No. 20-222

In the Supreme Court of the United States

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

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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In *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), this Court held that a defendant in a securities class action must have the "opportunity" to rebut the presumption of classwide reliance at class certification through evidence that an alleged misrepresentation did not affect the stock price. But the lower courts have transformed that "opportunity" into an exercise in futility. Respondents do not dispute that, of the more than 2,000 securities class actions filed since *Halliburton II*, defendants have rebutted the presumption by showing no price impact in only five cases—and almost never in inflation-maintenance cases. The decision below administers the *coup de grâce* to the ability to rebut the presumption: the court of appeals held that it could not consider the exceptionally generic nature of the alleged misstatements as evidence tending to disprove price impact.

Respondents urge the Court to leave the court of appeals' decision in place—or to issue an open-ended remand to what they perceive to be a sympathetic forum. But in the wake of the government's brief largely agreeing with petitioners, respondents resort to guerrilla warfare. They offer no serious legal arguments in defense of the decision below; in fact, they go for long stretches without citing any cases at all. Instead, they seek to distract the Court by casting doubt on whether the court of appeals refused to consider the generic nature of the alleged misstatements; attacking arguments that petitioners do not make; and renewing a baseless forfeiture argument that the Court has already rejected in granting certiorari. Respondents are wrong at every turn.

Hidden among respondents' many distractions are two critical concessions: first, that the "evidence of the statements' generality can be relevant to price impact, notwithstanding that it overlaps with materiality" (Br. 20); and second, that "a more-general statement is relatively less likely to affect a security's price than a more-specific statement" (Br. 26). Together, those new concessions compel the conclusion that the court of appeals erred by refusing to consider the generic nature of the alleged misstatements. On top of that, the court of appeals erroneously saddled petitioners with the burden of persuasion in rebutting the presumption first recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). That holding was contrary to the plain terms of Rule 301.

The Court should apply the correct legal standard in this case and reverse the court of appeals' judgment. The lower courts badly need guidance on how to conduct the price-impact inquiry mandated by *Halliburton II*, especially as the plaintiffs' bar increasingly invokes the inflation-maintenance theory (which limits defendants' ability to rebut the *Basic* presumption). This case affords the

Court with an unusual opportunity to provide such guidance: the exceptionally generic nature of the alleged misstatements, when considered with petitioners' overwhelming economic evidence of a lack of price impact and respondents' failure to present anything other than speculation, makes this case easy.

Virtually every public company in America makes general and aspirational statements in their annual reports and SEC filings, such as "[o]ur clients' interests always come first" and "[i]ntegrity and honesty are at the heart of our business." If respondents can obtain certification of a class action for $13 billion in alleged losses on the basis of such commonplace statements, then the only limit on what constitutes securities fraud will be the imagination of the plaintiffs' bar. That is why the stakes in this case are so high. The court of appeals' judgment should be reversed.

A. A Defendant In A Securities Class Action May Rebut The *Basic* Presumption Of Classwide Reliance By Pointing To The Generic Nature Of The Alleged Misstatements

In the decision below, the court of appeals held that the generic nature of the alleged misstatements has "nothing to do with" the Rule 23 inquiry, and it criticized the dissent's approach—which would have taken the generality of the statements into account—as "inject[ing] materiality into [the] Rule 23 analysis." Pet. App. 23a, 37a. By refusing to consider the nature of the alleged misstatements, the court of appeals contravened this Court's holding in *Halliburton II* that a defendant may rebut the *Basic* presumption with any evidence that an alleged misrepresentation did not affect the stock price, even if that evidence overlaps with a merits inquiry. See 573 U.S. at 279-283.

Having vigorously defended the court of appeals' holding at the certiorari stage, see Br. in Opp. 17-21, respondents beat a retreat. They now submit that a court *can* consider the generality of an alleged misrepresentation, but only through expert testimony. See Br. 19-40. That artificial limitation has no basis in law or logic. This Court should reject the court of appeals' erroneous holding.

