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 THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Laura H. Posner*
Counsel of Record
COHEN MILSTEIN
SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
(212) 220-2925
lposner@cohenmilstein.com

* Former Bureau Chief,
New Jersey Bureau of
Securities, 2014 – 2017

Vincente L. Martinez
Zachary Knepper
NORTH AMERICAN
SECURITIES ADMINISTRATORS
ASSOCIATION, INC.
750 First Street, NE
Suite 1140
Washington, DC 20002

Counsel for Amicus Curiae

Dated: March 3, 2021

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATEMENT OF INTEREST[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55-251 (5th ed. 2014). Our U.S. members' principal activities include registering securities offerings, licensing and examining brokers and investment advisers who sell securities or provide investment advice, and pursuing enforcement actions to combat fraud and other violations of state securities laws. The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA supports the work of its members and the investing public by, among other things, promulgating model rules, providing professional

---

[1] Pursuant to U.S. Sup. Ct. Rule 37.6, counsel for *amicus* affirms that no party other than *amicus* and its counsel authored this brief, in whole or in any part, and that no person or entity other than *amicus* or its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have provided their written consent for the filing of this *amicus* brief.

development opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemakings. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws, securities regulation, and investor protection.

This is one of those cases. NASAA and its members have an interest in this matter because this case could have important implications for the integrity and viability of private antifraud actions brought under the federal securities law and, potentially, under state securities laws as well. Meritorious private securities fraud suits, particularly class actions, are crucial to ensuring compliance with the securities laws. Such suits are an essential supplement to the criminal, civil, and administrative enforcement actions pursued by NASAA's U.S. members and federal regulators for the benefit of all investors. NASAA submits this brief to support the continued vitality of the class action mechanism for seeking redress for harmed investors.

<u>SUMMARY OF ARGUMENT</u>

Petitioners argue that the court of appeals erred by holding that Petitioners had the burden of persuasion to rebut the *Basic* presumption, and by supposedly preventing Petitioners from "point[ing] to the generic nature of the alleged misstatements" in that endeavor. They seek fundamental changes to the operation of the *Basic* presumption that would practically eliminate defendants' burden, and would do so precisely in the sorts of cases where the presumption matters most. Modifying the operation of the *Basic* presumption in the manner proposed by Petitioners is contrary to the remedial purposes of the federal securities laws, contravenes the continually expressed support of Congress and the Court for private class actions, would significantly undermine the ability of innocent investors to recover their losses, and would inevitably result in a loss of confidence in the U.S. markets.

As the Court recently affirmed in *Lorenzo* v. *SEC*, 139 S. Ct. 1094 (2019), the securities laws are intentionally robust and are designed to provide redress for all forms of securities fraud. *Id.* at 1104 ("Congress intended to root out all manner of fraud in the securities industry"). Private securities class actions are crucial to ensuring compliance with the securities laws and promoting investor confidence in the markets. They provide critical remedies to harmed investors and address the collective action problems and financial and informational disadvantages facing individual investors in litigation against corporate defendants. Private class actions are also a necessary and important supplement to government enforcement because state and federal regulators do not have sufficient resources to detect, investigate, prosecute, and remedy all securities law violations. It is in part for these reasons that courts should continue to apply the *Basic* presumption when a plaintiff establishes through economic evidence that the market was efficient unless the defendants can prove that there was no price impact.

Furthermore, false statements or omissions which artificially boost a stock's price or maintain existing price inflation, are both instances of fraud. It does not matter whether the fraudulent statements "initially introduce" inflation into a defendant's stock price, or instead "wrongfully prolong" the presence of that inflation. *FindWhat Inv'r Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1316 (11th Cir. 2011). The latter situation is simply a "mirror image" of the former, but "in black ink, rather than red." *Schleicher* v. *Wendt*, 618 F.3d 679, 683 (7th Cir. 2010). In either case, investors are harmed when the truth underlying the misrepresentation or omission comes to light. Accordingly, there is no reason to treat "theories of 'inflation maintenance' and 'inflation introduction'" as "separate legal categories." *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 259 (2d Cir. 2016).

In addition, the court of appeals below correctly observed that the presumption "would be of little value if defendants could overcome it by simply producing *some* evidence of a lack of price impact," Pet. App. 75a (internal quotation marks omitted). Accordingly, the Court should continue to maintain the framework it established in *Basic* and reaffirmed recently in *Halliburton II*.

