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 THE NATIONAL ASSOCIATION OF SHAREHOLDER & CONSUMER ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988.[1] NASCAT's member law firms represent both institutional and individual investors in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are committed to representing victims of corporate abuse, fraud, and white collar criminal activity in cases with the potential to advance the state of the law, educate the public, modify corporate behavior, and improve access to justice and compensation for those who have suffered injury at the hands of corporate wrongdoers. NASCAT advocates the principled interpretation and application of the federal securities laws—including the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.—to protect investors from manipulative, deceptive and fraudulent practices and to ensure this nation's capital markets operate fairly and efficiently.

Comprised of attorneys whose practice focuses in substantial part on the application of the federal securities laws, NASCAT has a deeply-rooted interest in the maintenance of orderly and even-handed rules concerning the certification of class actions in securities cases. This Court's decisions have consistently rejected attempts to overrule the fraud-on-the-market doctrine articulated in *Basic, Inc. v.*

[1] This brief is filed with the consent of the parties. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Levinson, 485 U.S. 224 (1988), but the Court has recognized that defendants may rebut *Basic*'s presumption of class-wide reliance by presenting evidence that the defendant's allegedly fraudulent statements did not actually impact the price of the defendant's stock. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) ("*Halliburton II*"). This case concerns the scope of that rebuttal to be allowed at the class certification stage, and whether general issues of materiality may be repackaged as "price impact" notwithstanding this Court's holding in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455 (2013), that plaintiffs need not establish materiality as a prerequisite to class certification. NASCAT agrees with Respondents' arguments that the Second Circuit correctly rejected Petitioners' attempt to expand the scope of rebuttal to effectively unwind *Amgen*. NASCAT writes separately to suggest that this Court's holdings in *Amgen* and *Halliburton II* will be best preserved by limiting defendants' opportunity to rebut price impact prior to class certification to direct, empirical evidence.

SUMMARY OF ARGUMENT

The critical requirement for certifying a class action in a securities fraud case is that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988), this Court presumed that reliance is a common question so long as plaintiffs can show that a defendant's allegedly fraudulent statements were public and the defendant's stock trades in an efficient market. And because basic

elements of a securities fraud claim like loss causation, materiality, and price impact are common issues, this Court has generally rejected proposals to require plaintiffs to prove those elements as a prerequisite to class certification. But the Court did say, in *Halliburton II*, that defendants may rebut the *Basic* presumption by offering "evidence that the misrepresentation did not in fact affect the stock price." 573 U.S. at 279. This case concerns the permissible scope of such rebuttal.

Petitioners here read *Halliburton II* ambitiously to hold that "a court must consider *all* of the evidence relevant to price impact," Petr. Br. at 33. They thus contend that the district court should have considered the supposedly "generic" nature of Goldman's statements about its reputation for integrity and its conflicts management policies—even though such an argument goes to the materiality of the statements and Petitioners had previously advanced that argument in a motion to dismiss on materiality grounds. It is true that materiality is *relevant* to price impact; materiality asks, after all, whether a given statement might influence a reasonable investor to buy or sell stock. But *Halliburton II* distinguished sharply between materiality and price impact. *See* 573 U.S. at 282–83. The difference, as this Court's discussion makes clear, is that price impact—unlike materiality—can be established or disproven by direct, empirical evidence. *See id.* Rebuttal under *Halliburton II* should be limited to such evidence, and Petitioners' arguments should be postponed to the merits stage.

Petitioners' expert report that they submitted to the district court concerning the purportedly generic nature of Goldman's statements illustrates why such

arguments are inappropriate at class certification. That report contains no empirical demonstration of the actual affect, or lack thereof, of Goldman's statements on its share price. What it does demonstrate is the propensity of such evidence to embroil the parties and the court in time-consuming and expensive controversies over matters with little relation to the predominance question that is supposed to remain center stage at class certification.

Finally, including arguments like Petitioners' generic-ness claim within the scope of *Halliburton II*'s rebuttal would have serious procedural consequences. Such a course would eviscerate this Court's holding in *Amgen* by allowing defendants to repackage materiality as price impact, expand the scope of interlocutory appeals under Fed. R. Civ. P. 23(f), and undermine the ability of district courts to control the course of securities fraud litigation. Nothing in *Halliburton II* requires these results.

ARGUMENT

I. Defendants may not rebut *Basic*'s presumption of reliance by arguing that statements were too generic to move the stock price.

This Court explained in *Halliburton II* that *Basic*'s fraud-on-the-market doctrine "incorporates two constituent presumptions":

> 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. 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.

573 U.S. at 279. To invoke this presumption, a plaintiff must show that (1) the alleged misrepresentations were made publicly; (2) they were material; (3) the stock traded in an efficient market; and (4) the plaintiff traded between the time the misrepresentations were made and the time their falsity was revealed. *Id.* at 268. The presumption may be rebutted by a showing "that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248.

