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 AMICI CURIAE INSTITUTIONAL INVESTORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici include 19 public-sector institutional investors who buy, hold, and sell billions of dollars of federally regulated securities. Many have been plaintiffs in federal securities fraud lawsuits. This multifaceted perspective gives amici reason to seek the appropriate balance between effective enforcement of the Nation's securities laws—essential to protect defrauded shareholders—and

[1] Both Petitioners and Respondents have lodged blanket amicus consent letters with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

deterring baseless litigation, whose costs are ultimately borne by shareholders.

Amici write to explain how the proposal Goldman and its amici offer here—rewriting the securities laws by empowering courts to consider the generality of a defendant's misstatement in assessing its price impact—has the potential to throw off that balance. That proposal will harm shareholders and weaken the integrity of the market. Yet it will do virtually nothing to prevent the supposed threat of baseless shareholder litigation.

Amici are listed below:

The Alaska Permanent Fund Corporation is the state-owned manager of the Alaska Permanent Fund, a sovereign wealth fund with $72 billion in assets under management, established by oil revenues to create a renewable financial resource for current and future generations of Alaskans.

The Alaska Retirement Management Board oversees the investments of the Alaska's pension and benefits systems for over 100,000 public employee members with $38.3 billion in assets under management.

The California Public Employees' Retirement System pension fund is the largest defined benefit public pension in the United States, overseeing $432 billion in assets on behalf of 2 million members in its retirement system and 1.5 million members in its health-benefit system.

The California State Teachers' Retirement System is the largest educator-only pension fund in the world and the second largest pension fund in the United States, administering $282.5 billion in assets on behalf of 975,000 California public-school educators.

The Fire and Police Pension Association of Colorado serves as trustee for the Fire and Police Members' Benefit Investment Fund, which administers $6 billion in retirement, disability, and death benefits on behalf of Colorado firefighters, police officers, and their families.

The Delaware Public Employees' Retirement System is a statutory collective trust comprised of state, county, and municipal public pension plans and funds, administering $11 billion in assets on behalf of more than 75,000 current and former employees.

The District of Columbia Retirement Board was created by Congress in 1979 and manages approximately $10 billion in assets on behalf of the District's police officers, firefighters, and teachers.

The State Board of Administration of Florida is responsible for managing approximately $215 billion in assets on behalf of more than 25 state-wide investment, retirement, and catastrophic recovery funds.

The Employees' Retirement System of the State of Hawaii manages approximately $18 billion in assets, providing retirement, disability, survivor benefits to 135,000 members, retirees, and beneficiaries.

The Maryland State Retirement and Pension System is responsible for administering $62.5 billion in retirement, disability, and death benefits on behalf of more than 350,000 current and former state and local employees, teachers, law enforcement officers, legislators, and judges.

The Municipal Employees' Retirement System of Michigan administers retirement benefits on behalf of more than 100,000 participants.

The New York State Common Retirement Fund is the third largest public pension fund in the United States, administering an estimated $247.7 on behalf of more than one million state and local government employees, retirees, and their beneficiaries.

The Oklahoma Firefighters Pension & Retirement System oversees approximately $3.5 billion in assets for the benefit of over 25,000 active and retired Oklahoma firefighters.

The Public School Employees' Retirement System, established in 1917, manages $59 billion in retirement benefits on behalf of approximately 500,000 current and former public school employees of the Commonwealth of Pennsylvania.

The Commonwealth of Pennsylvania State Employees' Retirement System, created in 1924, administers approximately $34.5 billion on behalf of 250,000 current and former employees state and local government.

The Employees' Retirement System of Rhode Island, established on July 1, 1936, manages approximately $9 billion in retirement, disability, and survivor benefits on behalf of state employees, public school teachers, judges, state police, participating municipal police and fire employees.

The Virginia Retirement System is the 18th largest pension plan in the United States, and 41st largest in the world, administering $92.1 billion to provide defined benefit and defined contribution retirement benefits for more than 742,000 employees, retirees, and beneficiaries.

The Washington State Investment Board manages $164.9 billion in investments for 17 retirement plans benefitting public employees, teachers, school employees, law enforcement officers, firefighters, and judges, in addition to other public funds for the benefit of Washington's industrial insurance program, colleges and universities, and developmental disability programs.

