

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GOLDMAN SACHS GROUP, INC., ET AL.,)
) Petitioners,)
) v.) No. 20-222
ARKANSAS TEACHER RETIREMENT SYSTEM,)
ET AL.,)
) Respondents.)
- - - - -

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ARKANSAS TEACHER RETIREMENT SYSTEM,)
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Respondents.)
- - - - -

Washington, D.C.
Monday, March 29, 2021

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:00 a.m.

1 APPEARANCES:

2

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10 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-222, Goldman
5 Sachs Group versus Arkansas Teacher Retirement
6 System.

7 Mr. Shanmugam.

8 ORAL ARGUMENT OF KANNON K. SHANMUGAM
9 ON BEHALF OF THE PETITIONERS

10 MR. SHANMUGAM: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 In this case, the court of appeals
13 upheld the certification of a securities class
14 action based on exceptionally generic and
15 aspirational statements in the face of
16 overwhelming and unrebutted evidence that the
17 statements had no impact on the stock price.

18 In so doing, the court of appeals
19 committed two legal errors.

20 First, the court refused to consider
21 the generality of the statements as evidence
22 tending to disprove price impact. As
23 Respondents now agree, a court may consider the
24 nature of a statement in making that
25 determination. There is no merit to the further

1 contention that a court may consider the nature
2 of the statement only through expert testimony.

3 Second, the court of appeals erred by
4 holding that the Basic presumption shifted the
5 ultimate burden of persuasion to a defendant on
6 the issue of price impact. Rule 301 governs
7 presumption, and it shifts only the burden of
8 production, unless a statute or rule provides
9 otherwise. Basic plainly created a presumption,
10 and Congress has not even recognized a private
11 cause of action for securities fraud, much less
12 provided that the Basic presumption shifts the
13 burden of persuasion.

14 Should the Court agree with us on
15 either question presented, it should reverse the
16 judgment below. The lower courts desperately
17 need guidance on how to navigate this Court's
18 decisions on the Basic presumption. While
19 Halliburton II held out the promise that
20 defendants would be able to rebut the
21 presumption, that has proven to be effectively
22 impossible thanks, in part, to the inflation
23 maintenance theory.

24 And under the correct legal standard,
25 this is an easy case because the statements were

1 exceedingly generic, the alleged conflicts of
2 interest were already in the public domain, and
3 Respondents presented no valid evidence to
4 establish the cause of the stock drops. If
5 certification is permitted here, the promise of
6 Halliburton II will have been betrayed, and any
7 stock drop will inevitably result in a
8 reverse-engineered securities class action based
9 on statements like these.

10 The court of appeals' judgment should
11 be reversed. I welcome the Court's questions.

12 CHIEF JUSTICE ROBERTS: Mr. Shanmugam,
13 you said that the Respondents now agree with you
14 that the generic nature of the statements can be
15 considered, and you said that -- in discussing
16 any possible difference, you focused on their
17 argument that expert testimony is required.

18 Is -- is there any daylight on the
19 substantive question between the two of you
20 concerning the generic statements?

21 MR. SHANMUGAM: I don't think so,
22 Mr. Chief Justice, because Respondent concedes
23 at page 26 of their brief that a more general
24 statement is relatively less likely to affect a
25 security's price. And that is our fundamental

1 submission on the first question presented.

2 And to the extent that Respondents
3 suggest that an expert is required, we think,
4 first, that that is contrary to this Court's
5 direction in Halliburton II that any evidence
6 relevant to price impact should be considered,
7 and, second, we did have an expert, Dr. Starks,
8 who elaborated on the relevance of the nature of
9 the statement.

10 CHIEF JUSTICE ROBERTS: So you think
11 it's okay to submit expert testimony on that
12 question if you want to; you just don't think
13 it's required?

14 MR. SHANMUGAM: That is correct,
15 Mr. Chief Justice. We think that the nature of
16 the statements is evidence that simply weighs in
17 the preponderance-of-the-evidence inquiry. And,
18 certainly, plaintiffs, like defendants, are free
19 to come forward with expert testimony on the
20 question of price impact.

21 CHIEF JUSTICE ROBERTS: So what is the
22 debate between -- between two parties on whether
23 a statement is sufficiently generic? What does
24 it look like?

25 I mean, you have a statement of the

1 sort at issue here. I mean, does one side say,
2 well, you can tell from common sense that this
3 is -- is -- is -- is too generic and the other
4 side says, no, my common sense says it's not?

5 MR. SHANMUGAM: Well, Dr. Starks
6 testified, Mr. Chief Justice, that generic
7 statements such as these are pervasive in the
8 market, they are made by all of Goldman Sachs'
9 chief competitors, and that analysts did not
10 view them as pertinent.

11 Now, to be clear, we don't think that
12 expert testimony of that sort is required, and,
13 again, where you have exceptionally generic
14 statements like these, our fundamental
15 submission is that plaintiffs have to make a
16 more compelling showing that there was, in fact,
17 price impact.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief
22 Justice.

