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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether a defendant in a securities-fraud class action may rely on the nature of the alleged misstatements in order to rebut the presumption of classwide reliance recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), by showing that those misstatements did not impact the market price of the security.

2. Whether a defendant seeking to rebut the *Basic* presumption by showing the absence of price impact bears the burden of persuasion on that issue.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC), administers and enforces the federal securities laws. The Court's disposition of this case will affect the ability of private plaintiffs to obtain relief for violations of those laws. The SEC, represented by the Solicitor General, filed a brief as amicus curiae in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), the case in which this Court first endorsed the fraud-on-the-market doctrine. The United States has likewise filed briefs in recent cases where the Court reaffirmed and elaborated on that doctrine. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013); *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804 (2011). Because meritorious private securities-fraud suits, including class actions, are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of Justice and the SEC, the United States has a substantial interest in this case.

STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*) makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. § 10(b), 48 Stat. 891 (15 U.S.C. 78j(b)). SEC Rule 10b-5, which implements Section 10(b), makes it unlawful for any person, in connection with the purchase or sale of a security, "[t]o make any untrue statement of a material fact or to omit 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). This Court has "long recognized an implied private cause of action to enforce" these provisions, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) (*Halliburton II*), and Congress has "ratified th[at] implied right of action," *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

In order to recover in a private suit under Section 10(b) and Rule 10b-5, a plaintiff must prove: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5)

economic loss; and (6) loss causation." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 37-38 (2011) (citation omitted).

This case principally concerns the reliance element. When this Court first held "that reliance is an element of a Rule 10b-5 cause of action," the Court explained that proof of reliance establishes the "requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). The "traditional (and most direct) way a plaintiff can demonstrate reliance" is to show that he was aware of the false statement and purchased stock "based on that specific misrepresentation." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 810 (2011) (*Halliburton I*). In *Basic,* however, this Court recognized "an alternative means of satisfying" the reliance element of a private Section 10(b) claim, an approach that has come to be known as the "fraud-on-the-market theory." *Halliburton II*, 573 U.S. at 275, 278; see *Basic*, 485 U.S. at 241-247.

The fraud-on-the-market theory is "a substantive doctrine of federal securities-fraud law" that rests on two basic premises. *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 462 (2013). First, "certain well developed markets are efficient processors of public information," *id.* at 461, including "any material misrepresentations," *Basic*, 485 U.S. at 246. Second, "rather than scrutinize every piece of public information about a company for himself, the typical 'investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price'—the belief that it reflects all public, material information." *Halliburton II*, 573 U.S. at 268 (quoting *Basic*, 485 U.S. at 247). Based on these premises, the fraud-on-the-market theory provides that, "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Id.* at 279. "[I]f the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Ibid.*

The fraud-on-the-market doctrine "can be invoked by any Rule 10b-5 plaintiff." *Amgen*, 568 U.S. at 462. The theory has "particular significance" for class actions, *ibid.*, however, because it allows plaintiffs to prove reliance through evidence common to an entire class, thereby increasing the likelihood that "questions of law or fact common to class members [will] predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); see *Halliburton I*, 563 U.S. at 809-810. Accordingly, prospective class plaintiffs often seek to establish the factual predicates of a fraud-on-the-market theory at the class-certification stage.

2. In three recent decisions, this Court has refined the legal framework that courts apply to resolve class-certification questions when Rule 10b-5 plaintiffs invoke the fraud-on-the-market theory.

In *Halliburton I*, the Court considered whether, in order to obtain class certification, plaintiffs who invoke the fraud-on-the-market theory must prove "'loss causation,'" *i.e.*, that "the defendant's deceptive conduct caused their claimed economic loss." 563 U.S. at 807. The Court held that proof of loss causation is not required at the class-certification stage because "[l]oss causation has no logical connection" to the efficiency of the relevant market or to any other factual predicate of a fraud-on-the-market theory. *Id.* at 813. Thus, while a Rule 10b-5 plaintiff must ultimately prove loss causation in order to prevail on the merits, such proof is not a prerequisite to class certification.

Two years later, in *Amgen*, this Court considered whether Rule 10b-5 plaintiffs were required to establish the materiality of the alleged misstatements before a class could be certified. 568 U.S. at 465-466. The Court acknowledged that materiality, unlike loss causation, is not simply an element of the ultimate Rule 10b-5 claim, but also a prerequisite to establishing the fraud-on-the-market theory. *Id.* at 471-472. The Court nevertheless concluded that plaintiffs need not prove materiality at the class-certification stage because the determination whether a particular misstatement was material is common to the whole class. A failure to prove materiality at a later stage of the case therefore would not result in individual issues predominating; rather, it "would end the case for one and for all" as "no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 468.

Most recently, in *Halliburton II*, this Court reaffirmed "*Basic*'s presumption of reliance" and rejected the argument that it should be overruled or modified, but held that defendants may "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 266, 279. The Court explained that one of the "constituent" elements of the fraud-on-the-market theory is that, "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Id.* at 279. That presumed "[p]rice impact is * * * an essential precondition for any Rule 10b-5 class action" because it provides "'the basis for finding that the fraud had been transmitted through [the] market price,'" and thus for establishing reliance on a class-wide basis. *Id.* at 281-282 (quoting *Basic*, 485 U.S. at 248). The Court held that, when a defendant "show[s]" through "direct evidence" "that the alleged misrepresentation did not actually affect the stock's market price," it is no longer appropriate to presume such class-wide reliance, and "[e]ach plaintiff would have to prove reliance individually." *Ibid.* When a defendant establishes that the alleged misstatements had no price impact, class certification therefore is inappropriate because individual questions of reliance would predominate at trial. See *ibid.*

