No. 20-222

In the Supreme Court of the United States

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

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.

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

BRIEF FOR FINANCIAL ECONOMISTS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are a collection of academic scholars and accomplished practitioners with deep experience and expertise in financial economics.[1] Amici have contributed to and advanced this important field with their research, writing, teaching, and consulting, including (for some) participating in securities-related litigation. They have extensive knowledge of the kind of economic analyses employed to determine price impact in securities cases, and they are intimately familiar with public-securities markets. They

[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

have a significant interest in the proper and efficient development of legal principles in this area—promoting a measured system that respects the legitimate interests of all stakeholders (corporations and investors alike).

Although each signatory might not agree with every statement in this brief, all agree that price impact requires a proper economic analysis that cannot be supplanted by judicial intuition or common sense. Trained economists regularly use peer-reviewed, accepted economic tools and methods to isolate the effect (if any) of misstatements and omissions on market price. Those tools and methods present the most accurate means for determining whether so-called "general" or "generic" statements impacted the market, and there is no basis for a judicial shortcut to that purely empirical inquiry.

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[2] The views expressed in this brief do not necessarily reflect the views of the institutions with which the individual amici are or have been associated.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents important questions about how courts should examine "price impact" at the class-certification stage of a securities-fraud case. At various stages of these proceedings, petitioners have suggested that a statement that is "legally immaterial" can never have price impact; that "generic" statements can never affect share price; and that judges should exercise common sense in evaluating "general" statements—with a strong presumption, again, that such statements categorically lack price impact. Indeed, according to petitioners, unless legal intuition is interposed as a safeguard against abuse, it will be "virtually impossible" for corporate defendants to rebut "price impact" in price-maintenance cases.[3]

Petitioners are wrong. Contrary to petitioners' contention, economic analysis is necessary to determine the actual effect of a misstatement or omission on share price, and courts cannot substitute judicial intuition or common sense for rigorous economic analysis. Economic tools are routinely used to analyze the impact of all kinds of statements on market price, including so-called "general" or "generic" statements—and those "general" statements

[3] Although petitioners have substantially narrowed their position in their merits brief, amici address their recent theories in the case, especially as those theories still relate to the latest iteration of petitioners' arguments.

can indeed (under the right circumstances) have price impact. Economic methods can reasonably disaggregate the effects of confounding information on price drops, isolating the effect (or lack thereof) on challenged statements. And none of this suggests that corporate defendants will be left powerless to oppose class certification—the same tools that establish price impact can *disprove* price impact where the challenged conduct in fact did *not* affect the market price.

At its irreducible core, price impact reflects the actual, real-world effect of a misstatement or omission—an empirical question turning on empirical work, not common sense, intuition, or legal presumptions. Trained economists can, and regularly do, answer these questions in reliable ways that petitioners' novel proposals cannot.

A. According to petitioners, a statement or omission that is "legally immaterial" can never have price impact; it is perfectly appropriate for judges to make intuitive, "common sense" judgments about whether a market would naturally react to certain statements; and these judicial determinations can be made with or without hard economic or empirical data.

Petitioners are mistaken. Price impact is ultimately a *factual* question; it is purely empirical. It asks what *actually* happened in the marketplace, not how a hypothetical "reasonable" investor would have responded. *E.g.*, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 263-264 (2014) (*Halliburton II*); *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 467 (2013). Trained economists use accepted economic tools and methods, focused on hard economic data, to determine whether a share price was affected or not. Those tools can isolate the effect of specific statements or omissions, disaggregate confounding factors, and provide an empirical

basis for deciding what is ultimately an empirical question. Judicial intuition—or self-avowed "common sense"—is no substitute for these accepted economic techniques.

B. In the proceedings below, petitioners argued that a "general statement" (whatever that means) cannot have price impact as a matter of law. Pet. App. 19a ("Under [petitioners'] proposed revision, what it terms 'general statements' would be legally insufficient as evidence of price impact."). Petitioners are incorrect. Even assuming one could devise a workable definition of "*general* statements," trained economists can measure the effect of those statements using the same tools that apply to other representations.