23 Counsel, the -- I'm interested in how
24 Basic interact -- the Basic presumption
25 interacts with in -- the inflation maintenance

1 theory. Would you -- I -- why should Basic --
2 the Basic presumption even apply if there's
3 never been -- the cause -- the cause of the
4 alleged inflated price has never been
5 identified?

6 MR. SHANMUGAM: Justice Thomas, we
7 don't dispute that the inflation maintenance
8 theory can be a valid theory, but I think this
9 illustrate -- case illustrates the difficulties
10 in applying that theory, and I think the
11 application here is seriously problematic.

12 So just to be clear, the inflation
13 maintenance theory is the notion that, even
14 though a statement when made may not have had an
15 impact on the stock price, it somehow maintains
16 the price at an inflated level.

17 And the way in which the parties
18 litigate that issue is by looking at the
19 so-called back end, at -- looking at the alleged
20 corrective disclosures, to see if any back-end
21 price drop is indicative of front-end price
22 inflation. And that --

23 JUSTICE THOMAS: But doesn't that lead
24 you into the reverse-engineering problem that
25 you mentioned in your discussions with the Chief

1 Justice?

2 MR. SHANMUGAM: It does in a case like
3 this, Justice Thomas, and let me explain why.

4 I think, if you have a case in which
5 the inflation-causing event, the
6 inflation-maintaining misstatement, and the
7 alleged corrective disclosure all have the same
8 content, the inflation maintenance theory just
9 about works. And if you look at the Beetle
10 hypothetical in the court of appeals opinion at
11 page 16a of the petition appendix, I think you
12 see an example of that.

13 But this case is a far cry from that
14 because the plaintiffs don't even deign to
15 identify the inflation-causing event. And there
16 is a mismatch between the alleged misstatement
17 and the alleged corrective disclosures precisely
18 because the alleged misstatements are so
19 exceedingly generic, statements like our
20 clients' interests always come first, integrity
21 and honesty are at the heart of our business,
22 and so forth.

23 And where you have that mismatch
24 between the alleged misstatements and the
25 alleged corrective disclosures, it casts doubt

1 on the inference underlying the inflation
2 maintenance theory, namely, whether any back-end
3 price drop is indicative of front-end price
4 inflation.

5 JUSTICE THOMAS: The -- would -- and I
6 know I dissented in Amgen, but, as I understand
7 it, Amgen indicates or it holds that the
8 plaintiff is not required to prove materiality
9 at the cert -- at the class certification stage
10 in order to invoke Basic.

11 But does it preclude the -- the
12 defendant from disproving materiality?

13 MR. SHANMUGAM: Well, I think what a
14 defendant can do is point to evidence that would
15 also be relevant to materiality at the class
16 certification stage in order to negate price
17 impact. And, certainly, the mere fact that a
18 court at the motion to dismiss stage says that a
19 case shouldn't be dismissed on materiality
20 grounds doesn't mean that that element has been
21 definitively resolved.

22 JUSTICE THOMAS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer.

25 JUSTICE BREYER: Good morning.

1 There's an issue in a product liability case as
2 to whether a tire was made properly and caused
3 the accident, and it's tried to a judge, and
4 there's some evidence introduced by experts,
5 probably, and counter-experts, and the judge
6 reviews that on appeal and listens to what the
7 evidence in the record is and doesn't check his
8 common sense at the door.

9 Well, why isn't that just what's at
10 issue here in your first issue? Everybody
11 agrees. Take the statement for what it's worth.
12 Listen to the experts, and don't check your
13 sense -- common sense at the door. That's what
14 judges do. So why are we hearing that issue?

15 MR. SHANMUGAM: Well, I --

16 JUSTICE BREYER: Isn't that an issue
17 for the court of appeals?

18 MR. SHANMUGAM: I --

19 JUSTICE BREYER: And very rarely would
20 we hear it. What's the legal issue?

21 MR. SHANMUGAM: Justice Breyer, I
22 certainly agree that our submission here is that
23 a court shouldn't check its common sense at the
24 door, and it should take the nature of the
25 statements into account in the ways that I've

1 suggested. It should weigh that evidence as
2 part of the preponderance-of-the-evidence
3 inquiry, and it should consider the nature of
4 the statements in determining whether those
5 statements match up with the corrective
6 disclosures.

7 I think where the court of appeals
8 went wrong was in lumping in that argument with
9 our other arguments and saying that they were
10 all precluded by Amgen. All Amgen holds is that
11 a party cannot litigate the issue of
12 materiality, that materiality is not the focus
13 of the inquiry.

14 JUSTICE BREYER: But, on the issue not
15 of -- not of material, you're saying the precise
16 mistake on this that the court of appeals made
17 on the price impact theory in evaluating the
18 evidence that was given is?

19 MR. SHANMUGAM: That it took the
20 nature of the statements off the table. It said
21 -- and I'm quoting from page 23a --

22 JUSTICE BREYER: It refused to
23 consider the fact that they were general even
24 though the experts told them that the fact that
25 it's general doesn't mean never. The fact that

1 it's general means sometimes it can affect the
2 price. And they didn't pay any attention to
3 that, you're saying? I'll read the record and
4 see, but I thought that's a job for the court of
5 appeals.