Finally, although evidence about the content and context of alleged misstatements, including characterizations purporting to show their so-called "general" or "generic" nature, may be relevant to whether there was price impact, such evidence is not conclusive. Judges thus should not be permitted to rely exclusively on such self-serving characterizations to "intuit" whether the alleged misstatements *could or could not* have had any price impact. Rather, it is essential that courts engage in fulsome analyses of the evidentiary record in order to determine the actual effect of the alleged fraud on the stock's price.

Indeed, as the Court has recognized, "market efficiency is not a yes-or-no proposition," and therefore "a public, material misrepresentation might not affect a stock's price even in a generally efficient market." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 279 (2014) ("*Halliburton II*"). The inverse is also equally true; namely, that alleged misstatements that could be characterized or appear in a vacuum to be "general" or "generic" may impact price.

ARGUMENT

I. PRIVATE SECURITIES CLASS ACTIONS ARE CRUCIAL TO ENSURING COMPLIANCE WITH THE SECURITIES LAWS AND PROMOTING INVESTOR CONFIDENCE IN THE MARKETS.

Since the Court implemented the fraud-on-the-market presumption in *Basic*, the Court has been unwavering in its support for and recognition of the important role played by private securities fraud litigation in maintaining the integrity of the securities markets, deterring securities fraud, and compensating victims of fraud. *See, e.g.,* Barbara Black, *Eliminating Securities Fraud Class Actions Under The Radar*, 2009 Colum. Bus. L. Rev. 802, 808 (2009). Congress too has repeatedly recognized the importance of private securities litigation in deterring fraud and compensating victims (S. Rep. No. 104-98, at 8 (1995)), and in maintaining investor confidence in our markets and market integrity (H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). However, investor confidence requires both "confidence that the laws will be obeyed and that, when they're not, that the fraudsters will be made to pay." Luis A. Aguilar, Commissioner, U.S. Securities and Exchange Commission ("SEC"), Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation (Apr. 4, 2011), *available at* https://www.sec.gov/news/speech/2011/spch040411laa.htm. Petitioners seek fundamental changes to the operation of the *Basic* presumption that would have the practical effect of eliminating defendants' burden in precisely the sorts of cases where the presumption matters most. Doing so would be contrary to the fundamental remedial purposes of the federal securities laws, and significantly undermine the ability of innocent investors to recover their losses and the critical deterrent effect such private class actions serve, resulting in the inevitable loss of confidence in the U.S. markets.

A. Private securities class actions provide critical investor remedies and ensure that investors have a viable source of redress for fraud and deception.

Private class actions are the defrauded investor's primary mechanism for compensation. Research shows that "private enforcement . . . dwarf[s] public enforcement" in compensating victims of fraud, and thus private litigants are more successful at recovering losses for individual investors than government enforcement actions. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1542-43 tbls. 2 and 3 (2006).

The class action mechanism is not only effective, but essential for most investors seeking to vindicate their rights. Without it, recovery for fraud under Rule 10b-5 of the Securities Exchange Act of 1934 would often be impossible as a practical matter. Defendants generally have two built-in advantages over individual investors: first, defendants typically have far more money than the investors they have harmed and, second, they generally possess most of the relevant documents and information that are essential to the success of the claims brought by those injured investors. *See* Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. 655, 672 (2016). Further, a defendant facing a large number of potential plaintiffs has the advantage of being able to achieve economies of scale in case preparation, enabling far more cost-effective investment in litigation. *See* Bruce Hay & David Rosenberg, "*Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1379 (2000). As a result of this information asymmetry and their superior resources, leverage, and the size of potential liability, large defendants have an incentive to engage in "tactics of attrition designed to fend off claims by making them too costly to pursue[.]" *See* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 4 (2011). Acceptance of Petitioners' arguments in this case would have a compounding effect to undermine the viability of the class action mechanism.

Without the ability to aggregate their claims, victims of fraud with relatively small damages may never sue. *See* Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. at 679. Investors – particularly retail investors with relatively small holdings – face a collective action problem. While each investor harmed by securities fraud could benefit from litigation, few have sufficient incentive to investigate and bring individual claims because the costs of litigation often dwarf their individual expected returns. Lisa L. Casey, *Class Action Criminality*, 34 Iowa J. Corp. L. 153, 163 (2008). *See also Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem . . . .") (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). If harmed investors rationally decide not to sue because of this cost-benefit imbalance, the wrongdoer may not be held accountable which may incentivize further wrongdoing. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 75 (2007).

