No. 20-222

IN THE

Supreme Court of the United States

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

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.,
Respondents.

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

BRIEF OF EVIDENCE LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

ALLISON EHLERT
EHLERT HICKS, LLP
2001 Addison Street,
Suite 300
Berkeley, CA 94709
(510) 833-7339
aehlert@ehlerthicks.com

RACHEL BLOOMEKATZ
Counsel of Record
BLOOMEKATZ LAW LLC
1148 Neil Avenue
Columbus, OH 43201
(614) 259-7611
rachel@bloomekatzlaw.com

Counsel for Amici Curiae
(additional counsel listed on inside cover)

March 3, 2021

JEREMY A. LIEBERMAN
EMMA GILMORE
MARC I. GROSS
POMERANTZ LLP
600 3rd Avenue
New York, NY 10016
(212) 661-1100
jalieberman@pomlaw.com

MICHAEL DELL'ANGELO
SHERRIE R. SAVETT
BERGER MONTAGUE
1818 Market Street, Suite 3600
Philadelphia, PA 10103
mdellangelo@bm.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTEREST OF AMICI CURIAE[1]

Amici curiae are twenty-seven of the foremost scholars in the field of evidence. They each teach, research, and write about the law of evidence at law schools across the country. The second question presented in this case asks whether, in order to rebut the *Basic* presumption, defendants bear the burden of *persuasion*—as every circuit court to address the issue has held—or whether they bear only a burden of *production*, as Goldman Sachs argues. Based on their expertise in the Federal Rules of Evidence, presumptions, and evidentiary burdens, amici share the view that defendants carry the burden of persuasion in rebutting the *Basic* presumption, and they urge this Court to affirm the Second Circuit's decision on this point. Amici disagree with Goldman Sachs's position that the default rule of Federal Rule of Evidence 301 may be displaced only if the burden of persuasion is mentioned explicitly in the statute. Adopting that position would undermine courts' ability to effectuate statutory intent and is inconsistent with the nature of the presumption of reliance this Court established in *Basic* and reaffirmed in *Halliburton II*.

In alphabetical order, amici are:[2]

Ronald J. Allen, John Henry Wigmore Professor of Law, Northwestern University School of Law

---

[1] No counsel for a party authored this brief in whole or in part, and no one other than amici curiae or their counsel contributed money to fund the preparation or submission of this brief. The parties consented to the filing of amicus briefs through global consent letters on file with the clerk's office.

[2] Institutional affiliations are provided for identification purposes only. This brief does not purport to present the institutional views, if any, of the named law schools.

Jessica Berch, Lecturer in Law, Sandra Day O'Connor College of Law

Daniel Blinka, Professor of Law, Marquette University Law School

Donald Braman, Associate Professor of Law, The George Washington University School of Law

Kenneth S. Broun, Professor of Law Emeritus, University of North Carolina School of Law

Daniel J. Capra, Reed Professor of Law, Fordham Law School

Kevin Cole, Professor of Law, University of San Diego School of Law

George Fisher, Judge John Crown Professor of Law, Stanford Law School

Victor Gold, William H. Hannon Professor of Law, Loyola Los Angeles Law School

Michael Graham, Professor of Law Emeritus, University of Miami School of Law

David Gray, Jacob A. France Professor of Law, University of Maryland School of Law

Michael J. Hutter, Professor of Law, Albany Law School

Laird Kirkpatrick, Harkey Professor of Law, The George Washington University School of Law

Tom Lininger, Orlando J. and Marian H. Hollis Professor, University of Oregon School of Law

Michael M. Martin, Distinguished Professor of Law, Emeritus, Fordham Law School

Lynn McLain, Emerita Professor and Dean Joseph Curtis Faculty Fellow, University of Baltimore School of Law

Colin Miller, Professor of Law, University of South Carolina School of Law

Jane Campbell Moriarty, Carol Los Mansion Chair in Faculty Scholarship Professor of Law, Duquesne University School of Law

Christopher B. Mueller, Henry S. Lindsley Professor of Law, University of Colorado School of Law

Roger Park, Distinguished Professor of Law and James Edgar Hervey Chair in Litigation, University of California Hastings College of Law

Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, The George Washington University School of Law

Liesa R. Richter, George Lynn Cross Research Professor, William J. Alley Professor of Law, University of Oklahoma Law School

Paul Rothstein, Carmack Waterhouse Professor of Law, Georgetown University Law Center

Stephen A. Saltzburg, Wallace and Beverley Woodbury University Professor of Law, The George Washington University Law School

David Schlueter, Professor of Law, Hardy Chair Emeritus, St. Mary's University School of Law

Julia Simon-Kerr, Professor of Law, University of Connecticut School of Law

Rebecca Wexler, Assistant Professor of Law, University of California Berkeley School of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal Rule of Evidence 301 does not stand in the way of this Court adhering to its precedents and expressly holding that defendants bear the burden of persuasion to overcome the presumption of reliance spelled out in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). That is because—contrary to Goldman Sachs's arguments—Rule 301 is not absolute. Its shifting of the burden of production, but not the burden of persuasion, is merely a default rule. That is apparent on its face. The language "unless a federal statute or these rules provide otherwise" plainly recognizes that the default rule is inapplicable if the substantive law at issue necessarily demands that the defendants actually *show*—i.e., *prove*—that the presumption cannot stand. That is precisely the case here.