State of Wisconsin Investment Board is the 8th largest public pension fund in the United States and 25th largest pension fund in the world, managing more than $143.9 billion in total assets for more than 648,000 current and former employees of state agencies, the university system, school districts and most local governments.

INTRODUCTION AND SUMMARY OF ARGUMENT

Basic v. *Levinson*, 485 U.S. 224 (1988) achieved an important equilibrium in Rule 10b-5 securities fraud lawsuits, balancing the protections afforded to defrauded investors against those afforded to companies facing allegations of securities fraud. For investors, *Basic* provides a presumption, grounded in sound economics, that in efficient markets, a company's stock price incorporates "all public information about the company." Pet. Br. 8 (citing *Basic*, 485 U.S. at 247). That means both true and false public statements will be "reflected in the market price" of a security. *Erica P. John Fund, Inc.* v. *Haliburton Co.*, 563 U.S. 804, 813 (2011) (*Halliburton I*). "Basic's fundamental premise" is that an investor buying, selling, or holding a security is operating on the "integrity of the price set by the market"—and "in reliance" on the truthfulness of all the publicly available information incorporated in that price. 485 U.S. at 245. Accordingly, shareholders need not prove that they relied upon a particular piece of information in purchasing a stock to satisfy the reliance element of a securities fraud claim; the fact that they traded on an efficient market price means that they have relied on it. The Basic presumption therefore eliminates a need for individualized reliance inquiries, facilitating class certification. At the same time, Basic and its progeny equalize things for companies by recognizing that the presumption remains theory about the ways markets generally respond to information—an "indirect proxy for price impact." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 281 (2014) (*Halliburton II*).

And theory about the way stocks *normally* perform may not reflect how they *actually* perform. *Halliburton II* thus allows defendants to rebut the presumption by presenting evidence that their alleged "misrepresentation did not, for whatever reason, *actually* affect the [stock's] market price." 573 U.S. at 269 (emphasis added). And the standards for that showing are appropriately generous to defendants. "Any showing that severs the link between the alleged misrepresentation and * * * the price received or paid by the plaintiff * * * will be sufficient to rebut the presumption of reliance." *Id.* at 248.

Yet Goldman and its amici want to upset the Court's careful equilibrium. Finding themselves unable to rebut the *Basic* presumption often enough, they seek to change the presumption. Rather than hewing to the opportunity *Halliburton II* provides to rebut *Basic*'s theory with evidence about "actual" stock performance, 573 U.S. at 269, they seek to create room to introduce more theory. They contend that the *Basic* presumption should be rebuttable with legal conclusions that a defendant's misstatements are too "general" to move investors, even in the face of evidence that those misstatements *did* move investors. That position stretches the price-impact analysis beyond the boundaries set by economics and this Court's precedents. It puts generalist judges ahead of trained, qualified economic experts in deciding the types of information likely to influence investors. And it introduces concerns that are better addressed in the "materiality" element of a securities fraud claim rather than reliance.

Goldman and its amici believe this precedent-stretching, pro-defendant slant on *Basic* is needed to combat a supposed glut of frivolous "event-driven" litigation fueled by the "inflation-maintenance" theory. But there is no crisis in need of fixing. Any purported growth of "event-driven" litigation is driven more by the types of representations that corporations are making than the "events" triggering suit. And "inflation-maintaining" securities fraud is not new either. It is simply a type of securities fraud that *keeps* the market price up rather than *driving* the market price up.

This emphasis on trends in securities fraud litigation are mere distractions. The truth is that defendants' central difficulty in rebutting the *Basic* presumption is not the result of any particular litigation trend, nor is it the consequence of any problem with the legal standards for proving securities fraud. Rather, it is because the *Basic* presumption generally proves true. The markets move in response to publicly disclosed information about a company—including information that may seem "general" to untrained observers. Accordingly, Goldman's proposal will not solve any real problems with securities litigation.

All Goldman's proposal *will* do is sap strength from securities fraud suits as vital mechanisms for enforcing the securities laws. It will remove mechanisms of accountability that shareholders desire from public companies, and it will undercut the market's basic integrity—the baseline necessary for all trading. Accordingly, the lower court correctly rejected Goldman's attempt to diminish the showing necessary to establish a lack of price impact by smuggling materiality into the price-impact inquiry. And this Court should reject that attempt as well.

