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 PROFESSORS OF SECURITIES LAW AND COMPLEX LITIGATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## INTRODUCTION AND SUMMARY OF ARGUMENT[1]

Fifty years ago, less than five percent of the American public owned stocks. The investors whose decisions shaped the market relied on slide rules and pocket calculators to interpret corporate figures. Analysts read the *Wall Street Journal* on the way to work to get an information advantage over their colleagues.

Today, that market is unrecognizable. Traders use sophisticated technology to parse vast troves of data and to comb through company statements in search of insights about those companies' financial health. The composition of the investing public has changed a great deal, too. Today more than half of the American public has some interest in the stock market. And that public is increasingly interested in companies' records on social, environmental, and corporate governance issues—and in what those records say about their reputations and their bottom lines.

Despite its growing appetite for more and different information, however, the market is not perfect. Under pressure to post year-over-year growth, troubled publicly-traded companies occasionally make false or misleading statements about their financial health. Most commonly, companies try to maintain unsustainable share growth by downplaying or concealing emerging problems.

Goldman Sachs's position in this case is untethered from these market realities. *First*, hearkening back to an earlier age, Goldman assumes that the only corporate

[1] All parties consent to the filing of this amicus brief. 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 its preparation or submission.

statements that can have an impact on the market are those statements that investors perusing corporate disclosures by hand would recognize, in isolation, as "non-generic." This assumption is sorely mistaken. Investors have *always* evaluated corporate statements in the broader context in which they are made. And today they are better at that than ever, incorporating sophisticated computerized tools to provide clues as to each company's present or future.

*Second*, Goldman fails to appreciate that what statements might strike a judge as intuitively "generic" or "general" are just the sorts of statements that motivate whole segments of the investing public. Indeed, Goldman's statements in this case—properly understood in context—would not strike these investors as "generic" at all, but rather as statements of considerable significance to its reputation and operations.

And *third*, Goldman labors under an artificially narrow view of the scope of securities fraud, supposing that most fraud occurs when a company hatches a scheme to rapidly inflate its share price. Reality is less exciting: The vast majority of securities fraud occurs when companies' misstatements conceal unknown problems to maintain their prior share price.

Worse still, Goldman's position in this case doesn't just ask this Court to enshrine these misapprehensions about the market in securities law. It also seeks an end-run around the Court's established precedent concerning class certification in securities fraud cases.

As the law stands, defendants already have a mechanism to argue that their statements were too general to support a claim of securities fraud. They can argue that those statements were immaterial—that is,

that no reasonable investor could have attached significance to them. *See Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 388 (2014). And defendants already do this in basically every securities-fraud case—beginning with the pleadings stage, and again at summary judgment and trial.

Eight years ago, this Court rebuffed a request from securities-fraud defendants to allow them to make the same argument at class certification, too. As the Court explained in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), and reaffirmed in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), materiality is an issue capable of classwide resolution that need not be resolved at this juncture.

Yet what Goldman seeks here would render those holdings a dead letter. While Goldman can point to theoretical distinctions between materiality and whether a statement is generic, there would be no point to this Court's holding that a plaintiff need not prove materiality at class certification if the very same arguments that a defendant would have used to do so can be trotted out in the guise of an attack on reliance.

Nor is there a need for it to do so. Whether a statement is generic provides little insight into whether it mattered to investors—and materiality challenges already provide ample opportunities for defendants to ask courts to dismiss securities-fraud complaints on that basis.

The court below correctly applied these principles, and this Court should affirm.

## INTEREST OF *AMICI CURIAE*

*Amici* are law professors and scholars who focus their teaching and scholarship on federal securities law and complex litigation. They submit this brief to clarify the contours of the modern market for this Court's benefit, including investors' focus on the context in which statements are made, their reliance on big data and sophisticated computing, and the investing public's growing interest in information about companies' records on environmental, social, and especially corporate governance issues. Drawing on this experience, *amici* urge this Court to tread carefully in considering whether to empower inexpert judges to scrutinize, at a new juncture, whether statements are too generic to matter to an increasingly omnivorous investing public.

Further, as complex-litigation and securities-law scholars, *amici* are familiar with the lower courts' experience applying this Court's fraud-on-the-market decisions. *Amici* provide the Court with an overview of that experience to explain why undue attention to "generic" statements would work an end-run around this Court's sensible caselaw in this area and to clear up confusion surrounding the so-called "price-maintenance" (or "inflation-maintenance") theory of price impact. *Amici* are:

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## ARGUMENT

### I. Whether a statement is "generic" has little, if any, bearing on its price impact.

Goldman's position on the first question presented in this case depends on two premises: that investors respond differently to "generic" statements than to specific ones, and that there is a grave need for courts to assess that question at the class-certification stage. Both premises are mistaken. Investing decisions are highly context-dependent—especially in today's markets. Today's investors are attuned to a wide and growing range of company actions and statements, including those that might strike a reviewing court as insignificant. Take, for instance, the statements at issue in this case. To today's investors, those statements aren't "generic" at all.