When interpreting statutes, this Court and the circuit courts sometimes create presumptions to best effectuate congressional intent. That is exactly how the *Basic* presumption came to be. The Court determined that the congressional policy embodied in the Securities Act of 1934 called for the full and accurate disclosure of information related to securities to promote the integrity of the market and the setting of "just" prices. The Court reasoned that advancing that goal would best be achieved through a presumption of class-wide reliance if plaintiffs show, among other things, that a defendant made material misrepresentations that affected a security's price. Having created and reaffirmed that presumption (in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*)), it is illogical to conclude that this Court is powerless to explain how it operates in practice—including how burdens of proof are allocated. Rule 301 is a default rule, not a muzzle that constrains a court's ability to declare how presumptions born of their interpretation of statutes

should work to further the intent of those statutes. This Court has never before relented in the face of Rule 301—neither in the securities context nor any other. And the courts of appeals have uniformly (and correctly) construed this Court's decisions in *Basic* and *Halliburton II* as shifting to defendants the burden of persuasion to rebut the presumption of reliance by demonstrating a lack of price impact by a preponderance of the evidence.

Basic made clear that to overcome the presumption of reliance, defendants must actually "sever[] the link" between the alleged misrepresentation and the price of the security. 485 U.S. at 248. *Halliburton II* reaffirmed this holding and suggested that "sever[ing] the link" would require defendants to adduce "more salient" evidence than the plaintiffs. 573 U.S. at 282. Thus, the language of *Basic* and *Halliburton II*, together with their focus on advancing Congress's intent, show that the Court imposed on defendants the burden of persuasion, and not just a burden of production, to rebut the presumption.

Further, *Basic* relied on a portion of the Advisory Committee Note to Rule 301 that accompanied the original version of the Rule adopted by the Court and submitted to Congress in 1972. That version explicitly called for defendants to bear the burden of persuasion in response to presumptions. In citing the section of the Advisory Committee Note corresponding to its proposed (but ultimately rejected) Rule, the *Basic* Court further made clear its intent that defendants would actually have to prove that no fraud on the market occurred to defeat the presumption of reliance.

Finally, invoking the *Basic* presumption is no easy feat. Plaintiffs must make a considerable showing that often entails submitting expert analyses to establish market reliance. If they can succeed in meeting the several

requirements (and numerous factors for assessing those requirements) to trigger the presumption, it should not vanish just because defendants put forth some evidence creating a dispute as to price impact. Such a lack of proportion—demanding that plaintiffs perform the equivalent of rolling a boulder up a hill but allowing defendants to give it a little nudge to roll it back down—is both unfair and inconsistent with the reason for creating the presumption in the first place. It is therefore entirely appropriate to impose upon defendants a burden of persuasion, rather than a simple burden of production, to overcome plaintiffs' hard-won presumption.

In sum, this Court should adhere to the reasoning of *Basic* and *Halliburton II*, in addition to longstanding doctrine concerning how presumptions work, and hold that defendants must actually prove a lack of price impact to dismantle the *Basic* presumption.

ARGUMENT

I. Rule 301 prescribes a default rule that allows courts to assign the burden of persuasion to the party opposing a presumption when necessary to properly apply the substantive law at issue.

A. Rule 301 is a default rule.

Rule 301 is a default rule that admits of exceptions. That is clear from its text. Under Rule 301, an opposing party bears only a burden of production in attempting to overcome a presumption, "unless a federal statute or [the Rules of Evidence] provide otherwise." Fed. R. Evid. 301.

Rule 301's default is that a presumption shifts the burden of production, but not the burden of persuasion, to the party against whom a presumption is directed. This is known as the "bursting bubble" view of presumptions. It doesn't take much to burst a bubble, only enough for a

reasonable person to find evidence inconsistent with the presumption. In fact, "[t]he Advisory Committee [that drafted Rule 301] was of the view that a presumption would have too slight an effect—would essentially be rendered meaningless—if it merely served to shift the burden of going forward; the Advisory Committee's proposed Rule 301 thus provided for burden-shifting. But Congress rejected this position." Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, 1 Federal Rules of Evidence Manual § 301.02[1] (12th ed.). The end result was a compromise that recognized the Advisory Committee's concern as well as a congressional preference for a less demanding default rule.

Rule 301 applies in mine-run cases. But in some situations, effectuating the purposes of the underlying substantive law demands that the party opposing the presumption bear not just a burden of production, but also a burden of persuasion. In those cases, Rule 301 is inapplicable.

