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 *Amici Curiae* Securities and Financial Markets Association, Bank Policy Institute, American Bankers Association, U.S. Chamber of Commerce, and American Property Casualty Insurance Association in Support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association.

The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, BPI's members employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine of financial innovation and economic growth.

American Bankers Association (the "ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA

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[1] Pursuant to Rule 37.6, counsel for all parties have provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The Chamber of Commerce of the United States of America (the "Chamber") is the Nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of approximately 3 million businesses, trade, and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community. Many of the Chamber's members are companies subject to the U.S. securities laws who would be adversely affected if the decision below is not corrected.

American Property Casualty Insurance Association ("APCIA" and, together with SIFMA, BPI, the ABA, and the Chamber, the "*Amici*") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

The *Amici* have a substantial interest in the issues presented in this case. The precedent set below by the Second Circuit contradicts this Court's guidance that defendants may rebut the presumption of classwide reliance at the class certification stage, threatens unwarranted class litigation from plaintiffs proceeding under an inflation-maintenance theory, and could subject the *Amici's* membership to runaway class certification.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents questions of profound importance to the *Amici's* members. The decision reached by the Second Circuit threatens to make the presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) effectively irrebuttable, burdening companies and their shareholders with meritless claims based on generic statements which have no price impact.

The Plaintiffs in this case allege that generic, aspirational statements contained in Goldman Sachs Group, Inc.'s ("Goldman's") public filings misled the market and artificially maintained an inflated price for Goldman's stock. These statements consisted of vague assertions such as "[o]ur clients' interests always come first." The Second Circuit held that the vague nature of statements such as these could not be considered at the class certification stage in determining whether Defendants had sufficiently demonstrated under *Basic* that the alleged misstatements did not affect the stock price. This holding contradicts this Court's precedent that a court may not "artificially limit" the evidence considered at class certification. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) (*Halliburton II*). As explained by Judge Sullivan in dissent, when assessing price impact, the statements themselves cannot be ignored, particularly where the statements are so generalized as to be unlikely to be incorporated into the stock price. A court should be "free to consider the alleged misrepresentations in order to assess their impact on price." Pet. App. 45a.

Countless companies, including members of the *Amici*, make generic aspirational statements that could be used as grist for inflation-maintenance claims following any negative corporate announcement causing a stock price drop. If defendants are not provided a legitimate opportunity to rebut the *Basic* presumption, including by reference to the generic and aspirational nature of the alleged fraudulent statements at issue, there is a substantial risk of near-automatic class certification, leading to potential runaway liability and mounting financial pressure for companies and their shareholders to pay on alleged misstatements that had no market impact.

ARGUMENT

I. THE CHALLENGED STATEMENTS IN THIS CASE ARE GENERAL, ASPIRATIONAL, AND OF THE KIND COMMONLY MADE IN THE MARKETPLACE

Plaintiffs proceed on the "inflation-maintenance" theory, which this Court has never endorsed. Under this theory, Plaintiffs argue that Goldman made certain false statements in its Annual Reports and Form 10-K filings published between 2007 and 2010, which fooled the market into overvaluing Goldman's stock. The alleged misstatements do not refer to any particular product line, transaction, or practice whatsoever, let alone to the firm's sponsorship or trading in collateralized debt obligations or other mortgage-related instruments. Although Plaintiffs concede that Goldman's stock price did not increase following any of these statements, they allege that the statements nonetheless maintained an inflated stock price until 2010, when the price fell following reports of government enforcement activity against Goldman alleging that it failed to adequately disclose conflicts in the mortgage-related transaction space. Plaintiffs allege that the announcement of possible federal investigations revealed to the market that the generic and vague statements were false.

Many of the statements are general descriptions in the "Business Principles" section of Goldman's Annual Reports. Examples include:

- "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard."
- "Integrity and honesty are at the heart of our business."
- "Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow."

J.A. 31-33.

The other challenged statements are contained in the "Risk Factors" section of Goldman's Form 10-K filings. Like the business principles statements, the risk factors statements are general and non-specific. They do not refer to any particular conflicts or conflict avoidance procedures and also make no guarantee that Goldman will be able to avoid or resolve all conflicts of interest. Examples include:

- "Conflicts of interest are increasing and a failure to appropriately deal with conflicts of interest could adversely affect our businesses. Our reputation is one of our most important assets. As we have expanded the scope of our businesses and our client base, we increasingly have to address potential conflicts of interest . . . ."
- "We have extensive procedures and controls that are designed to address conflicts of interest . . . ."

J.A. 27, 29.

Statements like these are ubiquitous in the marketplace. Companies of all kinds, including the *Amici's* members, often make general, aspirational statements like Goldman's. Companies make such statements for a variety of reasons, including to motivate employees and affirm organizational culture. J.A. 588-89. The statements communicate an organization's goals and principles to key stakeholders, including customers, employees, and investors. J.A. 588.