Moreover, a court's focus is often not limited to what a firm "generally" said about a topic, but what it *failed* to say before a corrective disclosure: "'once a company speaks on an issue or topic, there is a duty to tell the whole truth,' '[e]ven when there is no existing independent duty to disclose information' on the issue or topic." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016). Thus, "the proper question" for "price impact" is "what would have happened if [the company] had spoken *truthfully*." *Ibid.* When there is a direct nexus between an earlier misstatement and a corrective disclosure, economists can readily determine the front-end impact by measuring the back-end "reduction in * * * share price." Pet. App. 18a; see also, *e.g.*, Frank Torchio, *Proper Event Study Analysis in Securities Litigation*, 35 J. Corp. L. 159, 164-165 (2009); David I. Tabak, *Loss Causation and Damages in Shareholder Class Actions: When It Takes Two Steps to Tango* 6 (NERA Economic Consulting, May 2004) <https://tinyurl.com/tabak-loss-causation>. That commonplace analysis revealed price impact in the proceedings below.

C. According to petitioners, if courts insist upon a proper economic analysis over intuition and common sense, it will be "virtually impossible" for corporate defendants to rebut the *Basic* presumption. Pet. Br. 22. This is simply wrong. The industry-standard tools and methods noted above can separate wheat from chaff—and if there is no price impact, those tools will reveal *the lack of price impact*. If it were otherwise, there would be no decisions declaring price impact missing (yet such decisions exist), and petitioners would not be able to explain their own filings in this case—unless they are now willing to concede that their own expert submissions were deficient.

Petitioners also ignore the obvious reason why price impact is often difficult to rebut. Price impact enters the stage after a case has survived a motion to dismiss (including on materiality); after the PSLRA's heightened-pleading standards have been satisfied; and after the *Basic* prerequisites have been established. That means the litigation involves public misstatements disclosed in an efficient market on a (likely) material subject. Those are the cases where price impact is *expected*.

If a statement (general or otherwise) nevertheless has no effect on share price, no relevance to a company's value, and no nexus to a corrective disclosure, it will not have price impact. And economic experts will be able to establish that point with accepted scientific analysis. There is no need to short-circuit the analytical process in favor of common sense or intuition whenever a defendant declares the challenged statements somehow too "general" to impact market price.

ARGUMENT

A. "Price Impact" Turns On A Statement's Actual, Real-World Effect On Market Price—Not Legal Materiality Or Judicial Intuition

1. a. Contrary to petitioner's contention, a legal determination of materiality is irrelevant to a proper economic analysis of price impact. As this Court has repeatedly confirmed, price impact is a factual question. It asks whether the challenged conduct *in fact* affected the share price. *Halliburton II*, 573 U.S. at 269. There is nothing hypothetical about that inquiry; it does not ask (unlike legal materiality) how a hypothetical person would rationally respond in the same position. Compare, *e.g.*, *Amgen*, 568 U.S. at 467. Price impact requires a careful study of the actual effect on price itself—even if the answer deviates from what an ideal "reasonable" investor might do. *E.g.*, U.S. Amicus Br. 18.

"Price impact," in short, is what the market *actually did*—the actual, real-world effect of a statement or omission on market price.[4]

b. Trained economists use hard economic data and accepted economic tools to determine the concrete effect of a statement or omission on share price. These tools include event studies, content analysis, valuation models, and an examination of "comparable" events, among others. *E.g.*, *Halliburton II*, 573 U.S. at 280; *Bricklayers &*

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[4] The market price reflects a corporation's value (*i.e.*, the present value of discounted future cash flows). An efficient market incorporates all public information reflecting firm value into the share price. *Halliburton II*, 573 U.S. at 268; *Basic Inc.* v. *Levinson*, 485 U.S. 224, 244 (1988). Adjustments in the share price thus reflect underlying adjustments in firm value—and misleading information (suggesting a higher or lower valuation) can therefore artificially distort market price. *E.g.*, *FindWhat Investor Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1315 (11th Cir. 2011).