B. Statutory doctrine can displace the generally applicable Rule 301.

Goldman Sachs insists that unless a statute *expressly* states that a party opposing a presumption bears the burden of persuasion, Rule 301 governs and the party bears only a burden of production. Petr. Br. at 40–41. But Goldman Sachs's cramped approach would wipe out all judicial holdings that depart from Rule 301's default—unless those departures were based on explicit statutory authorization. That reflects a misreading of Rule 301 that endows it with a sweeping power it does not have.

Courts and commentators alike have understood that when necessary to satisfy the demands of the substantive law being applied—including "statutory policy"—courts may diverge from Rule 301's default rule and allocate the burden of persuasion to the opposing party. Indeed, this

Court has declared that Rule 301 "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible." *Nat'l Labor Relations Bd. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 n.7 (1983), *abrogated on other grounds by Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994). As a leading evidence treatise explains: "Rule 301 contains exempting language . . . that permits courts to accord to statutory presumptions (and to court-made presumptions implementing statutes) an effect other than the one prescribed by Rule 301" in order to satisfy "statutory policy." Christopher B. Mueller & Laird C. Kirkpatrick, 1 *Federal Evidence* § 3:8 (4th ed.).

Many presumptions arise from judicial interpretations of statutes—as in *Basic*—rather than from explicit statutory text. Goldman Sachs does not (and cannot given this Court's precedents) contend that courts lack the authority to designate initial burdens based on their interpretation of a statute. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) ("This burden-shifting principle is not new or novel. There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'" (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)). Since courts can define the initial burden to invoke a presumption, it makes no sense to say that they are powerless to define the opposing party's burden to overcome that presumption. Such a holding would give courts considerable freedom to establish what showing is necessary to trigger a presumption, but then hold them hostage to the bursting bubble when it comes to the amount of proof necessary to overcome it.

What's more, when a presumption arises from judicial construction of a statute—again, as in *Basic*—it would be absurd to expect that Congress specified in the statute the opposing party's burden to overcome a presumption that did not yet exist. But that is what Goldman Sachs' approach would require. Unsurprisingly, no court has ever adopted such an irrational rule. Rather, just as judicial interpretations of statutes may create presumptions, so too can they shift the burden of persuasion (and not just production) to the party rebutting the presumption when necessitated by statutory interpretation. It would be pointless for courts to go to the trouble of crafting presumptions based on legislative intent if they can be overcome based on a mere burden of production. The famous evidence scholar Edmund M. Morgan described it as "little short of ridiculous" to imagine that a plaintiff could succeed in invoking a presumption and then have it disappear because a defendant put forth contradictory evidence but did not actually have to persuade:

> If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing. And if the judicial desire for the result expressed in the presumption is buttressed by either the demands of procedural convenience or is in accord with the usual balance of probability, it is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect.

Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 82 (1933).

Thus, the *Basic* presumption is an important part of assuring the Securities Act of 1934 fulfills its purpose, which it cannot do if it "bursts" and disappears upon the production of any countervailing evidence by a defendant.

II. The substantive law of securities fraud shifts the burden of persuasion to defendants to rebut the *Basic* presumption.

This Court's decisions in *Basic* and *Halliburton II* reflect precisely this sort of consideration of substantive law of a statute—here section 10(b) of the Securities Act—in both creating the *Basic* presumption and assigning the burden of persuasion to defendants to rebut it. Thus, the statute and its substantive law apply, not the generally applicable Rule 301.

A. The *Basic* presumption is a substantive doctrine of federal securities statutes.

As an initial matter, the *Basic* presumption is undeniably grounded in a statutory source because this Court adopted the presumption pursuant to federal securities laws. This Court recognized in *United States Department of Justice v. Landano* that the *Basic* presumption is one of several "judicially created presumptions under federal statutes that make no express provision for their use." 508 U.S. 165, 174–75 (1993)*; see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 462 (2013) (referring to the *Basic* presumption as "a substantive doctrine of federal securities–fraud law"); *Basic*, 485 U.S. at 245 ("The presumption of reliance . . . supports[] the congressional policy embodied in the 1934 Act.").

Halliburton II left no doubt about the significance of the *Basic* presumption as a necessary part of federal securities statutes. *Halliburton II*, 573 U.S. at 274. As in this case, the defendants claimed that the court could not

invoke a presumption that was not expressly in the statute's text. But the Court rejected that argument, reaffirmed *Basic*, and declined to revise the requirements for invoking the presumption. *Id.* at 266–70. This Court recognized that Congress had even enacted legislation that accepted the contours of the *Basic* presumption as described by the Court's securities-fraud decisions. *See Amgen*, 568 U.S. at 476 ("Congress rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*" when it passed the PSLRA). Accordingly, rather than requiring that all presumptions be based in text, this Court recognized that the "[*Basic*] presumption is a judicially created doctrine designed to implement a judicially created cause of action," and declared that it is "a substantive doctrine of federal securities-fraud law." *Halliburton II,* 573 U.S. at 274. And if the presumption itself can be judicially created, it would be exceedingly odd to hold that the *effect* of that presumption cannot be. This is because, if the effect of the presumption must be the bursting bubble, there is little reason to establish the presumption in the first place.