1. As a preliminary matter, respondents now contend that the court of appeals did not "refuse[] to consider the generic nature of the alleged misstatements in determining price impact." Br. 38 (internal quotation marks omitted). Respondents did not raise that objection in opposing certiorari, and for good reason—it is inaccurate.

The court of appeals recognized that petitioners were "not formally asking for a materiality test." Pet. App. 22a. Relying on an expansive interpretation of *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), the court of appeals mischaracterized petitioners' argument about the generic nature of the statements as "materiality by another name." Pet. App. 24a. In the face of petitioners' argument that a court should "consider the nature of the statements in assessing price impact," Pet. C.A. Reply Br. 27; see pp. 11-12, *infra*, the court of appeals held that "[w]hether alleged misstatements are too general to demonstrate price impact has *nothing to do* with the issue of whether common questions predominate." Pet. App. 23a (emphasis added). As the government recognizes, the court thereby indicated that "the generic nature of alleged misstatements cannot even be considered as evidence when assessing whether the misstatements had an actual price impact." U.S. Br. 15.[1]

[1] The government suggests that the Court should remand because it is "unclear" whether the court of appeals meant what it said. See U.S. Br. 26. But the government does not identify the source of the purported ambiguity.

The court of appeals' refusal to consider the nature of the statements is confirmed by the back-and-forth between the majority and the dissent. Judge Sullivan accused the majority of "ignor[ing] the alleged misrepresentations when assessing price impact" and "strain[ing] to avoid looking at the statements themselves for fear that such a review amounts to 'smuggling materiality into Rule 23.'" Pet. App. 44a (quoting *id.* at 22a). The dissent rejected the majority's "rigid compartmentalization" of the materiality and price-impact inquiries and reasoned that the approach was not "required by *Amgen*." *Id.* at 45a. And the dissent correctly explained that, in assessing price impact, a court should "consider the nature of the alleged misstatements," "coupled with" the expert evidence, even if "[the] inquiry 'resembles' an assessment of materiality." *Id.* at 44a, 45a.

The majority "viewed things differently." U.S. Br. 24. It devoted an entire section of its opinion to responding to the dissent—without ever accusing the dissent of mischaracterizing its holding. The majority could have said it was not "ignor[ing]," "strain[ing] to avoid," or refusing to "consider" the nature of the statements. Pet. App. 44a. Instead, the majority doubled down, claiming that the dissent's approach would "revisit the question of whether the statements are too general as a matter of law to be deemed material" and would "inject materiality into [the] Rule 23 analysis." *Id.* at 37a.

In short, the court of appeals chose to characterize petitioners' whole argument about the generic nature of the statements as a materiality argument that *Amgen* "preclud[ed]" it from "reaching." Pet. App. 38a. The court of appeals thus unambiguously held that the generic nature of the statements cannot be considered even as evidence of the absence of price impact.

2. The court of appeals' refusal to consider the nature of the statements was erroneous. The generic nature of a statement is critical evidence on price impact.

Respondents now concede—for the first time—that "evidence of the statements' generality can be relevant to price impact, notwithstanding that it overlaps with materiality." Br. 20. From that concession, it naturally follows that a court should consider the nature of a statement in assessing price impact. Respondents nonetheless attempt to restrict the *manner* in which a court can consider the nature of a statement at class certification, contending that a court can do so only through "evidence such as expert testimony." Br. 26. That contention is unfounded.

a. As a preliminary matter, respondents wrongly suggest that an alleged misstatement is not "actual evidence." Br. 15. But in a securities-fraud case, the alleged misstatement is unquestionably essential evidence: plaintiffs could never prove their claims without identifying—and then introducing—the actionable misrepresentation. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

As to *how* a court should consider that evidence, petitioners and the government contend that the generic nature of an alleged misstatement is important evidence of the absence of price impact. See Pet. Br. 26-30; U.S. Br. 19-26. For their part, respondents acknowledge the "truism" that "a more-general statement is relatively less likely to affect a security's price than a more-specific statement." Br. 26. But fastening on a single line in petitioners' brief, they repeatedly accuse petitioners of asking a court to rely only on "common sense" in evaluating the nature of an alleged misstatement. Br. 26-34.

