miscellaneous proceedings" and giving non-exhaustive list of examples).

At class certification, plaintiffs are not proving that they actually relied on the defendants' statements. That question is for summary judgment or trial. At class certification, the question is whether "a proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Amgen*, 568 U.S. at 469 (citation omitted). For that reason, the plaintiffs are not required to establish all the elements that would justify an actual presumption of reliance. They need not prove, for example, that the defendants' statements were material, even though this Court has recognized that materiality "indisputably" is "an essential predicate" of any permissible presumption of reliance. *Id.* at 466-67 (explaining that "[b]ecause immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors").

At class certification, then, the *Basic* rule does not operate as a "presumption" within the meaning of Rule 301 because it is not being used to presume the existence of a fact based on proof of predicate facts. *See* Petr. Br. 38; *see also* 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 5.02[1], Matthew Bender (database updated 2020). Instead, the Court has simply identified certain facts a plaintiff can prove to establish suitability for class treatment (publicity and market efficiency) and allowed defendants an opportunity to establish a different fact (lack of price impact) that would indicate that class treatment is unwarranted. Rule 301 imposes no constraints on that exercise.

3. Finally, even if Rule 301 applied, *Basic* would fall within its exception for cases in which "a federal statute ... provide[s] otherwise." Fed. R. Evid. 301; *see*

Allstate, 966 F.3d at 610-11; *Waggoner*, 875 F.3d at 103.

This Court has determined that the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*, impliedly provides for a private right of action with the burden-shifting regime described in *Basic*. *See Halliburton II*, 573 U.S. at 274. The burden shifting rules are "provide[d]" for in the statute in the same way that the cause of action and presumption are. *Ibid.*

Congress then enacted legislation that presumes the continued existence of private securities class actions under the *Basic* regime. *See Stoneridge Inv. Partners, LLC v. Sci.-Atl., Inc.*, 552 U.S. 148, 165-66 (2008) (in the PSLRA, Congress "ratified" 10b-5 private cause of action "as then defined"). Through that legislation, Congress has "provid[ed]" for the continued operation of the *Basic* presumption in the manner described in that decision.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

Thomas A. Dubbs
James W. Johnson
Michael H. Rogers
Irina Vasilchenko
LABATON SUCHAROW LLP
140 Broadway, 34th Floor
New York, NY 10005

Spencer A. Burkholz
Joseph D. Daley
ROBBINS GELLER RUDMAN & DOWD LLP
655 W. Broadway., Ste. 1900
San Diego, CA 92101

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