B. The same reasons that prompted the Court to create the *Basic* presumption also require shifting the burden of persuasion to defendants seeking to rebut that presumption.

Assigning the burden of persuasion to defendants is consistent with the *Basic* Court's reasoning for adopting the presumption of reliance in the first place. And allowing defendants to rebut the *Basic* presumption with just a single piece of evidence would undermine the entire basis for the *Basic* presumption, and hence undermine the federal securities statutes themselves.

In *Basic*—and later affirmed in *Halliburton II*—this Court held that federal securities statutes necessitated

that plaintiffs be able to pursue a fraud-on-the-market theory by establishing the elements for a presumption of market reliance. Specifically, in *Basic*, the Court observed that the "modern securities markets" are not based on face-to-face transactions but rather transactions intermediated by the pricing mechanism of the market. 485 U.S. at 243. "Requiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted material information had been disclosed, or if the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." *Id.* at 245. That in turn would allow dishonest and fraudulent practices to thrive, thereby disserving the "[u]nderlying . . . legislative philosophy" of the 1934 Securities Exchange Act: "'There cannot be honest markets without honest publicity.'" *Id.* at 230 (quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess., 11 (1934)).

In light of those considerations, the Court in *Basic* adopted the presumption of reliance based on the fraud-on-the-market theory. The Court explained that the presumption of reliance was necessary to effectuate Congress's intent in enacting the Securities Act of 1934—to promote market integrity by inducing the disclosure of all material information about securities. *Basic*, 485 U.S. at 245–46. Accordingly, the Court reasoned that "[t]he presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act." *Id.* at 245.

But if a defendant can overcome that presumption merely by producing evidence that its misrepresentations did not affect a stock's price—rather than proving as much—Congress's policy objective will be much harder to

vindicate. The statutory policies of the Securities Act will not be served if the *Basic* presumption can be eliminated by a defendant's mere introduction of evidence sufficient to create a factual issue on the question of reliance.

In addition, the *Basic* Court reasoned that the presumption of reliance is necessary to give plaintiffs a reasonable chance to certify classes of similarly situated defrauded investors. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997) (discussing importance of class actions in vindicating claims that may be too small or difficult to bring individually). Allowing plaintiffs to invoke a presumption of reliance enables them to proceed as a class by eliminating the need for "each class member to show direct reliance on [a company's] statements." *Basic*, 485 U.S. at 230. As the Court noted in *Basic*, and repeated in *Halliburton II*, "'[r]equiring proof of individualized reliance' from every securities fraud plaintiff 'effectively would . . . prevent [] [plaintiffs] from proceeding with a class action' in Rule 10b–5 suits" because if "every plaintiff had to prove direct reliance on the defendant's misrepresentation, 'individual issues then would . . . overwhelm[] the common ones,' making certification under Rule 23(b)(3) inappropriate." *Halliburton II*, 573 U.S. at 268 (quoting *Basic*, 485 U.S. at 242). The *Basic* presumption, therefore, is necessary to allow small investors who are harmed by a company's misrepresentations to aggregate their claims and not only be compensated but also vindicate the goals of the Securities Act.

By contrast, if adopted, Goldman Sachs's position would thwart class certification because plaintiffs would have to either individually prove reliance (defeating predominance) or, according to Goldman Sachs (at 41–42) prove price impact at the class certification stage. But this Court already rejected the claim that plaintiffs must prove

price impact before class certification, stating that it would "radically alter" the *Basic* presumption. *Halliburton II*, 573 U.S. at 278. Goldman Sachs's argument is just a thinly veiled attempt to effectively overrule that holding. Its position is that it could introduce a single piece of evidence and then plaintiffs have to win that merits issue—all at the preliminary Rule 23 phase. That contravenes this Court's holding that plaintiffs do not have to prove price impact at the class certification stage.

Basic thus understood that Rule 301 must yield to the appropriate application of the substantive law. Enabling defendants to eliminate the presumption of reliance by merely producing evidence that their alleged misrepresentations did not affect the stock's price would seriously handicap Rule 10b-5 actions as mechanisms for enforcing the securities laws. Only by shifting the burden of persuasion to defendants on this issue can the *Basic* presumption serve its intended purpose of "support[ing] . . . the congressional policy embodied in the 1934 Act" and facilitating class treatment of Rule 10b-5 claims, without which considerable fraud will go unpunished. *Basic*, 485 U.S. at 245.