3. Respondents are shareholders of Goldman Sachs Group, Inc., who brought a securities-fraud class action against Goldman Sachs and three of its former executives (petitioners here). Pet. App. 5a-6a. Respondents allege that between 2006 and 2010, petitioners made statements about Goldman Sachs's conflict-of-interest policies and business practices that were misleading in light of Goldman Sachs's actual, undisclosed conflicts of interest in several transactions that it had structured, and that those misleading statements artificially maintained the company's stock at an inflated price. *Id.* at 4a-6a. The allegedly misleading statements included the assertions that Goldman Sachs "ha[d] extensive procedures and controls that are designed to identify and address conflicts of interest," that "[o]ur clients' interests always come first," and that "[w]e are dedicated to complying fully with the letter and spirit of the laws,

rules and ethical principles that govern us." *Id.* at 4a-5a (citations omitted). Respondents further allege that the markets learned of the conflicts in April 2010, when the SEC brought an enforcement action against Goldman Sachs based on one of the transactions alleged to involve undisclosed conflicts (the "Abacus CDO" transaction), and that the revelation about the company's conflict-of-interest problems contributed to a nearly 13% decline in its share price that day. *Id.* at 6a-7a, 81a. Respondents also allege that several subsequent news reports about SEC and Department of Justice investigations into Goldman Sachs revealed that the conflicts of interest were more extensive than investors had at first appreciated, causing the company's stock to drop even further. See *id.* at 81a-82a.

Respondents filed the present securities-fraud suit on behalf of a putative class of investors who had purchased Goldman Sachs shares between February 5, 2007, and June 10, 2010. Pet. App. 6a. They allege that, but for petitioners' misleading statements, the price at which the members of the class purchased their shares during that period would have been lower, better reflecting the truth about Goldman Sachs's alleged conflicts. *Ibid.* This theory of liability under Section 10(b) and Rule 10b-5—in which the defendants' misleading statements are not alleged to have caused the stock price to rise, but instead to have maintained the price when it would otherwise have declined—is often referred to as a "price-maintenance" or "inflation-maintenance" theory. *Id.* at 11a & n.5, 16a (citation omitted); see, *e.g.*, *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 256-258 (2d Cir. 2016) (endorsing inflation-maintenance theory); *Glickenhaus & Co.* v. *Household International, Inc.*, 787 F.3d 408, 418-419

(7th Cir. 2015) (same); *FindWhat Investor Group* v. *FindWhat.com*, 658 F.3d 1282, 1314-1316 (11th Cir. 2011) (same), cert. denied, 568 U.S. 814 (2012).[1]

Petitioners moved to dismiss the suit, arguing that the alleged misstatements were so vague and general as to be immaterial as a matter of law, because no reasonable investor could have relied on them in making investment decisions. See 868 F. Supp. 2d 261. The district court rejected the argument, and the court denied petitioners' subsequent motion to pursue an interlocutory appeal on that issue under 28 U.S.C. 1292(b). See 868 F. Supp. 2d 261; 2014 WL 5002090.

After the district court denied petitioners' motion to dismiss, respondents requested class certification pur-

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[1] In evaluating whether a defendant's misstatement fraudulently maintained a security's price, lower courts have compared the stock price following the alleged misstatement to the price that resulted when the defendant truthfully revealed the relevant adverse information, rather than to the price that would have resulted if the defendant had simply remained silent instead of making the alleged misstatement. See, *e.g.*, *Glickenhaus & Co.*, 787 F.3d at 417-418 ("As soon as the first false statement was made, that overpricing became fully attributable to the false statement, even if the stock price didn't change at all, because had the statement been truthful, the price would have gone down."); *FindWhat Investor Group*, 658 F.3d at 1315 n.33 ("If a company knowingly makes materially false representations with the purpose and effect of preventing the stock price from falling to the level that the truth would yield, the company is responsible for perpetuating inflation within the stock price."). The court of appeals followed that approach here. See Pet. App. 17a. Petitioners did not seek this Court's review of the question whether the appropriate comparator in an inflation-maintenance case is a truthful disclosure about the cause of the inflated price, or instead the simple absence of a misleading statement. This case therefore provides no occasion for the Court to consider that question.

suant to Federal Rule of Civil Procedure 23(b)(3), relying on the fraud-on-the-market theory to establish class-wide proof of reliance and presenting evidence to satisfy the prerequisites for invocation of the theory. In opposing class certification, petitioners argued that certain expert reports showed that the "challenged general, aspirational statements did not impact Goldman Sachs' stock price." D. Ct. Doc. 142, at 15 (Apr. 6, 2015) (capitalization altered; emphasis omitted). One economic analysis concluded that at the time the alleged misrepresentations were made, they had no impact on price. Pet. App. 86a. A separate analysis examined the connection between the stock price and the alleged corrective disclosures, starting with disclosure of the SEC's enforcement action. *Id.* at 87a. That analysis concluded that the price movement reflected the market's reaction to news of the enforcement actions themselves, not to any revelation about the underlying conflicts of interests. *Ibid.* Petitioners also presented evidence that Goldman Sachs's stock price had not decreased on prior occasions when media outlets had reported about conflicts of interest at the company. *Id.* at 90a.

