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 Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a securities class action defendant may defeat class certification by showing that its statements were immaterial, so long as it casts the argument as going toward price impact rather than materiality.

2. Whether defendants bear the burden of production or persuasion on price impact at the class certification stage.

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INTRODUCTION

In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), this Court held that securities fraud plaintiffs are "not required to prove the materiality of [a defendant's] alleged misrepresentations and omissions at the class-certification stage." *Id*. at 469-70. That is because a defendant's assertion that a statement is immaterial, if accepted, will defeat the claims of *all* class members – a point in favor of class adjudication, not against it. *Id*. at 467-68. In *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), this Court reaffirmed *Amgen*'s holding, explaining that "materiality . . . should be left to the merits stage, because it does not bear on the predominance requirement of [Fed. R. Civ. P.] 23(b)(3)." *Id*. at 282.

Goldman asks this Court to grant certiorari in this case to hold the opposite – *i.e.*, that a defendant *can* defeat class certification by showing that its challenged statements are immaterial, so long as it labels that argument a "price impact," rather than a "materiality," defense.

No court has ever accepted that position, and Goldman does not even try to assert a circuit conflict. To the extent Goldman argues that materiality should at least be *considered* as relevant evidence at the class certification stage, there is no conflict on that version of the question either. And, in any event, Goldman did not make that argument below, either to the district court or the court of appeals, probably because it would not have made a difference to the outcome in this case – the district court found that Goldman's other alleged evidence on price impact was wholly unconvincing for fact-bound reasons the Second Circuit affirmed on appeal and Goldman does not challenge here.

Goldman also asks the Court to decide whether a defendant has the burden of production or persuasion on price impact. Pet. i. This Court has previously denied certiorari on that question. *See Barclays PLC v. Waggoner*, No. 17-1209. The petition provides no reason for a different result here. There is still no circuit conflict. And Goldman's assertion that defendants bear only the burden of production still cannot be reconciled with *Halliburton II*. Moreover, this case would be an especially poor vehicle for deciding the question, even if it warranted review. The district court effectively applied the rule Goldman advocates and, moreover, found Goldman's evidence so lacking that the nature of its burden had no effect on the outcome.

Finally, neither question presents an issue of recurring importance. A defendant's inability to raise a materiality objection at class certification will not matter if district courts do their duty and dismiss immaterial claims at the motion-to-dismiss stage (which inevitably precedes the class certification decision in securities cases). Despite its breathless claims that the Second Circuit's decision "will have devastating practical consequences for public companies," Pet. 5, Goldman points to no evidence that district courts routinely allow immaterial claims to proceed to class certification. At the same time, the precise nature of a defendant's burden on price impact has arisen infrequently in actual litigation, no doubt because the distinction only matters in cases (unlike this one) in which the evidence is close. Accordingly, there is no need for this Court to consider either question in advance of a meaningful circuit conflict.

STATEMENT OF THE CASE

I. Factual Background

Goldman Sachs is a large investment bank that engages in securities offerings, provides merger and acquisitions advice, and acts as a dealer in making a market in securities. In addition, in recent years, it began to create collateralized debt obligations (CDOs), which are securities that pool assets, such as mortgages and mortgage derivatives, that produce a cash flow. Goldman clients who believe the underlying assets will perform well can purchase the securities as "long" investments, expecting the CDOs to produce income. Clients who believe the underlying assets may perform poorly can take "short" positions on the CDOs and make money if the CDO assets fail. A "synthetic CDO" permits an investor to assume the risk of the long or short side of an existing CDO by contract without actually owning the underlying securities.[1] It is a pure bet on whether the assets in the CDO go up or down in value.

Importantly, Goldman also invests its own money in securities tied to the securitized mortgage market, including CDOs. Goldman may take short positions on its CDOs, putting it in a position to profit if the underlying assets perform poorly, even while its clients who bought the CDOs are losing money. Of course, betting against the performance of securities it

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[1] A synthetic CDO is a CDO that invests in credit default swaps or other noncash assets to obtain an exposure to a portfolio of fixed income assets.

is selling to its clients puts the firm in a position where its own financial interests are adverse to its clients'. That creates not only conflicts, but also client-relations problems, potential legal exposure, and ultimately reputational issues, therefore requiring scrupulous disclosure of the conflicts and the associated risks.

A. Goldman's Statements

Goldman recognized that its business practices created substantial risks and, therefore, it acknowledged in its Form 10-K filings with the Securities and Exchange Commission (SEC) that "[c]onflicts of interest are increasing and a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses." C.A. App. 5716. Violations of conflict-of-interest rules would not only create potential liability with respect to the specific investments involved. They would also diminish Goldman's reputation and credibility with its clients across the breadth of its operations, a reputation that Goldman emphasized was "one of our most important assets." *Ibid*. Indeed, analysts repeatedly explained that Goldman's stock traded at a premium compared to its peers because of the firm's reputation for integrity and its ability to manage conflicts among its various departments. *See, e.g.*, *id.* at 3220 (Merrill Lynch, Mar. 13, 2007); *id.* at 8008 (Buckingham Rsch. Grp., June 17, 2008).

Goldman sought to reassure its stockholders that these conflict-related risks were well-controlled. First, and most importantly, it claimed in its Form 10-K that it has "extensive procedures and controls that are designed to identify and address conflicts of interest."