Even if they were, courts already have ample mechanisms to weed out insignificant statements as a basis for securities-fraud claims. And Goldman's position cannot be reconciled with the basic principles of securities law—not to mention this Court's precedent applying the fraud-on-the-market theory.

Accepting Goldman's novel proposition—inviting courts to form their own intuitive judgments as to how "generic" a statement is at class certification—would therefore be a mistake.

#### A. Investors don't care whether a statement is "generic."

**1.** Call up anyone who works a trading desk or manages retirements savings for a large mutual fund and ask them to help you spot whether companies' statements are "generic" or meaningful. Their answer will be that that task is a waste of time. And you won't find a definition of

"generic" in Goldman's brief in this case, either. That's because whether a statement is too "generic" or "general" to move markets entirely depends on the context in which it was made—from market conditions, to company history, to what other companies are saying.

To see why, suppose that a company reports to investors that it expects to earn "typical" annual profits. Or suppose that a company reports that its operations are in strict accordance with local health and safety codes. In an ordinary year, in isolation, either statement might be an unremarkable assurance that few investors would vest with any significance.

But now suppose that a little-understood infectious disease has begun sweeping the globe, shuttering businesses and generating radical alterations to modern life, including prompting local governments to enact unexpected new health and safety requirements. In those circumstances, expecting ordinary profits or keeping pace with local legal changes would be an extraordinary feat that would certainly attract investor attention.

Some of the ways in which context matters are obvious. When investors read a company's disclosures, for instance, it's easy to expect them to be attuned to "wording, syntax, hyperbole, euphemisms, and tone"—all of which "can carry value-relevant messages" that drive investment decisions. Donald C. Langevoort, *Disasters and Disclosures*, 107 Geo. L.J. 967, 984 (2019).

But some are less so. In today's markets, what context clues are available—and which clues investors care about—reflect a changing technological landscape and a changing investing public.

***Big data and technology.*** To begin with, the traditional model of a market—in which individual

investors peruse companies' quarterly disclosures by hand, review their financial positions, assess a handful of digestible metrics to determine whether their shares are accurately priced, and call in trades to a broker—is a thing of the past. Markets now run on big data. *See* Yesha Yadav, *The Failure of Liability in Modern Markets*, 102 Va. L. Rev. 1031, 1035 (2016).

And investors have help interpreting it. Take corporate disclosures. Investors can now use computerized tools to unearth minor changes in company statements—and then examine those changes to see whether they have any significance. Some even use natural-language processing to interpret the language of the disclosures themselves—deploying what Goldman itself has dubbed "a critical tool for tomorrow's investors." Frank Partnoy, *The Secrets in Your Inbox*, The Atlantic (Sept. 2018), https://perma.cc/8RQN-4HD9; *see also* Craig Lewis & Steven Young, *Fad or future? Automated analysis of financial text and its implications for corporate reporting*, 49 Accounting & Bus. Research 587, 588 (2019).

These approaches enable investors to both "mitigate concerns about information overload" and to "detect latent features in the data that even the closest manual analysis may struggle to identify"—such as using attribute dictionaries to assess whether the words companies use in their disclosures connote a positive or negative outlook. *Id.* at 588, 597; *see also* Alex LaPlante & Thomas F. Coleman, *Teaching Computers to Understand Human Language: How Natural Language Processing is Reshaping the World of Finance*, The Global Risk Institute (Jan. 15, 2017), https://perma.cc/QQS6-JK5V.

Nowhere in this process do investors—or the machines they increasingly rely on—discount "generic" statements. To the contrary, investors use technology to hunt for clues in and among statements that might otherwise seem general.

***Environmental, Social, and Governance (ESG) information.*** Today's investors are also attuned to new sorts of information about the companies in which they might invest. In particular, many investors now incorporate information about each company's environmental, social, and corporate governance (ESG) performance into their decision-making. And, to meet investor demand for this information, many companies disclose information about their performance on those factors—just the sorts of information Goldman derides as hopelessly generic.