6 MR. SHANMUGAM: The court of appeals
7 took --

8 JUSTICE BREYER: What have I said
9 wrong?

10 MR. SHANMUGAM: Well, the court of
11 appeals not only took the nature of the
12 statements off the table, but, in assessing the
13 evidence, it really attached no significance to
14 the nature of the statements, and that was the
15 district court's error as well.

16 And so our view is that once that is
17 corrected, this is an easy case because of the
18 exceptionally generic nature of the statements.

19 JUSTICE BREYER: Okay. I got that
20 point.

21 Now, if you -- if I have time, I'd
22 like to know the difference between materiality
23 and price impact, which I put in my mind and get
24 it for a while and then I -- I lose it.

25 So what is it in your opinion?

1 MR. SHANMUGAM: I think I can answer
2 that in a sentence because I know time is short.
3 Materiality focuses on what a hypothetical
4 reasonable investor would care about. Price
5 impact focuses on what actually happened.

6 JUSTICE BREYER: Okay. Got it. Thank
7 you.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE ALITO: Do you think there can
10 ever be a statement that is so bland that there
11 can never be reliance?

12 Suppose a company says, we are a nice
13 company. Would you say that a court could not
14 say that statement is so bland and innocuous
15 that there cannot be reliance, or must a court
16 say, well, that is one factor I will take into
17 account and I won't take into account other
18 factors?

19 MR. SHANMUGAM: I -- I think that's
20 what courts do every day, Justice Alito, in
21 evaluating materiality at the motion to dismiss
22 stage. And as we point out in our brief, there
23 is a familiar and massive body of case law that
24 says that statements of that variety are
25 immaterial as a matter of law.

1 I -- I think that the argument that
2 we're making here is overlapping and in some
3 respects similar, but it is conceptually
4 distinct. It is that when you have a statement
5 like this, it is unlikely to affect the market
6 price. And the fact that a statement is
7 unlikely to affect the market price, as the
8 government explains at some length in its brief,
9 tends to show that the statement did not affect
10 the market price in actuality.

11 JUSTICE ALITO: Well, I understand
12 that, but you now disclaim in your brief the
13 argument that a statement in itself can be so
14 bland and innocuous and uninformative that there
15 can't be reliance. That's what I'm -- that's
16 what I'm asking about.

17 Do you really want to say that?

18 MR. SHANMUGAM: Well, I -- I think
19 what we're saying, Justice Alito, is that the
20 more generic a statement is, the less likely it
21 is to have price impact.

22 And, of course, to be clear, we're
23 specifically talking about price impact in the
24 context of the Basic presumption and not the
25 separate question of whether, say, some

1 individual individually relied.

2 And, again, I think, on that issue,
3 where you have exceedingly generic statements
4 like this -- and these statements are not too
5 far removed from your hypothetical of a company
6 that just says that it's a nice company -- it is
7 exceedingly unlikely that that's going to have
8 price impact. And plaintiffs have to come
9 forward with pretty compelling evidence that it
10 does. And you certainly --

11 JUSTICE ALITO: All right. Very --

12 MR. SHANMUGAM: -- don't have that
13 here.

14 JUSTICE ALITO: -- very quickly on the
15 Rule 301 issue. Am I right that all that is
16 involved here is the ultimate assignment of the
17 risk of non-persuasion? So none of this really
18 matters, assuming either side can produce
19 whatever burden of production they -- they have
20 to bear. Who's going to win if, in the mind of
21 the judge, ultimately, the evidence on reliance
22 is ultimately -- is -- is -- is in equipoise?
23 That's all that's involved.

24 MR. SHANMUGAM: Justice Alito, it is a
25 preponderance-of-the-evidence standard, and the

1 allocation of the burden of persuasion will
2 matter only in a case where there is
3 sufficiently weighty evidence on both sides.
4 And that's why we think that we would prevail
5 here and that the Court should reverse
6 regardless of the outcome on the second question
7 presented.

8 JUSTICE ALITO: All right. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Counsel,
12 basically, what I think you're arguing is that a
13 judge may rely on common sense and intuition in
14 addressing whether a statement is generic so
15 that it was unlikely to have a price impact.

16 But how should a judge go about
17 weighing her intuition against the opinion of
18 experts? It seems to me, even with the
19 hypothetical that Justice Alito posed, that what
20 I would have done, and I think most judges would
21 do, is to say: Gee, my gut tells me, why would
22 this even matter? Now I've got a bunch of
23 petitioners' experts who say no, this is why it
24 should. And unless I can articulate why those
25 experts' position is unreasonable, why should my

1 instinct win? And then --

2 MR. SHANMUGAM: Justice --

3 JUSTICE SOTOMAYOR: -- why should --
4 does an appellate court have to say -- if the
5 judge says no, I agree with the experts, does an
6 appellate court then check its gut and decide
7 whether it disagrees with the district court
8 that the experts were convincing?