ARGUMENT

The Court should reject Goldman's effort to undermine the *Basic* presumption by empowering courts to conclude that the generic nature of a defendant's misstatement disproves its price impact.

Goldman and its amici have mobilized here to stave off what they claim to be an improper "expansion" of the *Basic* presumption by the court of appeals. Pet. Br. 33 (quoting *Stoneridge Investment Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008)). But they are the ones calling for change, demanding that the presumption be slanted in a more defendant-friendly direction.

They urge the Court to adopt Judge Sullivan's position from his dissent below, which would enable district courts to "consider the alleged misrepresentations themselves" in conducting the price impact inquiry during class certification. (Pet. App. 44a-45a, Sullivan, J. dissenting). Goldman and company insist that in doing so, a court should be entitled to conclude the "generic nature of the alleged misstatements is evidence of the absence of price impact." Pet. Br. 32. But that proposal stretches the price-impact inquiry beyond its natural limits, and the limits imposed by the Court's precedents.

A. Theorizing that fraudulent misstatements were too generic to have price impact cannot rebut the *Basic* presumption, which requires showing that misstatements actually had no price impact.

1. *Halliburton* put a hard limit on the types of "appropriate evidence" that can disprove price impact and rebut the *Basic* presumption. 563 U.S. at 811. Only evidence

demonstrating that a company's misstatement did not "actually affect the market price" can rebut *Basic*'s theoretical prediction that in an efficient market all publicly available information about a company affects the market price. 573 U.S. at 269. Accordingly, *Halliburton II* does not permit courts to make the legal "conclusions" Goldman suggests, based on the "generic" nature of a misstatement, that a "reasonable investor" could not view a statement as significant. Pet. Br. 32. Evidence concerning misstatements' generality is not "evidence" of the forces that "actually affect" market price. It is a mere prediction of what *might* move market price, which courts have the tools to consider at the motion to dismiss or summary judgment stage, but not at class certification.

If the generality of a misrepresentation plays any appropriate role in overcoming the *Basic* presumption, it must remain as part of the *proper* inquiry: determining the "actual" impact of the statement on purchasers of the stock. Within the guardrails of that proper framework, a qualified expert might be to be able to draw upon a statement's generality to explain why the market did not respond to it, just as an expert might draw upon the statement's specificity to explain why the market did react. But such conclusions about the generic nature of a misstatement can only be offered to *support* evidence of actual price impact. They cannot *substitute* for such evidence, as Goldman and amici would like. That substitution would simply replace theory with more theory—transgressing beyond *Halliburton II*'s already generous limits. Permitting a judge's conclusions about a misstatement's generality to stand as "evidence" on equal footing with "actual" evidence on price impact, as Goldman suggests, would frustrate the inquiry *Halliburton II* envisions. It would invite district judges to substitute argument for evidence and conclude that a misstatement was incapable of having price impact when the evidence suggests that it actually did. That would allow a judge to conclude that the *Basic* presumption was rebutted when it should have held.

Refusing to allow consideration of a misstatement's generality during the price-impact inquiry does not place any "'artificial[]' restriction on the kind of evidence a court may consider in evaluating price impact." Pet. Br. 30 (quoting *Halliburton II*, 573 U.S. at 281). Nor does it suggest that the price-impact inquiry is limited to "quantitative" analysis. WLF Br. 9. It is simply an acknowledgement that the price-impact inquiry requires evidence—not legal conclusions about any purported statement's capability to influence investors.

2. Yet Goldman's effort to force "generality" into the price-impact inquiry does more than violate *Halliburton II*'s natural limits. It also intrudes into territory occupied by another element of a securities fraud claim: materiality. Materiality is determined by evaluating whether there is "[a] substantial likelihood that" the false or misleading statement "would have been viewed by the reasonable investor as having altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32. That makes materiality the natural home for predictive judgments about a misstatement's *likelihood* to mislead, reserving reliance as the home for judgments about whether investors were *actually* misled. See *Nathenson* v. *Zonagen Inc.*, 267 F.3d 400, 418 (5th Cir. 2001) ("Materiality thus looks to likely potential" as opposed to "what actually happened."). Concerns about a misstatement's generality thus bear only indirectly on whether investors would be misled by misrepresentations—and thus fall short of the kinds of "salient evidence" *Halliburton* requires to defeat the presumption that the market relied

on those misrepresentations. 573 U. S. at 282. That makes Goldman's concerns about the "generality" of misstatements an awkward fit for the price-impact inquiry.