To be sure, investing based on environmental, social, or corporate responsibility concerns is nothing new. *See* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 Cardozo L. Rev. 1921, 1930 (2020) (noting as ESG precursors John Wesley's "instructions for his followers to avoid stocks that conflicted with Methodist religious teachings," the limitations imposed by Sharia law, and the "environmental and South African divestment movements"). But ESG investing differs from past efforts to "screen" investment products on behalf of a "niche audience" of investors with an unclear financial payoff. *Id.*

For one thing, demand for ESG information reflects the market's changing assessment of risk and value. Traditional corporate responsibility efforts weren't about profit at all. But today's investors feel differently, seeing information about ESG factors as "facilitating their ability

to evaluate a firm's operational plan from a longer term perspective," to "evaluate business risk," and to gain "insights into a board's level of engagement and oversight." Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 924, 932–33 (2019); *see also* Laura E. Deeks, *Discourse and Duty: University Endowments, Fiduciary Law, and the Cultural Politics of Fossil Fuel Divestment,* 47 Envtl. L. 335, 344–45 (2017) ("[C]onsideration of ESG factors is increasingly recognized as part of the obligations of universal investors not because it is right to do so from a moral imperative, but because it is right to do so from a risk management and prudent investment imperative.").

Put differently, there is a growing consensus that a company's value cannot be understood without incorporating ESG factors. *See* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk,* 41 J. Corp. L. 647, 662–64, 682–85 (2016) (explaining investor demand for ESG information on ESG risk management and other financial ESG impacts); COSO & World Bus. Counc. For Sustainable Dev., *Enterprise Risk Management: Applying Enterprise Risk Management to Environmental Social and Governance-Related Risks* 5, 18 (Oct. 2018), https://perma.cc/DT7W-E7FG (articulating a risk-management framework incorporating ESG factors).

And ESG investing doesn't just account for traditional corporate-social-responsibility factors, such as a company's impact on air and water pollution, energy efficiency, or labor standards, or even emerging problems like data protection and privacy.

Instead, ESG investing is particularly focused on corporate governance issues like risk management, board

composition, executive compensation, business strategy, and political contributions—not to mention board oversight, integrity, and attention to community and stakeholders. *See* Usman Hayat and Matt Orsagh, *Environmental, Social, and Governance Issues in Investing: A Guide for Investment Professionals*, CFA Institute (Oct. 2015), https://perma.cc/B7RA-VZWZ; Harper Ho, *Risk-Related Activism,* 41 J. Corp. L. at 663–68.

Moreover, today, ESG investing is big business. One third of all managed assets in the United States are sustainably invested using ESG factors. U.S. SIF, *Report on U.S. Sustainable and Impact Investing Trends* (2020), https://perma.cc/UB62-QU5C. It has also moved into the mainstream: The largest asset manager in the world, BlackRock, has reported that it plans to have $1.2 trillion in ESG assets in the next decade. Erica T. Jones, *The "ABC's" of ESG*, The National Law Review (Feb. 8, 2021), https://perma.cc/4JZY-7N26. The particulars vary, but these funds are now deploying such strategies as requiring "portfolio companies to post minimum performance on ESG factors for inclusion in a fund," or even developing their own ESG investment products. Reiser & Tucker, *Buyer Beware*, 41 Cardozo L. Rev. at 1932.

Companies have not failed to notice this new focus or its large audience. Many now tout their performance on ESG factors precisely because they wish to appeal to the broadening interests of the investing public. *See* Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. at 926–27. They, too, recognize that statements that once looked generic, aspirational, or insignificant can carry significant weight today.

**2.** All this means that today's investment markets are driven by factors that once seemed niche—or that might strike an outsider as "irrelevant" or "generic." Assurances about a company's environmental record, the independence of its board, the ethical commitments of its principals, or other reputational factors are now unlikely to be ignored—least of all by the increasingly sophisticated methods investors and analysts rely on to assess a company's worth.

This reality has not been lost on the SEC. Like investors and researchers, it now regularly incorporates natural-language-processing methods and other big-data tools into its fraud detection and other enforcement activities. *See* Lewis & Young, *Fad or Future*, 49 Accounting & Bus. Research at 596.

And the SEC has long shown an interest in matters of corporate governance. For instance, it requires companies to disclose whether they have adopted written codes of ethics applicable to certain principal officers—and, if no such code has been adopted, to explain why it has not. *See* 17 C.F.R. § 229.406.

The SEC has even broadened its requirements in response to investor interest. For instance, after years of allowing companies to disregard shareholder proposals seeking to address executive pay, the SEC began first imposing extensive mandatory disclosure requirements, and ultimately accepting the view that "the size and structure of executive compensation is economically material to investors." Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. at 936; *see also, e.g.*, *In re Dow Chem. Co.*, Securities Exchange Act Release No. 83,581 (July 2, 2018) (SEC enforcement action against

Dow Chemical for failing to adequately disclose executive perks).