Basic's fraud-on-the-market presumption of reliance is relevant at not one but two stages of most securities fraud litigation. At class certification, the fraud-on-the-market presumption that everyone trades in reliance on the stock price allows reliance to be treated as a question common to all members of the plaintiff class, thereby satisfying the predominance requirement of Fed. R. Civ. P. 23(b)(3). But reliance is also an issue on the merits, and thus fraud-on-the-market also shapes how the plaintiff class must ultimately prove its case. *Basic*'s second constituent presumption is more central to certification because it permits a court to presume that all class members relied on the misrepresentation. The first presumption—that a public and material misrepresentation affects the stock price—is

necessarily a common, unitary question that does not differ from plaintiff to plaintiff.

This Court's general class certification jurisprudence emphasizes that "it 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,'" *Comcast v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160–61 (1982)), and this Court has accordingly required affirmative proof at the class certification stage of at least some of the elements for invoking *Basic*'s presumptions of reliance.[2] At the same time, however, this Court has insisted that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466. Hence, the Court has rejected invitations to require plaintiffs to affirmatively prove loss causation, *Halliburton I*, 563 U.S. at 813, materiality, *Amgen*, 568 U.S. at 474, and price impact, *Halliburton II*, 573 U.S. at 278–79, as prerequisites for class certification. Although each of these issues is relevant to fraud-on-the-market as a basis for *liability*, each is a common issue that can be established on a class-wide basis. *See, e.g.*, *Amgen*, 568 U.S. at 466.

The final section of the *Halliburton II* opinion, however, introduced a limited exception. The Court rejected Halliburton's argument that plaintiffs must affirmatively prove price impact as a predicate for certification, observing that this would essentially

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[2] *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 811 (2011) ("*Halliburton I*") ("[P]laintiffs must demonstrate that the alleged misrepresentations were publicly known . . . , that the stock traded in an efficient market, and that the relevant transaction took place [within the relevant time period].").

eliminate *Basic*'s first presumption (that public material statements in an efficient market affect stock prices). 573 U.S. at 278. But the Court agreed that defendants must be allowed to try to rebut that presumption. Hence, "defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Id.* at 284.

This case concerns the scope of the *Halliburton II* rebuttal. Three points are crucial. First, Rule 23(b)(3) requires—and *Amgen* confirms—that the central inquiry at class certification must focus on whether common questions predominate in the case. Nothing in *Halliburton II*'s exception for rebuttal evidence of price impact suggests any shift away from this focus on predominance.

Second, materiality and price impact are both common issues. But *Halliburton II* treated price impact differently from materiality because price impact—unlike materiality—is susceptible of direct, empirical proof. Rebuttal should thus be limited to such proof.

And third, Petitioners' arguments that Goldman's statements were generic in character may be *relevant* to price impact, but they are not the kind of direct, empirical evidence that *Halliburton II* envisioned as appropriate for rebuttal. They sound primarily in materiality. And materiality is, at bottom, merely *indirect* evidence of price impact. There is no way to allow such arguments at class certification without undoing *Amgen* altogether.

A. The crucial question for purposes of class certification is the predominance of common *questions*, not the answers to those questions.

This Court's recent cases concerning *Basic*'s fraud-on-the-market presumption have consistently resisted efforts to expand the showing that securities plaintiffs must make at class certification. Each of these decisions has emphasized that the *only* question before the Court was whether "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).[3] As Justice Ginsburg insisted in *Amgen*, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." 568 U.S. at 466 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6 (2011)). She explained,

> the key question . . . is not whether materiality is an essential predicate of the fraud-on-the-market theory; indisputably it is. Instead, the pivotal inquiry is whether proof of materiality is needed to ensure that

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[3] *See Halliburton I*, 563 U.S. at 809 ("[T]he sole dispute here is whether EPJ Fund satisfied the prerequisites of Rule 23(b)(3)."); *Amgen*, 568 U.S. at 465 ("The only issue before us in this case is whether Connecticut Retirement has satisfied Rule 23(b)(3)'s requirement that 'questions of law or fact common to class members predominate . . . .'"); *Halliburton II*, 573 U.S. at 275–76 (noting that "[i]n securities class action cases, the crucial requirement for class certification will usually be the predominance requirement"); *id.* at 282–83 (stressing the relation between price impact and predominance for Rule 23(b)(3) purposes).

> the *questions* of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses.

Id. at 467 (quoting Fed. R. Civ. P. 23(b)(3)). Plaintiffs need not affirmatively prove loss causation (*Halliburton I*), materiality (*Amgen*), or price impact (*Halliburton II*) because those are questions common to the whole class.