To be clear, petitioners do not contend that a judge should determine the existence of price impact based on gut instinct. Instead, petitioners maintain that a court

should analyze all of the evidence relevant to price impact, weighing the evidence in a classic exercise of the judicial function—and that a court should not "set aside common sense" in doing so. Pet. Br. 27; see *id.* at 43-48.

Respondents provide no support for the notion that a court should ignore the *likely* effect of an alleged misstatement in determining its *actual* effect. It does not take a doctorate in econometrics to understand that exceptionally generic statements such as "[o]ur clients' interests always come first" and "[i]ntegrity and honesty are at the heart of our business" very likely did not affect the stock price.

The alleged misstatements here are of a piece with those that courts have uniformly and for decades deemed "too general to cause a reasonable investor to rely upon them." *City of Pontiac Policemen's & Firemen's Retirement System* v. *UBS AG*, 752 F.3d 173, 177, 183 (2d Cir. 2014); see *Employees' Retirement System* v. *Whole Foods Market, Inc.*, 905 F.3d 892, 902 (5th Cir. 2018); *Carvelli* v. *Ocwen Financial Corp.*, 934 F.3d 1307, 1318-1322 (11th Cir. 2019); Pet. 21 (citing additional cases). That venerable body of law—which respondents do not challenge—rests on the rationale that general statements, ubiquitous within a given industry, do not provide concrete information that would affect a reasonable investor's assessment of value. See *ECA* v. *JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009). Even if a topic—such as "integrity"—is "undeniably important," a statement about that topic can still be "so general that a reasonable investor would not depend on it as a guarantee." *Ibid.* As the government explains, a court may "consider the probable reactions of a hypothetical reasonable investor in assessing the likely cause of a movement in the price of a security." U.S. Br. 26.

b. Respondents submit that a court should consider the generic nature of an alleged misrepresentation only through expert testimony ("almost without exception"—whatever that means). Br. 26. Respondents cite no legal authority—not even one case—supporting their arbitrary limitation. See Br. 26-34.

Respondents' proposed limitation contravenes this Court's case law applicable to securities class actions. In *Halliburton II*, the Court refused "artificially [to] limit" the evidence that a defendant may use to rebut the *Basic* presumption at class certification. 573 U.S. at 283-284. And the Court's references to "direct" evidence simply made clear that defendants could introduce evidence *directly* relevant to price impact, as compared to *indirect* evidence used to disprove the prerequisites for the presumption of price impact. See 573 U.S. at 280-282. More broadly, respondents' limitation on the type of evidence a court can consider at the class-certification stage is contrary to the "rigorous analysis" mandated by Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011) (citation omitted).

In any event, to the extent respondents contend that a court should consider the generic nature of an alleged misrepresentation only through expert testimony, that contention does not aid them here. As respondents concede (Br. 31), petitioners *did* introduce an expert who opined on the nature of the statements. Dr. Laura Starks demonstrated that generic statements such as those here were pervasive in the market and that analysts did not view them as pertinent to investment decisions. See J.A. 596-605, 611-612, 618-620. If, as respondents acknowledge, a defendant can present expert testimony that "the statements were so generalized that the market regarded them as irrelevant," Br. 31, it is hard to see why Dr. Starks' testimony was insufficient (even if petitioners did

not cite it as often as respondents think they should have, see Br. 35 n.8).

c. Respondents not only fail to defend the court of appeals' actual holding, but also ignore several of petitioners' central arguments.