Those materiality-as-generality concerns are also an awkward fit procedurally because "securities fraud plaintiffs are not required to prove the materiality of [a defendant's] alleged misrepresentations and omissions at the class certification stage." *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 469–470 (2013). Such statements do "not bear on the predominance requirement of [Fed. R. Civ. P.] 23(b)(3)." *Id.* at 282. The question of whether a statement is "general" or "material" applies equally to the entire class, so it should be reserved for the merits stage of the litigation.

All this "overlap" between "generality" and "materiality" suggests that introducing the latter can only result in confusion—a confusion that defendants might manipulate to water down the evidentiary standards for disproving price impact. Goldman and amici offer no good reason why such confusion should be tolerated.

3. The lessons from this Court's materiality jurisprudence further undermine the supposed wisdom of empowering judges to draw "conclusions" about materiality in the guise of "generality." The most central of those lessons suggests that evidence about price impact and materiality should only be offered by qualified experts, not derived by generalist judges. That is because the inquiry into "generality," like materiality, is highly "fact-specific" and context-dependent, regardless of the stage at which it is considered. *Matrixx Initiatives, Inc.* v. *Siracusano*, 562 U.S. 27, 43 (2011). This case amply demonstrates the point.

Goldman's misstatements at issue in this case were critical to Goldman's particular business in ways that might not be obvious to the untrained observer. Goldman's business involves developing customized investments for a variety of clients—a business that could cause one client's gains to come at another client's expense. And Goldman engages in its own customized investments, so it could be betting on the short end of an investment even while selling the long end to its clients. Managing conflicts of interests between Goldman's clients—and between Goldman and its clients—was therefore critical. That is why Goldman warned investors that "a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses." JA5716.

When Goldman represented to investors that "[i]ntegrity and honesty are at the heart of our business," JA5716, this also was not merely one of the many bland aspirational platitudes that often appear in corporate charters and mission statements. It was a specific statement, made directly to investors, relating to aspects of Goldman's business that were central to its business position—the trading premium that Goldman enjoyed because of its solid reputation.

Further distinguishing Goldman's representations from traditional sales puffery, Goldman admitted that conflicts of interest were a threat to its reputation, and, if not properly handled, could have tangible costs for shareholders, including loss of that reputational premium and potential additional costs in "litigation or enforcement actions." JA5716. When Goldman claimed that it had "extensive procedures and controls that are designed to identify and address conflicts of interest," that served as assurance that Goldman's reputational price premium was safe and justified. And thus, when Goldman promised that "[o]ur clients' interests always come first," JA93, that was not "generic or aspirational" puffery (Insurers' Br. 9)—

Goldman was saying that it would not tolerate conflicts of interest, much less actively foster them by betting against its customers and favoring some over others. Each of these representations thus "emphasize[d] [Goldman's] reputation for integrity or ethical conduct as central to its financial condition," which made the statements actionable even if they might be considered mere "puffery" in another context. *Ind. Pub. Ret. Sys*. v. *SIC, Inc*., 818 F.3d 85, 97-98 (2d Cir. 2016).

4. In addition, many of the "environmental, social, and governance goals" that most companies include in their investor-facing statements are not anodyne "generic and aspirational" puffery either. Insurers' Br. 9. Corporate commitments to "sustainability, the environment, diversity, sexual harassment, worker safety amidst the Covid-19 pandemic, and other issues of pressing social concern" have not come to dominate companies' 10Ks and annual reports because of sheer corporate benevolence. Soc'y for Corp. Governance (SCG) Br. 3. Companies include them because of "request[s]," "pressure," and "lobbying" from "investors." RLC Br. 4, 16. Many investors today want to align their business and social goals in the investments they make. And many institutional investors face internal pressure to make that alignment. They will pay a market premium, or choose one investment over another, based on a company's ability to facilitate that alignment. Investors want those goals committed to writing to ensure that companies can be held "accountable" for following through on them. SCG Br. 3 (quoting Leo E. Strine Jr. & Joey Zwillinger, *What Milton Friedman Missed About Social Inequality*, N.Y. Times (Sept. 10, 2020), https://nyti.ms/2DUYeOC). These statements are designed to influence investor behavior—and that makes them "capable of affecting the stock price." RLC Br. 13.