Petitioners have briefed this case as if the problem in *Halliburton I*, *Amgen*, and *Halliburton II* were solely the overlap between defense arguments challenging loss causation, materiality, and price impact at class certification and the merits of the plaintiffs' claims. *See* Petr. Br. at 5, 8–10, 13–14, 20–21, 25–26, 30–33. Hence, Petitioners insist that overlaps between merits issues and accepted prerequisites to certification are common, and therefore that the allegedly generic nature of the Petitioners' statements may be considered for purposes of certification notwithstanding its overlap with materiality. *See id.* at 20–21, 24–30, 33. In *Amgen*, however, Justice Ginsburg characterized this way of framing the issue as "[t]otally misapprehending our essential point." 568 U.S. at 468. She explained that "[w]e rest, instead, entirely on the text of Rule 23(b)(3)," which requires only common *questions*. *Id.*

The critical problem with considering materiality at the class certification stage is not that it is a merits issue, but rather that it is an "'objective'" question that "can be proved through evidence common to the class." *Id.* at 467 (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976)). Moreover, "failure of proof on the element of materiality would end the case

for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Amgen*, 568 U.S. at 467–68. Hence, plaintiffs "need not, at [class certification], prove that the predominating question [of materiality] will be answered in their favor." *Id.* at 468. Either way, the class stands or falls together.

Arguments concerning Goldman's statements about its reputation and conflicts management safeguards have the same quality as the materiality arguments excluded from consideration for class certification purposes in *Amgen*. Indeed, Petitioners framed their generic-ness arguments as going to materiality in their initial motion to dismiss, their unsuccessful motion for reconsideration after that motion was denied, and their unsuccessful motion to certify that denial for interlocutory appeal under 28 U.S.C. § 1292(b).[4] To be sure, the quality of those statements may also be relevant to whether they had any impact on the price of Goldman stock. But the fact remains that this is a *unitary* question. Petitioners argue that the statements were too generic to move the market price; they do *not* claim that anything about those statements might have caused them to impact different investors differently, thereby splitting a common question into a set of individual ones.

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[4] *See Richman v. Goldman Sachs Group, Inc.*, 868 F. Supp.2d 261, 277–78 (S.D.N.Y. 2012) (partially denying motion to dismiss); *In re Goldman Sachs Group, Inc. Securities Litigation*, No. 10 Civ 3461, 2014 WL 2815571, at *4–5 (S.D.N.Y. June 23, 2014) (denying reconsideration); *In re Goldman Sachs Group, Inc. Securities Litigation*, No. 10 Civ. 3461, 2014 WL 5002090, at *2 n.2 (S.D.N.Y. Oct. 6, 2014) (denying motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b)).

As in *Amgen*, there is no risk that accepting Petitioners' position on Goldman's statements would render this case inappropriate for class treatment. If Petitioners are right that Goldman's statements could not have moved the market, then *all* plaintiffs' claims will fail on materiality grounds. *See Amgen*, 568 U.S. at 467–68 ("[T]here is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating."). Proof that statements are sufficiently concrete to be actionable, like proof of materiality generally, is thus "not required to establish that a proposed class is 'sufficiently cohesive to warrant adjudication by representation'—the focus of the predominance inquiry under Rule 23(b)(3)." *Id.* at 469 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

To be sure, whether a defendant's statements impacted the stock price is also a common question, but *Halliburton II* allows consideration of price impact at a class certification as a means of rebutting *Basic*'s presumption of class-wide reliance. Nonetheless, *Halliburton II* did not question (much less purport to overrule) *Amgen*, nor did it alter Rule 23(b)(3)'s focus on the predominance of common questions. As this Court explained, the difference lies in the character of proof that may be offered to prove or disprove price impact.

B. *Halliburton II* contemplated that only "direct" evidence of a lack of price impact could rebut the *Basic* presumption.

Although *Halliburton II* rejected calls either to overrule *Basic* or to require plaintiffs to prove price

impact as a prerequisite to class certification, the Court did see price impact as "*Basic*'s fundamental premise," 573 U.S. at 283, because one cannot equate reliance on the stock price with reliance on a statement unless the latter moves the former. The Court thus held that "defendants should at least be allowed to defeat the [*Basic*] presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 279. Petitioners' brief offers an extremely ambitious reading of this language: "[A] court must consider *all* evidence offered by the defense showing that the alleged misrepresentations did not actually affect the stock price." Petr. Br. at 31.[5] *Halliburton II*, however, said no such thing. Instead, it is clear from this Court's discussion that it had a considerably narrower range of evidence in mind.

The Court began by construing "*Basic*'s own logic" as using "market efficiency and the other prerequisites for invoking the presumption" as "an indirect way of showing price impact." 573 U.S. at 281.[6] But the Court insisted that "an indirect proxy should not preclude direct evidence when such evidence is available." *Id.* Hence, a plaintiff's ability to establish price impact "indirectly" under *Basic* "does not require courts to

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[5] *See also* Petr. Br. at 33 ("[A] court must consider *all* of the evidence relevant to price impact, even if it overlaps with the evidence relevant at the merits stage").