The district court certified the class, holding that petitioners had failed to rebut the presumption of class-wide reliance. Pet. App. 79a-80a. The court declined to consider some of petitioners' evidence regarding a lack of price impact, including the analysis purporting to show that earlier media reports of conflicts of interest at Goldman Sachs had not affected the stock price. *Id.* at 90a-91a. The court held that such evidence related to the materiality of the statements about conflicts, rather than to their price impact, and that *Amgen* therefore precluded the court from considering the evidence at the class-certification stage. *Ibid.*

4. The court of appeals authorized an interlocutory appeal, see Fed. R. Civ. P. 23(f), and vacated the class certification. Pet. App. 60a-78a. Applying recent circuit precedent, the court held that once respondents established "the preliminary elements to invoke the *Basic* presumption"—that Goldman Sachs's shares traded on a generally efficient market, the alleged misrepresentations were public, and the putative class members purchased during the relevant period—the burden shifted to petitioners to establish a lack of price impact by a preponderance of the evidence. *Id.* at 73a-76a (discussing *Waggoner* v. *Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), cert. denied, 138 S. Ct. 1702 (2018)). Because it was unclear from the district court's decision whether the district court had correctly applied a preponderance standard, the court of appeals vacated the district court's decision. *Id.* at 76a.

The court of appeals also held that on remand, the district court should consider the evidence about earlier media reports of conflicts that it had previously refused to consider. See Pet. App. 76a-78a. The court of appeals explained that the evidence was permissible "to show that [petitioners'] statements about Goldman's efforts to avoid conflicts of interest 'did not actually affect the stock's market price.'" *Id.* at 77a (quoting *Halliburton II*, 573 U.S. at 282). It observed that, under *Halliburton II*, such evidence must be considered at the class-certification stage even though "price impact touches on materiality." *Ibid.*

5. On remand, the district court again certified a class after considering additional submissions, includ-

ing testimony from three experts during a day-long evidentiary hearing. Pet. App. 47a-59a. The court concluded that petitioners had not overcome the presumption of class-wide reliance because they had "failed to establish, by a preponderance of the evidence, that the alleged misstatements had no price impact." *Id.* at 54a. In its analysis, the court addressed the evidence regarding the lack of market reaction to earlier media reports about potential conflicts at Goldman Sachs. See *id.* at 55a-56a & n.6. The court observed that, because those earlier reports had contained less detail about Goldman Sachs's alleged conflicts of interest than did the SEC's enforcement action, the market could have reacted to the different disclosures in different ways. *Ibid.*

6. The court of appeals again authorized an interlocutory appeal under Rule 23(f), and a divided panel of the court affirmed the class-certification decision. See Pet. App. 1a-46a.

As relevant here, the court of appeals first rejected petitioners' argument that "'general statements'" are categorically "insufficient as evidence of price impact" in cases brought under an inflation-maintenance theory. Pet. App. 19a; see *id.* at 15a-27a. The court held that treating "'general statements'" as "'[in]capable of maintaining inflation in a stock price as a matter of law' for the purpose of class certification," as petitioners urged, would be inconsistent with *Amgen* because it would reintroduce "materiality by another name" at the class-certification stage. *Id.* at 21a, 24a (quoting Pet. C.A. Br. 48). The court stated that "[w]hether alleged misstatements are too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones." *Id.*

at 23a. However, the court also stated that "just because something looks like materiality does not mean it is materiality," particularly given that price impact "also resembles materiality, but defendants may attempt to disprove it at class certification." *Ibid.*

The court of appeals then considered the district court's determinations that "the prerequisites for the *Basic* presumption are met" and that petitioners had "failed to rebut" that presumption. Pet. App. 27a; see *id.* at 27a-35a. It held that the district court had applied the correct legal standard, and that the court had not committed clear error in weighing the evidence presented and determining that petitioners had failed to carry their burden of disproving price impact. See *id.* at 34a-35a.

Judge Sullivan dissented. Pet. App. 39a-46a. In his view, the "lack of movement in the share price" following "36 earlier news reports that revealed the falsity of the misstatements alleged in the complaint * * * proved that the later drop was caused by something *other* than the disclosure of the alleged conflicts of interest." *Id.* at 41a-42a. He viewed "the nature of the alleged misstatements" as reinforcing that conclusion, and he criticized the majority for "strain[ing] to avoid looking at the statements themselves for fear that such a review amounts to 'smuggling materiality into Rule 23.'" *Id.* at 44a (quoting *id.* at 22a). Judge Sullivan would have ordered that the class be decertified on the ground that "the generic quality of Goldman's alleged misstatements, coupled with" the lack of price movement in connection with the earlier media reports, "clearly compels the conclusion that the stock drop following the corrective disclosures" was not caused by "the misstatements alleged in the complaint." *Id.* at 45a.

SUMMARY OF ARGUMENT

I. A. In the proceedings below, petitioners argued that the generic content of the alleged misstatements in this case made it impossible, as a matter of law, that the misstatements could have had a price impact. The court of appeals correctly rejected that categorical argument. No categorical rule exists under which misstatements phrased in general terms can be deemed legally incapable of affecting a security's price, regardless of other evidence. On the contrary, courts considering particular facts may appropriately credit evidence that seemingly generic statements would have been significant to the trading decisions of reasonable investors, or that a generally efficient market acted inefficiently on specific occasions and reacted to the statements even though doing so was objectively unreasonable.

B. In addition to rejecting petitioners' categorical claim, the court of appeals' decision can be understood to have held that the generic nature of the misstatements alleged in a securities-fraud suit is *legally irrelevant* to a court's determination of price impact. As petitioners correctly argue (Br. 24-33), that proposition is incorrect. Evidence about the nature of the alleged misstatements may sometimes be important in determining whether the claimed securities violations more likely than not affected the market price, as part of the overall mix of evidence presented. Under this Court's decision in *Halliburton II*, a court may not ignore that evidence in assessing price impact at the class-certification stage merely because the evidence would also be relevant to the question of materiality, which would be resolved at the merits stage. 573 U.S. at 281-284.