9 MR. SHANMUGAM: So I would say two
10 things in response to that, Justice Sotomayor.

11 First -- and this goes directly to
12 Respondents' suggestion that the only way that
13 the nature of the statements comes in is through
14 experts -- district courts all the time weigh
15 expert testimony together with other evidence.
16 And all we are asking the Court to do is to say
17 that that is the rule, in other words, that a
18 court should take the nature of the statements
19 into account together with the expert testimony.

20 JUSTICE SOTOMAYOR: All right --

21 MR. SHANMUGAM: Now, second --

22 JUSTICE SOTOMAYOR: -- counsel, may I
23 stop you? Because time is limited.

24 You point to two statements that
25 suggest the Second Circuit didn't do that and

1 neither did the district court. But it seems to
2 me that your arguments below all centered on a
3 point that you've given up here. You argued
4 below that generic statements cannot have impact
5 -- price impact as a matter of law. So read in
6 -- in context, I think the Second Circuit's two
7 statements were responding to that.

8 MR. SHANMUGAM: Justice Sotomayor,
9 there were certainly points below where we made
10 the more ambitious argument that the nature of
11 the statements should be dispositive. But I
12 think that there is no doubt that we also made
13 the argument that the nature of the statements
14 is relevant to the analysis in the way that
15 we've been discussing today.

16 And, indeed, that was really the
17 central focus of the first part of the oral
18 argument before the court of appeals, and that
19 is, of course, the argument that we made in our
20 cert petition and the argument that we're making
21 now.

22 JUSTICE SOTOMAYOR: And that's a
23 matter for the record, counsel. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Mr. Shanmugam, if I

1 could continue on this question of exactly what
2 the Second Circuit did wrong in your view, is --
3 is there any piece of evidence that the Second
4 Circuit refused to consider that you think it
5 should have? Any piece of expert evidence or
6 anything else?

7 MR. SHANMUGAM: Justice Kagan, we
8 think that the nature of the statements is
9 itself evidence and that what the court of
10 appeals suggested was that that has, in the
11 court of appeals' own words, nothing to do with
12 the issue of whether common questions
13 predominate.

14 JUSTICE KAGAN: So that's the --

15 MR. SHANMUGAM: And that was the --

16 JUSTICE KAGAN: -- that's the
17 sentence, Mr. Shanmugam, you're quoting on page
18 268, right? And I understand you also to be
19 objecting to the statement on page 275.

20 Are -- are those the only two
21 sentences, essentially, that you think the court
22 of appeals got wrong or that leads you to think
23 that the court of appeals was approaching it in
24 the wrong way?

25 MR. SHANMUGAM: I -- I think that

1 that's right, though I think it undersells it to
2 say that it is only those two sentences because,
3 if, for instance, you take a look at the latter
4 passage, the passage from 36a to 38a in the
5 petition appendix, that's the passage in which
6 the majority responds to Judge Sullivan's
7 dissenting opinion, the whole gist of which was
8 that the nature of the statements should be
9 taken into account.

10 And I think it's telling, Justice
11 Kagan, that Respondents, in their brief in
12 opposition, in response to our making this
13 argument, did not in any way suggest that there
14 was any ambiguity in the court of appeals'
15 opinion. It was only after the government
16 suggested that possibility in its amicus brief
17 that Respondents started making that argument.

18 JUSTICE KAGAN: I -- I guess, you
19 know, this is similar to what Justice Sotomayor
20 asked you, but, in the context of an argument
21 that you made below, which was that there were
22 certain kinds of general statements that as a
23 matter of law were irrelevant, I see those
24 statements at least possibly as going to that
25 argument that you made below rather than any

1 argument that you're making now.

2 MR. SHANMUGAM: I don't think that
3 that is the better reading, Justice Kagan, and I
4 do think that when you look at other statements
5 that the court of appeals made, in discussing
6 Amgen in particular, the court of appeals seemed
7 to think that Amgen, almost as a penumbral
8 matter, really precluded any consideration of
9 the nature of the statements.

10 And I think that that's fundamentally
11 flawed, and I would point this Court to the
12 Seventh Circuit's decision in Allstate, which I
13 think engaged in the correct analysis in
14 suggesting that, notwithstanding the significant
15 overlap between price impact, materiality, and
16 loss causation, a court should not blinker
17 itself; it should consider all of --

18 JUSTICE KAGAN: But didn't --

19 MR. SHANMUGAM: -- the relevant
20 evidence.

21 JUSTICE KAGAN: -- didn't the Second
22 Circuit make it clear that it knew that in its
23 first opinion in this case? Same panel, same
24 case, and, there, the -- the Second Circuit said
25 clearly, look, you can consider at class

1 certification evidence that is relevant to
2 materiality.