Examples of similar statements made by large financial institutions and Fortune 500 firms are innumerable. A selected few are identified below:

- "Our brand and reputation are key assets of our Company."
- "Our . . . reputation and experience are among this company's strongest advantages."
- "Our reputation is one of our most important assets."
- "Our continued success is substantially dependent on . . . the reputation we have built over many years . . . ."
- "[Our] success is based on creating innovative, high-quality products and services and on demonstrating integrity in every business interaction."
- "[W]e believe our success depends on maintaining the highest ethical and moral standards everywhere we operate. That focus on integrity starts at the top."
- "Management of potential conflicts of interests has become increasingly complex as we expand our business activities through more numerous transactions, obligations and interests with and among our clients."
- "Our businesses depend on our strong reputation and the value of [our] brand."

J.A. 591, 597-603; *see also Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944 (6th Cir. 2009) ("vague" and "loosely optimistic" affirmations are "ubiquitous" and "numbingly familiar in the marketplace"); *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (statements about defendant's integrity and risk management were "so general" that "[n]o investor would take such statements seriously in assessing a potential investment, for the simple fact that almost every investment bank makes these statements").

Statements similar to Goldman's concerning the existence of procedures to manage conflicts of interest are also commonplace in the market. *See, e.g.*, J.A. 602 ("The failure of the Firm to deal, or to appear to fail to deal, with various issues that could give rise to reputational risk could cause harm to the Firm and its business prospects. These include, but are not limited to, appropriately dealing with potential conflicts of interest").

The statements challenged by Plaintiffs are general, aspirational, and ubiquitous. The Second Circuit itself has held investors usually do not consider such statements when buying and selling stock. *See, e.g., Singh v. Cigna Corp.*, 918 F.3d 57, 60-61 (2d Cir. 2019) (holding that general statements about Cigna's reputation, integrity, and compliance efforts contained in its Code of Ethics and Form 10-Ks would not be relied upon by a reasonable investor); *City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) (general statements about reputation, integrity, and compliance with ethical norms are too general to cause a reasonable investor to rely upon them) (internal quotation marks omitted); *ECA, Local 134 IBEW Joint Pension Trust of Chicago* *v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (the statement that defendant "set the standard for best practices in risk management techniques . . . is so general that a reasonable investor would not depend on it as a guarantee that [defendant] would never take a step that might adversely affect its reputation").

II. A COURT SHOULD BE PERMITTED TO CONSIDER THE NATURE OF THE ALLEGED MISREPRESENTATIONS WHEN EVALUATING WHETHER THE DEFENDANT HAS REBUTTED THE *BASIC* PRESUMPTION

In *Basic*, this Court recognized that classwide reliance may be presumed if the plaintiffs demonstrate that: (1) the alleged misrepresentations were material, publicly known, and would induce an investor to misjudge the share value, (2) the stock traded in an efficient market, and (3) the plaintiff traded the stock between the time the alleged misrepresentations were made and the truth was revealed. 485 U.S. at 246-28 n.27. Importantly, the *Basic* presumption is rebuttable. As stated in *Halliburton II*, 573 U.S. at 284, defendants "must be afforded an opportunity to rebut" the *Basic* presumption "through evidence that an alleged misrepresentation did not actually affect the market price of the stock." Thus, as applied to Plaintiffs' inflation-maintenance theory, a court considers at the class certification stage whether the evidence provided by defendant severs the link between the statements alleged to have maintained an inflated share price and the share price itself.

However, the *Basic* presumption as applied has very rarely been rebuttable in practice, particularly in inflation-maintenance cases. Even in the wake of *Halliburton II*, which explicitly held that defendants have the ability to rebut the presumption of classwide reliance by showing a lack of price impact, in virtually every federal case involving inflation-maintenance theories, courts have held that defendants failed to rebut the *Basic* presumption.[2] In fact, the *Amici* are aware of only a small handful of cases decided since *Halliburton II* in which defendants successfully rebutted the *Basic* presumption even in part, through a showing of a lack of price impact.[3]

In some cases, despite the evidence put forward by defendants showing a lack of price impact, district courts hold that the evidence does not establish that the price decline was not caused "at least in part" by the disclosure of alleged misrepresentations or fraud. *See, e.g., Waggoner v. Barclays PLC*, 875 F.3d 79, 92 (2d Cir. 2017). Establishing a lack of so called "back-end" price impact—that is, that the stock price was not affected following the alleged corrective disclosure—

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[2] Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077 (2019).