Most notably, respondents do not offer a coherent interpretation of the Court's decisions in *Amgen* and *Halliburton II*. It is rare to see a brief in this Court that makes so little effort to address the relevant case law. In response to petitioners' effort to reconcile the Court's decisions (Pet. Br. 30-33), respondents have virtually nothing to say, other than that "*Amgen* and *Halliburton II* hold that courts may not determine materiality on class certification." Br. 32. Respondents all but ignore that *Halliburton II* requires courts to consider *all* relevant evidence of price impact, even if the evidence would also be relevant to the materiality inquiry. See 573 U.S. at 279-283. The court of appeals made the same error: it "embrac[ed] *Amgen* at the expense of *Halliburton II*." *In re Allstate Corp. Securities Litigation*, 966 F.3d 595, 609 (7th Cir. 2020).

Respondents also avoid discussing the inflation-maintenance theory, even though that theory was central to the certification of the class. By definition, plaintiffs relying on that theory have no evidence that the alleged misstatement moved the stock price when made, so the only evidence of price impact can come from an inference drawn from a back-end price drop. Respondents do not answer petitioners' argument that, when the inflation-maintenance theory is invoked, a court should carefully scrutinize the nature of the alleged misstatement, and compare it to the nature of the alleged "corrective disclosure," to determine whether the back-end price drop in fact supports an inference of front-end price inflation. As

petitioners have explained, the more general the supposedly inflation-maintaining statement, the less likely an alleged "corrective disclosure" actually corrected the statement, and thus the less likely the price drop was attributable to the alleged correction. See Pet. Br. 27-29.

In addition, respondents have nothing to say about the practical consequences of the court of appeals' rule. They do not dispute that event-driven securities litigation is on the rise; that plaintiffs increasingly invoke the inflation-maintenance theory; that lower courts have interpreted that theory to make class certification nearly automatic; that securities class actions almost always settle before trial; that the costs to public companies to defend such actions and pay out settlements on meritless claims are enormous; and that defendants have rebutted the *Basic* presumption by showing no price impact in only five of the thousands of cases since *Halliburton II*. See Pet. Br. 33-37. It is no wonder that the most prolific plaintiffs' firms have rallied to respondents' side with amicus briefs.

Respondents blithely suggest that the current state of affairs is nothing to worry about, claiming that courts routinely dismiss cases if the misrepresentations are "immaterial as a matter of law" and that the remaining cases are "ordinarily a natural fit for class certification." Br. 21-22. But this Court has never said that certification of a securities class action should "ordinarily" be granted. And the fact that an action has survived a motion to dismiss on materiality is no reason to exempt it from the "rigorous analysis" required at class certification. *Wal-Mart*, 564 U.S. at 351 (citation omitted).[2]

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[2] In this case, the district court denied petitioners' motion to dismiss on materiality, determining that respondents had sufficiently pleaded that element. See Pet. App. 7a. Should the case proceed, petitioners intend to argue (at summary judgment and then, if necessary, at trial) that the alleged misstatements were not material.

3. In a last-ditch effort to convince this Court not to disturb the court of appeals' decision on the first question presented, respondents offer a scattershot series of forfeiture arguments. In particular, respondents assert that petitioners "never asked" the court of appeals to consider the nature of the alleged misstatements as evidence relevant to the price-impact inquiry, Br. 38, and that petitioners only briefly made that argument at the certiorari stage before this Court, Br. 36. Those assertions are unfounded.

a. Working backward from this Court: respondents contend that petitioners primarily argued at the certiorari stage that the alleged misstatements had no price impact because they were "immaterial as a matter of law" and only glancingly argued that the alleged misstatements should be taken into account in the price-impact inquiry. Br. 19, 36. That is incorrect. In their petition for certiorari, petitioners made clear that they were objecting to the court of appeals' failure to "consider[] evidence of the generic nature of the alleged misstatements when assessing price impact." Pet. 20; see Pet. 17-21. When respondents nevertheless addressed both arguments in their brief in opposition, see Br. in Opp. 17-21, petitioners reiterated in their reply brief that they were "not asking for a ruling on the merits issue of materiality" but were arguing only that "a defendant is entitled to point to the generic nature of the alleged misstatements as part of its showing of no price impact." Reply Br. 3. No one, least of all respondents, could have been under any illusion about petitioners' argument.