[6] *See also id.* at 283 ("[A]s explained, publicity and market efficiency are nothing more than prerequisites for an indirect showing of price impact. There is no dispute that at least such indirect proof of price impact 'is needed to ensure that the questions of law or fact common to the class will predominate.'" (quoting *Amgen*, 568 U.S. at 467)).

ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.* at 282.

Critically, the Court envisioned direct empirical evidence that, notwithstanding that the general criteria for publicity and market efficiency had been established, the statements in question did not "actually affect the stock's market price" as *Basic* anticipated. *Id.* The Court noted, for instance, that "defendants may introduce price impact evidence at the class certification stage . . . for the purpose of countering a plaintiff's showing of market efficiency," and that "plaintiffs themselves can and do introduce evidence of the *existence* of price impact in connection with 'event studies' . . . to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." *Id.* at 280. It "makes no sense," this Court concluded, to allow such evidence for purpose of judging market efficiency but *not* for the purpose of rebutting *Basic*'s presumption. *Id.*

Halliburton II thus envisioned its rebuttal as a clash between the indirect evidence of price impact that plaintiffs establish by meeting *Basic*'s criteria and, where available, *direct* evidence that no such impact actually occurred. In suggesting that "[e]vidence of price impact will be before the court at the certification stage in any event," *id.* at 283, the Court suggested that rebuttal is limited to the sort of empirical evidence employed to prove or disprove market efficiency. *See also id.* at 280–81 (discussing the use of event studies to prove or disprove market efficiency). And in determining whether to admit such

evidence for purposes of rebuttal, the Court explained that "[t]he choice . . . is between limiting the price impact inquiry before class certification to indirect evidence, or allowing consideration of direct evidence as well." *Id.* at 283.

Nothing in *Halliburton II*'s discussion of what sort of evidence might rebut the *Basic* presumption suggests that "a court must consider *all* of the evidence relevant to price impact," as Petitioners claim. Petr. Br. at 33. This Court's discussion focused quite clearly on the possibility that, in actual cases, unruly facts might betray the theoretical assumptions upon which *Basic*'s presumptions rest. The first part of the *Halliburton II* opinion, after all, concerned whether *Basic*'s assumption that capital markets are basically efficient had been undermined by more recent empirical evidence. The Court rejected this argument, concluding that this evidence had "not refuted the modest premise . . . that public information generally affects stock prices." 573 U.S. at 272. But this Court's discussion recognized that actual market behavior may not always play out as theory would predict.

Defendants are thus given the opportunity to demonstrate empirically that, notwithstanding a plaintiff's showing of publicity and market efficiency, there was no price impact from the defendant's statements in the way that *Basic*'s economic theory would expect. The question for decision here, then, is whether the supposedly "generic" nature of the statements at issue in this case amounts to the sort of direct evidence disproving price impact that *Halliburton II* had in mind.

C. Courts can and should readily distinguish between materiality and price impact in limiting rebuttal under *Halliburton II*.

Although it may not always be easy to distinguish between "indirect" and "direct" evidence of price impact, that line is readily drawn in this case. As Petitioners concede, their arguments about the nature of Goldman's statements concerning its reputation and conflicts management go to the materiality of those statements. Petr. Br. at 13–14. Petitioners argue, correctly, that arguments about materiality are also relevant to price impact; a non-material statement is one that a reasonable person would not expect to impact the price of a stock. But that hardly means that arguments about materiality are *direct evidence* of price impact as required by *Halliburton II*. In fact, the very nature of materiality suggests that they cannot be.

"The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Indus.*, 426 U.S. at 445. This Court has held that the "materiality requirement is satisfied when there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (quoting *Basic*, 485 U.S. at 231–32)). Materiality is thus *relevant* to price impact, in that it represents a judgment that a statement would or would not affect a reasonable investor's willingness to purchase a stock.

But materiality is plainly *indirect* evidence of price impact. It involves speculation as to how a reasonable investor would view a statement—not empirical verification that the statement actually did or did not affect the stock price. As this Court recognized in another context, "[p]roof of materiality can sometimes be regarded as establishing a rebuttable presumption." *Kungys v. United States*, 485 U.S. 759, 777 (1988) (citing *Basic*, 485 U.S. at 245–49). That is why *Halliburton II* said that establishing the efficiency of the market for a security amounts to "indirect" proof that material information about the issuer's business would move the stock price.

Petitioners' arguments regarding the generic nature of their statements have this quality whether we call them "materiality" or "price impact." Those arguments concern qualities of the statements themselves, and they assert that no reasonable investor would be motivated by statements of this kind. Nothing in those arguments purports to demonstrate empirically that actual investors did or did not react to Goldman's statements. Generic-ness is, at best, an indirect argument that the statements could not have impacted Goldman's stock price.