Class actions address these problems by permitting individuals to share litigation costs and make the potential return large enough to incentivize counsel to devote the necessary resources to the development of complex securities fraud cases. *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. Rev. 497 (1969), *available at* https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1150&context=bclr (Fed. R. Civ. P. 23 concerned with "vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"); Cabraser & Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. at 26; Casey, *Class Action Criminality*, 34 Iowa J. Corp. L. at 163-64. Without these incentives, most defrauded investors would not be able to afford representation or to take action to recover their losses.

In addition, class actions serve an important deterrent effect. As Congress has repeatedly made clear, "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. Rep. No. 104-98, at 8 (1995). They also maintain investor confidence in our markets and ensure market integrity:

> [P]rivate lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.

H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). *Accord Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 n.4 (2007).

B. Private securities class actions are a necessary and effective supplement to government enforcement.

Private securities class actions "are 'a necessary supplement to [regulatory enforcement] action.'" *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964)); *accord Tellabs*, 551 U.S. at 313; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975). *See also* Elisse B. Walter, Commissioner, U.S. SEC, Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program (Nov. 8, 2011) (hereinafter "Walter Remarks"), *available at* https://www.sec.gov/news/speech/2011/spch110811ebw.htm ("[P]ublic and private rights are the two pillars on which enforcement rests."). Without such litigation, many instances of securities fraud would go unaddressed and unremediated because the volume of violations is too great for the U.S. SEC and state securities regulators to detect, investigate, prosecute and remedy alone.

The SEC and state securities regulators have broad investor protection mandates and limited resources to fulfill those mandates. For example, securities regulators must devote resources not only to enforcement, but to licensing, registration, examinations and audits of registered firms, as well as crucial senior protection and investor education initiatives. As former SEC Commissioner Elisse B. Walter has remarked, "even with ideal resource availability, the Commission cannot bring every case." Walter Remarks, *supra*. As a result of limited resources, securities regulators must prioritize cases based on a variety of criteria, including (1) the message delivered to the industry and public about the reach of the securities regulator's enforcement efforts, (2) the amount of investor harm done, (3) the deterrent value of the action, and (4) the securities regulator's visibility in certain areas such as insider trading and financial fraud. *See Major Human Capital Challenges at SEC and Key Trade Agencies: Hearing Before the S. Subcomm. on Oversight of Gov't Mgmt., Restructuring & the Dist. of Columbia*, Comm. on Governmental Affairs, 107th Cong. 6 (2002) (statement of Richard J. Hillman, Director of Financial Markets and Community Investments, and

Loren Yager, Director of International Affairs and Trade). State and federal securities regulators simply lack the budgets and staff to address all possible wrongdoing. *See* James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737, 762 (2003).

Even when regulators take enforcement action, there is no guarantee such action will result in compensation for harmed investors. Although as recently affirmed by the Court in *Liu* v. *SEC*, 140 S. Ct. 1936 (2020), state and federal securities regulators can generally order violators of securities laws to disgorge ill-gotten profits, levy fines, and order rescission or restitution where these remedies are legally authorized, [2] the goal of government enforcement is to ensure the integrity of the securities industry and the markets by protecting all investors collectively. State and federal securities regulators primarily do not represent the individual interests of harmed investors, and therefore often do not seek damages on behalf of those investors.

Further, in cases where the SEC can seek disgorgement, it is not always the case that disgorged funds can be distributed to harmed investors. As the SEC recently explained to the Court, sometimes it is not feasible to identify harmed investors, or the cost

---

[2] *See*, *e.g.*, Uniform Securities Act of 1956, § 408(b), *available at* https://www.nasaa.org/wp-content/uploads/2011/08/UniformSecuritesAct1956withcomments.pdf (authorizing rescission and restitution in civil enforcement action); Uniform Securities Act of 2002, § 603(b)(2)(C), *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=af36852d-457e-db56-3fc2-b2485cdc47e9&forceDialog=0 (same).

of distribution may exceed the amount each investor would receive. Brief for the Respondent [SEC] at 37, *Liu* v. *SEC*, No. 18-1501 (Jan. 15, 2020). Thus, "while the agency can require wrongdoers to give up the benefits they have received from violations, it cannot necessarily make the victims whole." *See* Walter Remarks, *supra*.