Trowel Trades Int'l Pension Fund v. *Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 95-96 & n.12 (1st Cir. 2014); Esther Bruegger, et al., *Estimating Financial Fraud Damages With Response Coefficients*, 35 J. Corp. L. 11, 25 (Fall 2009); David I. Tabak, *Materiality & Magnitude: Event Studies in the Courtroom* 2 (National Economic Research Associates, Apr. 1999) (Working Paper #34) <https://tinyurl.com/tabak-materiality> (also published in Roman L. Weil, et al., *Litigation Services Handbook: The Role of the Financial Expert* (3d ed. 2001)).

These tools and methodologies have been standard fare in securities litigation nationwide, and the same techniques are also trusted by government actors and private firms in a variety of other contexts. *E.g.*, Sanjai Bhagat, et al., *Event Studies and the Law, Part I*, 4 Am. L. & Econ. Rev. 141, 142 (2002); *FindWhat Investor Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1313 (11th Cir. 2011). They are widely considered reliable methods of analysis, and they accomplish exactly what is required in this setting—isolating a single event's effects from confounding factors and disaggregating independent causes behind movements in share price. See, *e.g.*, *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016); *Bricklayers*, 752 F.3d at 90, 95-96 & n.12; *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 309 F.R.D. 251, 262-263 (N.D. Tex. 2015); Allen Ferrell, et al., *Price Impact, Materiality, and* Halliburton II, 93 Wash. U. L. Rev. 553, 577 n.68 (2015); Merritt B. Fox, Halliburton II*: It All Depends on What Defendants Need To Show To Establish No Impact on Price*, 70 Bus. Lawyer 437, 443-444, 450-451 (Spring 2015); Frederick C. Dunbar, et al., *Counterfactual Keys to Causation & Damages in Shareholder Class-Action Lawsuits*, 2009 Wis. L. Rev. 199, 242; see also Jay W. Eisenhofer, et al., *Securities Fraud, Stock Price Val-*

uation, and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation, 59 Bus. Lawyer 1419, 1427-1428 (Aug. 2004) ("an event study is required to exclude factors from the overall economy (such as an overall stock price decline), factors impacting the relevant industry, and factors related to the specific company that are not fraud related").[5]

2. A judge's intuition or common sense is no substitute for that rigorous economic analysis. Contra Pet. Br. 27.

Judges are not experts in the way markets react to certain kinds of information, the effect of certain disclosures on company value in any given industry, or the reaction of an efficient market to misleading or false information. Intuition and common sense might often mirror the result of a proper economic study, but the two modes of analysis are not the same. Price impact is grounded in real-world events; it is purely descriptive and quantitative. It requires expert analysis and study, using peer-tested scientific techniques. An informed or educated guess (even by experienced district judges) cannot approximate a proper economic analysis.

Indeed, the limits of common sense and intuition are already reinforced by lower courts themselves. Some expert analysis will occasionally rely on subjective elements—such as when deciding the likelihood that a price impact was the result of two coinciding events (that, for whatever reason, were not isolated using a scientific method). Those "subjective" judgments are typically

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[5] Economists, of course, can perform this work without knowing whether a judge has deemed a given statement or omission "legally material." While it is certainly true that the market will often parallel the actions of a hypothetical "reasonable" investor, the ultimate question, again, remains what the market actually did, reasonable or otherwise. And that question (price impact) can only be answered by actual economic study.

based on formal training, industry knowledge, and witness expertise. And yet judges *still* subject those informed views to heightened scrutiny—precisely because they lack the objective, scientific grounding of a data-driven approach. *E.g.*, *Bricklayers*, 752 F.3d at 95-96 & n.12. A fortiori, there is no basis for elevating judicial intuition (or "common sense") above expert analysis on complex, empirical questions.

While petitioners now advance a more "modest" approach (Pet. Br. 21), they would still have common sense and intuition drive the analysis.[6] And the dissent below effectively endorsed the same position—declaring it implausible (per the dissent's personal assessment) that market price was affected by petitioners' misstatements or omissions. Pet. App. 44a-45a (Sullivan, J., dissenting). Those positions are incorrect. Courts require experts in this area because the area requires expertise. What one views as intuitively right may strike others as intuitively wrong—and objective, scientific analysis is necessary to resolve these difficult, fact-intensive questions. See, *e.g.*, Topside Financial Economists Amicus Br. 7 (confirming, without any obvious role for judicial intuition, that "rigorous economic analysis is required to determine whether a stock price was affected by a particular statement").