As such, it should not be part of the *Halliburton II* rebuttal. That rebuttal, as we have discussed, was designed to give defendants the opportunity to check the *Basic* presumption's indirect proof of price impact with direct proof; in other words, to use empirical evidence to disprove the suppositions of economic theory. But evidence going to materiality simply proposes indirect suppositions of its own. A judgment that a statement is not material is simply a prediction that such a statement *should not* affect the stock price

because it is not the sort of information that a reasonable investor would rely upon in deciding whether to buy or sell shares. But materiality evidence brings us no closer to knowing what *actually* happened—whether, in *Halliburton II*'s words, "an alleged misrepresentation did not *actually* affect the market price of the stock," 573 U.S. at 284 (emphasis added)—than does the *Basic* presumption itself. One cannot rebut a presumption simply by asserting another presumption.

Failing to distinguish between direct and indirect evidence of price impact would, moreover, eviscerate this Court's holding in *Amgen*. Petitioners have argued here that arguments about materiality—such as their claims that Goldman's statements were "mere puffery" and too generic to matter to a reasonable investor—are always relevant to price impact. That is true, in a broad sense. But that is precisely why mere "relevance" to price impact cannot be enough to include an issue in the rebuttal allowed under *Halliburton II*. The important point is that Petitioners argue that generic statements do not impact prices because no reasonable investor would rely on them, Petr. Br. at 43–44, which is the very definition of materiality. On Petitioners' view of the matter, it is difficult to imagine *any* materiality argument that could not be made to rebut price impact at the class certification stage. But to hold that, of course, is simply to overrule *Amgen* in practice.

II. Petitioners' expert report highlights the pitfalls of considering common, unitary aspects of materiality to rebut price impact at class certification.

The parties in this case appear to agree that "in assessing price impact, courts may account for statements' 'generality.'" Resp. Br. at 15. Petitioners argue that the generality of a statement is *itself* evidence tending to disprove that the statement had any price impact, *see* Petr. Br. at 26–30, while Respondents contend that generality becomes relevant only if and to the extent that it is relied upon by expert witnesses to disprove price impact. *See* Resp. Br. at 15. While *Amici* prefer Respondents' position to Petitioners', we take a more restrictive view of the matter than either. *Amici* submit that the character of a statement itself will always be *indirect* evidence at best about price impact, and that an expert commenting on the statements' character is no more direct. Petitioners' expert here is simply opining on materiality in the guise of speaking to price impact. Under *Halliburton II*, expert opinions concerning a statement should be considered to rebut the *Basic* presumption only if and to the extent that they offer direct, empirical evidence "showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." 573 U.S. at 282.

A. Limiting rebuttals of price impact to evidence in support of an expert witness will still allow consideration of indirect evidence inconsistent with *Halliburton II*.

The evidence and arguments that defendants submit under *Halliburton II* to rebut the *Basic* presumption should be circumscribed by their content, not who proffers them. The fact that an expert offers an opinion that certain statements are too generic to affect a stock's price does not change the character of that opinion from indirect to direct evidence of price impact. The opinion, like all arguments concerning materiality, remains a prediction about what a reasonable investor *would* do, not evidence of what *actual* investors *did* do.

An expert's opinion does, of course, differ from the lawyers' arguments offered by Petitioners in that the former is backed by the expert's training and expertise. But that does not in itself transform the opinion from indirect to direct evidence. A case in point is Petitioners' rebuttal expert, Dr. Starks, whom Petitioners later abandoned in their briefing both in the district court and on appeal. Dr. Starks offered her opinion that,

> [b]ased on my education, academic research on investments, and years of investment management experience, equity investors do not consider general statements included in company communications on broad topics, such as the Business Principles Statements and Conflict Controls Statements at issue in this case, to provide pertinent information for their investment decision-making process.

J.A. vol. 2, at 596, ¶ 41. Dr. Starks's report did include a list of similar statements made by other companies, *id.* at 597–605, ¶¶ 42–47, and she also asserted that contemporaneous analyst reports did not report on Goldman's statements, *id.* at 609–12, ¶¶ 52–55. But the report did *not* include any effort to demonstrate empirically that Goldman's statements had no *actual* impact on the stock price.

An expert report may provide helpful insight as to materiality when the district court ultimately resolves that question on the merits. But this Court has made clear that materiality is *not* to be decided as a prerequisite to class certification. *See Amgen*, 568 U.S. at 481 ("[T]he potential immateriality of Amgen's alleged misrepresentations and omissions is no barrier to finding that common questions predominate."). Nor does hypothesizing, however sophisticated or well-informed, about what a reasonable investor *would* think of statements like the ones in question here substitute for empirical evidence of whether the statements did or did not *actually* affect the stock price. The latter is what *Halliburton II* contemplates at the rebuttal stage.