Halliburton II strengthened the proposition that defendants bear the burden of persuasion to overcome the presumption. There, the defendants urged the Court to overturn *Basic*. As a fallback position, the defendants argued that if the Court was not inclined to overturn *Basic*, they could rebut the *Basic* presumption by merely producing contrary evidence. *See Halliburton II* Reply Br. at 23 (No. 13-317). This Court rejected both arguments. As to defendants' rebuttal requirements, the Court repeated *Basic*'s holding that the presumption of reliance can be overcome by "'[a]ny showing that severs the link'" between the alleged misrepresentation and the price of the

security (or the plaintiff's decision to trade at fair market price). *Halliburton II*, 573 U.S. at 269 (quoting *Basic*, 485 U.S. at 248). For example, one such "showing" might be that "the alleged misrepresentation did not, for whatever reason, actually affect the market price." *Id.*

Goldman Sachs contends that *Basic*'s use of the word "any" in the phrase "any showing" imposes a lenient standard for defendants to meet, along the lines of the Rule 301 default rule. But in context, the word "any" in *Basic* meant that there are a number of different *kinds of facts* that could be offered to "sever[] the link" between the alleged misrepresentation and the presumed fact of reliance. *See* 485 U.S. at 249 (giving examples of rebuttal such as a showing that news of the truth had "credibly entered the market and dissipated the effects of the misstatements," or a showing that the plaintiffs "would have divested themselves of their [] shares without relying on the integrity of the market"). While there are different ways that a defendant could actually show the absence of reliance in order to meet its rebuttal burden, this does not mean that any fact will actually (or virtually automatically) rebut the presumption. *See In re Allstate Corp. Sec. Litig.,* 966 F.3d 595, 611 (7th Cir. 2020) ("After all, *Basic* said that '[a]ny showing *that severs the link'* would be sufficient to rebut the presumption, . . . not that mere production of evidence would defeat the presumption.").

In permitting defendants to challenge the presumption at the class certification stage, rather than waiting until the merits, *Halliburton II* said that courts are not required "to ignore a defendant's direct, *more salient* evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." 573 U.S. at 282 (emphasis added). "More salient evidence" is the

language of a burden of persuasion, not a mere burden of production. The concurrence echoed this statement, emphasizing that the Court's opinion "recognizes that it is incumbent upon the defendant *to show* the absence of price impact." *Id.* at 284 (emphasis added).

Goldman Sachs admonishes that the language from this Court should not be "parsed" and is "scant evidence" that this Court shifted the burden of persuasion. Petr. Br. at 41. But it is not just the words this Court used in *Basic* and *Halliburton II* that place the burden of persuasion on defendants—and those words are important. It is the Court's *reasoning* that demonstrates that the substantive law of 1934 Act requires defendants who are seeking to rebut the presumption of reliance to carry the burden of persuasion.

C. *Basic*'s reference to the Rule 301 Advisory Committee Note further supports the conclusion that defendants must rebut the *Basic* presumption by a preponderance of the evidence.

Ignoring this Court's reasoning and language in *Basic* and *Halliburton II*, Goldman Sachs asserts that Rule 301 must apply because it was cited in *Basic*. Petr. Br. at 41. But its reliance on the citation to Rule 301 is misplaced. The Court's citation to Rule 301, and specifically to the Advisory Committee Note, helps respondents, not petitioners.

First, *Basic* cited Rule 301 and its Advisory Committee Note to support this statement: "Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties." 485 U.S. at 245. The Court's citation for that principle was: "See E. Cleary, McCormick on Evidence 968–969 (3d ed. 1984); see also Fed.Rule Evid. 301 and Advisory

Committee Notes, 28 U.S.C.App., p. 685." No one disputes that presumptions can be such "useful devices." And this mere citation does not stand for the greater proposition that Rule 301's mere burden of production applies here for rebutting the presumption the *Basic* Court found necessary to effectuate the Securities Act.

But even more telling is the Court's cite to the Advisory Committee Note accompanying Rule 301 and to a specific pin cite. The cited Note was written to accompany the version of Rule 301 that this Court approved in 1972. That version required parties rebutting a presumption to carry the burden of *persuasion*, not just production.[3] And the accompanying Note made clear that the Court was approving an approach to presumptions that shifted the burden of *persuasion* to a party against whom a presumption operated.

The Note states: "Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of *establishing* the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it." Fed. R. Evid. 301, Advisory Comm. Notes (emphasis added) (citing Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937)). As the Advisory Committee Note further explains, applying only the burden of production on a party seeking to rebut a presumption would be "too slight." It stated:

---

[3] That version of the rule provided: "In all cases not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Mueller & Kirkpatrick, *Federal Evidence*, at § 3:1.

> The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, *is rejected* as according presumptions too "slight and evanescent" an effect.

Id. (emphasis added) (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, at p. 913).[4]

Congress, however, rejected the Rule adopted and submitted by the Court and instead modified it so that defendants bear only the burden of production. Naturally, the *Basic* Court would have been aware of Congress's rejection of its proposed Rule 301 and Congress's adoption of a more modest rule. But that makes the *Basic* Court's reliance on the Advisory Committee Note to the original proposed rule, and its comment about the usefulness of presumptions in allocating "burdens of proof," highly meaningful. Rather than advancing Goldman Sachs's argument that the citation means Rule 301's meager burden should apply, the citation to the Advisory Committee Note to the original proposal further emphasizes the Court's understanding that the burden of persuasion for rebutting the *Basic* presumption rests with the defendant.