Similarly, the SEC has long advised issuers that they are required to disclose material information about their exposure to risks related to climate change. *See* Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 924, at 937 (citing *Commission Guidance Regarding Disclosure Related to Climate Change*, Securities Exchange Act Release No. 9106, Exchange Act Release No. 61,469, 72 Fed. Reg. 6289, 6290, 6293–97 (Feb. 8, 2010)). As the Commodity Futures Trading Commission has emphasized, whether companies comply with that guidance also matters to regulators (and investors) because of the market-wide effects of climate-related financial risk. Commodity Fut. Trad. Comm'n (CFTC), *Managing Climate Risk in the U.S. Financial System* (2020), https://perma.cc/M28A-94QH.

**3.** In its securities fraud cases, this Court has previously appreciated that the significance of a statement to the investing public is a highly contextual inquiry.

In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), for instance, the Court acknowledged the many inputs that go into a single investing decision. Investors, the Court explained, take all statements in context, reading each statement, "whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information." *Id.* at 190. Moreover, investors "take[] into account the customs and practices of the relevant industry." *Id.* And they treat statements differently depending on the medium in which they were expressed. So when companies expressed opinions in registration statements

filed with the SEC, for instance, the Court emphasized that "[i]nvestors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life." *Id.*

This Court has brought the same appreciation of how investing functions to the question of materiality. As this Court explained in *TSC Industries, Inc. v. Northway*, 426 U.S. 438 (1976), whether a statement is material for securities fraud purposes depends upon whether 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." *Id.* at 449. That "total mix" explicitly invites consideration of the full context available to an investor.

**4.** Yet in this case, Goldman asks this Court to depart from this well-reasoned logic and to hold that courts can, or even must, make their own commonsense judgments as to whether a statement is too "generic" to matter. As the foregoing discussion makes plain, there are three fatal flaws with this approach.

*First*, it asks this Court to disregard how investors actually operate. That move risks damaging consequences for investors and the market. Because there is likely to be a mismatch between courts' assessments of how "generic" a statement is and investors' reliance on it, Goldman's rule penalizes investors who behave differently. And that effect is unlikely to be random, but instead will penalize particular investors—those who use automated tools to draw meaning from anodyne statements, or those focused on the sorts of ESG factors that could strike a court as insignificant, but which may indeed matter. This Court

should exercise extreme caution before creating this distorting effect.

*Second*, Goldman offers a solution in search of a problem. When securities-fraud defendants want to argue that their statements are too "generic" to matter to investors, they have a convenient vehicle to do so: a motion to dismiss on materiality grounds. In such a motion, they can argue that their statements (or omissions) were "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *See, e.g.*, *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 162 (2d Cir. 2000) (quotation omitted).

Nearly every securities fraud defendant—Goldman included—does just this. And they have fantastic success: Surveys reflect that half of the opinions addressing such motions have dismissed claims for lack of materiality. *See* David A. Hoffman, *The "Duty" To Be a Rational Shareholder*, 90 Minn. L. Rev. 537, 542 (2006); *see also* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does--Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 Emory L.J. 83, 116 n.94 (2002) (noting that in one survey 70 percent of securities dismissals held that at least one alleged misstatement was immaterial).

To be sure, Goldman insists that the questions whether a statement is (a) material or (b) too generic to be reflected in its securities price are distinct. As discussed below, they must be in order for it to prevail here.

But *third*, even if that's right, it's no help to Goldman, because it simply underscores the ways in which Goldman's suggested approach lacks the guardrails that guide the materiality inquiry and ensure that it accurately captures investor behavior. When a defendant argues that

a statement is immaterial as a matter of law, as explained above, it must meet a highly context-dependent standard, under which it must explain why the *total mix* of information available rendered the defendant's communication misleading.

Goldman offers no comparable guardrails to guide the generality question here. To the contrary, the facts of this case amply demonstrate the difficulties judges would have deploying Goldman's ill-defined "generality" standard.

Start with Goldman's insistence that every company invariably assures its investors that it operates with integrity and honesty, that it carefully manages conflicts of interest, that those conflicts are "fully disclosed and well known to investors." JA 209. Even if that's so, it's no help to Goldman.

For one thing, the fact that disclosures are general—or ubiquitous—doesn't illustrate that investors don't care about them. As discussed above, the significance of ESG information to investors, including growing investor attention to questions of corporate governance, has made disclosures pertaining to conflicts and ethics focal points for many investors. There is no doubt that Goldman anticipated as much and intended its statements about these issues to burnish its reputation. And whether investors would have taken note of Goldman's assurances in this respect hinges on context—such as whether other, similar companies made similar assurances. If Goldman had failed to make the same assurances the market did, investors likely would have noticed, regardless of their purported "genericness."