B. Petitioners' expert reports indicate other pitfalls with the use of such evidence.

As Respondents have explained, *see* Resp. Br. at 13–14, 35 & n.8, Petitioners failed to cite or argue Dr. Starks's report in support of their arguments that Goldman's statements were simply too generic to be actionable, preferring simply to appeal to judicial intuitions and materiality case law on that point. But even if this Court (or the district court on remand) were to look at Petitioners' expert evidence on this

point, that inquiry would simply highlight the reasons why such evidence should not figure at the certification stage. Dr. Starks's discussion not only failed to include any empirical demonstration of the statements' actual effects on the stock price, but it was also highly selective in its discussion of the attention that the statements' received from market observers. It also failed to consider an empirical literature addressing the market effects of reputational harm generally. And—most damning under *Amgen*—it highlights the potential for time and resource-intensive litigation at class certification over a question that remains a common one, irrelevant to Rule 23(b)(3)'s predominance requirement.

Dr. Starks's report began by opining that general statements

> do not provide information that bears on a company's future financial performance or value. Statements such as [Goldman's] Business Principles Statements and Conflict Controls Statements are also too general to convey anything precise or meaningful, cannot be viewed by investors as assurances of a particular outcome and, in some cases, are nothing more than truisms.

J.A. vol. 2, at 596, ¶ 41. She reached this conclusion based on the tendency of other leading companies to make similar statements, *id.* at 597–605, ¶¶ 42–47, and her finding that "during the Class Period prior to the alleged corrective disclosure dates, the analysts reporting on Goldman's stock did not mention or refer to the statements identified as misstatements by Plaintiffs (i.e., Business Principles Statements or Conflict Controls Statements)," *id.* at 611, ¶ 54. If the

statements had mattered to the market, she suggested, professional analysts would have emphasized them. *See id.* at 605–06, ¶ 48.

Respondents have identified a number of problems with the Starks report. Dr. Finnerty, Respondents' expert, found that Dr. Starks imposed such narrow search criteria that any number of relevant analysts' statements and news reports escaped her net. J.A. vol. 2, at 647, ¶3. Moreover, Dr. Starks focused on reports contemporaneous with when Goldman made its initial statements, while Dr. Finnerty focused on press and analyst reaction when the allegedly corrective disclosures occurred. *See id.* at 652–58, ¶¶ 130–32.[7] (To the extent that rebuttal focuses on what *actually* happened and not on what one might *expect* to happen, the latter temporal focus seems more appropriate.) Nor did Starks address the academic literature on the effects of harm to reputation on firms.[8]

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[7] *See, e.g.*, Associated Press, *Fraud Charge Deals Big Blow To Goldman's Image*, April 18, 2010 (J.A. vol. 2, at 653 ¶ 131) ("While Goldman Sachs contends with the government's civil fraud charges, an equally serious problem looms: a damaged reputation that may cost it clients."); Credit Suisse, *Goldman Sachs Group, Inc.—Strong Fundamentals—No New News on SEC Charge*, April 20, 2010. (J.A. vol. 2, at 658 ¶ 131) ("More worrisome to us [than the SEC's charges] is the potential longer-term impact on the firm's client franchise, human capital and reputation.").

[8] *See e.g.*, Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. Fin. & Quantitative Analysis 581, 581 (2008); Jonathan M. Karpoff, *Does Reputation Work to Discipline Corporate Misconduct*, The Oxford Handbook of Corporate Reputation 361, 363 (Michael L. Barnett & Timothy G. Pollock eds., 2012).

This Court need not determine which of these dueling experts had it right, of course. The point is that these submissions illustrate the difficulties that will confront courts if they consider such evidence as part of the *Halliburton II* rebuttal. Even an expert opinion may be conclusory or impressionistic, and allowing experts to opine about general qualities of statements or the general tendencies of the market is unlikely to produce clear conclusions about price impact. Our system ordinarily leaves such quandaries to the finder of fact. But if such disputes must be resolved by the court at class certification, then *Amici* agree with Respondents that judges will most likely fall back on their general intuitions and, as in this case, the general case law on materiality. *See* Resp. Br. at 32–34.[9] That would leave little significance to *Amgen*.

The more fundamental problem, however, is that, muddy or clear, the general tendency of a certain sort of statement to move the market price of a stock remains a unitary issue. As happened in this case, opening that issue up at class certification is likely to produce extensive and contradictory submissions, expending a great deal of the parties'—and the court's—resources. That might be worth doing if the result would reveal the answer to the central question under Rule 23(b)(3): whether common issues are likely to predominate in the case. But, of course, all class members generally rely on the same statements, and

[9] *See also Ark. Tchr. Ret. Sys. v. Goldman Sachs Group, Inc.*, 955 F.3d 254, 278 (2d Cir. 2020) (Sullivan, J., dissenting) (considering it "obvious" that "no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based").

so debates over those statements' character and likely effect occur over ground common to all.[10]

Nor, as *Halliburton II* explained, do arguments sounding in materiality go to "'*Basic*'s fundamental premise'" of price impact; rather, "[p]rice impact is different" from materiality. 573 U.S. at 283 (quoting *Halliburton I*, 563 U.S. at 813). As we have noted, this Court emphasized the need to permit "direct evidence," where available, showing that "an alleged misrepresentation did not actually affect the market price of the stock." 573 U.S. at 283, 284. This Court should not permit the parties to expand the scope of rebuttal to include costly and time-consuming evidence that does not serve that purpose.