These are material statements regardless of their supposed "generality."

Accordingly, judges should be hesitant to declare a statement too "generic" to move investors simply by reading these statements on a cold record. Judges lack the ability to make this determination on their own, and judges exhibit a tendency to make such judgments based on whether a misstatement would move *them* to purchase a stock, rather than whether it might move *others*. They need guidance from others with experience in the market. And they should not be encouraged to reach such conclusions when not guided there by experts examining the actual evidence of price impact, or to have their judicial conclusions on the materiality of these statements stand on equal footing with those expert conclusions—which is exactly what Goldman and its amici are asking the Court to empower them to do.

5. What is more, companies should not enjoy any special immunity to make false or misleading "generic" representations—even when some of those representations speak to high societal ideals. Investors encourage companies to make such commitments so that they can be held accountable for them. It defeats the entire purpose of those commitments to allow companies to use the "generic" and "aspirational" nature of those statements to escape accountability. Goldman and amici want to give companies the license to say these things and not face any consequence when the things they say turn out to have been false or misleading. If rejecting that proposition means "chilling" such empty gestures, then so be it. SCG Br. 2.

B. None of the supposed ills of modern securities litigation justifies Goldman's effort to slant the *Basic* presumption in defendants' favor.

Yet Goldman and its amici contend the Court should force a fit anyway to give corporations a "meaningful" chance to rebut the *Basic* presumption. Pet. Br. 3; RLC Br. 5. They are unhappy with corporations' win-loss record at class certification. They want more policing of "general" and "aspirational" statements at the certification stage to curb the supposed rise of "event-driven" litigation, fueled by supposed abuses of the "inflation-maintenance" theory. Indeed, theirs almost seems like a frontal attack on the inflation maintenance theory itself, questioning whether it is "legally sustainable" (WLF Br. 2) and whether it has been "recognized" by this Court (Pet. Br. 32),even though the theory's legality is not at issue. See Pet. Br. 32; WLF Br. 2, 18-20; Insurers' Br. 7; RLC Br. 6-7.

1. The "inflation maintenance" theory is just ordinary securities fraud—just fraud that skews a stock's price "not by adding [inflation] to a stock" rather than "by maintaining it." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016). Both inflation-creating misstatements and the inflation-maintaining variety involve the same fundamental inputs: fraudulent statements by the company, and a resulting artificial inflation in the purchase price. The only difference is that one makes the price go up and the other prevents the price from going down—"just a mirror image of the situation for the same figures in black ink, rather than red." *Schleicher* v. *Wendt*, 618 F.3d 679, 683 (7th Cir. 2010). This difference in outcomes is merely mechanical and says nothing particular about the wrongfulness or actionability of the fraudulent statements that go into it. As often as not, it is the product

of happenstance—the combined effects of the fraud together with all other publicly available information on the company. Accordingly, "theories of 'inflation maintenance' and 'inflation introduction' are not separate legal categories." *Vivendi*, 838 F.3d at 259 (citations omitted). "There is no reason to draw any legal distinction between fraudulent statements that wrongfully *prolong* the presence of inflation in a stock price and fraudulent statements that initially *introduce* that inflation." *FindWhat Inv'r Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1316 (11th Cir. 2011).

2. The reason that most securities fraud lawsuits involve allegations of inflation-maintenance is not some pernicious trend within the plaintiff's bar. Pet. Br. 34. It is because most fraud maintains, rather than creates, inflation: "[O]f all the misstatements that do in fact inflate the purchase price of issuers' shares, probably most are made to avoid disappointing expectations rather than to increase expectations, which means they are not followed by an immediate significant price increase." Fox, *After* Dura*: Causation in Fraud-on-the-Market Actions*, 31 J. Corp. L. 829, 852 (2006); *see also* Murdock, Halliburton, Basic*, and Fraud on the Market: The Need for a New Paradigm*, 60 Vill. L. Rev. 203, 242 (2015) ("Much of the alleged fraud in publicly traded securities arises from management's attempt to maintain the price of the stock when it knows that the position of the company is deteriorating."); Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 Wash. U. L. Rev. 487, 524 (2015) ("[I]n the prototypical fraud case where, for example, misstatements continue a trend of positive news, the price impact can be price maintenance with little to no movement."); Jill E. Fisch, *The Trouble with* Basic*: Price Distortion After* Halliburton, 90 Wash. U. L. Rev. 895, 921–22 (2013) ("Mis-

representations that effectively confirm market expectations are * * * ubiquitous.") (internal quotation marks and citation omitted).