b. As for the court of appeals: it held (over a dissent and without any suggestion of forfeiture) that the generic nature of the statements could not be considered even as evidence of the absence of price impact. See pp. 4-5, *supra*. Because the court of appeals passed on that question,

it is properly before the Court regardless of whether petitioners pressed the argument below. See, *e.g.*, *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

In any event, petitioners repeatedly asked the court of appeals to consider the nature of the alleged misstatements in assessing price impact. Indeed, that was a central focus of the oral argument, where petitioners' counsel repeatedly asserted that the district court "did not consider the actual statements" and that "[t]he statements themselves are evidence." C.A. Oral Arg. 1:45-9:00; see, *e.g.*, Pet. C.A. Br. 47, 48, 60-61; Pet. C.A. Reply Br. 18-19, 22-25, 27. Perhaps for that reason, the Court had no difficulty in rejecting respondents' forfeiture argument when they made it at the certiorari stage, see Br. in Opp. 24-25; Reply Br. 10, and there is no reason to accept it now.

To be sure, petitioners also made additional arguments below—including arguing, at points, that the generic nature of the alleged misstatements should be *dispositive* of the price-impact inquiry. To the extent petitioners did so, it in no way precludes them from arguing, and this Court from holding, that a court must at least *consider* the nature of the alleged misstatements in assessing price impact. The court of appeals' contrary holding, which respondents no longer truly defend, was erroneous.

B. The Plaintiffs In A Securities Class Action Retain The Ultimate Burden Of Persuasion When Invoking The *Basic* Presumption

Federal Rule of Evidence 301 is a binding enactment of Congress, and respondents offer no valid reason why it does not apply to the *Basic* presumption. Respondents make little effort to square their argument with the rule's

text. Even if the Court had the authority to shift the burden of persuasion on the issue of price impact, it has not done so to date and should not do so now. The court of appeals' holding that a defendant bears the burden of persuasion in rebutting the *Basic* presumption was erroneous.

1. Respondents have no good answer to Rule 301's text. Their primary textual argument is that the rule's second sentence—which states that "*this rule* does not shift the burden of persuasion"—demonstrates that Congress did not intend to limit courts' ability to "establish burden-shifting regimes that shift the burden of persuasion upon proof of predicate facts." Br. 46. But that sentence is far more naturally read to clarify that the rule shifts *only* the burden of production and not the burden of persuasion as well. And the words "this rule" simply acknowledge that other rules govern presumptions too. See, *e.g.*, Fed. R. Evid. 302. If Congress had wanted to preserve the authority of courts to create presumptions that shift burdens of persuasion, it could have said as much in the first sentence. But that sentence makes clear that the rule applies "unless a federal statute or these rules"—not courts—"provide otherwise."

Respondents' remaining textual arguments are even less persuasive. *First*, they suggest that the *Basic* rule is not a "presumption" within the meaning of Rule 301, at least at class certification, because it "is not being used to presume the existence of a fact based on proof of predicate facts." Br. 49. That is a puzzling argument, not least because the Court in *Basic* described the presumption of reliance as a "presumption" in the context of class certification—and specifically cited Rule 301 in doing so. See 485 U.S. at 245; see also *Halliburton II*, 573 U.S. at 279 (characterizing the *Basic* presumption as "just that" (citation omitted)). It would be odd for the presumption of reliance

to operate as a "presumption" (subject to Rule 301) at the merits stage but not at class certification. Of course, the *Basic* presumption satisfies respondents' own test for what constitutes a "presumption": here, the "predicate facts" are that the alleged misrepresentation was public and that the stock traded in an efficient market, and the "presumed fact" is that the misrepresentation had price impact. See *ibid.*

Second, respondents protest that a statute "provide[s]" that a defendant bears the burden of persuasion because Congress has "enacted legislation that presumes the continued existence of private securities class actions." Br. 50. But Congress has never recognized the private cause of action or the judicially created presumption that assists plaintiffs in bringing that cause of action, much less provided that the defendant bears the burden of persuasion in rebutting the presumption. See Pub. L. No. 104-67, § 203, 109 Stat. 762.