III. Expanding the scope of *Halliburton II*'s rebuttal would undermine the orderly processing of securities fraud claims.

Petitioners seek to expand the scope of a *Halliburton II* rebuttal not simply to achieve an early ruling on materiality, which they received under Rule 12(b)(6) prior to class certification, but as an end run around the final judgment rule. In this case, as in many like it,[11] Petitioners moved to dismiss the

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[10] *See Halliburton II*, 573 U.S. at 282 ("[T]he common issue of materiality can be left to the merits stage without risking the certification of classes in which individual issues will end up overwhelming common ones.").

[11] *See, e.g.*, Brief of *Amicus Curiae of National Association of Shareholder and Consumer Attorneys in Support of Respondent* at 9–13, *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, No. 11-1085 (U.S. filed Sept. 27, 2012) (available at https://www.nascat.org/wp-content/uploads/2015/11/amgen.pdf) (discussing prevalence of motions to dismiss on materiality grounds prior to district court rulings on class certification).

complaint for lack of materiality prior to the district court's ruling on class certification.[12] That motion was denied, as was Petitioners' motion for reconsideration a year later.[13] Ordinarily, that ruling would not be appealable until final judgment, and the district court's conclusion that Petitioners' statements were not immaterial as a matter of law would be law of the case unless and until the district court found some good cause to reopen it. But class certification rulings are subject to interlocutory appeal under Rule 23(f). Expanding the scope of issues that must be proven at class certification, or the scope of the rebuttal allowed under *Halliburton II*, thus necessarily expands the scope of interlocutory appeal. It also undermines the force of the District Court's ruling on a pre-certification motion to dismiss by giving defendants a second bite at the appeal on materiality—and an immediately appealable bite at that.

Halliburton II requires that "defendants must be afforded an opportunity before class certification to defeat the presumption [of reliance] through evidence that an alleged misrepresentation did not actually affect the market price of the stock." 573 U.S. at 284. *Amici* submit that where, as here, defendants have moved to dismiss for lack of materiality on the basis of the same arguments they later invoke to disprove price impact, and the judge has rejected that motion prior to considering class certification, they have *had* the opportunity that *Halliburton II* requires. Nothing in this Court's decision indicates that Petitioners are

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[12] *See* 15 U.S.C. § 78u-4(b)(3)(B) (providing, as part of the Private Securities Litigation Reform Act, for stay of all other proceedings during the pendency of a motion to dismiss).

[13] *See supra* note 4.

entitled to two bites at the apple, prior to class certification,[14] on their argument that Goldman's statements were too generic to matter.

But in any event, this Court should keep the scope of *Halliburton II* rebuttals at class certification narrow to prevent end runs around the final judgment rule. Allowing defendants to shoehorn any argument relevant to price impact into a rebuttal at class certification, with the result subject to immediate interlocutory appeal, is likely to lead to a flood of Rule 23(f) appeals, disrupt the division of labor between trial and appellate courts, and undermine the ability of the district courts to make rulings on key issues that will bind the parties until final judgment.

A. Expanding the scope of rebuttal undermines the policy against piecemeal appeals and disrupts the relationship between trial and appellate courts.

This Court has noted that "'[f]rom the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be decided in a single appeal." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (quoting *McLish v.Roff*, 141 U.S. 661, 665–66 (1891)). This final judgment rule "serves several important interests":

> It helps preserve the respect due trial judges by minimizing appellate-court interference

[14] Here, Petitioners took additional nibbles out of the apple via motions for reconsideration and to certify an interlocutory appeal, and they will of course have yet *another* bite when the case proceeds to the merits.

> with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

Flanagan v. United States, 465 U.S. 259, 263–64 (1984) (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).[15] Hence, "[t]he justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009).

This Court has said little about the appropriate scope of Rule 23(f). But it has construed the scope of the court of appeals' general appellate jurisdiction statute, 28 U.S.C. § 1291, "in line with these reasons for the [final judgment] rule." *Microsoft*, 137 S. Ct. at 1712. Presumably the courts of appeals should likewise exercise their discretion when to grant review under Rule 23(f) in line with these purposes.[16] But given the broad discretion vested in the courts of appeals under Rule 23(f), *see id.* at 1709–10, restrained use of Rule 23(f) certification seems unlikely in itself to prevent the erosion of the final judgment rule in securities cases. *Amici* suggest that the problem lies

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[15] *See also Microsoft*, 137 S. Ct. at 1712.