---

[4] As one treatise has put it: "The Advisory Committee was of the view that a presumption would have too slight an effect—would essentially be rendered meaningless—if it served to shift the burden of going forward; the Advisory Committee's proposed Rule 301 thus provided for burden-shifting." Saltzburg, Martin & Capra, 1 Federal Rules of Evidence Manual § 301.02[1].

III. The difficulty of establishing the *Basic* presumption demonstrates that defendants should bear the burden of persuasion on rebuttal.

The *Basic* presumption requires plaintiffs to make a much greater showing than is required for other presumptions governed by Rule 301—including submitting expert reports and technical analysis. That too supports placing a correspondingly higher burden on defendants to rebut the presumption than what is dictated by Rule 301.

The typical presumption requires little of a party seeking to rely on it. And thus it makes sense that for the typical presumption, little is required of a party seeking to rebut it. For example, the classic "mailbox rule" provides that a party may rely on the presumption that a properly addressed envelope that was mailed also was received by the addressee by simply offering testimony that the letter was properly addressed and mailed. The rebuttal evidence, in turn, can simply be the other party's statement "I did not get it." *See Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 320–22 (3d Cir. 2014). Other examples of presumptions subject to the Rule 301 default rule are also relatively simple to establish. *See, e.g.*, *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286–87 (3d Cir. 2006) (describing presumption that "a domicile once acquired is presumed to continue until it is shown to have been changed," and that rebutting the presumption merely requires showing that one has taken up residence in the new domicile and intends to remain there) (internal quotation marks and citation omitted); *Matter of Multiponics, Inc.*, 622 F.2d 725, 728 (5th Cir. 1980) (explaining that "where funds are on deposit at a bank, a presumption of a debtor-creditor relationship arises," but that the presumption can be rebutted "when the funds on deposit with the bank are held in a special account or impressed with a trust");

O'Boyle Tank Lines, Inc. v. Beckham, 616 F.2d 207, 209 (5th Cir. 1980) (in interstate shipment of goods, the shipper is presumed liable to the carrier for freight charges; this presumption may be rebutted by the bill of lading or other facts and documents which indicate that another has the true beneficial interest in the goods).

The evidentiary burden of rebuttal in such cases is quite meager, often described as sufficient evidence to withstand a motion for summary judgment or judgment as a matter of law. *See e.g., McCann*, 458 F.3d at 288. Any evidence that a trier of fact *could* believe is ordinarily sufficient to overcome a motion for summary judgment or a directed verdict because "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). That means that the burden of rebutting presumptions governed by Rule 301's default rule is weak.

By contrast, invoking the *Basic* presumption is not a simple matter. It is much more demanding than the typical presumption. To trigger the *Basic* presumption of reliance, plaintiffs must show by a preponderance of the evidence "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton II*, 573 U.S. at 268 (citing *Basic*, 485 U.S. at 248 n.27).

These elements often incorporate sub-factors. For example, several circuits have endorsed the use of what are known as the "*Cammer*" factors (drawn from *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989)) for assessing the market-efficiency requirement. *See Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017); *In re DVI, Inc. Sec. Litig.*,

639 F.3d 623, 634 n.16 (3d Cir. 2011); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 18 (1st Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004). The *Cammer* factors consist of: (1) the average weekly trading volume of the stock; (2) the number of securities analysts following and reporting on the stock; (3) the extent to which market makers traded in the stock; (4) the issuer's eligibility to file an SEC registration Form S-3; and (5) the demonstration of a cause and effect relationship between unexpected, material disclosures and changes in the stock's price. *Waggoner*, 875 F.3d at 94.[5]

As the *Halliburton II* Court noted, to satisfy these elements by a preponderance of the evidence, plaintiffs must typically submit "event studies"—i.e., "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." 573 U.S. at 280. If the defense is able to attack even one of the *Basic* elements (or one of the *Cammer* factors) sufficiently, a court may find that plaintiffs have failed to prove an efficient market and cannot trigger the *Basic* presumption of reliance.

Securities-fraud plaintiffs thus must make a significant showing to invoke the *Basic* presumption—it is a much heavier burden before getting the benefit of a

[5] Other courts have made invoking the *Basic* presumption an even more demanding showing. In *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001), the court added three additional factors: that (1) investors tend to be more interested in companies with higher market capitalizations, thus leading to more efficiency; (2) a small bid-ask spread indicated that trading in the stock was inexpensive, suggesting efficiency; and (3) if substantial portions of shares are held by insiders, the price is less likely to reflect only the total of all public information. *See also Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (suggesting eight factors in non-exhaustive list including the five *Cammer* factors).

presumption than a party typically must bear before benefitting from a legal presumption. *See supra* at 19–20. "Fairness" and "common sense" thus dictate that this hard-won presumption should not vanish just because defendants present evidence calling into question the price impact of their misrepresentations. It is inconceivable that plaintiffs would lose all benefit of the presumption simply because a defendant offered "some" rebuttal evidence.