Pet. App. 4a. Second, it represented in its Annual Reports that "[o]ur clients' interests always come first," *ibid.*, conveying that it would never intentionally subordinate its clients' financial interests to its own. Instead, it insisted, "[i]ntegrity and honesty are at the heart of our business." *Id.* at 5a.

B. Goldman's Undisclosed Conflicts

These statements were false and misleading. Starting in 2006, the firm engaged in a series of egregious violations of its clients' trust, creating CDOs (or synthetic CDOs) that were designed to benefit only one of Goldman's favored clients or were structured to reduce Goldman's "long" exposure to the subprime mortgage market by allowing it to short securities at its clients' expense, all while concealing and misrepresenting those facts to its clients who purchased the securities. Two deals are representative.

Abacus CDO. In mid-to-late 2006, Goldman was asked by a favored client, hedge fund Paulson & Co., to structure a transaction that would allow Paulson to short certain residential mortgage-backed securities (RMBS). Pet. App. 5a; C.A. App. 58. Goldman allowed Paulson to select underlying assets for the Abacus portfolio that Paulson believed were particularly unlikely to perform. Pet. App. 5a; C.A. App. 58, 60-63. Goldman then maneuvered to conceal that critical fact by appointing a third party, ACA Capital Management, LLC (ACA), as the nominal portfolio selection agent, and later convinced ACA to become the largest investor in Abacus. C.A. App. 61. Goldman deceived ACA about Paulson's short position in

Abacus, leading it to believe that Paulson was investing in the Abacus equity and thus had interests aligned with ACA in the CDO. *Id.* at 61, 66-67. And in marketing the resulting synthetic CDO to other investors, Goldman did not disclose Paulson's involvement in picking assets, much less that Paulson made those selections while intending to short Abacus. *Id.* at 66.

When, as expected, the underlying securities failed catastrophically, Goldman's customers lost more than $1 billion, while Paulson, as the CDO's sole short, reaped a corresponding profit of the same amount. Pet. App. 5a.

Hudson CDO. Around the same time, Goldman instructed its mortgage department to massively reduce its long position on the subprime mortgage market. In response, the firm created the Hudson synthetic CDO as a vehicle for its "structured exit" from some of its troubled investments. C.A. App. 99. Goldman used the CDO to short $1.2 billion of mortgage-related assets from its own inventory, as well as another $800 million in other subprime RMBS securities. *Ibid*. Goldman then proceeded to sell the long side of the security to its clients without revealing its purpose and structure was to reduce Goldman's proprietary risk. *Ibid*. In fact, Goldman represented that the CDO was "sourced from the Street," and was "not a Balance Sheet CDO," implying Goldman had obtained the assets from third parties, when, in truth, the assets were entirely from Goldman's own inventory. *Id.* at 206. Goldman's marketing booklet then represented that "Goldman Sachs has aligned incentives with the Hudson program by investing in a portion of equity," without disclosing that its $6 million long position was a mere fig leaf, representing only 1/300th the size of its short position. *Id.* at 101.

Goldman ultimately pocketed nearly $1.7 billion in gross revenues from its short position in Hudson at the direct expense of its client investors. C.A. App. 106. In 2015, a FINRA arbitration panel found that Goldman made "material omissions and misstatements in the marketing materials" for Hudson, which "*masked a significant conflict of interest*." *Nat'l Austl. Bank Ltd. v. Goldman, Sachs & Co.*, 2015 FINRA Arb. LEXIS 455 (May 7, 2015) (emphasis added).

C. Initial Press Suspicions And Goldman's False Denials

Because of its dramatically reduced long position on the mortgage market, Goldman survived, even thrived, while the housing market crashed and its competitors lost billions. Some in the press began to raise questions about Goldman's business practices, wondering how Goldman could sell its clients securities the firm was also shorting. Goldman responded by assuring the market that it had undertaken no undisclosed or otherwise improper conflicts with its clients. For example, one of the statements alleged to constitute securities fraud in this case came in response to a *New York Times* article about Goldman's profitable shorting of the mortgage market. *See* C.A. App. 82-84, 89 (Compl. ¶¶123-26, 139-42). The firm issued a press statement falsely representing, among other things, that its short position was "fully disclosed and well known to investors." *Id.* at 83.

In the absence of any concrete evidence that these denials were false, Goldman's stock price remained buoyed.

D. Disclosure Of The Truth

Beginning in April 2010, however, reports of government lawsuits, investigations, and the facts underlying them revealed that Goldman's representations about its conflict systems and policies were materially false and misleading, and contained material omissions.

On April 16, 2010, the SEC filed a civil lawsuit charging Goldman with securities fraud in relation to the Abacus CDO. Pet. App. 80a-81a. The 22-page complaint provided detailed allegations that had not previously been reported and supporting evidence, such as internal emails, that had previously been undisclosed. *See id.* at 55a-56a. Goldman would later settle the suit for $550 million and admit to misconduct – namely, that its representations regarding Abacus and Paulson's role were "incomplete" and "a mistake." C.A. App. 3064; *see* Pet. App. 5a; C.A. App. 69.