[3] *See IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016); *Ohio Pub. Employees Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, No. 08-cv-0160, 2018 WL 3861840 (N.D. Ohio Aug. 14, 2018); *In re Finisar Corp. Sec. Litig.*, No. 11-cv-01252, 2017 WL 6026244 (N.D. Cal. Dec. 5, 2017); *In re Intuitive Surgical Sec. Litig.*, No. 13-cv-01920, 2016 WL 7425926 (N.D. Cal. Dec. 22, 2016); *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251 (N.D. Tex. 2015).

has proven an extremely difficult burden for defendants to carry. Thus the burden facing defendants in inflation-maintenance cases is even more difficult that other cases, as even if defendants can show (as Goldman did here) that the alleged misrepresentations had no impact on the relevant stock price, they must nonetheless also prove the negative that *no portion* of the change in stock price following an alleged corrective disclosure was due to the correction of the supposed misrepresentations. In one recent decision, defendants presented evidence showing that none of the alleged misrepresentations had any statistically significant price impact when they were made, and on 40% of the alleged misrepresentation dates, the stock price actually *decreased*. *Plymouth Cty. Ret. Sys. v. Patterson Companies, Inc.*, Civ. No. 18-871, 2020 WL 5757695, at *11 (D. Minn. Sept. 28, 2020). However, the district court held that despite the lack of front-end price impact, defendants failed to establish a lack of back-end price impact because their evidence was insufficient to show that at least some of the price decline was due to "information other than revelation of antitrust conduct." *Plymouth*, 2020 WL 5757695, at *13. What is more, the district court also held that consideration of whether the market was already aware of the antitrust allegations against defendants, and thus whether the price decline was actually tied to a correction of the alleged misrepresentations, was a merits issue not for consideration at the class certification stage. *Plymouth*, 2020 WL 5757695 at *13.

In the wake of *Halliburton II*, despite this Court's guidance, it therefore seems that the *Basic* presumption has proven nearly irrebuttable. The decision below takes this even further, stressing that defendants bear the ultimate burden of persuasion in rebutting the *Basic* presumption, and that a court cannot consider the nature of the misrepresentations themselves. As a result, the Second Circuit held that Defendants failed to rebut the *Basic* presumption despite robust evidence. Defendants presented an event study showing no price impact. Defendants also showed that before any of the alleged corrective disclosure dates in 2010, numerous prior disclosures publicized the existence and risk of conflicts of interest—none of which had any effect on the stock price (indeed, some of the challenged statements themselves even warned of the risk of conflicts of interest). This evidence was put forward to show that vague and vacuous statements like "[i]ntegrity and honesty are at the heart of our business" did not have any price impact, because they did not trick the marketplace into buying Goldman stock at an artificially inflated price.

As explained by Judge Sullivan in his dissent: "Candidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact. Here, 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 Plaintiffs' claims are based." Pet. App. 44a-45a.

Despite this, the Second Circuit majority's decision would bar courts from considering the nature of the alleged misstatements in assessing whether defendants rebutted the *Basic* presumption. The Second Circuit reasoned that a court cannot consider the nature of the alleged misstatements when analyzing their price impact without veering too closely into a materiality determination that is inappropriate at the class certification stage. But this is not so.

The Second Circuit's holding is inconsistent with this Court's precedent. It also creates a standard that is difficult to apply in practice. As Judge Sullivan noted in dissent, a "rigid compartmentalization" of the price impact and merits analyses is neither possible nor required by *Amgen* or *Halliburton II*. Pet. App., 45a. It is "fair for [a] court to consider the nature of the alleged misstatements in assessing whether and why the misrepresentations did not in fact affect the market price of Goldman stock." Pet. App., 44a (internal quotation marks omitted). As further noted by Judge Sullivan, "[o]nce a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price. The mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper." Pet. App. 45a.

It is not disputed that materiality is a consideration for the merits stage rather than the class certification stage. But this does not mean that evidence relevant to price impact which may *also* be relevant to materiality at the merits stage must therefore be ignored at the class certification stage. This Court has repeatedly made clear that the mere fact that evidence may be relevant at the merits stage is not reason to exclude it from consideration at the Rule 23 phase. In *Halliburton II* the Court was faced with the question of whether direct evidence that the statements had no price impact could be considered at the class certification stage, even though such evidence could also be before the court at the merits stage. The Court held that such evidence could be considered and that the class certification inquiry should not be "artificially limit[ed]." 573 U.S. at 283. In *Comcast* this Court implored courts to "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim," *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), and in *Wal-Mart* this Court explained that a class certification analysis may "entail some overlap with the merits of plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). What is more, the Seventh Circuit, applying *Halliburton II* in *In re Allstate*, made clear that a district court "must assess evidence that may speak directly to the forbidden merits inquiries of materiality and loss causation, while evaluating it *only* for what it reveals about the core *Basic* inquiry of transaction causation." *Allstate Corp. Sec. Litig.*, 966 F.3d 595, 611 (7th Cir. 2020). A district court must not refuse to consider evidence relevant to price impact at the class certification stage simply because that evidence also has relevance to merits considerations.