Indeed, in *Halliburton I*, Halliburton argued that defendants in every case could satisfy their burden on rebuttal simply by "put[ting] an expert on the stand" and having the expert "say there was no price impact." Transcript of Oral Argument at 39, *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. 804 (2011) (No. 09-1403). As Justice Kagan responded, if the Court were to adopt such a rule, then "the *Basic* presumption isn't worth much." *Id.* at 40. It would mean that the defendants could "put an expert on the stand, and the *Basic* presumption falls away, and the plaintiffs have to actually prove their case at that very early stage." *Id.* As the Second Circuit recognized: "The presumption of reliance would . . . be of little value if it were so easily overcome." *Waggoner*, 875 F.3d at 100–01.

To deprive plaintiffs of the presumption in cases in which the defendant has not truly rebutted it, but only proffered some evidence that, if believed, would rebut it, requires plaintiffs to push a boulder up a mountain, only to allow the defendants to tap the boulder to push it back down.

IV. No federal court of appeals has held that defendants can rebut the *Basic* presumption by merely producing evidence that there was no price impact.

Federal courts of appeals have uniformly held that defendants seeking to rebut the *Basic* presumption bear the burden of proving a lack of price impact by a

preponderance of the evidence. Searching for authority, Goldman Sachs and its amici can only find dicta to support the sea change in securities law they seek. They cite not a single case where, after securities plaintiffs established all the elements of the *Basic* presumption, a circuit or district court allowed defendants to rebut it with the mere introduction of contrary evidence. This Court should not destabilize the "careful balance" it struck in *Basic* and *Halliburton II*, Petr. Br. at 3, by upending the uniform practice of lower courts throughout the country and letting defendants burst the *Basic* presumption with a single piece of evidence.

A. Circuit courts uniformly hold that the Rule 301 default does not apply.

The Second Circuit is far from alone in rejecting defendants' Rule 301 argument and concluding that, at the class certification stage, "defendants must rebut the *Basic* presumption by disproving reliance by a preponderance of the evidence." *Waggoner*, 875 at 99. Quite the opposite: No circuit court has held that defendants can "rebut the *Basic* presumption by simply producing *some* evidence." *Id.* at 100.

In *In re Allstate Securities Litigation*, the Seventh Circuit held that "the fraud-on-the market presumption endorsed in *Basic* creates a burden-shifting framework," whereby, once the plaintiff satisfies the *Basic* elements, "the burden of persuasion, not production, to rebut the *Basic* presumption shifts to defendants." 966 F.3d at 610. Because the *Basic* presumption is part and parcel of Section 10(b) actions, Rule 301 "imposes no impediment" to this burden-shifting framework. *Id.*

The Eleventh Circuit said the same thing. In *Local 703, I.B. of T. Grocery and Food Employees Welfare Fund v. Regions Financial Corporation*, that court rejected the

notion that submission of any rebuttal evidence is sufficient to rebut the *Basic* presumption. 762 F.3d 1248, 1252 (11th Cir. 2014). It did not mince words: "*Halliburton II* by no means holds that in every case in which such evidence is presented, the presumption will always be defeated." *Id.* at 1259.

It is so well-established in some circuits that defendants must carry the burden of persuasion to rebut the *Basic* presumption that it is even part of the model jury instructions. The Fifth and the Ninth Circuit provide two examples. The Fifth Circuit instruction states that, once a plaintiff makes its showing, the jury may presume that a plaintiff relied on a defendant's misstatement or omission unless the defendant can rebut that presumption by a preponderance of the evidence. Pattern Civ. Jury Instr. 5th Cir. § 7.1 (2020). It states:

> If you find that Defendant [name] made an omission or failed to disclose a material fact, you must presume that Plaintiff [name] relied on the omission or failure to disclose. Defendant [name] may rebut, or overcome, this presumption if [he/she] *proves, by a preponderance of the evidence*, that Plaintiff's [name]'s decision would not have been affected even if Defendant [name] had disclosed the omitted facts.

Id. (emphasis added) (citing *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 364 (5th Cir. 1987) (defendant can rebut presumption of fraud on the market "by showing, upon the shifting of the burden to defendant, that the nondisclosures did not affect the market price.")).

The Ninth Circuit instruction is to the same effect. It states that if the plaintiff satisfies the *Basic* elements by a preponderance of the evidence, the jury "may find that the

plaintiff has proved that [he] [she] [it] relied on the defendant's statements." Model Civ. Jury Instr. 9th Cir. § 18.5 (2020). And it places the burden of persuasion for rebutting that presumption on the defendants:

> If, however, the defendant *proves by a preponderance of the evidence* that (1) the plaintiff did not actually rely on the integrity of the market or (2) the alleged misrepresentation or omission did not affect the market price of the security, then the defendant has rebutted any presumption that the plaintiff relied on the market. In that event, the plaintiff must then prove that [he] [she] [it] justifiably relied directly on the alleged misrepresentation or omission.

Id. (emphasis added).