After the SEC's suit and news broke of other government investigations into the Hudson CDO and other transactions, Goldman's stock price fell precipitously. Analysts and others explained that the revelations affected Goldman's worth not simply because the suit and investigations could result in substantial costs and penalties. As one market observer wrote, the "greatest penalty for Goldman is not the financial damages – Goldman is enormously wealthy – but the reputational damage." C.A. App. 5466. A Citigroup analyst wrote that because

"Goldman's reputation is one of the firm's greatest assets," the revelations "could have significant detrimental effect across all of the firm's business." *Id.* at 4668. A column in the *Wall Street Journal* likewise noted that the "premium" in Goldman's stock price "has dissolved because the market is worried, not about lawsuits or politics, but about Goldman's core business," which depended on "the perception that it . . . manag[es] the conflicts to the satisfaction of its clients." *Id.* at 3648.

II. Procedural Background

Plaintiffs subsequently brought this litigation, alleging violations of Sections 10(b) (15 U.S.C. § 78j(b)) and 20(a) (15 U.S.C. § 78t(a)) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. § 78a *et seq.*), and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5). Pet. App. 47a. Plaintiffs asserted an "inflation maintenance" theory (also sometimes called a "price maintenance" theory), explaining that rather than causing an increase in Goldman's stock price, the false and misleading statements during the class period prevented the company's stock price from falling to the level it would have if the market had been told the truth. *Id.* at 11a & n.6.

A. Denial Of Motion To Dismiss

The district court denied Goldman's motion to dismiss in relevant part. C.A. App. 167-74. Of greatest relevance here, the court rejected Goldman's objection that its challenged statements were immaterial. *Id.* at 172-74. The court pointed out that "Goldman's representations about its purported controls for avoiding conflicts" were not aspirational, but concrete factual assertions upon which investors would reasonably rely. *Id.* at 188. Goldman asked the district court to certify its decision for interlocutory appeal, but the court declined. *Id.* at 190.

B. Initial Class Certification And Appeal

Subsequently, the district court granted Plaintiffs' motion to certify a class of investors who purchased Goldman shares during the relevant period. Pet. App. 79a-94a. Goldman appealed, arguing among other things that "the statements on which Plaintiffs base their claims are too general to cause a reasonable investor to rely upon them and hence could have no price impact as a matter of law." 16-250 Goldman C.A. Opening Br. 35 (internal quotation marks omitted). The Second Circuit rejected that argument, explaining that under this Court's decision in *Amgen*, although "materiality is 'an essential predicate of the fraud-on-the-market theory,' it is common to the class and does not bear on the predominance requirement of Rule 23(b)(3)." Pet. App. 68a-69a n.6 (quoting *Amgen*, 568 U.S. at 466).

Relying on a recent Second Circuit decision, the court of appeals also rejected Goldman's claim that it bore only the burden of production to rebut the presumption of reliance afforded by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). *See* Pet. App. 74a (citing *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018)). But because it was unclear whether the district court had applied the proper standard, the court vacated and remanded for reconsideration of Goldman's price-impact evidence. *Id.* at 78a.

C. Remand

On remand, the district court permitted Goldman to supplement its evidence, entertained two rounds of additional briefing, and held a full-day evidentiary hearing, including testimony of three experts, followed by another day of oral argument. Pet. App. 49a. Afterwards the court issued an opinion fully reconsidering Goldman's price-impact rebuttal but concluding that "the *Basic* presumption is not rebutted." *Id.* at 59a.

Although the district court acknowledged that Goldman bore the burden of persuasion on price impact, Pet. App. 50a, it structured its analysis as if Plaintiffs bore the burden of proof. The court thus began with Plaintiffs' expert, Dr. Finnerty, whose testimony the court credited as establishing that Goldman's false statements maintained an artificial inflation in its stock price. *See id.* at 54a.

The district court then considered Goldman's contrary evidence and found it largely unreliable and irrelevant. *See* Pet. App. 54a-59a. Goldman first presented an event study by its expert, Dr. Choi, who attempted to show that the market reaction to the corrective disclosure was based *solely* on the market's fears about the cost of enforcement litigation and potential penalties, not because of the revelation that Goldman did not, in fact, have "extensive procedures and controls . . . designed to identify and address conflicts of interest," as it had represented. *Id.* at 4a; *see id.* at 52a-53a. But the court found the analysis "unreliable for four reasons" (*id.* at 57a), ranging from the expert's "arbitrary" method of selecting events for the study (*ibid.*), to his failure to account for the nature of the misconduct alleged in prior enforcement actions (*id.* at 58a), to serious methodological errors in his statistical analysis (*id.* at 58a-59a).

Second, another Goldman expert, Dr. Gompers, presented a series of media reports that he claimed had previously disclosed the truth about Goldman's conflict management practices without provoking a market reaction. After reviewing the news reports itself, the district court found that Goldman's claims were unfounded. The court explained that most of the articles contained "generic reports on conflicts" that might "suggest possible or theoretical conflicts" but contained no proof of improper conflicts that Goldman had failed to manage appropriately. Pet. App. 55a & n.6; *see also ibid*. (noting that some "were not damaging or revelatory, but rather commendatory"). In addition, the court found that to the extent a handful of articles may have *suggested* Goldman *might* have engaged in undisclosed or otherwise improper conflicts, those few articles lacked the "hard evidence," details, and credibility necessary for the market's lack of reaction to demonstrate that investors were indifferent to whether Goldman was engaged in improper conflicts with its clients. *Id.* at 56a. Far more likely, the court found, was that the market did not react because in the same group of reports, Goldman repeatedly and vociferously denied that it had engaged in improper, undisclosed conflicts. *Ibid.*

Given the strength of Plaintiffs' showing of price impact, and the "deficiencies inherent" in Goldman's evidence, the district court concluded that Defendants had failed to rebut the *Basic* presumption. Pet. App. 59a.