In any event, Goldman's account of what happened here is missing crucial context. As the respondents' brief explains (at 6–8), on the cusp of a financial crisis, Goldman

cultivated a position that was exceptionally vulnerable to conflicts of interest by developing financial products that it could sell to two different sides of the transaction (or hold an interest in itself). And Goldman didn't even stop there—instead, it repeatedly denied charges that it was not managing its conflicts properly, even as scrutiny over its practices intensified. Given its business model, investors would surely have noticed if Goldman had failed to make "generic" assurances that it had procedures and controls in place to identify and address conflicts of interest.

Yet despite all this, in his dissent below, Judge Sullivan confidently assessed all of Goldman's statements as "generic" statements to which investors would have attached no significance at all. *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 278 (2d Cir. 2020). That's sorely mistaken, and this Court risks similar outcomes if it approves Goldman's tack.

### B. Placing weight on whether a statement is "generic" would be inconsistent with—or work an end-run around—this Court's securities precedent.

Goldman's position also creates untenable tension with existing securities law—both in this context and in general.

**1.** Section 10(b) of the Securities Exchange Act of 1934 prohibits any person from using or employing, "in connection with the purchase or sale of any security," "any manipulative or deceptive device or contrivance in contravention of" the SEC's rules. 15 U.S.C. § 78j(a)(1). SEC Rule 10b-5 in turn implements that statute. It prohibits making "any untrue statement of a material fact" or "omit[ting] to state a material fact necessary in

order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b). As this Court has explained, recovery under Rule 10b-5 requires a plaintiff to show that (1) a defendant made a material misrepresentation or omission; (2) with scienter—that is, a "wrongful state of mind"; (3) in connection with the purchase or sale of securities; (4) upon which the plaintiff relied; and (5) an economic loss to the plaintiff that (6) that misrepresentation or omission caused. *Dura Pharms., Inc. v. Bruodo*, 544 U.S. 336, 341–42 (2005).

As framed by Goldman, this case concerns a simple question relating to the "reliance" element. The reality, however, is more complicated.

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court identified one means of satisfying the reliance element. *Id.* at 421–27. Under what is now known as the "fraud-on-the-market theory," a plaintiff who shows that "the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market" may invoke what amount to two related presumptions: (1) that the defendant's "misrepresentation affected the stock price," and (2) that, if the plaintiff purchased the stock at the market price during the relevant period, it did so "in reliance on the defendant's misrepresentation." *Halliburton II*, 573 U.S. at 268.

The theory is especially useful in securities class actions like this one, where it is one avenue by which class action plaintiffs may demonstrate that common questions predominate over individual ones as part of a bid for class certification. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809–10 (2011) (*Halliburton I*).

Following *Basic*, this Court has set forth some of the parameters for their doing so. First, such plaintiffs need not prove an element of securities fraud that, like loss causation, has "no logical connection" to the factual "predicate[s]" of the fraud-on-the-market theory. *Halliburton I*, 563 U.S. at 813. And, conversely, plaintiffs need not prove every element of the fraud-on-the-market theory either, but instead must prove only those elements required to satisfy the ordinary criteria of Rule 23. *Amgen*, 568 U.S. at 465–66, 468. That means plaintiffs need not prove materiality: While it's an element of the fraud-on-the-market theory, any ultimate failure of proof on that element would not demonstrate that individual issues predominated over common ones, but rather would demonstrate that materiality *was* such a common issue. *Id.*

Finally, while reaffirming the theory's general contours, this Court has emphasized that a defendant may "defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Halliburton II*, 573 U.S. at 266, 279.

Here, Goldman argues that such "evidence" may include evidence that the statements on which the plaintiffs' claim is premised were too "generic" to affect the price of its stock. That position is in tension with securities law as a general matter—and would work an end-run around this Court's approach to fraud-on-the-market cases in particular.

**2.** To begin with, Goldman's approach is altogether incompatible with claims that a defendant's omissions violated SEC Rule 10b-5.

Consider again the text of that Rule. It prohibits "omit[ting] to state a material fact necessary in order to make" a defendant's statements, "in light of the circumstances under which they were made, not misleading." Goldman never explains how a court could coherently apply a "generic" statement bar in the omissions context. One would plainly be inappropriate: To understand whether a defendant's omission violated the Rule, a court must take account not just of the defendant's statement itself, but also of all the surrounding circumstances. Those could include the defendant's other statements, the nature of the defendant's business, the presence of regulatory scrutiny, and a wide host of other factors.