Inflation-maintaining fraud can also be far more economically devastating than price-increasing fraud. It draws more people into a collapsing stock, and draws out the inflation for a longer time, often with many more fraudulent statements, so that when the price does fall, it falls further, and harms more people, than simple inflation-creating fraud might have. "Because thousands of shares are purchased each day, the longer that inflation remains within a stock price, the more shares that are purchased at inflated prices, and the more shares that stand to lose when the inflation subsequently dissipates from the price." *FindWhat Inv'r Grp.*, 658 F.3d at 1316.

The circumstances under which price-maintaining fraud tends to occur can make this type of fraud especially pernicious. Inflation in a stock can create powerful incentives to lie, especially in a declining, uncertain market as firms "would have every incentive to maintain inflation that already exists in their stock prices by making false or misleading statements." *Vivendi*, 838 F.3d at 258. "After all, the alternatives would only operate to the company's detriment: remaining silent * * * could allow the inflation to dissipate, and making true statements on the issue would ensure the inflation dissipates immediately." *Id.*

Price-maintaining fraud is thus no less wrongful, no less harmful, and therefore no less actionable than price-increasing fraud. It should not be viewed with special suspicion or subjected to special rules.

2. There is no scourge of frivolous "event-driven litigation" either. The reason suits have expanded beyond claims centered on fraudulent financial "restatements"

(RLC Br. 16) is not the result of the plaintiffs' bar conjuring securities lawsuits from catastrophic company "disasters." WLF Br. 13; Insurers' Br. 6. It follows instead from companies' expansion of their investor-facing statements to go way beyond financials, including commitments on a wide variety of subjects. These have converted annual reports and 10-Ks "from [] short precis of financial results, to lengthy documents that explain corporate values to internal and external audiences." SCG Br. 3. When companies change the kinds of representations they make, that will change the kind of securities fraud lawsuits they face. Companies make those statements in hopes of influencing investors' purchasing decisions. They should not be free to walk away from those statements when they prove false.

3. Goldman's claims of "vexatious litigation" and "coerced settlements" also do not pan out. Pet. Br. 27-29. The Court fully considered and rejected these arguments in *Amgen*. 568 U.S. at 474-78. And for good reason: It is already plenty hard to maintain a securities class action. Plaintiffs will not find an easy path through dismissal, certification, trial, and settlement simply by reverse-engineering representations to fit disastrous events by combing through annual reports to find something that vaguely fits. Insurers' Br. 3.

Indeed, for all the complaining that the *Basic* presumption has become "truly unrebuttable" (Pet. App. 44a) (Sullivan, J., dissenting) and "nearly unsurmountable" (RLF Br. 11), Goldman and its amici have not shown the traditional types of price-impact evidence to be inadequate. Such evidence typically involves "event studies," which defendants use to demonstrate a lack of correlation between revelations about fraud and stock prices. Amici suggest that it can be hard for a company to use these event studies to show a lack of correspondence on the "back end," when corporate fraud is revealed, because those revelations are often catastrophic for the company on several fronts and are therefore accompanied by "government investigations or other civil litigations" that have their own impacts on stock price. Insurer's Br. 8. But revelations that produce this triple threat of stock-drop, investigation, and lawsuit, are exactly the types of information that investors care about, so the fact that they all come together hardly disguises a lack of price impact.

All that is above and beyond the other requirements of the *Basic* presumption—each of which a defendant may challenge: that the alleged misrepresentations were publicly known; that the stock traded in an efficient market; and that the plaintiff traded the stock between the point in time that the misrepresentations were made and the point that the truth was revealed. *Basic*, 485 U.S. at 248, n.27.