D. Second Appeal

Goldman appealed again, and the Second Circuit affirmed. Having failed to convince the court in the first appeal to consider materiality directly in assessing price impact, Goldman argued in the second appeal that the inflation maintenance theory should be unavailable when the plaintiff relies on "general" misstatements. Pet. App. 19a-20a. But the court concluded that this was just an argument about "materiality by another name." *Id.* at 24a. And regardless of the label, "[i]f general statements cannot maintain price inflation *because* no reasonable investor would have relied on them, then the question of inactionable generality is common to the class." *Ibid*.

The court of appeals then affirmed the district court's finding that Goldman's articles did not disprove price impact, noting that Goldman "has no persuasive response to the court's findings." Pet. App. 30a. The court also rejected Goldman's "one-paragraph argument that the district court misconstrued Dr. Choi's event study" because Goldman did not "meaningfully engage with the district court's detailed rejection of Dr. Choi's report." *Id.* at 31a-32a.

Judge Sullivan dissented. Unlike the majority, he accepted Goldman's claim that prior news reports "had in fact already revealed the supposed falsity of the alleged misrepresentations prior to the three 'corrective disclosure' dates, with no discernible impact on the price of Goldman's shares." Pet. App. 40a; *see id*. at 41a-42a. *But see id.* at 37a (majority decision explaining that "[o]ur dissenting friend points to no inaccuracies or misstatements of the evidence to support his view that the district court's conclusions were so clearly erroneous that they require appellate correction"). The dissent also thought it "fair . . . to consider the nature of the alleged misstatements" as supporting the conclusion drawn from the articles. *Id.* at 44a. Together, "the generic quality of Goldman's alleged misstatements, coupled with" the evidence from the new reports, was sufficient, in the dissent's view, to prove that "the stock drop following the corrective disclosures was attributable to something *other* than the misstatements alleged in the complaint." *Id.* at 45a.

The Second Circuit subsequently denied Goldman's petition for rehearing en banc. Pet. App. 95a-96a.

REASONS FOR DENYING THE WRIT

I. The First Question Presented Does Not Warrant Review.

Goldman first asks this Court to decide whether a defendant in a securities class action may disprove price impact, and thereby defeat class certification, "by pointing to the generic nature of the alleged misstatements." Pet. i. Goldman does not claim that this question has divided the courts of appeals. Indeed, Goldman does not claim that *any* court has ever adopted its position. To the contrary, to respondents' knowledge, this is the only case in which the claim has ever been made. The theory was rejected by the district court, Pet. App. 91a n.5, and by two different panels of the Second Circuit in two separate appeals, *id*. at 68a n.6, 21a-25a & n.11. When Goldman sought rehearing en banc on the question, that petition was denied without recorded dissent. *Id.* at 96a. No further review is warranted.

A. There Is No Circuit Conflict.

Goldman does not claim that any court of appeals has previously held that a securities defendant may disprove price impact by arguing that its statements were too general or generic to have a price impact. Pet. i. The best it can do is claim that the case would have come out differently if the Second Circuit had followed the "framework" applied by the Seventh Circuit in *In re Allstate Corp. Securities Litigation*, 966 F.3d 595 (7th Cir. 2020). *See* Pet. 20-21. That is incorrect, *see infra* p.18, but it also would not establish a circuit conflict even if it were true – Goldman does not contest that *Allstate*'s actual *holdings* are completely aligned with the law of the Second Circuit. *Compare Allstate*, 966 F.3d at 613-14 (holding that defendant may attempt to disprove price impact by showing the market failed to react to prior disclosure of the truth), *with* Pet. App. 29a-32a (allowing same form of argument in this case), *and* Pet. 22 (acknowledging Second and Seventh Circuits agree on burden of proof question).

Goldman suggests that the lack of a conflict is unimportant given "the Second Circuit's outsized influence in securities class actions." Pet. 29. That influence, it suggests, causes other circuits to fall in line with the Second Circuit's position, diminishing the prospect of a circuit split ever developing. Pet. 29-30.[2] That's an awkward claim for a petition that elsewhere asserts a conflict on another question of securities law. *See* Pet. 21-22. But in any event, Goldman cannot point to any practice by this Court of granting certiorari on securities litigation questions from the Second Circuit without a circuit split. In fact, all of the major decisions upon which Goldman relies originated in other circuits and all resolved circuit conflicts. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (*Halliburton II*) (certiorari to the Fifth Circuit); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465 (2013) (Ninth Circuit); *Erica P. John Fund, Inc. v.*

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[2] Goldman reports that in "2019, the number of filings within the Second Circuit was almost double that within the Ninth Circuit, the next most popular circuit." Pet. 30. But Goldman's source explains that the Second Circuit's cases that year were at "historically high levels." Cornerstone Rsch., *Securities Class Action Filings: 2019 Year in Review* 2 (2020) <tinyurl.com/secclassactions2019>. In general, the Second Circuit decides about a quarter of the Nation's securities cases. *See id*. at 38.

Halliburton Co., 563 U.S. 804, 809 (2011) (Fifth Circuit); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (Ninth Circuit); *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (Sixth Circuit).

B. The Second Circuit's Decision Is Correct.

Certiorari is also unnecessary because the Second Circuit's decision is correct.