3 MR. SHANMUGAM: I think so, Justice
4 Kagan. I think where the Second Circuit went
5 wrong is that in -- despite that recognition of
6 that general principle, the Second Circuit,
7 unambiguously in our view, said that the nature
8 of the statements could not be taken into
9 account. And that exception to the general
10 principle, I would respectfully submit, was
11 erroneous as a matter of law.

12 JUSTICE KAGAN: Thank you,
13 Mr. Shanmugam.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Good morning. Can
17 you explain how we could rule for you on the
18 second QP, your Rule 301 argument, without
19 running into the problems your friends on the
20 other side say we'd have and we -- we'd have to
21 effectively overrule Halliburton II?

22 MR. SHANMUGAM: I don't think so,
23 Justice Gorsuch, and let me explain why. I
24 think the obvious difference in what we're
25 arguing from what the defendants were arguing in

1 Halliburton II is that defendants would still
2 bear the initial burden of production on price
3 impact.

4 I think, in Halliburton II, the Court
5 concluded that if price impact were essentially
6 a requirement that plaintiffs would have to
7 establish, it would really neuter the fraud-on-
8 the-market presumption because it would make it
9 impossible for the plaintiffs to have the
10 benefit of the presumption.

11 By contrast, our submission here is
12 simply that this presumption works like any
13 other presumption. And Rule 301 makes clear
14 that, as to presumption, the burden of
15 production shifts but not the burden of
16 persuasion, unless the presumption is provided
17 for by federal statute or by rule.

18 JUSTICE GORSUCH: Okay. And on that
19 score, I guess your friends on the other side
20 would respond, it's a mistake to think about the
21 Basic presumption as a presumption at all. It's
22 really more like a substantive rule or a proxy.

23 What do -- what do you say to that?

24 MR. SHANMUGAM: Justice Gorsuch, I
25 don't know how this could be viewed as anything

1 other than a presumption. Indeed, in
2 Halliburton I, the Court described it as "just
3 that, a presumption."

4 And in Basic, in establishing the
5 presumption in the first place, the Court
6 actually cited Rule 301, which I think reflects
7 the recognition that this would be a presumption
8 in the Rule 301 sense.

9 And at that point, the only remaining
10 question is whether the presumption is provided
11 for by a federal rule or a federal statute. And
12 where you have a cause of action that is
13 judicially created, much less the absence of any
14 suggestion by Congress that the Basic
15 presumption is a matter of statute and that the
16 presumption shifts the burden of persuasion, we
17 submit that Rule 301 applies by its terms.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.

21 JUSTICE KAVANAUGH: Thank you, Chief
22 Justice.

23 Good morning, Mr. Shanmugam.
24 Following up with the Chief Justice's questions
25 on the difference between you and the other

1 side, and other of my colleagues have also asked
2 about this, it seems like the adjectives are
3 going to be different and the adjectives will
4 probably matter in future litigation, so I want
5 to make sure I have crisply exactly what you
6 think it should be.

7 My understanding is that you think the
8 generic nature of the alleged misstatement is
9 powerful evidence of the lack of price impact.
10 You also use "critical" or "important." What's
11 your preferred adjective? And -- and do you
12 really think the other side is agreeing with
13 that? We'll find out soon, I guess.

14 MR. SHANMUGAM: Good morning, Justice
15 Kavanaugh. What I would say about that and what
16 we would respectfully submit that the Court
17 should say is that the more generic a statement,
18 the less likely it is that it will contain the
19 type of information that is incorporated into
20 the market price of the stock. And we think
21 that in this case, the statements are
22 exceedingly generic, and, where that is true,
23 that is powerful or compelling evidence.

24 And it is precisely for that reason
25 that we think that the Court really should go on

1 and address the certification here and reverse
2 the judgment below because --

3 JUSTICE KAVANAUGH: So can I just stop
4 you there? If we conclude that it's generic but
5 not exceedingly generic, you're drawing a
6 distinction between those two things, is that
7 not powerful evidence?

8 MR. SHANMUGAM: I -- I think it's a --
9 a -- a sliding scale, Justice Kavanaugh. And so
10 I think that where you have statements that are
11 very generic -- and it's hard to see a statement
12 like "our clients' interests always come first"
13 as anything but -- that is powerful and
14 compelling evidence.

15 JUSTICE KAVANAUGH: All right. How
16 are --

17 MR. SHANMUGAM: And in this case --

18 JUSTICE KAVANAUGH: Keep going.

19 MR. SHANMUGAM: I -- I -- I think
20 what's really striking in this case and the
21 reason why this case is an easy case is because,
22 once you take that into account and look at
23 what's on the other side, all you have on the
24 other side is a single expert who really made no
25 effort to attribute the stock drop to the

1 alleged corrective disclosures, much less to
2 disaggregate the effect of the reports of
3 government enforcement activity --

4 JUSTICE KAVANAUGH: Can I ask you --

5 MR. SHANMUGAM: -- from those alleged
6 corrective disclosures.

7 JUSTICE KAVANAUGH: -- can I -- since
8 you're using "generic," how are you defining
9 "generic" or, stated otherwise, what kinds of
10 statements are not generic?