And even plaintiffs enjoying the *Basic* presumption must allege and prove that the defendants' misstatements involved more than puffery to prevail at trial. They must prove that the misstatements were material and "falsifiable." *Gross* v. *GFI Grp., Inc.*, 784 F. App'x 27, 30 (2d Cir. 2019). They must allege and prove that the representations were fraudulent and that defendants acted with scienter, all according to the rigorous pleading standards of the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4 (b)(2). And they must demonstrate that the company's false representations caused them financial loss. Pet. Br. 28 (citing *Vivendi*, 838 F3d at 255). And class certification contains its own barriers that a plaintiff must surmount. With so many significant obstacles to maintaining securities fraud claims, Defendants hardly need to impose new ones.

3. It is thus unsurprising that Goldman's claims of an uptick in "frivolous" claims caused by "event-driven" lawsuits enjoy scant evidentiary support. Pet. Br. 32. Goldman and its amici infer much from a few anecdotes about a series of lawsuits that have been recently filed—but have not yet survived the gauntlet of motions to dismiss and for certification. Insurer's Br. 9 n. 7 & 10; RLC Br. 19. None of these lawsuits suggests an increase in the filing of frivolous ones generally or that frivolous suits have become more likely to succeed.

And while securities lawsuit filings have increased overall "since 2018" (WLF Br. 15), that is not because the plaintiffs' bar discovered new pathways to filing frivolous suits three years ago. As this Court clarified in 2018, in *Cyan, Inc.* v. *Beaver County Employees Ret. Fund*, 138 S. Ct. 1061 (2018), unremovable class actions under the Securities Act of 1933 may be brought in state court under the Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998). That means the same "event" that once produced one securities-fraud lawsuit is now likely to produce several: one in federal court, and one or more in state court. This accounts for the increase in state securities-fraud litigation. Michael Klausner *et al.*, *Section 11 Litigation in the Post-Cyan Environment* (Despite *Sciabacucchi*) (June 22, 2020), http://bit.ly/2N4vEPE. But it is not a problem with *Basic*. And if it is a problem, only Congress can remedy it. Accordingly, this supposed uptick in frivolous "event-driven" lawsuits is no real uptick at all. There is no scourge of frivolous lawsuits in need of slaying.

4. Indeed, if such a scourge did exist, it is not even clear how smuggling materiality into the price-impact inquiry would do much to combat it. If, as Goldman and amici suggest, courts are hesitant to dismiss claims on materiality

grounds because courts follow this Court's admonition that this inquiry is "fact-specific," Pet. Br. 22 (quoting *Matrixx Initiatives, Inc.*, 562 U.S. at 43), then courts should be even more reticent when making that decision without the benefit of full discovery as some satellite portion of the class-certification inquiry.

The truth is that defendants' lack of success in defeating the *Basic* presumption results because the fundamental economic premise underlying the presumption generally holds true. The markets react to publicly available information because companies craft their corporate messages to influence investors' purchasing decisions. Because companies succeed in influencing investors that does not warrant changing the rules. It is the reason to leave the rules, and the balance struck by this Court in *Basic* and progeny, exactly as they are.

C. Holding in Goldman's favor will harm investors and undermine securities-fraud lawsuits as essential investor-protection tools.

Resisting Goldman's (and its amici's) calls to contract the *Basic* presumption by allowing theorizing about the "generality" of statements to supplant evidence of actual price impact is also essential to protect the vitality of securities fraud suits to protect investors and deter corporate wrongdoing.

1. The private Rule 10b-5 right of action cannot remain an important vehicle for deterring fraudulent misconduct without a presumption that market participants rely on public information embedded in market prices. Without it, "the burden of inquiring whether hundreds, or likely thousands of investors relied on the alleged misrepresentation would be overwhelming" and would therefore preclude any possibility of class certification. Cox, *Fraud on*

the Market After Amgen, 9 Duke J. Constitutional L. & Pub. Policy 101, 106 (2013); accord *Basic*, 485 U.S. at 242. And without the availability of the class action device, few investors would have sufficient financial resources to pursue meritorious securities fraud claims at all. Because "the recoverable amount is too slight to justify" the prohibitive cost of an individual suit, a class action "is the only viable option for most aggrieved investors," and the alternative is to forgo suit entirely. Cox, *supra*, at 106, n.17.