1. In *Amgen*, this Court could not have been clearer that plaintiffs are "not required to prove the materiality of [a defendant's] alleged misrepresentations and omissions at the class-certification stage." 568 U.S. at 469-70. *Halliburton II* reaffirmed that holding, explaining that materiality "does not bear on the predominance requirement" because it is "an objective issue susceptible to common, classwide proof." 573 U.S. at 282.

Goldman nonetheless insists that it *can* defeat class certification by showing its statements were "too general to cause a reasonable investor to rely upon them." Pet. 21 (quoting *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014)). While Goldman bends over backwards to avoid using the word "material," the Second Circuit properly saw through the synonyms, observing that "Goldman's authority for what constitutes an impermissibly 'general statement'" are all materiality cases. Pet. App. 22a; *see also* Pet. 21 (citing four materiality decisions).

Goldman also attempts to disguise its argument by referring to a statement's "generic nature" as a form of "evidence" that can go to price impact, even though it also addresses materiality. *See, e.g.*, Pet. i, 3, 8. But the only "evidence" Goldman cites is the bare statements themselves and its laundry list of case citations that, it claims, shows the statements were immaterial as a matter of law. *See* Pet. 16-17; *see also* Pet. i (asking whether a defendant "may rebut the presumption of classwide reliance . . . by pointing to the *generic nature of the alleged misstatements*") (emphasis added). Accordingly, this is not a case like *Halliburton II* or *Allstate*, in which the district courts refused to consider concrete evidence (an event study and expert testimony respectively) because the evidence was also relevant to materiality. In fact, when the district court here initially refused to review Goldman's news reports because they were "evidence of the statements' lack of materiality," the Second Circuit applied the same framework as the Seventh Circuit's recent *Allstate* decision and vacated with instructions to consider the evidence. Pet. App. 76a. On remand, the only "evidence" the district court refused to consider was Goldman's *legal* assertion that its statements did not satisfy the Second Circuit's standards for materiality.

A defendant's legal argument that a statement is immaterial is not the kind of "evidence" regarding price impact that *Halliburton II* permits. *See* 573 U.S. at 280-81 (citing event study as example of proper evidence). *Halliburton II* allowed defendants a chance to present evidence disproving price impact only because the Court believed that "[p]rice impact is different" than materiality. *Id*. at 283; *see also Nathenson v. Zonagen Inc*., 267 F.3d 400, 418 (5th Cir. 2001) ("Materiality thus looks to likely potential" as opposed to "what *actually* happened"). The price-impact defense *Halliburton II* allows, in contrast, requires defendants to produce "direct, more salient evidence" to show that the predicted price impact did not, in fact, occur. 573 U.S. at 282. Having allowed defendants to disprove price impact because that showing "is different" from disputing materiality, the Court necessarily precluded defendants from attempting to disprove price impact by arguing the statements were immaterial.

Goldman counters that *Halliburton II* allowed defendants to disprove price impact "through direct as well as indirect price impact evidence." Pet. 18 (quoting 573 U.S. at 283). But that was a reference to defendants' right to introduce evidence regarding "publicity and market efficiency," two *Basic* prerequisites that, the Court observed, are "indirect proof of price impact." 573 U.S. at 282-83. The Court surely did not intend its reference to "indirect" evidence to provide a backdoor for making the materiality arguments *Amgen* forbade.

2. Although Goldman spends the bulk of its petition arguing that it should be allowed to defeat class certification based on nothing more than a showing of immateriality, it also argues that "[a]t a minimum, the nature of those statements should have been *taken into account* in determining whether the presumption had been rebutted." Pet. 21 (emphasis added). That argument is baseless as well.[3]

As noted, Goldman's claim of immateriality is not the kind of "evidence of price impact" *Halliburton II* intended to allow. 573 U.S. at 283. Moreover, requiring a court to "consider" whether a statement is material at the class certification stage would effectively overrule *Amgen*. A statement is either material or it

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[3] It is also waived. *See infra* pp.24-25.

is not. If a court decides that the challenged statements are immaterial in the course of "considering" the defendant's price impact "evidence," Goldman contends it would be compelled to deny class certification because of that immateriality. *See* Pet. 20 (if Second Circuit "had considered evidence of the generic nature of the alleged misstatements when assessing price impact, it would have easily resolved this case in petitioners' favor"). That is no different from the rule the Court rejected in *Amgen* and *Halliburton II*. *See Halliburton II*, 573 U.S. at 282 (reaffirming *Amgen*'s rejection of the request that "defendants be permitted to disprove . . . materiality before class certification").

To the extent Goldman embraces Judge Sullivan's suggestion that a court can properly consider materiality as an "obvious explanation" for why the statements had no price impact, Pet. App. 44a-45a, that suggestion has no merit either. If other evidence already disproved price impact, it is unnecessary to consider materiality. But if the other evidence does *not* disprove price impact, allowing defendants to nonetheless defeat class certification by arguing that their statements were immaterial would make materiality the defense to class certification *Amgen* rejected.

3. Goldman insists that depriving defendants of the chance to contest materiality at class certification will encourage vexatious litigation and produce coerced settlements. Pet. 27-29. But this Court fully considered and rejected those arguments in *Amgen*. 568 U.S. at 474-78. If the Court is inclined to rethink that rejection, it should do so in a case in which the petitioner openly asks the Court to overrule *Amgen*.