11 MR. SHANMUGAM: I -- I -- I think that
12 a generic statement is essentially a statement
13 that has little specific factual content, and I
14 think that these statements really illustrate
15 that, statements like "our clients' interests
16 always come first."

17 It -- it -- it's hard with regard to
18 many of these statements to even imagine a
19 corrective disclosure, much less to think that
20 the disclosures at issue here, which involve
21 information that was already in the public
22 domain, could qualify.

23 JUSTICE KAVANAUGH: Last -- last
24 question: In response to Justice Breyer and I
25 think Justice Kagan as well, I think you're

1 saying that the Second Circuit's error was being
2 misled by Amgen. Is that correct?

3 MR. SHANMUGAM: I think that is
4 correct. And the Second Circuit, I think,
5 failed to navigate between Amgen and Halliburton
6 II and its dictates that all relevant evidence
7 should be considered.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett.

11 JUSTICE BARRETT: Good morning, Mr.
12 Shanmugam. So I want to see if I understand
13 exactly what's at issue in this case because it
14 seems to me that at the merits stage it's pretty
15 narrow.

16 So you and the Respondents both agree
17 that the nature and content of the statements,
18 here their generality, bears on the -- the Basic
19 presumption and the Court ought to consider it,
20 right?

21 MR. SHANMUGAM: Yes, I think that's
22 correct.

23 JUSTICE BARRETT: Okay. So the only
24 dispute between you is whether the judge can
25 rely on common sense or expert testimony only.

1 Am I correct about that?

2 MR. SHANMUGAM: Well, I don't think
3 it's fair to characterize our position as
4 relying only on common sense. I -- I think that
5 everyone agrees with the proposition that the
6 more generic a statement is, the less likely it
7 is to affect a security's price. So --

8 JUSTICE BARRETT: Okay. Let me --

9 MR. SHANMUGAM: -- as Respondents --

10 JUSTICE BARRETT: -- let me rephrase
11 that, Mr. Shanmugam. Not only -- it seems to me
12 very unlikely that any defendant in a class
13 action like this is not going to bring in
14 experts on the question of how the generality of
15 this statement might have affected the price,
16 you know, whether inflating it or, you know,
17 causing it to spike or what have you.

18 So the only -- the only dispute then
19 is just the method of proof. I think, in the
20 defendants' case, it would most oftenly -- often
21 be both/and, like both expert evidence and
22 common sense, but, in the Respondents' view, it
23 should be only expert evidence and never common
24 sense. Is that accurate?

25 MR. SHANMUGAM: I -- I think, as a

1 practical matter, Justice Barrett, that is in
2 the sense that, typically, both sides will have
3 experts in any significant securities fraud
4 case. And, as I mentioned earlier, we did,
5 indeed, have an expert who elaborated on this
6 issue of the nature of the statements point to
7 other companies that had made them and so forth.

8 JUSTICE BARRETT: Okay. So you
9 started your argument by saying that this case
10 was an opportunity for us to respore -- restore
11 the promise of Halliburton II by making the
12 Basic presumption rebuttable.

13 Let's say that you lose on QP II. How
14 does a ruling on that very, very narrow issue,
15 saying, sure, judges can also consider their
16 common sense, make the Basic presumption
17 rebuttable? What does it really accomplish?

18 MR. SHANMUGAM: Well, Justice Barrett,
19 I think that that's why, in our view, this Court
20 should not simply vacate and remand to the court
21 of appeals but should proceed to apply the --

22 JUSTICE BARRETT: But --

23 MR. SHANMUGAM: -- correct legal
24 standard.

25 JUSTICE BARRETT: -- but, Mr.

1 Shanmugam, that wasn't a QP. You didn't ask us
2 to do that, and it's a pretty fact-bound thing.

3 MR. SHANMUGAM: Well, as -- as you
4 know, Justice Barrett, the Court obviously has
5 the discretion to apply the legal standard once
6 it articulates it.

7 And our submission is simply that this
8 is a really easy case for the reasons I've said.
9 It's not just that these statements were
10 generic. The alleged conflicts of interest were
11 in the public domain. And Respondents' expert
12 testimony was painfully thin.

13 And so I think it would provide
14 much-needed guidance to the lower courts if this
15 Court were to go on and apply the correct legal
16 standard as it not infrequently does.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, Mr. Shanmugam.

20 MR. SHANMUGAM: Thank you, Mr. Chief
21 Justice.

22 So I -- I would just say a couple of
23 things about the government's position in this
24 case because you're about to hear from the
25 government.

1 We largely agree with the government.

2 I think we part ways on just two key points.

3 On the first question presented, we
4 don't agree with the government that the Court
5 should issue an open-ended remand so that the
6 court of appeals can clarify the legal rule that
7 it was applying.

8 We believe, as I indicated in my
9 colloquy with Justice Kagan, that the court of
10 appeals unambiguously held that the generic
11 nature of the statements could not be considered
12 in the price impact inquiry.