B. Goldman Sachs and its amici cite cases that are inapposite.

To obfuscate the dramatic change in securities law their position would usher in, Goldman Sachs and its amici cite several cases, suggesting that some courts have adopted their position. Not so. Those cases at best have dicta supporting the application of Rule 301's burden of production, but none holds that the *Basic* presumption may be eliminated by introducing a single expert opinion or piece of evidence suggesting that its misstatements had no price impact.

Goldman Sachs and its amici primarily rely upon the Eighth Circuit's decision in *IBEW Local 98 Pension Fund v. Best Buy Co.*, which stated that after the plaintiffs established the predicates for the *Basic* presumption, the "defendants had the burden to come forward with evidence showing a lack of price impact," and cited Rule 301. 818 F.3d 775, 782 (8th Cir. 2016); *cited at* Petr. Br. at 22,

Former SEC Officials and Law Professors Amicus Br. at 22, Society for Corporate Governance Amicus Br. at 19 n.18. But that case did not resolve the issue presented here. First, no party in this case disputes that defendants do indeed have to "come forward with evidence showing a lack of price impact," as the Eighth Circuit stated. All agree that the defendants at least have the burden of production. The question is whether they also carry the burden of persuasion, which the Eighth Circuit did not address and which was not disputed by the parties in *Best Buy*. *See Waggoner,* 875 F.3d at 103 n.36 ("The Eighth Circuit's statement appears to be dictum because the extent of the burden was not at issue."); *see also In re Allstate Corp. Sec. Litig.*, 966 F.3d at 610 n.4 (reasoning that the Eighth Circuit's decision as to the burden of production did not conflict with its decision that defendants also carry the burden of persuasion to rebut the *Basic* presumption).

Moreover, the Eighth Circuit's ultimate holding was that the defendants' "overwhelming evidence of no 'front-end' price impact rebutted the *Basic* presumption" and plaintiffs "presented no contrary evidence of price impact." *Best Buy*, 818 F.3d at 782–83. In that situation, any allocation of the burden of persuasion was of no consequence and the "Eighth Circuit's ruling did not depend on the standard of proof." *Waggoner*, 875 F.3d at 103 n.36.

Notably, district courts in the Eighth Circuit have recognized that *Best Buy*'s discussion of Rule 301 was just dicta and have explicitly declined to read *Best Buy* as requiring that defendants only satisfy the mild burden under Rule 301 to rebut the *Basic* presumption. *See, e.g.*, *In re CenturyLink Sales Practices & Sec. Litig.,* 337 F.R.D. 193, 209 (D. Minn. 2020); *Plymouth Cnty. Ret. Sys. v.*

Patterson Cos. Inc., No. CV 18-871 (MJD/HB), 2020 WL 5757695, at *11 (D. Minn. Sept. 28, 2020).[6]

The upshot: Accepting Goldman Sachs' position that it need only meet a burden of production to rebut the *Basic* presumption would upend the consensus of courts throughout the country. Goldman Sachs seeks to use Rule 301 as a backdoor out of the *Basic* presumption, undoing this Court's decision to affirm that presumption in *Halliburton II*. As courts across the country agree, Rule 301 provides no such backdoor and this Court should not create one.

CONCLUSION

The Court should affirm as to the second question presented.

---

[6] Reaching, Goldman Sach's amici attempt to show their position is not an outlier by citing a smattering of district court cases that have applied Rule 301's burden of production to defendants rebutting the *Basic* presumption. Former SEC Officials and Law Professors Amicus Br. at 23. But even its own citations do not support the point. *See Bing Li v. Aeterna Zentaris, Inc.*, 324 F.R.D. 331, 345 (D.N.J. 2018), *aff'd sub nom. Vizirgianakis v. Aeterna Zentaris, Inc.*, 775 F. App'x 51 (3d Cir. 2019) (holding that because "[defense expert's] report does not demonstrate the absence of a price impact, Plaintiffs' presumption of reliance stands unrebutted"); *KBC Asset Mgmt. NV v. 3D Sys. Corp.*, No. CV 0:15-2393-MGL, 2017 WL 4297450, at *8 (D.S.C. Sept. 28, 2017) (holding that defendants had not even "presented evidence sufficient to convince it there was no price impact").

Respectfully submitted,

RACHEL BLOOMEKATZ
Counsel of Record
BLOOMEKATZ LAW LLC
1148 Neil Avenue
Columbus, OH 43201
(614) 259-7611
rachel@bloomekatzlaw.com

ALLISON EHLERT
EHLERT HICKS, LLP
2001 Addison Street, Suite 300
Berkeley, CA 94709
(510) 833-7339
aehlert@ehlerthicks.com

JEREMY A. LIEBERMAN
EMMA GILMORE
MARC I. GROSS
POMERANTZ LLP
600 3rd Avenue
New York, NY 10016
(212) 661-1100
jalieberman@pomlaw.com

MICHAEL DELL'ANGELO
SHERRIE R. SAVETT
BERGER MONTAGUE
1818 Market Street, Suite 3600
Philadelphia, PA 10103
mdellangelo@bm.net

March 3, 2021 *Counsel for Amici Curiae*