In any event, as discussed next, Goldman's complaints are unfounded.

C. The First Question Presented Is Of No Recurring Importance.

Goldman claims that certiorari is required even absent a circuit conflict because depriving defendants the opportunity to contest materiality at the class certification stage renders the *Basic* presumption "effectively irrebuttable any time plaintiffs invoke the inflation-maintenance theory." Pet. 25. And on that premise, Goldman and its amici spin out an elaborate parade of horribles. Pet. 25-30.

But Goldman barely attempts to defend its claim that the Second Circuit's decision makes "certification 'all but a certainty' in inflation-maintenance cases." Pet. 26 (citation omitted). In reality, defendants have two fulsome opportunities to avoid class certification of claims premised on immaterial statements.

First, defendants can move to dismiss based on immateriality before the litigation ever reaches the class certification stage. That opportunity makes complete nonsense of Goldman's assertion that plaintiffs can secure class certification (and a quick settlement) by merely "identify[ing] public allegations of company misconduct and, after the inevitable stock drop that follows, assert[ing] that the stock price had been improperly 'maintained' by generic, aspirational statements of the sort that virtually all companies make." Pet. 25. If the statements are indeed immaterial, the case should be dismissed at the outset.[4]

Goldman's dire predictions thus depend on district courts failing to faithfully apply the law of materiality at the pleading stage. But Goldman does not even claim that such failures are common. To the contrary, as the Second Circuit noted, Goldman's own briefs have repeatedly included lengthy tables of materiality precedents, *all of which* were cases in which a district court dismissed a complaint for lack of materiality. *See* Pet. App. 22a; Goldman C.A. Opening Br. 4 & n.1, 43-46.[5] If there were a pattern of district courts neglecting their duty to dismiss immaterial claims, surely Goldman and its amici would have cited to some actual examples.

Second, even if an occasional immaterial statement escapes dismissal, ordinary price impact analysis should be sufficient to preclude class certification. As Goldman itself emphasizes, one would not expect an immaterial statement to have a price impact. Pet. 21. Accordingly, if a false statement is truly immaterial to investors, a defendant should be able to show that it had no actual impact on stock prices. That is true no less in inflation maintenance cases than any other. In a case alleging that a false statement inflated a company's stock, the defendant's expert uses event studies and other methods to show

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[4] As the panel noted, defendants also have an additional opportunity to challenge materiality at summary judgment. Pet. App. 26a.

[5] Goldman thus has refuted its own claim (Pet. 29) that motions to dismiss are ineffective against suits alleging immaterial misstatements.

that the price change observed at the time of the false statement was caused by something other than the statement. *See, e.g.*, *Halliburton II*, 573 U.S. at 280. Goldman admits that in an inflation maintenance case, the defendant's expert can conduct the same kind of study at the time of the corrective disclosure. Pet. 6; *see also, e.g.*, *Waggoner v. Barclays PLC*, 875 F.3d 79, 104 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018); *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 254-55 (2d Cir. 2016).

Indeed, in this very case, Goldman presented a study that purported to identify an independent cause for the observed crash in Goldman's stock price when the truth about its conflict management practices was revealed. *See* Pet. App. 13a-14a, 52a-53a. The district court rightly found that this effort failed because multiple methodological failures made Goldman's event study completely unreliable. *Id.* at 14a, 57a-59a. But that suggests that Goldman's materiality complaints are unfounded, not that the law should be revised to permit Goldman to make up for its failures of factual proof through legal arguments about materiality.

Goldman insists these opportunities are not sufficient to protect defendants from vexatious inflation maintenance suits and settlement pressures. Pet. 29. But if that were true, Goldman's predictions should have come to pass already, for although inflation maintenance claims have been around for more than a decade,[6] no court has yet defied *Amgen*

[6] *See* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1075-76

and allowed a defendant to defeat class certification of an inflation maintenance claim by disproving materiality.

Finally, it is worth acknowledging what is really at issue here. The rule Goldman seeks will not affect a district court's class certification decision. As noted, by the time of certification, the district court will have already rejected the materiality objection in ruling on the defendant's motion to dismiss. Raising it *again* in opposition to class certification is unlikely to change the court's mind. Instead, the only practical effect of making materiality an issue at class certification is that defendants will have a broader opportunity to obtain interlocutory review of the materiality determination, given that Federal Rule of Civil Procedure 23(f) permits class certification appeals without a district court's permission, while appeals from denials of motions to dismiss are allowed only at the discretion of the district court, *see* 28 U.S.C. § 1292(b). But if Goldman thinks Congress made a mistake in restricting interlocutory appeals of motion-to-dismiss orders in securities cases, it should lobby Congress to change *that* rule rather than ask this Court to contort its class certification precedents.

D. This Case Is A Poor Vehicle.

This case would be a poor vehicle for resolving Goldman's first question in any event.

First, Goldman did not preserve its claim that courts should at least take materiality "into account"

(2019) (citing Judge Easterbrook's decision in *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010), as first appellate decision to accept theory).

in considering price impact. Pet. 21. That argument was raised for the first time in the case by Judge Sullivan's dissent and never by Goldman.[7] Nor is there any reason to think the result would be different if the district court had been ordered to take materiality "into account" as a factor supporting Goldman's other evidence on price impact, when the district court found that evidence wholly lacking for reasons the Second Circuit affirmed and Goldman does not challenge in this Court. *See supra* pp.11-12.