Accordingly, private class actions are critical to effective enforcement of the securities laws and perform a role that cannot be replaced by government enforcement. It is in part for these reasons that class certification must be granted when a plaintiff makes legally sufficient allegations and establishes reliance under the *Basic* presumption, unless the defendants can prove that there was no price impact.

II. FRAUDS THAT SERVE TO MAINTAIN AN ALREADY-INFLATED STOCK PRICE ARE AS HARMFUL AS INFLATION-INDUCING FRAUDS, AND MUST BE SUBJECT TO REDRESS UNDER THE SECURITIES LAWS.

As securities markets grow increasingly complex, investors rely heavily on the public markets to set prices reflecting "an unbiased assessment of the security's value in light of all public information." *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 462 (2013). When that reliance is misplaced and the investor purchases a security at an inflated price, the investor will suffer a loss when the market becomes aware of the inflation. Misrepresentations that prevent a stock's price from falling can cause harm by prolonging the period during which the stock is traded at inflated prices, and "[e]very investor who purchases at an inflated price—whether at the beginning, middle, or end of the inflationary period—is at risk of losing the inflationary component of his investment when the truth underlying the misrepresentation comes to light." *FindWhat*, 658 F.3d at 1315.

There is no basis for a court to draw a distinction between fraud that induces price inflation and fraud that maintains existing inflation in the price of the security. Both conceal price inaccuracies that harm investors when revealed. In a 2010 opinion by Judge Easterbrook, the U.S. Court of Appeals for the Seventh Circuit declined to draw a distinction between misrepresentations that prevent a stock's price from declining and those that cause a stock's price to artificially rise. *See Schleicher v. Wendt*, 618 F.3d 679, 683-84 (7th Cir. 2010). The court observed:

> [w]hen an unduly optimistic false statement causes a stock's price to rise, the price will fall again when the truth comes to light. Likewise when an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made.

Id. at 683. In other words, they are both instances of the same kind of fraud, which "lies in an intentionally false or misleading statement, and the loss is realized when the truth turns out to be worse than the statement implied." *Id.* at 684. The U.S. Courts of Appeal for the Second and Eleventh Circuits are in accord. *See*, *e.g.*, *In re Vivendi*, 838 F.3d at 259; *FindWhat*, 658 F.3d at 1314-15.

Further, if there were no possibility under the law to hold issuers to account for maintaining an inflated stock price through fraud, public companies would be perversely incentivized to lie in order to maintain that inflation. *See In re Vivendi*, 838 F.3d at 258-59.[3] *See also FindWhat*, 658 F.3d at 1317 ("We decline to erect a *per se* rule that, once a market is already misinformed about a particular truth, corporations are free to knowingly and intentionally reinforce material misconceptions by repeating falsehoods with impunity."). By seeking to recognize and criticize inflation-maintenance as a distinct theory of liability separate in kind from front end price inflation, Petitioners in effect seek disparate treatment of inflation-maintaining frauds in a way that would shield wide swaths of issuer misstatements from liability regardless of their motivation. Such a result would severely undermine the effectiveness of the antifraud provisions of state and federal securities laws.

The concerns expressed by Petitioners and certain *amici* about inflation maintenance claims do not override the fact that fraud is fraud, regardless of whether it introduces price inflation or maintains it. Petitioners and certain *amici* contend that fraud

---

[3] In *In re Vivendi*, the court describes in detail how, in an effort to "transition from a centuries-old French utilities conglomerate into a modern global media powerhouse," Vivendi trumpeted its "aggressive growth prospects" and "buying frenzy," while concealing information about the company's lack of cash and mounting debt. *See In re Vivendi*, 838 F.3d at 233-37.

claims based on inflation-maintenance are especially susceptible to abuse and unmeritorious claims. *See* Pet. Br., 5; *see also* Brief of Former SEC Officials and Law Professors as *Amici Curiae* in Support of Petitioners, 20. This is wrong. Indeed, *Basic* itself involved inflation-maintenance allegations, and it is emblematic of why it is critical that such claims are preserved. However, even if true that such claims are subject to abuse, the arguments raised by Petitioners and certain *amici* ignore the fact that a plaintiff would still need to prove the other elements of a violation of Rule 10b-5 at trial, including loss causation, materiality, and scienter, to prevail on such a claim. Further, academic and empirical research suggest that the purported *in terrorem* effect of class certification is overstated. *See*, *e.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003); Hay & Rosenberg, "*Sweetheart" and "Blackmail" Settlements*, 75 Notre Dame L. Rev. at 1379 ("[T]he risks of . . . blackmail settlements have been overstated."); Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 61 (1996), *available at* https://www.uscourts.gov/sites/default/files/rule23_1.pdf (doubting that "the certification decision itself, as opposed to the merits of the underlying claims, coerce[s] settlements with any frequency").[4]