2. Moving away from the rule's text, respondents argue that Congress cannot have meant what it said in Rule 301 because a handful of cases establish that courts have broad authority to assign burdens. Br. 48. But those cases do not suggest that the Court has the authority to shift the burden of persuasion in the context of the *Basic* presumption.

Respondents principally rely on a footnote in *NLRB* v. *Transportation Management Corporation*, 462 U.S. 393 (1983), stating that Rule 301 "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible." *Id.* at 403 n.7. But *Transportation Management* involved an "affirmative defense," *id.* at 402, not a presumption—*i.e.*, a rule that predicate facts trigger the presumption of another fact in the absence of contrary ev-

idence. At most, the Court was stating the uncontroversial proposition that Rule 301 did not "restrict[]" a court's authority to shift the burden of persuasion when a presumption is not at issue—and that, even in those circumstances, a court could shift the burden only "in a manner that would otherwise be permissible." *Id.* at 403 n.7. In any event, the footnote does not engage with the rule's text, and the Court has since cast doubt on its precedential value. See *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U.S. 267, 277 (1994). *Transportation Management* thus provides a thin basis for disregarding Rule 301.

Respondents' remaining cases do not support the proposition that the Court should refuse to apply Rule 301 here. See Br. 47-48. Respondents cite only three other cases in which the Court has shifted the burden of persuasion, and none of those cases cited Rule 301. One case is a constitutional case decided before Rule 301 was enacted. See *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973). The other two involve pattern-or-practice claims under Title VII of the Civil Rights Act. See *Teamsters* v. *United States*, 431 U.S. 324 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). But Title VII includes a "detailed remedial scheme," under which a court cannot order certain remedies if the employer shows that it took an adverse employment action for any reason other than the discrimination. *Wal-Mart*, 564 U.S. at 366. Thus, the Court has "established" a burden-shifting framework for pattern-or-practice cases that "gives effect to [those] statutory requirements." *Ibid.* (citing *Teamsters*, 431 U.S. at 361). Critically, there are no such statutory requirements here.

3. Respondents have no answer to the fact that *Basic* itself cited Rule 301 in establishing the presumption of reliance. See Br. 41 n.9. Respondents attempt to brush off

that citation by pointing out that the Court also cited the advisory committee notes accompanying the initial proposed rule, which they say "conspicuously" indicated the Court's view that "presumptions shift the burden of persuasion." *Ibid.* But as other notes make clear, Congress expressly *rejected* that initial proposal more than a decade before *Basic*; the final rule resolved a longstanding debate about the nature of presumptions in favor of the view that presumptions "do[] *not* shift the burden of persuasion." 28 U.S.C. App., p. 687 (emphasis added).

Respondents nevertheless doggedly assert that *Basic* and *Halliburton II* already resolved the question, arguing that the text of Rule 301 must give way to the Court's use of the word "show" in those opinions. See Br. 40-41. But that use is perfectly consistent with petitioners' position that a defendant bears only the burden of production: a "showing" can naturally mean a production of evidence. See, *e.g.*, *United States* v. *Baker Hughes Inc.*, 908 F.2d 981, 983, 991 (D.C. Cir. 1990) (Thomas, J.). As the Court made clear in *Halliburton II*, the defendant can "*defeat* the presumption at the class certification stage *through evidence* that the misrepresentation did not in fact affect the stock price." 573 U.S. at 279 (emphases added). If anything, that language affirmatively suggests that the defendant bears only the burden of production.