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[6] Petitioner apparently would still assign judicial intuition a dispositive role whenever the evidence is close. The only difference is that whereas their former position let judicial intuition *categorically* preclude consideration of any other evidence, their new position lets other evidence come in—while still letting judicial intuition play some undefined, outcome-determinative role in trumping any other showing.

Because precisely that kind of economic analysis undergirds the decision below, there is no basis for overturning the Second Circuit's judgment.[7]

B. "General Statements" Can Have Price Impact—And The Same Standard Economic Tools Can Isolate Whatever Impact They Have

In the proceedings below, petitioners argued that a "general statement" (however defined) is per se inadequate to establish "price impact." Pet. App. 19a. Petitioners are wrong.

1. Initially, petitioners fail to offer any administrable line between "general" and "non-general" statements. And no such workable standard is apparent (as a matter of economics or otherwise): there is no universal rule separating out statements that convey relevant information from those that do not. And it is not a productive use of judicial or party time to decide whether a given statement

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[7] A proper economic study may rely on data or analysis that overlaps with elements of a legal "materiality" defense. Price impact and legal materiality are two distinct concepts; each can be analyzed independently at the appropriate stage of a case. Petitioner is therefore correct that a court should not artificially exclude any aspect of a proper economic analysis simply because it covers the same ground as a materiality defense. See *Halliburton II*, 573 U.S. at 283. But there is no indication below that any evidence or expert testimony was excluded on this basis; indeed, quite the opposite—the Second Circuit's initial opinion reversed the district court (correctly) for failing to consider certain aspects of petitioners' expert submissions (Pet. App. 76a), and the district court on remand rejected petitioners' expert analysis *on the merits*, not because it (supposedly) overlapped with a materiality defense. See *id.* at 27a ("even though defendants may not challenge materiality at the Rule 23 stage, they may present evidence to disprove price impact when seeking to rebut the *Basic* presumption"; "for example, Goldman presented event studies and testimony from multiple experts," but "[t]he district court found this evidence insufficient").

is "general" instead of simply asking *whether that statement (however characterized) had price impact*.[8]

Indeed, the same economic tools employed to determine price impact for "specific" statements work equally well when applied to general statements. See, *e.g.*, U.S. Amicus Br. 15-16. An event study, for example, can still isolate the statement's effect on share price (Torchio, *supra*, at 163), experts can still conduct content analysis to test whether certain concepts were discussed by market observers (J.A. 605-606, 646-647, 652-659), and so on. If it is indeed true that "[t]he more generic the statement, the less likely the statement is to move the market price" (Pet. Br. 21), then expert analysis will have little trouble establishing exactly that *in any specific case*. There is no justification for a categorical rule that simply presumes "general" statements lack price impact.

2. Petitioner further overlooks that the ultimate question is not necessarily limited to how the market reacted to a "general" statement, but how the market would have reacted to a *full and accurate disclosure* on the same topic. Once a corporation has chosen to address an issue, it is required to speak truthfully (*Vivendi*, 838 F.3d at 258)—and that includes disclosing all facts necessary to make a statement "not misleading." 17 C.F.R. 240.10b-5(b). It follows that "the original misstatement and the corrective disclosure" effectively *do* "have the same informational content" (contra Pet. Br. 21). And "'[t]he best

[8] The same statement can also mean different things in different contexts. Suppose, for example, that a firm, like clockwork, says in quarterly filings that, "in compliance with the Foreign Corrupt Practices Act, we do not pay bribes to foreign officials." But suppose the same firm suddenly drops that statement from its latest filing. Each filing together may convey a different message than an identical filing viewed in isolation. Cf. *Vivendi*, 838 F.3d at 257.

way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward, on the assumption that the lie's positive effect on the share price is equal to the additive inverse of the truth's negative effect.'" Pet. App. 18a (quoting *Glickenhaus & Co.* v. *Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015)).