[16] *See, e.g.*, Michael E. Solimine & Christine Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531, 1576 (2000) (emphasizing benefits of the final judgment rule and Advisory Committee's urging of "restraint" in use of Rule 23(f)).

not in Rule 23(f) but in the potential expansion of the scope of issues to be considered in connection with class certification.

This case illustrates the problem. The Second Circuit has granted and conducted interlocutory review under Rule 23(f) twice so far,[17] and Petitioners urged in both trips the argument that the district court sought to put to rest—at least until final judgment—by denying Petitioners' motion to dismiss on materiality. Such repeated trips to the court of appeals not only expend judicial resources and interfere with the district court's ability to manage the case, but also inject considerable uncertainty into the litigation.[18] If Petitioners succeed in establishing that "a court must consider *all* of the evidence relevant to price impact, even if it overlaps with the evidence relevant at the merits stage," Petr. Br. at 33, then securities fraud defendants would have strong incentives to relitigate materiality or other issues that could potentially be tied to price impact in order to secure immediate appellate review of those issues.[19]

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[17] *See Goldman Sachs*, 955 F.3d at 267–69; *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Group, Inc.*, 879 F.3d 474, 481 n.6 (2d Cir. 2018).

[18] *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (noting a "vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts'") (quoting *Parkinson v. Apr. Indus., Inc.*, 520 F.2d 650, 654 (2d Cir. 1975)).

[19] Such a doctrine would also be, like the "death-knell" doctrine this Court rejected in *Coopers & Lybrand*, "one-sided." *See Microsoft*, 137 S. Ct. at 1708. Expanding the scope of rebuttal under *Halliburton II* would expand the scope of appealable issues for defendants, but not plaintiffs.

The solution is to confine the scope of class certification—and therefore of Rule 23(f) review—as closely as possible to the central Rule 23(b)(3) question of whether common issues predominate. *See* 16 Edward H. Cooper, *Federal Practice and Procedure* § 3931.1 (3d ed. Oct. 2020 Update). Limiting the *Halliburton II* rebuttal to direct evidence tending to disprove any actual price impact would prevent defendants from recycling their materiality arguments as price impact arguments and appealing any adverse rulings under Rule 23(f).

B. Allowing relitigation of issues already subjected to a dispositive motion undermines the district court and contravenes the law of the case doctrine.

Expanding the scope of rebuttal under *Halliburton II* may undermine district courts' ability to control cases in ways that go beyond the intrusion of interlocutory review. In this case, as in many other securities fraud cases, the defendants moved to dismiss on materiality grounds and the district court rejected that motion before the parties litigated class certification. Petitioners managed to keep that motion alive for some time, moving first for reconsideration and then for certification of the issue for an interlocutory appeal under 28 U.S.C. § 1292(b). Once those motions were resolved, the district court's rejection of Petitioners' arguments that the relevant statements were "mere puffery" and therefore not material would ordinarily be law of the case. Allowing the same issues to be relitigated under the banner of price impact at class certification undermines the strong policies associated with that doctrine.

The law-of-the-case doctrine "generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506 (2011)). Such decisions do not bind appellate courts, of course, but they bind the parties until the relevant ruling can be appealed—and they generally govern the district court's succeeding deliberations in the case. As this Court has explained, "[t]his rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], at 118 (1984)). In complex cases like this one, this settlement function is essential to the district court's ability to conduct the litigation in a manageable way. District courts cannot settle questions in this way, however, if the parties can simply "re-brand" their arguments and relitigate them at class certification.

Courts hearing securities fraud claims might plausibly deal with this problem in either of two ways. One approach would be to consider materiality in relation to price impact as Petitioners wish, but to consider a district court's earlier ruling as controlling as to any such arguments that have already been the subject of a dispositive motion. After all, *Halliburton II* requires that "defendants must be afforded an opportunity [to rebut price impact] *before class certification*" 573 U.S. at 284 (emphasis added), but it does not require that this opportunity take any particular procedural form. Under this approach, the district court's rejection of Petitioners' arguments that

Goldman's statements were immaterial as a matter of law in connection with the motion to dismiss would be treated as resolving the ability of those same arguments to rebut price impact for class certification purposes as well.

That approach, by accepting what are essentially materiality arguments as part of the class certification decision, would still have the difficulty of allowing those arguments to be part of an interlocutory appeal. That would, as we have already argued, undermine the final judgment rule by expanding the scope of interlocutory review. *Amici* thus submit that the better answer is to exclude indirect, non-empirical arguments about price impact from the scope of the *Halliburton II* rebuttal altogether. That would preserve the values of both the final judgment rule and the law of the case doctrine while honoring the central point of *Halliburton II*, which was that indirect presumptions like the *Basic* presumption should be checked by direct empirical evidence when such evidence is to be had.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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