Second, Goldman would lose even under its own rule because, as the district court explained, the company's misstatements *were* material. C.A. App. 167-74, 187-89. Initially, Goldman simply ignores one of the challenged statements in the case – *i.e.*, Goldman's false statement in the *New York Times* that its shorting of CDOs was "fully disclosed and well known to investors." *Id.* at 82-84 (Compl. ¶ 123-26). Goldman's petition makes no effort to show that this statement was immaterial.

Nor were Goldman's representations regarding its conflict management system "generic" or

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[7] Although Goldman raised a host of other objections to the district court's price impact analysis, it never faulted the court for failing to take immateriality "into account." Instead, Goldman consistently argued only that immateriality was a complete defense to class certification. *See* Goldman C.A. Opening Br. 35-53, 62-67; *see also* C.A. App. 2920 n.2 (Goldman district court remand brief arguing only that because they were immaterial, "the challenged statements are not actionable and hence could not have impacted Goldman Sachs' stock price as a matter of law"); C.A. App. 2916-40 (making no other reference to alleged immateriality or generality of statements in remand briefing).

"aspirational." Goldman acknowledged that its business model of betting against the securities it sold to its customers created conflicts of interest that had to be carefully managed, at a risk of serious harm to the business. *See* C.A. App. 5716. To assure investors that those risks were appropriately controlled and mitigated, it made a representation of fact – *i.e.*, that it had "extensive procedures and controls that are designed to identify and address conflicts of interest." Pet. App. 22a (citation omitted).

The district court rightly concluded that this factual assertion would be material to investors. As the Second Circuit explained, it "is difficult to imagine that Goldman's shareholders would have been indifferent had Goldman disclosed its alleged failure to prevent employees from illegally advising clients to buy into CDOs that were built to fail by a hedge fund secretly shorting the investors' positions." Pet. App. 31a.

Goldman nonetheless says that its statement about its conflict management controls was merely "aspirational." Pet. 4. That would be surprising news to investors. If an oil refiner acknowledged its business could be severely damaged if its facilities caught fire, then told investors it has "extensive procedures and controls that are designed to identify and address" those fire hazards, no one would understand that claim to be the equivalent of "we *aspire* to have fire prevention procedures and controls, but at present either do not have them or have elected not to use them."

II. The Second Question Presented Does Not Warrant Review.

Goldman also asks the Court to decide whether it bears the burden of production or persuasion on price impact. Pet. i. This Court denied certiorari on that question in *Barclays PLC v. Waggoner*, No. 17-1209, when another defendant, supported by the same amici, made the same request for essentially the same reasons. *See Barclays* Pet. i, 12-18. There is no reason for a different result here. The Second Circuit's decision does not conflict with the law of any other circuit and faithfully applies this Court's decision in *Halliburton II*. Moreover, whether Goldman bore the burden of persuasion, or only the burden of production, made no difference to the outcome of this case, making this a poor vehicle for resolving any burden allocation question.

A. There Is No Circuit Conflict.

Goldman acknowledges that both the Second and Seventh Circuits have squarely rejected its position that defendants bear only the burden of production on price impact. *See* Pet. 22 (citing *Waggoner*, 875 F.3d at 102-03, and *Allstate*, 966 F.3d at 610). It claims only that those decisions conflict with the Eighth Circuit's decision in *IBEW Local 98 Pension Fund v. Best Buy Co*., 818 F.3d 775 (8th Cir. 2016). *See* Pet. 21-22. That is incorrect.

Goldman cites the introduction to *Best Buy*'s discussion of the evidence of price impact, where the Eighth Circuit stated that it "agree[d] with the district court that . . . defendants had the burden to come forward with evidence showing a lack of price impact." 818 F.3d at 782 (citing Fed. R. Evid. 301); *see* Pet. 22.

But as the Second Circuit has explained, that sentence was "dictum because the extent of the burden was not at issue" and because the "Eighth Circuit ultimately concluded that 'overwhelming evidence' in the case demonstrated that there had been no price impact." *Waggoner*, 875 F.3d at 103 n.36 (quoting *Best Buy*, 818 F.3d at 782-83); *see also Allstate*, 966 F.3d at 610 n.4 (agreeing that there is no circuit conflict).

Goldman cannot and does not contest either point. Pet. 22-23. The *Best Buy* plaintiffs accepted on appeal that "if and when a defendant has succeeded in carrying its burden of production" then "the burden shift[s] back to the plaintiffs to establish price impact with direct evidence." *Best Buy* Pls.' C.A. Br. 34 (internal quotation marks omitted). They disputed only whether the defendants had satisfied that burden. *Id*. at 39-44. The Eighth Circuit resolved that dispute by deciding that the defendants had presented "strong," 818 F.3d at 782, and "overwhelming evidence" of no price impact, *id*. at 783, a conclusion that rendered the difference between the burdens of production and persuasion irrelevant to the outcome. *See ibid*. Such an off-hand comment on a question that no party raised and upon which nothing turned is the very definition of dictum. *See, e.g.*, *United States v. Knowles*, 817 F.3d 1095, 1097 (8th Cir. 2016).

It should come as no surprise, then, that in the four years since *Best Buy* was decided, no other court in the Eighth Circuit has read the decision to limit the defendant to the burden of production.[8]

Goldman provides little reason to think that the Eighth Circuit would reject the well-reasoned opinions of its sister circuits if, and when, the issue arises in a case in which the question is fully briefed and matters to the outcome. Until then, certiorari is premature.