This Court recognized a similar point in *Omnicare*, 575 U.S. at 175. There, the Court explained that even statements of opinion—statements that, by Goldman's standard, look quite "general," *see id.* at 179–80—may generate a misleading omission, because a reasonable investor may understand such statements to "convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view." *Id.* at 188. If the "real facts are otherwise, but not provided," the Court explained, the statement "will mislead its audience"—even though it is merely opinion. *Id.*[2]

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[2] *Omnicare* concerned a claim brought pursuant to 15 U.S.C. § 77k(a) rather than Section 10 (or Rule 10b-5). That provision concerns the obligation of companies that seek to sell securities in interstate commerce to first file registration statements with the SEC. Though distinct from Section 10(b) (and Rule 10b-5), it contains the same material misstatement or omission element: If a registration statement "contain[s] an untrue statement of a material fact" or

If so, that means the company has a duty to correct the misimpression.

To be sure, perhaps Goldman's view is simply that the bar applies only to affirmative statements. But that view risks introducing similar problems. After all, as discussed at length above, whether a statement—as opposed to an omission—had an impact on the market is a similarly contextual inquiry.

**3.** Goldman's approach deviates from this Court's ordinary approach to securities cases in another way too: by working an end-run around this Court's holding in *Amgen* that plaintiffs are under no obligation to prove materiality in order to invoke the fraud-on-the-market theory at the class-certification stage.

Goldman is no doubt correct that price impact and materiality are different questions. *See* Goldman Br. at 32; *see also* Brief of United States at 15. The first asks what the market did, while the second asks what a reasonable investor would have considered important. A statement could have a price impact without being material (and conceivably could be material without having a price impact).

But that's not the right comparison. Goldman doesn't really ask this Court to approve its introduction of evidence of an absence of price impact—which it's already entitled to do. Instead, it seeks to introduce evidence that

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"omit[s] to state a material fact . . . necessary to make the statements therein not misleading," those who purchased the stock may sue. 15 U.S.C. § 77k(a). Recognizing this similarity, several courts of appeals have extended the Court's logic in *Omnicare* to the Section 10 context. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 616 (9th Cir. 2017); *Tongue v. Sanofi*, 816 F.3d 199, 209–10 (2d Cir. 2016).

a statement is "generic" (or to pursue a judge's intuitive assessment of that question). And the distinction Goldman draws between a "generic" statement and an "immaterial" one is so thin as to be nearly invisible.

Judge Sullivan didn't distinguish between the two when, dissenting below, he asserted that "no reasonable investor would have attached any significance" to the statements Goldman had issued—a classic invocation of immateriality. *Ark. Tchr. Ret. Sys.*, 955 F.3d at 278. And all the statements Goldman could find of a "general" standard akin to the one it wants this Court to apply here were materiality cases, too. *See* Cert. Pet. at 21 (citing four materiality cases).

That's because whatever distinction is viable in theory, in practice there is no difference between what a defendant would argue about these concepts. *See* Brief of United States at 16–17 (using "immaterial" and "general" interchangeably); *id.* at 17–18 (noting that courts seeking to determine whether "a misstatement was material would consider its generic character, together with any additional evidence bearing on whether a reasonable investor would have viewed the misstatement as 'significant'"). At best, then, Goldman renders *Amgen* a dead letter: Defendants can't argue that a statement is immaterial to defeat class certification, but they can make identical arguments that the statement is "generic."

In light of all this, this Court shouldn't entertain Goldman's effort to evade *Amgen* through a labeling exercise. After all, the point the Court made in *Amgen* is just as true here: The ostensible price-impact question of generality (whether a statement is too general to *have* mattered to investors) is just as susceptible of common proof as the materiality question (whether a statement is

too general *to* matter to investors). Put differently, the central flaw with Goldman's argument is that it tries to smuggle an issue at the core of the merits of a plaintiff's securities fraud claim, and which has nothing to do with the requirements of Rule 23, into the class-certification context.

This Court should reject that attempt. Doing so would impose no hardship on defendants like Goldman. If a defendant wants to introduce evidence of a lack of price impact, it should introduce evidence of a lack of price impact—not ask inexpert courts to hypothesize about how "likely" it is, Goldman Br. at 28, that the "nature" of the defendant's statements precluded them from causing a price impact, Goldman at 29. And if a defendant wants to argue that a statement is too general to matter to investors, it can seek dismissal or summary judgment on that basis—although we urge caution in pre-trial applications of materiality defenses for all the reasons discussed above.