[4] *See also* Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. at 657 ("Businesses sue other businesses far more often than classes of plaintiffs sue businesses, and available evidence indicates that non-class, intra-business disputes may be as expensive or, perhaps, more expensive to

Moreover, once the class has been certified, defendants can avoid trial if they prevail on a motion for summary judgment. True, defendants often prefer to settle to avoid the cost of discovery, *see* Pet. Br., 37, or the risk of a trial verdict against them, but self-interested policy arguments about the threat of litigation costs raised by defendants seeking to avoid the established course of litigation under the Federal Rules of Civil Procedure, should not be accepted as the basis to make certain frauds unactionable. Nor should such arguments enable defendants to use the class-certification process as "a weed whacker for merits problems." *See* Pet. App. 23a.

Maintaining the actionability of frauds that maintain an inflated stock will assure that the securities laws provide the means to address *all* fraud.

III. DEFENDANTS SEEKING TO REBUT THE *BASIC* PRESUMPTION SHOULD CONTINUE TO BEAR THE BURDEN OF PERSUASION, AND THE SO-CALLED "GENERAL" OR "GENERIC" CHARACTER OF ALLEGED MISSTATEMENTS MUST NOT BE CONCLUSIVE AS TO PRICE IMPACT.

As the Court established in *Basic* and reaffirmed in *Halliburton II*, defendants seeking to rebut the *Basic* presumption bear the burden of persuasion to prove the absence of the presumption's constituent elements. In meeting that burden, defendants may introduce any relevant evidence, including evidence purporting to show that the

---

defend against."); *id.* at 658 ("The very businesses that complain about meritless class actions sometimes bring questionable claims against their competitors.").

alleged misstatements were so purportedly "general" or "generic" that they did not impact the defendant company's stock price. However, Petitioners overstate the analytical value of such evidence in this case and such evidence must not be conclusive on its own as to price impact.

A. A defendant seeking to rebut the *Basic* presumption properly bears the burden of persuasion by a preponderance of the evidence.

As set forth in Respondents' Brief and the briefs of certain *amici*, including the United States, the court of appeals below correctly held that Petitioners bear the burden of persuasion to show the lack of price impact by a preponderance of the evidence in order to rebut the *Basic* presumption. Petitioners contend that they should bear only the burden to produce "some" evidence suggesting the lack of price impact, at which point the plaintiffs must directly prove price impact in order to rely on the *Basic* presumption. As Respondents' Brief and the United States' Brief make clear, that position is inconsistent with the Court's recent precedents and *Basic* itself.

Furthermore, as the court of appeals below recognized, the *Basic* presumption "would be of little value if defendants could overcome it by simply producing *some* evidence of a lack of price impact." Pet. App. 75a (internal quotation marks omitted); *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 100-01 (2d Cir. 2017). Publicly traded companies will frequently be able to point to noise in the market that may suggest that the particular statements at issue did not cause all of the price movement in question. As a result, plaintiffs would almost always be required to directly show price impact. If defendants could rebut the presumption of price impact merely by producing *some* evidence, regardless of its persuasiveness or completeness, rebuttal would be assured in cases involving the largest companies (against whom individual investors have the most need for the class action mechanism). Defendants could effectively force plaintiffs to directly prove price impact and the *Basic* presumption would be rendered a nullity. The Court in *Halliburton II* rejected this result because it "would radically alter the required showing for the reliance element of the Rule 10b-5 cause of action," 573 U.S. at 278-79, and the Court should reject it again here.