Economists are capable of determining whether the same information, properly disclosed at an earlier point in time, would have impacted the share price. The analysis requires an examination of the substance of the statements to ensure a proper nexus between the earlier ("generic") statement and the corrective disclosure. But once that nexus is identified, economists can measure the effect on share price by analyzing the corrective disclosure itself. Petitioner cannot sidestep this accepted economic technique by citing the so-called "generic nature" of the original misstatement.

C. Petitioners Are Wrong That It Is "Virtually Impossible" To Disprove Price Impact Without Relying On Common Sense Or Automatically Discounting "General" Statements

According to petitioners, if courts insist upon a proper economic analysis over intuition and common sense, it will unfairly stack the deck against corporate defendants in rebutting the *Basic* presumption. Pet. Br. 22.

1. Petitioners' argument that it is "virtually impossible" to rebut *Basic* cannot explain those cases *where parties have rebutted* Basic. See *IBEW Local 98*, 818 F.3d at 782; *Ohio Pub. Emps. Ret. Sys.* v. *Fed. Home Loan Mortg. Corp.*, No. 08-160, 2018 WL 3861840, at *13, *18 (N.D. Ohio Aug. 14, 2018); *In re Finisar Corp. Sec. Litig.*, No. 11-1252, 2017 WL 6026244, at *6-*7 (N.D. Cal. Dec. 5, 2017); *In re Intuitive Surgical Sec. Litig.*, No. 13-1920, 2016 WL 7425926, at *14-*16 (N.D. Cal. Dec. 22, 2016);

Erica P. John Fund, 309 F.R.D. at 270. While those cases may not have involved "price maintenance" theories, the same economic tools can establish or refute price impact—just as petitioners' experts attempted to do in this very case. Pet. App. 27a. There is no need to resort to judicial presumptions about "generic" statements, hypothetical "reasonable" investors, or "common sense." Established economic techniques can do the work without sacrificing the fact-driven character of the price-impact analysis—and neither petitioners nor their experts have explained why these modes of analysis could not show a lack of price impact in an appropriate case.

Petitioners emphasize that few (if any) inflation-maintenance cases are denied certification on price-impact grounds, but they ignore the context. Price impact is not decided at the outset of a case. It does not even become *relevant* until after the litigation survives a motion to dismiss (likely including a materiality challenge), and after the *Basic* prerequisites are satisfied—confirming that the challenge involves public information disseminated in an efficient market. See *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 38 (2011) (materiality); *Halliburton II*, 573 U.S. at 268-269 (*Basic* prerequisites). Cases involving weak materiality allegations are dismissed outright. The price-impact question is necessarily reserved for stronger cases advancing past those initial stages—after a judge has found a viable allegation of materiality and *Basic*'s initial criteria met. See, *e.g.*, Pet. App. 7a (rejecting petitioners' motion to dismiss on materiality and other grounds).

In short, where a judge has found a viable allegation that a public statement was made in an efficient market on a matter relevant to a hypothetical "reasonable" inves-

tor, it is not surprising to find price impact. Where economic analysis can substantiate that expectation, there is every reason a class *should* be certified.

2. Petitioners' parade of horribles is also undercut by their own expert submissions. Pet. App. 27a (noting petitioners "presented event studies and testimony from multiple experts"); *id.* at 67a n.5. As those submissions demonstrate, petitioners were perfectly capable of attacking price impact via accepted economic methods; their methodology was simply flawed for specific, fact-bound reasons. *Id.* at 29a-32a, 34a. That price impact *was* found here thus does not mean it will *always* be found in every case. Petitioners simply had difficulty proving the issue when the concrete economic data undercut their position.

* * *

Economists supporting corporate defendants have robust tools available to establish the lack of price impact, and corporate defendants have succeeded in doing exactly that multiple times since *Halliburton II*. There is no reason to think that any special rules are required—aside from asking experts to rigorously apply established economic techniques to the facts of each case. That kind of economic analysis will fairly determine (yes or no) whether a misstatement or omission had any real-world effect on price.

The Second Circuit applied the correct legal standards below—asking whether the district court erred in its assessment of the parties' competing expert submissions. The lower courts did not exclude any evidence from those analyses, and they did not short-circuit the experts' empirical reviews. The fact that the district court favored one side over the other is not proof that price impact is impossible to refute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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