2. Undermining the *Basic* presumption could also undermine the investing strategies of institutional investors. These institutions often make use of a variety of passive investment strategies, such as funds that mimic the performances of popular stock price indexes like the Dow Jones or Standard & Poors. Diamond, CalPERS *Committee Rethinking Active Management, Pensions & Investments* (Mar. 18, 2013). Indeed, some of the country's largest institutional investors index four-fifths or more of their domestic equity assets. Pensions & Investments, *Passive Equity Portfolios of 10 Large Pension Funds* (Mar. 25, 2013) (reporting rates of passive management in the equity portfolios of the nation's five largest pension funds ranging from 72% to 87%). Those passively managed portfolios contain substantial assets. The California Public Employees' Retirement System alone passively manages more than $125 billion in assets—half of its total $255 billion portfolio. Kephart, *Passive Investing: If It's Good Enough for CalPERS . . .* , Investment News (Mar. 24, 2013).

All this provides good reason to zealously maintain the existing contours of the *Basic* presumption. To allow otherwise would make it much harder for the modern trader—and the modern institutional investor—to maintain securities fraud lawsuits, whether class-wide or individually. These investors would not be able to prove individual reliance because they relied on the wisdom of the crowd. And that would leave many investors unprotected when they engage in some of the most popular, and successful types of trading.

And sapping private securities lawsuits of strength will afford the modern investor very little protection under the securities laws. Private 10b-5 securities suits are perhaps the best means available, not only to "provide an avenue for appropriate compensation of victims," Langevoort, *Managing the "Expectations Gap" in Investor Protection: The SEC and the Post- Enron Reform Agenda*, 48 Vill. L. Rev. 1139, 1161 (2003), but to provide an "effective substitute" to public actions "for deterrence purposes," *id.*—counteracting the pernicious incentives that encourage people to lie.

The Court "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement" to public enforcement brought by the Department of Justice or the Securities and Exchange Commission. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (describing role of litigation under implied private right of actions to enforce Section 10(b)); *accord Randall* v. *Loftsgaarden*, 478 U.S. 647, 664 (1986); *Bateman, Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975). So has Congress. See, e.g., S. Rep. No. 104-98, at 8 (1995) ("'[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program'") (quoting former SEC Chairman Arthur Levitt). Indeed, it has long been understood that United States capital markets are the deepest and most liquid because they are the fairest and best policed in the entire world. *See* Bhide, *Efficient Markets, Deficient Governments*, Harv. Bus. Rev. 128, 130-131 (1994) ("U.S. rules protecting investors are the most comprehensive and well enforced in the world."); *see also* Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 245-46 (2007).

The role of private suits in deterring fraud has become all the more vital as the resources available for public enforcement have become more strained. The SEC is now charged with overseeing "[a]pproximately $97 trillion in securities trading annually on U.S. equity markets and $43 trillion in the U.S. fixed income market" and the activities of over 28,000 registered entities. SEC, *Fiscal Year 2021 Congressional Budget Justification Annual Performance Plan* 3 (*SEC FY2021 Justification*), *https://www.sec.gov/cj* In addition, the SEC is responsible for reviewing the disclosures and financial statements of over 7,600 reporting companies. *Id.* It must also evaluate the tens of thousands of tips and complaints" it receives each year, including some 17,000 in 2019 and an estimate of 20,000 in 2020. *Id.* at 29. The SEC recently told Congress it needs additional positions and funding given "the growing size and complexity of the markets that we oversee." *Id.* at 3. *See also* SEC, *Division of Enforcement Annual Report* 4 (2018) (reporting that SEC's "total headcount is down approximately 10% from its peak in FY 2016").

Goldman's theory would thus curtail private securities suits just when they are most needed. The likely result is that more firms will be encouraged to commit fraud and will be more likely to escape liability when they do. And when more and more companies are encouraged to commit fraud, the very integrity of the market will suffer.

The Court has long counseled respect for the congressionally mandated deterrent purpose of private securities suits, refusing to narrow the ambit of the federal securities laws when doing so would "insulate those who commit securities frauds from any appreciable liability to defrauded investors" and "seriously impair the deterrent value of private rights of action" by diminishing "the incentives for [securities market actors] to comply with the federal securities laws." *Randall*, 478 U.S. at 664. This Court should heed that counsel once again and reject Goldman's unwise attempt to change the *Basic* presumption.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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