B. The so-called "general" or "generic" nature of alleged misstatements alone must not be conclusive as to price impact.

NASAA agrees with *amicus* the United States that evidence about the content of the alleged misstatements, and the context in which they were made, may be relevant to a court in determining whether the alleged misstatements did not have any price impact. *See* Brief for the United States as *Amicus Curiae* Supporting Neither Party, 21-23. However, such evidence should not be, and is not, conclusive as to price impact. Nor should judges be permitted to rely exclusively on self-serving characterization of the statements as "generic" to intuit whether the alleged misstatements *could or could not* have had any price impact. Rather, it is essential that courts engage in fulsome analysis of the record in order to determine the actual effect of the alleged fraud on the stock's price. Price impact and materiality are fundamentally different questions, and Petitioners' proposed approach improperly conflates the two.

Although materiality is an objective inquiry, its focus is on how a hypothetical "reasonable investor" would view the information in the alleged misstatements. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)). Price impact is a factual inquiry. Instead of asking how a hypothetical reasonable investor would react to the alleged misstatements, the relevant question to determine price impact is whether individual investors in the market did, in fact, react to the alleged misstatements. *See Basic*, 485 U.S. at 248; *Halliburton II*, 573 U.S. at 279. Although the so-called "general" or "generic" nature of an alleged misstatement might suggest that a hypothetical reasonable investor would not have found it to be significant, such evidence does not *show* that investors in the market "in fact did not" react to it.

The market may still react to statements that address matters of critical importance to the success and reputation of a company even if the alleged misstatements might be characterized as "generic" in the abtract. For example, the alleged misstatements in this case include statements that Goldman Sachs' "'clients' interests always come first" and that Goldman Sachs had "extensive procedures and controls that are designed to identify and address conflicts of interest." Respondents' Brief in Opposition to Petition for Ceriorari, 4-5. It is hardly obvious that these alleged misstatements are "generic," since they specifically concerned Petitioners' business, Petitioners' conflicts of interest, and Petitioners' efforts to address those conflicts, all of which are central to the alleged fraud.[5]

Interestingly, Petitioners' defense of these alleged misstatements appears to rely in part on a cautionary statement that shows precisely why these so-called "generic" statements are so critical and would be meaningful to investors. Specifically, Petitioners argue that the following cautionary statement effectively precludes investors' reliance on the alleged misstatements:

> [A]ppropriately identifying and dealing with conflicts of interest is complex and difficult, and *our reputation could be damaged* * * * if we fail, or appear to fail, to identify and deal appropriately with conflicts of interest. In addition, potential or perceived *conflicts could give rise to litigation or enforcement actions*.

Pet. Br., 11-12 (quoting J.A. 29) (emphases added). In this cautionary statement, Petitioners concede that their approach to conflicts of interest was critical to its reputation and therefore of importance to investors. It also rebuts Petitioners' argument that

---

[5] *See* "Generic," *Merriam-Webster.com* (last visited Feb. 26, 2021), *available at* https://www.merriam-webster.com/dictionary/generic (defining "generic" as "relating to or characteristic of a whole group or class," "not being or having a particular brand name," or "having no particularly distinctive quality or application").

the drop in the price of Goldman Sachs' stock was due entirely to disclosure of SEC enforcement activity, *see* Pet. App. 57a-59a (discussing conclusions of Dr. Choi), because Petitioners clearly link the failure or apparent failure to identify and deal appropriately with conflicts of interest to possible enforcement actions and damage to Goldman Sachs' reputation.

The Court has also recognized that "market efficiency is not a yes-or-no proposition," and therefore "a public, material misrepresentation might not affect a stock's price even in a generally efficient market." *Halliburton II*, 573 U.S. at 279. But materiality determinations must be kept distinct from reliance and price impact determinations because the inverse is equally possible. Even in an efficient market, investors may respond to what might be qualified as "generic" in the abstract in a way that manifests an actual price impact. Therefore, claims that an alleged misstatement is "general" or "generic" is of little analytical value in determining whether there was in fact price impact, and such evidence should not carry the outsize weight that Petitioners seek to attribute to it.

Accordingly, while the so-called "general" or "generic" nature of an alleged misstatement may be relevant to determining whether price impact occurred, such characterization does not establish that there was no price impact, and cannot be conclusive as to price impact.

CONCLUSION

For all of the foregoing reasons, *amicus* North American Securities Administrators Association respectfully submits that the Court should affirm the decision of the Second Circuit Court of Appeals below.

Respectfully submitted,

LAURA H. POSNER
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
212-220-2925
lposner@cohenmilstein.com

VINCENTE L. MARTINEZ
ZACHARY KNEPPER
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street, NE, Suite 1140
Washington, DC 20002

Dated: March 3, 2021