13 And if this Court remands rather than
14 reversing outright, we would submit that it
15 should do so with clear direction as to how to
16 conduct the inquiry, as I indicated in my
17 discussion with Justice Kavanaugh.

18 On the second question presented, we
19 respectfully submit that the government fails to
20 come to grips with the language of Rule 301.
21 The government offers no valid reason why it
22 should not apply to the presumption that Basic
23 created.

24 And in light of the court of appeals'
25 legal errors on both questions and the need to

1 provide guidance to the lower courts, this Court
2 should not simply vacate but reverse the court
3 of appeals' judgment. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Joshi.

7 ORAL ARGUMENT OF SOPAN JOSHI

8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING NEITHER PARTY

10 MR. JOSHI: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The dispute on the first question
13 presented has narrowed substantially.
14 Petitioners no longer maintain that a generic
15 statement categorically precludes a finding of
16 price impact. It doesn't.

17 And, likewise, Respondents no longer
18 maintain that the generic nature of a statement
19 is categorically irrelevant to price impact or
20 otherwise contrary to Amgen, as the opinion
21 below could be read to suggest.

22 Rather, price impact requires
23 comparing the actual price to what the price
24 would have been had there been no deceit. And
25 so the nature of the deceitful statement is

1 relevant, though not by itself dispositive, to
2 that inquiry.

3 As to the second question presented,
4 Halliburton II said that plaintiffs have the
5 burden to show the Basic prerequisites but do
6 not have the burden to directly show price
7 impact. So, if plaintiffs don't have that
8 burden, then, logically, defendants should bear
9 it.

10 Now Petitioners rely on 301, but that
11 rule's plain text leaves the burden of
12 persuasion untouched, and so it doesn't answer
13 the question here and doesn't displace
14 Halliburton II.

15 CHIEF JUSTICE ROBERTS: Going back to
16 Justice Alito's, you know, we are a nice
17 company, you say there's no categorical rule.
18 Sometimes a statement might support the
19 plaintiff's case and sometimes it won't.

20 What -- what does that argument look
21 like? I mean, the issue is "we are a nice
22 company," and that's one of the challenged
23 statements. What arguments are the parties
24 going to make?

25 MR. JOSHI: So, Mr. Chief Justice, I

1 guess I'll preface my answer by saying reliance
2 is an element of the merit of a securities fraud
3 claim, and so, presumably, it would be subject
4 to the same sort of motion to dismiss standard
5 that would apply to any securities fraud action.
6 So I think, in an extreme example like that, it
7 might not survive a motion to dismiss not just
8 on materiality but on reliance as well.

9 But, to directly answer your question,
10 at the class certification stage, the parties
11 would offer evidence to answer the question that
12 should always be answered in price impact: What
13 was the price at the time of the plaintiff's
14 transaction on the front end and what would the
15 price have been at that time absent the deceit?
16 And so --

17 CHIEF JUSTICE ROBERTS: Okay. Well,
18 that's a general statement, the general rule,
19 but exactly what arguments is someone going to
20 make? Is that there are people who would regard
21 "we are a nice company" as a fraudulent
22 statement depending upon subsequent events, and
23 how would they make that case?

24 MR. JOSHI: Well, two things, Mr.
25 Chief Justice.

1 First, of course, they would have to
2 establish falsity in -- in the first case
3 because that too is an element of a claim.

4 And then, second, it would probably
5 look something like what Dr. Starks did here --
6 I'm just theorizing -- but it would be, look,
7 similar statements like this never caused a
8 price impact. In similar industries or for
9 similar companies, the price before and after
10 would have been the same, and, therefore,
11 there's no price impact in this particular case
12 as a result of that false statement.

13 CHIEF JUSTICE ROBERTS: Thank you --

14 MR. JOSHI: Presumably, plaintiffs
15 would --

16 CHIEF JUSTICE ROBERTS: -- counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.

20 Counsel, would you give me an example
21 of how an immaterial or broad statement, such as
22 "we are a nice company and we like people" --
23 how that has an impact on price?

24 MR. JOSHI: So, Justice Thomas, it's
25 -- it's difficult to -- to give you an example

1 of how a truly immaterial statement could, in
2 reality, have actually had an impact on price,
3 precisely because the circumstances under which
4 that would materialize would be a generally
5 efficient market but reacting inefficiently in
6 this particular case, which is just the converse
7 of what the Court said was possible in
8 Halliburton II.

9 And so, because it would be an
10 unreasonable reaction, I suppose any example I
11 could give you might be deemed to be farfetched.
12 But I -- I do think it is just a logical
13 consequence of what this Court already
14 recognized in Halliburton II, which is, even in
15 a generally efficient market, a truly material
16 statement could have no price impact. And it
17 follows that a -- an immaterial statement might,
18 in some circumstances, have a price impact.

19 I think, in this particular case,
20 Respondents and some of their amici suggest that
21 in this particular case, because Goldman Sachs
22 was dealing with a lot of financial instruments
23 in which conflicts were extremely important,
24 both to the company, to its reputation that it
25 -- and reputational advantage that it enjoyed

1 over its competitors and peers, and the industry
2 more generally, that in this case, even highly
3 generic statements about conflicts did, in fact,
4 have a price impact.