B. The Second Circuit's Decision Is Correct.

Immediate review is also unnecessary because the Second and Seventh Circuits' position is correct.

In *Halliburton II*, this Court allowed defendants "to *rebut* the presumption by *showing*, among other things, that the particular misrepresentation at issue did not affect the stock's market price." 573 U.S. at 279 (emphasis added); *see also id*. at 282 (defendants may present "direct, more salient evidence *showing* that the alleged misrepresentation did not actually affect the stock's market price") (emphasis added). Those words convey the obligation to *actually* rebut the presumption through evidence that persuasively *shows* a lack of price impact. Indeed, in the same section of the opinion, the Court used the word "show" as a synonym for "prove" in describing the plaintiffs' initial burden of establishing the prerequisites for the *Basic* presumption. *Compare id*. at 279 (presumption of reliance applies "if a plaintiff *shows*" prerequisites) (emphasis added), *with id*. at 277 ("[T]o invoke the

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[8] Goldman claims that three district court decisions have construed *Best Buy* to hold that the defendant bears only the burden of production. *See* Pet. 23. But none is from a court within the Eighth Circuit. *Ibid*.

Basic presumption, a plaintiff must *prove*" the prerequisites) (emphasis added).

Goldman also neglects to mention that the Court considered and rejected a proposal to require "plaintiffs to prove that a defendant's misrepresentation actually affected the stock price—so-called 'price impact'—in order to invoke the *Basic* presumption." 573 U.S. at 277. The Court rejected that suggestion as a "radical alter[ation]" of existing law, which provides that if plaintiffs establish the preconditions for the *Basic* presumption, they are "entitled to a presumption that the misrepresentation affected the stock price." *Id*. at 278-79. Putting the burden of proof of price impact on the plaintiffs, the Court reasoned, would "effectively jettison" that part of the *Basic* presumption. *Id*. at 279. The only difference between the proposal rejected in *Halliburton II* and Goldman's proposal here, is that plaintiffs would bear the burden of persuasion only *most* of the time under Goldman's theory, instead of *always* as proposed by Halliburton. That is, plaintiffs would bear the burden of proof except in the presumably rare cases in which the price impact was so clear that the defendant was unable to muster enough evidence even to meet a burden of production. That result is hardly less radical than the one rejected in *Halliburton II*.

Goldman nonetheless argues that having called the *Basic* rule a "presumption," the Court's hands were tied by Federal Rule of Evidence 301. Pet. 23. That Rule, Goldman argues, mandates that a presumption may be overcome by a production of evidence alone. *Ibid*. Not so. Rule 301 simply provides a default rule that applies when the law does not otherwise establish what a party must prove to overcome a presumption; it does not purport to limit this Court's authority to establish burden-shifting frameworks consistent with its understanding of a federal statute. *See* Fed. R. Evid. 301; *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983) (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"), *overruled in part on other grounds by Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994). Nothing in the Rules Enabling Act authorizes the Rules of Evidence to limit this Court's options in deciding what burden-shifting regime is best suited to implementing a federal statute.

C. The Second Question Is Of No Recurring Importance.

Certiorari in advance of a significant circuit conflict is also unwarranted because the distinction between the burden of proof and production rarely matters in the end. As *Best Buy* illustrates, the difference is unimportant unless the case is close. Which may be why Goldman can identify only a handful of cases in which the question even came up. *See* Pet. 21-24 (citing only six cases in which the question has arisen since *Halliburton II* was decided six years ago). Indeed, even in this case, Goldman has insisted the question should make no difference, repeatedly contending that its evidence was sufficient under any standard. *See, e.g.*, Goldman C.A. Stay Mot. 15-16.

D. This Case Is A Poor Vehicle.

The allocation of burdens does not matter in this case either, making it a poor vehicle for deciding Goldman's second question. As the court of appeals observed, although the district court recited that circuit law placed the burden of persuasion on defendants, it structured its analysis as if Plaintiffs bore the burden of proof. *See* Pet. App. 32a n.19. The district court thus began by crediting Plaintiffs' expert as establishing that Goldman's false statements maintained an artificial inflation in its stock price. *See id*. at 54a. The court then considered Goldman's contrary evidence and found it largely unreliable and uninformative. *See id.* at 54a-59a. The court then concluded, "[i]n view of Dr. Finnerty's opinion *demonstrating* the price impact of alleged misstatements, and the *deficiencies inherent* in the opinions of Drs. Gompers and Choi, the Court concludes that Defendants have failed to rebut the *Basic* presumption by a preponderance of the evidence." *Id.* at 59a (emphasis added).

This is not the decision of a judge to whom the allocation of burdens made any difference. Nor is there anything in the Second Circuit's opinion to suggest that a different allocation of burdens would have led to a different outcome on appeal. *See, e.g.*, Pet. App. 27a (noting district court's factual findings subject to clearly erroneous review); *id.* at 34a-35a (finding Plaintiffs' expert's price impact analysis conformed to circuit-approved methodology); *id.* at 30a ("Goldman has no persuasive response to the court's findings that the 'hard evidence' first revealed in the corrective disclosures moved the market in a way that the news reports did not."); *id.* at 32a ("Goldman does not meaningfully engage with the district court's detailed rejection of Dr. Choi's report.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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