## II. Price maintenance is a paradigmatic example of price impact.

Though the merits of the "price-maintenance" or "inflation-maintenance" theory of price impact are not at issue in this appeal, Goldman repeatedly (at 4, 13, and elsewhere) suggests that that theory is somehow suspect. Far from it. To the contrary, price-maintenance theory is a straightforward and unremarkable way in which investors asserting fraud-on-the-market claims may establish price impact. It is a well-established doctrine that reflects how securities fraud typically unfolds and that enjoys near-universal acceptance by academic commentators and courts. This Court should disregard Goldman's aspersions to the contrary.

**1.** "Price impact," as this Court has used the term, "simply refers to the effect of a misrepresentation on a stock price." *Halliburton I*, 563 U.S. at 814; *see also* Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 Wash. U. L. Rev. 487, 519–25 (2015) (tracing the origins and evolution of the term in this Court's cases). And that "effect" is "the difference between the price that prevailed" and what that price would have been "had there been no fraud (that is, had the truth been told)." Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on* Amgen *and the Second Coming of* Halliburton, 57 Ariz. L. Rev. 37, 56 (2015).

Price impact is one of two presumptions securities-fraud class-action plaintiffs may invoke in order to establish reliance as a common question capable of classwide resolution. As this Court explained in *Basic*, it captures this logic: Because "certain well-developed markets are efficient processors of public information," a defendant's public, material misrepresentations may be presumed to be "reflected" in its securities' "market price." 485 U.S. at 247. Reliance can be established by one further presumption: that, if the plaintiffs bought stocks at a price reflecting the defendant's misrepresentations, that purchase was in reliance on the misrepresentations. *Halliburton II*, 573 U.S. at 268. If, however, a defendant can prove the absence of price impact, the presumption of reliance "collapses" and class certification is "inappropriate." *Id.* at 283.

Within this framework, price maintenance is simply one way that market price may reflect a defendant's misrepresentations: the effect of maintaining the

company's stock price in the face of what would otherwise be a decline.

For instance, suppose a company with a strong environmental record conducts routine emissions tests at its manufacturing plants and discovers a serious leak at several—but represents to its investors that the tests proceeded without a hitch. In these circumstances, the company's stock price may well remain unchanged. The market has no reason to suspect the problem, and, after all, "information that is not new to the market cannot be expected to move a security's price." James D. Cox, *Fraud on the Market After* Amgen, 9 Duke J. Const. L.& Pub. Pol'y 1, 22 (2013).

But that doesn't mean the company's misrepresentation had no effect. To the contrary, it maintained the company's stock at a higher price than it could have borne if the company had come clean. *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 419 (7th Cir. 2015). And because the company's misrepresentation was reflected in that artificially high price, new investors who paid that price may be presumed to have relied on the misrepresentation in doing so. *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1317 (11th Cir. 2011).

Price impact, in other words, depends on the application of a simple counterfactual: What would have happened to a company's stock if it had "spoken truthfully"? *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016); *see also* Jill E. Fisch, et al., *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 Tex. L. Rev. 553, 564–65 (2018). Whether it would have fallen or failed to rise, the defendant's decision to misinform the market had a clear effect.

Accordingly, there is no reason to treat "theories of 'inflation maintenance' and 'inflation introduction'" as "separate legal categories." *Vivendi*, 838 F.3d at 259. It doesn't matter whether fraudulent statements "initially introduce" inflation to a defendant's stock price, or instead "wrongfully prolong" the presence of that inflation. *FindWhat*, 568 F.3d at 1316. The latter situation is simply a "mirror image" of the former, but "in black ink, rather than red." *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010).

**2.** Far from fanciful, these facts describe most incidents of securities fraud.

Indeed, "the prototypical fraud case" doesn't involve a company's hatching a scheme to pump its share value up to new heights. Sale & Thompson, *Market Intermediation*, 93 Wash. U. L. Rev. at 524. Instead, a "majority" of cases unfold like this one did. Urska Velikonja, *Distortion Other Than Price Distortion*, 93 Wash U. L. Rev. 425, 426 (2015). A company experiences mounting troubles—or takes on a new risk, such as Goldman's decision to begin operating a business that either was, or might be perceived as being, self-dealing. To "avoid disappointing" the market's expectations, the company then attempts to conceal its problems by resorting to false assurances and denials—or by failing to reveal information necessary to make its statements true. Merritt B. Fox, *After* Dura*: Causation in Fraud-on-the Market Actions*, 31 J. Corp. L. 829, 852 (2006). The company's goal in doing so isn't to cause a spike in stock price, and it's unlikely to produce one. But its statements (or omissions) nevertheless *affect* the company's stock price—by keeping it higher than it would have been if the company had told the truth. Price-maintenance (or

inflation-maintenance) theories of price impact simply apply securities-fraud liability to these common facts.