It is unclear whether the court of appeals erroneously treated evidence about the nature of the alleged misstatements here as legally irrelevant, or instead considered the nature of those statements (along with the other evidence presented) and simply found the evidence insufficient to establish clear error in the district court's assessment of price impact. This Court therefore should vacate the decision below and remand for further proceedings.

II. The court of appeals also held that, once a plaintiff establishes the factual predicates for the fraud-on-the-market theory, a defendant seeking to rebut the presumption of reliance by showing a lack of price impact bears the burden of persuasion to show that the alleged misstatements had no impact on price. That holding was correct. Under this Court's decisions in *Basic* and *Halliburton II*, a defendant overcomes the presumption by *proving* a lack of price impact, not by merely introducing evidence on the issue. See *Basic*, 485 U.S. at 248; *Halliburton II*, 573 U.S. at 279.

Federal Rule of Evidence 301 does not require a different result. As this Court explained several years before it decided *Basic*, 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." *National Labor Relations Board* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), *abrogated on other grounds by Director* v. *Greenwich Collieries*, 512 U.S. 267 (1994). When the *Basic* Court adopted the fraud-on-the-market doctrine, Rule 301 therefore did not preclude the Court from requiring defendants affirmatively to prove a lack of price impact in circumstances where the fraud-on-the-market theory would suggest that price impact is likely to be present. Instead, Rule 301 merely clarifies that "*this rule* does not shift the burden of persuasion."

Fed. R. Evid. 301 (emphasis added). In *Halliburton II*, this Court declined to validate the defendants' suggestion that it rely on Rule 301 in modifying how the *Basic* presumption operates, and the Court should reject petitioners' materially identical argument here.

ARGUMENT

I. ALTHOUGH NO CATEGORICAL RULES APPLY, A DEFENDANT SEEKING TO REBUT THE *BASIC* PRESUMPTION MAY RELY ON THE GENERIC NATURE OF ALLEGED MISSTATEMENTS AS EVIDENCE THEY HAD NO ACTUAL PRICE IMPACT

The court of appeals correctly rejected petitioners' argument below that, as a *matter of law*, the generic character of petitioners' alleged misstatements negated the possibility of a price impact and thus precluded certification of a class. Circumstances may arise in which a general statement would be significant to a reasonable investor's trading decisions. And because market efficiency does not mean perfect efficiency, even a legally immaterial statement might affect the price of a security traded on a generally efficient market. There is consequently no legal or logical basis for a rule that general or generic statements are categorically incapable of affecting a security's market price.

The court of appeals' opinion can also be read, however, to hold that the generic nature of alleged misstatements cannot even be considered as evidence when assessing whether the misstatements had an actual price impact. See Pet. App. 23a, 37a-38a & n.24. Such a holding would be erroneous. Evidence regarding the nature of the statements, considered as part of the total mix of price-impact evidence presented to show that investors did or did not attach weight to a particular statement, is logically relevant to the determination whether a price impact occurred. Nothing in this Court's precedents forecloses a court from considering such evidence for that purpose. See *Halliburton II*, 573 U.S. at 279-283. Because it is unclear whether the court of appeals properly considered the nature of the alleged misstatements in reviewing the district court's assessment of price impact here, this Court should vacate the decision below and remand for further consideration.

A. A Court May Not Deny Class Certification On The Ground That, As A Matter Of Law, The Defendant's Allegedly Misleading Statements Were Too General To Impact Price

Petitioners argued below that general statements are incapable, as a matter of law, of affecting the price of securities traded on an efficient market. See, *e.g.*, Pet. C.A. Br. 46 ("[G]eneral statements, like those challenged here, are incapable of impacting a company's stock price as a matter of law."). That argument appears to rest on two subsidiary propositions. The first is that such general statements are categorically immaterial, *i.e.*, that no reasonable investor would ever view them as significant. See *id.* at 43 ("[G]eneral statements, like those challenged here, about business principles and conflicts controls are 'too general to cause a reasonable investor to rely upon them.'") (citation omitted). The second is that immaterial statements can never affect a security's trading price on an efficient market. See Pet. App. 24a (noting petitioners' argument that "general statements cannot maintain price inflation *because* no reasonable investor would have relied on them").

Both of those categorical propositions are unsound. Reasonable investors may sometimes attach significance to even very general statements about a company's practices. And because generally efficient markets may react inefficiently to particular disclosures at particular points in time, even immaterial statements are capable of impacting securities prices on such markets.

1. A statement's generic character may *suggest* that a reasonable investor would not have deemed it significant in making trading decisions. In assessing materiality, however, a court would not apply a per se rule to that effect, but would consider any other evidence or allegations that the parties offered on that issue. For example, a Rule 10b-5 plaintiff might allege or offer expert testimony that, precisely because a particular statement about a company's goods or services had become routine, market professionals would notice and attach significance to the company's failure to reiterate the statement at an expected time. Cf. *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 257 (2d Cir. 2016) ("Perhaps, in the face of silence, inflation *could* have remained unchanged. But it also could have * * * dissipated gradually because the defendant's silence in the face of escalating concerns on a particular subject would have all but amounted to an admission."). Alternatively, a plaintiff might present evidence of actual market impact to support a showing of materiality. Particularly if the question of materiality is otherwise close, proof that a particular statement actually caused a price impact on an efficient market—*i.e.*, that traders in the aggregate treated the statement as significant—could suggest (though not definitively prove) that a reasonable investor would have given the statement weight.