Respondents assert that the Court "necessarily rejected" the same argument in *Halliburton II* (Br. 44 & n.12), but they fail to note that the defendants there relied on Rule 301 to argue that a court must allow a defendant's "price-impact rebuttal" at the class-certification stage. Pet. Br. at 55, *Halliburton II*, *supra* (No. 13-317). While the Court did not mention Rule 301, it *agreed* that a defendant can rebut the presumption with evidence relevant to price impact; it certainly did not reject the interpretation of the rule petitioners offer here. See 573 U.S. at 279.

Relatedly, respondents claim that the Court would have to "overrul[e] *Halliburton II*" to hold that plaintiffs "originally" have the burden of persuasion under Rule 301. Br. 42. But the Court held only that plaintiffs need not prove price impact to invoke the presumption of reliance; it never questioned that plaintiffs have the burden to "satisfy the reliance element" more generally. *Halliburton II*, 573 U.S. at 268. Respondents also contend that there would be "little difference" between the rule rejected in *Halliburton II* and a rule that places on plaintiffs the burden of persuasion after a defendant meets the burden of production. Br. 43. But by requiring a defendant to produce evidence relevant to price impact, the Rule 301 framework ensures that plaintiffs do not bear the initial costs of marshaling such evidence. The *Basic* presumption did not give plaintiffs a *certain* path to class certification—just an easier one.

4. After all of that, if the Court nevertheless concludes that it has the authority to depart from Rule 301, it should hold that plaintiffs bear the burden of persuasion on the issue of price impact once a defendant meets its burden of production. That approach would bring the application of the *Basic* presumption in line with the congressionally approved policy of Rule 301 and it would ensure that the "party seeking * * * certification" in a securities class action—as in any other class action—must "affirmatively demonstrate" that the class satisfies the requirements of Rule 23. *Wal-Mart*, 564 U.S. at 350. Most importantly, it would ensure that, as promised by *Halliburton II*, a defendant has a meaningful opportunity to rebut what has become, in practice, a virtually irrebuttable presumption. See p. 10, *supra*.

C. The Court Should Reverse The Judgment Below

If the Court agrees that either of the court of appeals' holdings was erroneous, it should proceed to apply the correct legal framework and conclude that petitioners met their burden of production and, if applicable, their burden of persuasion on the issue of price impact.

1. The lower courts desperately need guidance on how to navigate this Court's decisions and properly to apply the *Basic* presumption. See *Allstate*, 966 F.3d at 608-609. Respondents do not dispute that there have been only five cases since *Halliburton II* in which defendants have successfully rebutted the presumption by showing no price impact. See Pet. Br. 35. And because plaintiffs increasingly invoke the inflation-maintenance theory, the evidence that would most directly disprove price impact—the absence of any price movement when the statements were made—is deemed insignificant. By cutting off consideration of the nature of the alleged misstatements, the court of appeals' opinion gives the plaintiffs' bar a roadmap to certification: plaintiffs need only identify a price drop, some bromides from the company, and an economist to quibble with the defendant's evidence of the absence of price impact.

The Court may never have a better opportunity to provide such guidance to lower courts. Securities class actions almost never go to trial, see Pet. 28, and interlocutory review of class-certification decisions is available only on a discretionary basis, see Fed. R. Civ. P. 23(f). As it has in other contexts, the Court should take this opportunity to "explain" how to conduct the relevant inquiry by "applying" the correct legal standard "to the case at hand." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 153 (1999).

2. Under the correct legal framework, this is an easy case. Even if petitioners possessed the ultimate burden

of persuasion, they rebutted the *Basic* presumption by presenting uncontradicted evidence that the exceptionally generic statements at issue had no price impact. See Pet. Br. 43-48. Respondents have no answer to that evidence; in fact, they take pains not to engage with it.

a. Respondents do not seriously dispute that the alleged misstatements were exceptionally generic. Contrary to respondents' insinuation (Br. 6-7), those statements were not made by Goldman Sachs in the specific context of its CDO business. Rather, the statements were repeated in annual reports and SEC filings, both before and after the class period, and were not tied to any specific business or transaction. See J.A. 27-29, 31-33; Pet. Br. 10-11. As Dr. Starks explained, similar statements are "pervasive" in corporate communications, both by Goldman Sachs' competitors and by other public companies. See J.A. 596-605; C.A. App. 5156-5175.