To see that such price-maintenance cases are "ubiquitous," Jill E. Fisch, *The Trouble with* Basic*: Price Distortion After* Halliburton, 90 Wash. U. L. Rev. 895, 921–22 (2013), this Court need look no further than its own fraud-on-the-market cases.

In *Basic*, for instance, the plaintiff investors argued that the defendants' public, but false, denial of merger negotiations had artificially prevented the company's stock price from going up. *See* Jill E. Fisch, *The Future of Price Distortion in Federal Securities Litigation*, 10 Duke J. Const. L. & Pub. Pol'y 89, 93 (2015). Meanwhile, both *Halliburton* cases were based on allegations of misstatements that were designed to prevent a stock drop—not simply misstatements designed to inflate the company's stock price. *See* Sale & Thompson, *Market Intermediation*, 93 Wash. U. L. Rev. at 548. Indeed, on remand from *Halliburton II*, the district court certified a class premised on such a price-maintenance theory. *See id.* at 548. Likewise *Amgen* and *Dura*: They, too, involved price-maintenance claims. *See* Sale & Thompson, *Market Intermediation*, 93 Wash. U. L. Rev. at 548 n.329 (discussing the defendant's alleged confirmatory misrepresentations concerning profits, safety, and new product development).

Securities-fraud litigation in the lower courts reflects a similar composition; as of 2019, over seventy percent of securities-fraud cases decided in the district courts relied on a price-maintenance theory. *See* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077–78 (2019).

**3.** To be sure, that price-maintenance is ubiquitous doesn't mean it's correct. But Goldman is mistaken in suggesting that the lower courts are somehow confused. As the courts of appeals to consider the question have uniformly—and persuasively—explained, the theory captures exactly what this Court was concerned with in *Basic* and its progeny.

Take the Eleventh Circuit's decision in *FindWhat Investor Group.* There, the Eleventh Circuit explained that fraudulent statements that prolong a stock's inflated price "can be just as harmful to subsequent investors" as the statements that "create inflation in the first instance." *FindWhat*, 658 F.3d at 1315. Indeed, inflation-maintaining misstatements may pose graver risks to the market than inflation-generating ones. "Every investor who purchases at an inflated price," the court explained, "is at risk of losing the inflationary component of his investment when the truth underlying the misrepresentation comes to light." *Id.* And 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." *Id.* at 1316. Of course, some investors in these circumstances don't suffer. If investors manage to sell while the defendant's inflation-maintenance continues apace, they won't be able to recover for securities fraud, because the defendant's misstatements didn't cause them any loss. But those investors who do hold stocks they purchased at an inflated price are entitled to the presumption of reliance—whether their purchases came "at the beginning, middle, or end of the inflationary period." *Id.* at 1315.

The other courts to consider this question have reached similar conclusions. *See Vivendi*, 838 F.3d at 259 ("Securities-fraud defendants cannot avoid liability for an alleged misstatement merely because the misstatement is not associated with an uptick in inflation."); Schleicher, 618 F.3d at 683–84 (7th Cir. 2010) (similar); *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 352 (3d Cir. 2009) (similar); *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) (similar).[3]

And other plausible circumstances drive home the point. Suppose a company makes projections estimating its future performance, but learns that it won't be able to live up to them. And suppose the company then fails to reveal the problems, trying to maintain the flawed rosy picture it had previously presented. Because of price-maintenance theory, investors could hold the company accountable for that misconduct. But without it, having once done something to inflate its stock, the company would have license to lie thereafter.

In *Schleicher*, the Seventh Circuit warned of a similar risk. 618 F.3d at 683. There, the Seventh Circuit examined a plaintiff's claims that a failing company had made false statements not to inflate its stock, but to "slow the rate of [its] fall." *Id.* The court sensibly rejected the argument that the company could avoid securities-fraud liability simply because its stock failed to rise. To conclude otherwise would immunize failing companies against

[3] Although the Eighth Circuit in *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016), declined to apply price-maintenance theory, its logic centered on the facts of that case, not disapproval of price-maintenance as such. *See id.* at 782–83. Indeed, the court left the door open for the application of the theory to other facts. *See id.*

securities fraud—and give the color of the ink on the company's balance sheets dispositive significance. *See id.* at 683–84.

This Court should reject Goldman's effort to disturb this well-reasoned consensus.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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