The categorical rule for generic misstatements that petitioners advocated below therefore would be unsound even as a rule of materiality. A court determining whether such 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. If the misstatement was made publicly and concerned a security traded on an efficient market, that additional evidence could include information about whether or how that market reacted. Thus, even if immaterial misstatements were legally incapable of causing a price impact in an efficient market, the categorical rule that petitioners previously advocated should be rejected inasmuch as it would render all this other evidence irrelevant in determining whether the misstatement was material.

2. Even if a misstatement is immaterial, moreover, that would not categorically render the misstatement incapable of producing a price impact. The question of materiality is an objective one that turns on how a *hypothetical* reasonable investor *would have behaved* under particular circumstances. The question of price impact, by contrast, is purely factual and turns on evidence about how a particular securities market *actually reacted* (or failed to react) to particular disclosures.[2]

To invoke the *Basic* presumption, a Rule 10b-5 plaintiff must show that the security in question traded on an efficient market. See pp. 3-4, *supra*. But the fact that a market for a particular security is *generally* efficient does not preclude the possibility that the market will

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[2] The distinction between reasonable and actual behavior is especially clear with respect to specific investors. A particular investor may attach significance to a statement that the hypothetical reasonable investor would view as irrelevant. Indeed, the point of defining reliance and materiality as distinct elements of a private Rule 10b-5 action, see pp. 2-3, *supra*, is that the two do not always stand or fall together.

react (inefficiently) to a particular immaterial statement at a particular point in time. "*Basic*'s presumption of reliance does not rest on a 'binary' view of market efficiency," in which the market for a particular security is either fully efficient or not at all efficient. *Halliburton II*, 573 U.S. at 272. The determination that a particular market is efficient enough to trigger the *Basic* presumption therefore does not imply that the market invariably processes information in a way that accords with the behavior of a hypothetical reasonable investor.

The Court in *Halliburton II* recognized that, "[b]ecause market efficiency is not a yes-or-no proposition, a public, material misrepresentation might not affect a stock's price even in a generally efficient market." 573 U.S. at 279. The converse result is likewise possible. Because even a generally efficient market might react inefficiently on a particular occasion, an immaterial misrepresentation might have an actual price impact on such a market. Evidence that a misstatement was too generic (or otherwise too trivial) for a reasonable investor to rely on it therefore does not definitively establish that no actual price impact occurred.

B. A Court May Consider The Nature Of Alleged Misstatements In Assessing Whether, As A Factual Matter, The Statements Affected The Market Price Of The Relevant Security

For the foregoing reasons, the generic character of an alleged misstatement does not *legally preclude* a factual finding that the misstatement affected a security's price on an efficient market, as petitioners argued below. Evidence concerning the generality of a misstatement may be *relevant*, however, to a court's determination whether a price impact occurred—as petitioners now emphasize in this Court. See Pet. Br. 32 (explaining that petitioners now advance only this "more modest submission"). In deciding whether class certification should be granted in a securities action, a court therefore should consider evidence about the nature of the particular alleged misstatements, along with any other available evidence, to determine whether the defendant has shown as a factual matter "that the alleged misrepresentation did not * * * actually affect the market price." *Halliburton II*, 573 U.S. at 269. Because it is unclear whether the court of appeals deviated from this approach, the court's judgment should be vacated and the case remanded for further proceedings.

1. Under *Basic*, when plaintiffs show "that [a] defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, [they are] entitled to a presumption that the misrepresentation affected the stock price." *Halliburton II*, 573 U.S. at 279. Any investors who purchased at the market price during the relevant period are accordingly presumed to have done so "in reliance on the defendant's misrepresentation," thereby allowing their claims to be considered on a class-wide basis. *Ibid.* The Court in *Amgen* further held that, although a Rule 10b-5 plaintiff must ultimately establish the materiality of the defendant's misrepresentation in order to prevail on the merits, the court need not determine materiality at the class-certification stage of the case. See 568 U.S at 467.

In *Halliburton II*, the Court held that a Rule 10b-5 defendant can overcome the *Basic* presumption of class-wide reliance, and thereby defeat class certification, by proving that "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." 573 U.S. at 279-280. Defendants commonly seek to make that showing by introducing "event studies" like the ones on which petitioners relied below. See *id.* at 280; see also *United States* v. *Gushlak*, 728 F.3d 184, 201 (2d Cir. 2013) (explaining that the use of event studies has become "standard operating procedure in federal securities litigation"), cert. denied, 572 U.S. 1003 (2014).

To assess whether a particular event or news report caused a change in a stock's price, event studies isolate company-specific (as opposed to market- or industry-wide) price movements in the stock and evaluate whether such movements were statistically significant around the time of the event or report. See Pet. App. 67a n.5 (explaining that both petitioners and respondents introduced such event studies in this case); see also, *e.g.*, *In re Pfizer Inc. Securities Litigation*, 819 F.3d 642, 649 (2d Cir. 2016) (further describing the nature and use of event studies). When event studies reveal no statistically significant movement in a company's stock price at either the time that an alleged misstatement was made or the time when it was corrected, it is relatively straightforward to conclude that the alleged misstatement had no price impact.

Often, however, securities-fraud class actions follow significant changes in a company's stock price, such as the drop from $184.27 to $160.70 that Goldman Sachs's stock experienced on the day that the SEC filed its fraud suit alleging conflicts of interest in relation to the Abacus CDO. See Pet. App. 81a; p. 7, *supra*. When significant price changes correspond to the time of the alleged misstatement or corrective disclosure, the price-impact analysis becomes more complicated. In such cases, the defendant can disprove price impact only by showing that, although a statistically significant price change occurred at the time of the alleged misstatement or correction, the change likely occurred entirely for other reasons.