b. The extreme generality of the alleged misstatements makes it exceedingly unlikely that the statements had any impact on the stock price. That alone weighs heavily in the price-impact analysis, and the additional evidence necessary to rebut the presumption is correspondingly reduced. By any measure, petitioners' evidence was sufficient: their experts showed not only that the price drops following the alleged "corrective disclosures" were not caused by corrections of the misstatements, but also that news of government enforcement action caused the entirety of the price drops. See Pet. Br. 45-46.

In response to that overwhelming expert testimony, what did respondents offer? Nothing. In particular, respondents "offered no hard evidence, expert or otherwise," to refute petitioners' evidence that the price drops following the corrective disclosures were not attributable to the misstatements. Pet. App. 45a-46a (Sullivan, J., dis-

senting). Before this Court, respondents do not even attempt to defend the opinions offered by their only expert, Dr. John Finnerty. But Dr. Finnerty opined only that Goldman Sachs' stock traded in an efficient market and that the stock price dropped on the dates of the alleged "corrective disclosures." See Pet. Br. 46-47; J.A. 373-374. As to the *cause* of those drops, Dr. Finnerty merely speculated—without any empirical support—that the drops were substantially caused by a "series of revelations concerning Goldman's alleged fraudulent conduct" in its CDO business. J.A. 642. Dr. Finnerty conducted no analysis to "differentiat[e]" between any price impact from the correction of the alleged misstatements and the "price impact of the enforcement actions." Pet. App. 42a (Sullivan, J., dissenting).

c. As they did below, respondents pick at the edges of petitioners' expert testimony with unfounded criticisms of the experts' methodologies. See Br. 24-26, 35-36. But they fail to identify any affirmative evidence that refutes petitioners' strong showing of the absence of price impact, particularly in light of the exceptionally generic nature of the alleged misstatements.

Critically, respondents offer no valid response to Dr. Paul Gompers' demonstration that Goldman Sachs' stock price did not move on any of the 36 dates on which the press reported that Goldman Sachs had conflicts of interest, showing that the subsequent stock-price drops accompanying the alleged "corrective disclosures" were in no part attributable to the alleged misstatements. See J.A. 442-453, 467-469, 472-473. Respondents contend that the news reports were less detailed than the allegations in the SEC enforcement action. See Br. 24-25. But respondents do not dispute that the news reports themselves contained specific allegations about Goldman Sachs' conflicts, including in the very CDOs on which respondents base

their claims. See C.A. App. 4511-4519, 5218-5221. It is hard to see how any additional details could further "correct" the exceptionally generic alleged misstatements, such as the statement that Goldman Sachs had extensive procedures and controls to address conflicts of interest. See Pet. App. 4a-5a.

Respondents also have no valid response to Dr. Stephen Choi's demonstration that the stock drops were entirely attributable to the news of the enforcement actions. See J.A. 526-571. They speculate that his conclusion makes no "legal difference" because the stock drops are "naturally attributable (at least in part)" to Goldman Sachs' alleged misstatements. Br. 24. But respondents cite no evidence in support of that proposition. And Dr. Choi's conclusion is supported by the fact that the statements themselves do not contain the same informational content as the alleged "corrective disclosures." See Pet. Br. 44.

When petitioners' powerful expert testimony is coupled with the exceptionally generic nature of the alleged misstatements and respondents' failure to present any evidence that the price drops were attributable to corrections of those statements, the only possible conclusion is that petitioners have rebutted the *Basic* presumption. If not, *Halliburton II*'s "opportunity" to rebut the presumption is simply a mirage. The Court should order the decertification of the class to provide guidance to the lower courts and to restore the careful balance struck by *Halliburton II*.

* * * * *

The judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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