The same principle applies to the consideration of the generic nature of the statements themselves when assessing evidence of those statements' price impact. A court must not be required to close its eyes and not consider the statements that are alleged to have misled the market and maintained an inflated stock price, when considering precisely that: whether the statements had an impact on the stock price. To hold otherwise would require a court to ignore other price impact evidence providing critical context, and would impose an artificial limitation on evidence of price impact in contravention of *Halliburton II*. Here, the generic nature of the challenged statements should have been considered when assessing the price impact evidence presented by Defendants.

III. THE SECOND CIRCUIT DECISION WILL RESULT IN UNWARRANTED CLASS LITIGATION IN INFLATION-MAINTENANCE CASES

The artificial application of judicial blinders at the class certification stage in the majority decision below threatens the *Amici's* membership with unwarranted class litigation. This case provides a blueprint for enterprising Plaintiffs (and their lawyers) to use everyday occurrences as grist for inflation-maintenance claims. After economically significant news, such as a company falling short of its earnings targets, an unfavorable business development or the announcement of enforcement activity against it, a company's stock price may drop. Following this price decline, as they presumably did in this case, plaintiffs will review years of public filings made by the company to select statements vague and generic enough to conceivably cover the cause for the stock decline, such as "[o]ur reputation is one of our most important assets," or "[w]e are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us." Pet. App. 4a-5a. Armed with these statements and a subsequent stock price drop, Plaintiffs will attempt to obtain class certification by alleging, despite any contrary evidence presented by defendants, that the statements served to maintain an artificially inflated stock price.

The situation for defendants in the Second Circuit—the most active circuit in the country for federal securities filings[4]—is particularly dire because the Second Circuit has previously held that defendants bear the burden of persuasion at class certification to show no price impact.

This inappropriate burden shifting becomes all the more significant as the inflation-maintenance theory gains prominence in securities litigation. The decision below noted that in the wake of *Halliburton II*, more than two-thirds of securities fraud plaintiffs in federal district courts invoked the inflation-maintenance theory when defendants tried to rebut the *Basic* presumption. In nearly every inflation-maintenance case, the court held that defendant failed to rebut the presumption.[5]

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[4] 2020 Midyear Assessment, 13 (2020), https://www.cornerstone.com/Publications/Reports/2020-Securities-Class-Action-Filings-2020-Midyear-Assessment.

[5] The only two inflation-maintenance decisions the *Amici* are aware of in which a court has found defendants rebutted the *Basic* presumption are the district court's decision upon remand from the Supreme Court in *Halliburton II* itself, *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 270 (N.D. Tex. 2015), and *Best Buy Co.*, 818 F.3d at 783.

Although a class would ultimately have to withstand a motion for summary judgment and prove its case at trial, these burdens alone cannot be relied on to prevent defendant companies and their shareholders from being functionally coerced into paying out meritless claims. Once a class is certified, defendants often face "hydraulic pressure" to settle and "avoid[] the risk, however small, of potentially ruinous liability." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). This Court has recently acknowledged that it is "well known that [class actions] can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims.'" *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (citing *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n. 3, (2010) (Ginsburg, J., dissenting)). Studies indicate that less than 1 percent of securities class action filings are litigated to a verdict. Cornerstone Research, Securities Class Action Filings 2019 Year in Review, 16 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review; Cornerstone Research, Securities Class Action Filings 2020 Midyear Assessment, 13 (2020), https://www.cornerstone.com/Publications/Reports/2020-Securities-Class-Action-Filings-2020-Midyear-Assessment. Event-driven securities class actions such as this one are on the rise, and they frequently "remain viable" despite weakness on the merits "because the potential damages are often very high." U.S. Chamber Institute for Legal Reform, Containing the Contagion: Proposals to Reform the Broken Securities Class Action System 10 (February 25, 2019), https://instituteforlegalreform.com/research/containing-the-contagion-proposals-to-reform-the-broken-securities-class-action-system (internal quotation marks omitted).

The implication of the Second Circuit's holding is therefore that companies, including the *Amici's* membership, will be exposed to runaway class litigation as the inflation-maintenance theory becomes ever more widespread. Where the nature of the alleged misstatements cannot be considered at the class certification stage—and where the other evidence presented by defendants is almost uniformly found to be insufficient—it is difficult to see what could stand in the way of class certification following any substantial decrease in a company's stock price. In spite of the Court's clear guidance in *Halliburton II* that the defendants may rebut the *Basic* presumption with evidence of no price impact, even if such evidence is also relevant to the merits, the Second Circuit's decision threatens to render the rebuttable presumption of classwide reliance irrebuttable.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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