When a court conducts that inquiry, the nature of the alleged misstatements will sometimes be an important piece of evidence. As explained above (see p. 19, *supra*), "*Basic*'s presumption of reliance * * * does not rest on a 'binary' view of market efficiency." *Halliburton II*, 573 U.S. at 272. Instead, "market efficiency is a matter of degree." *Ibid.*; see Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 167 (2009) ("[I]nformational efficiency is not a binary, yes or no question."). And the extent to which a particular market is efficient may vary from one type of information to another. See *Amgen*, 568 U.S. at 471 n.6 ("[A] market may more readily process certain forms of * * * information."). A defendant thus might attempt to disprove price impact through evidence that the nature of the misstatements alleged in a particular suit made them unlikely to be incorporated into the market price.

Such a showing could take various forms. A defendant might argue, for example, that the alleged misstatement involved "obscure technical data" that, while publicly disclosed "in a filing with the Securities and Exchange Commission," would nevertheless have been "difficult to * * * understand" for most financial analysts. *Amgen*, 568 U.S. at 471 n.6. The defendant might argue that, even if such a misstatement was material, in the sense that a reasonable investor who understood its import would have viewed it as significant in making trading decisions, the misstatement was unlikely to have affected the market price because most market participants would not have understood that significance. Especially if the other evidence about price impact was conflicting or ambiguous, evidence about the nature of the misstatement—*i.e.*, evidence about whether the misstatement involved the sort of information that was inherently likely to affect the market price—might reasonably influence the court's determination whether the defendant had disproved price impact by a preponderance of the evidence. If the court concluded that the defendant had carried that burden, class certification would be denied, but any investors who had relied directly on the misstatement (because they had the specialized knowledge to appreciate its significance) could pursue their own securities-fraud claims on an individual basis.

2. In dissent below, Judge Sullivan suggested that the nature of the alleged misstatements here was relevant in a somewhat analogous way. See Pet. App. 44a-46a. In his view, petitioners had established that 36 prior media disclosures about conflicts of interest at Goldman Sachs had caused "*no* impact on Goldman's stock price." *Id.* at 44a. He inferred that "the obvious explanation for why the share price didn't move after 36 separate news stories on the subject of Goldman's conflicts is that no reasonable investor would have attached any significance to the generic statements on which [respondents'] claims are based." *Id.* at 44a-45a. Judge Sullivan concluded that the "generic quality of Goldman's alleged misstatements, coupled with" the absence of any price movement after the 36 prior disclosures, "clearly compels the conclusion that the stock drop following the corrective disclosures was attributable to something other than the misstatements alleged in the complaint"—the "most obvious explanation" being

"that the drop was caused by news that the SEC and [Department of Justice] were pursuing enforcement actions against Goldman." *Id.* at 45a (emphasis omitted). He accordingly would have held that the district court had clearly erred in finding that petitioners failed to disprove price impact. *Id.* at 46a. Whether or not his ultimate conclusion as to price impact was right, Judge Sullivan correctly treated the nature of the alleged misstatements, and the inherent likelihood or unlikelihood that they would influence investor behavior, as relevant to the price-impact determination.

3. The panel majority viewed things differently. Responding in part to petitioners' broader arguments about the role of the inflation-maintenance theory, the majority stated that "[w]hether alleged misstatements are too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones." Pet. App. 23a. The majority attributed to Judge Sullivan the view that Goldman Sachs's statements were "too general as a matter of law" to support a Rule 10b-5 claim, and that "price maintenance cases are limited to more specific statements related to performance or corporate expectations." *Id.* at 37a. The majority also stated that Judge Sullivan's approach "would inject materiality into [the] Rule 23 analysis in the name of limiting the types of statements that can be considered for price maintenance." *Ibid.* While noting that the issue of materiality would "be addressed by the district court at an appropriate time," the court of appeals held that it was "preclude[d]" from considering materiality at the class-certification stage. *Id*. at 38a.

To the extent the court of appeals rejected the view that Goldman Sachs's alleged misstatements were "too general as a matter of law" to establish price impact, Pet. App. 37a, the court's analysis was correct. See Pt. I. A., *supra*. But the assertion that the misstatements' generic quality has "nothing to do with" the Rule 23 inquiry, Pet. App. 23a, suggests that the nature of the statements cannot even be considered in determining whether petitioners have disproved price impact. Cf. Br. in Opp. 20 (defending a version of this argument). To the extent the court adopted that latter view, it was incorrect: evidence about the nature of the misstatements alleged in a particular case will sometimes contribute to the overall body of relevant evidence for determining whether those misstatements had a price impact. See pp. 20-23, *supra*.

The court of appeals was also wrong to the extent it suggested that consideration of a statement's generic quality as part of the price-impact inquiry is impermissible because it "would inject materiality into [the court's] Rule 23 analysis." Pet. App. 37a; see Br. in Opp. 20 (arguing that relying on the nature of the statements to disprove price impact would be impermissible because, "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") (emphasis omitted). As we explain above, evidence that reasonable investors would not have relied on particular statements is logically relevant to, though not dispositive of, the question whether those statements actually moved the market. And in holding that Rule 10b-5 defendants can defeat class certification by disproving price impact, the Court in *Halliburton II* did not limit the evidence that defendants may introduce, or the inferences they may ask the court to draw, in order to carry their burden.

In particular, the Court in *Halliburton II* did not suggest that evidence relevant to both materiality and price impact must be ignored at the class-certification stage simply because the class-certification inquiry does not encompass materiality as such. Indeed, even if materiality were not a separate element of a private Rule 10b-5 cause of action, a court tasked with determining price impact could consider the probable reactions of a hypothetical reasonable investor in assessing the likely cause of a movement in the price of a security. Thus, although "the same evidence [pertinent to price impact] is likely to have obvious implications for the off-limits merits issue[] of materiality," a court "may not use the overlap to refuse to consider the evidence. The court must still consider the evidence as relevant to price impact," even while "consciously avoid[ing] deciding materiality." *In re Allstate Corporation Securities Litigation*, 966 F.3d 595, 608 (7th Cir. 2020).

Because it is unclear whether the court of appeals refused to consider the nature of the alleged misstatements as relevant evidence in reviewing the district court's price-impact finding, the Court should clarify that such a position would be incorrect, vacate the decision below, and remand for further proceedings.[3]

[3] The United States takes no position on the case-specific question whether the district court's assessment of price impact was clearly erroneous. The United States also takes no position on whether petitioners adequately preserved their present argument about the evidentiary value of the statements' general nature. Compare Br. in Opp. 24-25, with Cert. Reply Br. 10. Those questions are better considered in the first instance by the court of appeals on remand.

II. TO OVERCOME THE *BASIC* PRESUMPTION, A DEFENDANT MUST PROVE A LACK OF PRICE IMPACT, NOT SIMPLY INTRODUCE EVIDENCE ON THE ISSUE

Relying on Federal Rule of Evidence 301, petitioners contend (Br. 37-43) that, once they produced evidence suggesting a lack of price impact, the burden of persuasion on that issue shifted to respondents. That position cannot be reconciled with this Court's precedents, and Rule 301 does not support it.

A. At the class-certification stage of a Rule 10b-5 suit, a plaintiff establishes the necessary predicates for application of the fraud-on-the-market doctrine by showing that the defendant made public misrepresentations about a security that trades in an efficient market, and that class members purchased shares on that market at the relevant time. See *Halliburton II*, 573 U.S. at 279; *Basic*, 485 U.S. at 246-247. When a plaintiff establishes those predicate facts, a court must presume that the misrepresentations affected the market price for the security, and that buyers and sellers during the relevant period therefore relied (indirectly) on the misrepresentations, unless the defendant rebuts that presumption by a preponderance of the evidence.

The Court in *Basic* stated that defendants may rebut the presumption of reliance if they "show that the misrepresentation in fact did not lead to a distortion of price." 485 U.S. at 248; see *ibid.* ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."). An appropriate "showing" is one that eliminates the causal connection, such that once the showing has been made, any "basis for finding that the fraud had been transmitted through market price would be gone." *Ibid.* That language clearly contemplates proof through which a defendant satisfies a burden of persuasion, not merely a burden of production. Compare *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167, 180 (2009) (characterizing the "burden of persuasion" as the responsibility "to show" a fact with persuasive evidence) with *Director* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994) (describing the burden of production as "a party's obligation to come forward with evidence to support its claim").

More recently, in *Halliburton II* (itself a price-maintenance case), this Court reiterated that a defendant "rebut[s] the [*Basic*] presumption by *showing* * * * that the particular misrepresentation at issue did not affect the stock's market price." 573 U.S. at 279 (emphasis added); see *id.* at 284 (Ginsburg, J., concurring) ("[T]he Court recognizes that it is incumbent upon the defendant to show the absence of price impact."). The Court explained that such a rebuttal is successful if the defendant's "direct, more salient evidence show[s] that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.* at 282 (majority opinion). Indeed, the *Halliburton II* Court squarely rejected the defendant's argument that plaintiffs "should be required to prove" price impact "in order to invoke the [*Basic*] presumption," explaining that "this proposal would radically alter the required showing for the reliance element of the Rule 10b-5 cause of action." *Id.* at 278-279. That holding would largely be negated if a

Rule 10b-5 defendant, simply by introducing *some* evidence suggesting a lack of price impact, could shift the burden of persuasion on this issue to the plaintiff.

B. Federal Rule of Evidence 301 does not mandate a different result.[4]

1. This Court has previously declined to rely on Rule 301 to modify how the *Basic* presumption operates. In *Halliburton II*, the defendants made a substantially identical argument about the import of Rule 301. See Reply Br. at 23, *Halliburton II*, *supra* (No. 13-317) ("Halliburton does not bear the burden of persuasion to rebut the reliance presumption because Rule 301, which *Basic* cited, governs all presumptions 'unless a federal statute * * * provide[s] otherwise.'") (alterations and brackets in original). The Court apparently did not find the argument persuasive, since it squarely rejected the defendants' argument that a Rule 10b-5 plaintiff should be required to prove price impact. *Halliburton II*, 573 U.S. at 278-279.

2. Several years before it decided *Basic*, this Court explained that Rule 301 "merely defines the term 'presumption.' It 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." *National Labor Relations Board* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), *abrogated on other grounds by Greenwich Collieries*,

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[4] Rule 301 states that, "unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301.

supra.[5] Indeed, Rule 301 does not purport to disable courts from adopting their own burden-shifting frameworks where that course is otherwise appropriate, but instead states only that "*this rule* does not shift the burden of persuasion." Fed. R. Evid. 301 (emphasis added). Accordingly, nothing in Rule 301 precluded the Court in *Basic* and *Halliburton II* from requiring a defendant to prove the absence of price impact in order to defeat class certification once a plaintiff has established the prerequisites for invoking the fraud-on-the-market theory. And certainly nothing in Rule 301 requires the Court, having *already* adopted that burden-shifting framework, to abandon it now.

3. Petitioners also overstate the significance of this Court's use of the term "presumption" to describe the doctrine adopted in *Basic*. As this Court explained in declining to apply Rule 301 to a statutory provision declaring certain patents "'presumed valid,'" "the word 'presumption' has often been used when another term might be more accurate." *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U.S. 91, 104 n.6 (2011); see, *e.g.*, *In re G-I Holdings, Inc.*, 385 F.3d 313, 318 (3d Cir. 2004) (Alito, J.) (rejecting the argument that "the term 'presumption' [must have been used] in the technical sense expressed in Rule 301 of the Federal Rules of Evi-

[5] In *Greenwich Collieries*, *supra*, this Court overruled *Transportation Management Corp.*'s holding about "the meaning of burden of proof in § 7(c) of the" Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See 512 U.S. at 276. But that overruling was based on the Court's understanding of the text and history of the phrase "burden of proof" in the APA. See *id.* at 276-278. The Court did not express disagreement with its earlier description of Rule 301's limited purpose; indeed, neither the majority nor the dissent in *Greenwich Collieries* cited Rule 301.

dence"). What the *Basic* Court described as a "presumption" of price impact could be (and indeed has been) characterized instead as an "indirect proxy for price impact," "an indirect way of showing price impact," or a "way to demonstrate the causal connection" between an alleged misstatement and a monetary loss. *Halliburton II*, 573 U.S. at 281; *Basic*, 485 U.S. at 243. The content of this "substantive doctrine of federal securities-fraud law," *Amgen*, 568 U.S. at 462, does not depend on the Court's choice among those equally suitable labels.

Petitioners observe (Br. 41) that this Court referenced Rule 301 and its accompanying Advisory Committee notes in a "see also" citation in *Basic*. 485 U.S. at 245. The Court cited the Rule in the course of explaining that presumptions "[a]ris[e] out of considerations of fairness, public policy, and probability," and serve as "useful devices for allocating the burdens of proof between parties." *Ibid.* That description of the general purposes of presumptions does not indicate that the Court intended to adopt the specific burden-shifting approach described in Rule 301. The inference that petitioners urge is especially unwarranted given the Court's more specific statement elsewhere in the opinion that a defendant would need to "show" that the "causal connection" was "broken," *id.* at 248, in order to defeat class certification once a plaintiff had successfully invoked the fraud-on-the-market theory.

C. Petitioners contend (Br. 33-34) that, if defendants must actually disprove price impact to rebut the presumption of reliance, the presumption will be effectively irrebuttable. Experience in the lower courts does not support that contention.

Following *Halliburton II,* the courts of appeals that have addressed this issue have uniformly understood defendants to bear a burden of persuasion with respect to price impact when plaintiffs make the predicate showings of publicity and market efficiency. See, *e.g.*, *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 100-103 (2d Cir. 2017) (holding that defendants bear the burden of persuasion and that Rule 301 "imposes no impediment to [that] conclusion"), cert. denied, 138 S. Ct. 1702 (2018); *In re Allstate Corporation Securities Litigation*, 966 F.3d at 610 (same). At the certiorari stage, petitioners contended (Pet. 21-23) that the Eighth Circuit held otherwise in *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (2016). That is incorrect. In *Best Buy*, the court cited Rule 301 in passing to support the statement that the defendants "had the burden to come forward with evidence showing a lack of price impact." *Id.* at 782. But it did not suggest that defendants bear *only* the burden of production; on the contrary, it concluded that the defendants' "overwhelming evidence * * * rebutted the *Basic* presumption" in that case. *Ibid.*

The lower courts' correct view that a defendant must prove a lack of price impact by a preponderance of the evidence in order to rebut the *Basic* presumption has not prevented courts from finding the presumption rebutted in appropriate cases. Courts have found that defendants disproved price impact, including in inflation-maintenance cases. See, *e.g.*, *Best Buy*, 818 F.3d at 782 (finding that defendants had shown a lack of price impact, and that class certification therefore was improper); *In re Chicago Bridge & Iron Co. N.V. Securities Litigation*, No. 17 Civ. 1580, 2020 WL 1329354, at *1 (S.D.N.Y. Mar. 23, 2020) (adopting special master's report finding no price impact for certain alleged misstatements)[6]; *Ohio Public Employees Retirement System* v. *Federal Home Loan Mortgage Corp.*, No. 08 Civ. 160, 2018 WL 3861840, at *17-*18 (N.D. Ohio Aug. 14, 2018) (denying class certification in price-maintenance case based on finding that defendant's expert had demonstrated a lack of price impact, as well as finding that plaintiffs had not shown market efficiency), appeal pending, No. 20-4082 (6th Cir. filed Oct. 13, 2020); *In re Finisar Corp. Securities Litigation*, No. 11-cv-1252, 2017 WL 6026244, at *5-*7 (N.D. Cal. Dec. 5, 2017) (finding that defendants had rebutted presumption by showing lack of price impact); *In re Intuitive Surgical Securities Litigation*, No. 13-cv-1920, 2016 WL 7425926, at *16 (N.D. Cal. Dec. 22, 2016) (finding that defendants in price-maintenance case had rebutted presumption and shown lack of price impact as to some alleged misstatements). Indeed, in *Halliburton* itself, the district court found on remand that the defendants had rebutted the presumption of price impact as to some alleged misstatements. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 309 F.R.D. 251, 271, 273-274 (N.D. Tex. 2015).

The parade of horribles that petitioners invoke (Br. 34-35) therefore provides no sound reason for the Court to revisit the evidentiary framework set forth in *Basic*. Instead, the Court should adhere to that established framework, as it did in the face of a nearly identical argument in *Halliburton II*.

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[6] See *In re Chicago Bridge & Iron Co. N.V. Securities Litigation*, No. 17 Civ. 1580, 2019 WL 5287980, at *41 (S.D.N.Y. Oct. 18, 2019) (report of special master finding no price impact for certain alleged misstatements).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further consideration.

Respectfully submitted.

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