5 Now we don't take a position on
6 whether they're correct, but I imagine that's
7 the sort of dispute that the courts below would
8 resolve on -- on a remand.

9 JUSTICE THOMAS: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.

12 JUSTICE BREYER: I just would like
13 your view, if you can, because this is an area I
14 don't know thoroughly. It's filled with, if not
15 jargon, specialized terms, I think more than are
16 necessary, but that's just an opinion. But let
17 me go into this.

18 All right. I thought this first
19 question is just like saying is a tire defective
20 or not and you take the evidence for what it's
21 worth. And, apparently, everybody agrees, take
22 the evidence for what it's worth. Fine.

23 Why isn't that the end of the case?
24 On issue one. Mr. Shanmugam says: Well,
25 because they made a mistake in the court of

1 appeals. Review that.

2 But, when I read what they said, it
3 seemed to me that what the judge was saying is,
4 wait a minute, suppose what the guy had said at
5 the company was ishkabibble, total nonsense. My
6 God, how did that move prices? Why is that
7 material? Well, 12(b)(6), denied. Okay. Now
8 we have to assume it's material.

9 Now every member of the class is using
10 the word "ishkabibble." So whether
11 "ishkabibble" is or is not material was a matter
12 for the judge to decide under the heading
13 materiality. He may have made a mistake. You
14 don't get an appeal until later. But the issue
15 here is, are they all using the word
16 "ishkabibble"? Yeah, they all are, and,
17 therefore, there's a common issue for the class.

18 And I thought that's what the judge
19 was talking about when he used the statements
20 that Mr. -- Mr. Shanmugam referred to. Correct
21 me insofar as I'm wrong, okay?

22 MR. JOSHI: Certainly, Justice Breyer.
23 I -- I think the statements that Mr. Shanmugam
24 points to and that we identify in our brief as
25 well from the court of appeals appear to be more

1 categorical than I think you've described them.

2 Now, granted, you might say: Well,
3 they reside in particular sections of the
4 opinion that are captioned in a way that might
5 not be as categorical as they seem on paper.
6 But, if that's true, then we would just urge
7 this Court to clarify that so that there's no
8 mistaking what the law is for parties and
9 litigants and lower courts.

10 As to how the generic nature of the
11 statement might be used, I think, as
12 Mr. Shanmugam said, all parties agree now that
13 the more generic a statement, the less likely it
14 is to have actually caused a price impact. And
15 just like when a judge --

16 JUSTICE BREYER: Well, maybe, maybe,
17 but it depends on circumstances, and am I right
18 in thinking that the real problem here is the --
19 the defendants don't get an appeal from a
20 12(b)(6) denial on the basis of materiality;
21 they do get an appeal -- they do get an appeal
22 when the court says this is going to be class
23 action, and they'd like that appeal so they
24 don't have to settle.

25 Now that's what seems to me is

1 underlying that. Am I wrong or right?

2 MR. JOSHI: I think you're probably
3 correct as a descriptive matter, Justice Breyer,
4 but I don't think it changes the fact --

5 JUSTICE BREYER: No, it doesn't.

6 MR. JOSHI: -- that --

7 JUSTICE BREYER: You're right. You're
8 right.

9 MR. JOSHI: -- that -- right, that
10 Amgen and Halliburton II said that, you know,
11 price impact is to be evaluated at class
12 certification. And Congress and the rules
13 committee have provided for the --

14 JUSTICE BREYER: Yeah, yeah. That's
15 right. That's right.

16 CHIEF JUSTICE ROBERTS: Justice --
17 Justice Alito.

18 JUSTICE ALITO: Let me ask you a quick
19 question about the Basic presumption. Let's
20 suppose you're right. So the plaintiff proves
21 whatever the plaintiff has to prove under Basic.
22 Then the defendant, under Halliburton II, has
23 the opportunity to introduce its evidence on
24 this question. Then the judge has to decide.
25 And the risk of non-persuasion is on the

1 defendant, okay?

2 What does the judge compare? The
3 judge has the defendant's evidence. What does
4 it have on the plaintiff's side? If this were a
5 301 presumption, I would say the judge has, on
6 the plaintiff's side, whatever inference
7 naturally arises from the evidence that the
8 plaintiff has put in to satisfy Basic.

9 And the judge would have to weigh --
10 decide how much weight to give that. Am I
11 right? Is that what -- do you think that's what
12 happens the way you see things, or do you think
13 that Basic awards the plaintiff some quantum of
14 proof that goes beyond the inference that
15 naturally arises from what the plaintiff has
16 proven?

17 MR. JOSHI: So, Justice Alito, I think
18 Halliburton II described what the effect of
19 plaintiffs having satisfied the Basic
20 prerequisites is doing as being actually
21 satisfying the Rule 23 requirements, and -- and
22 the opinion says that twice in very short order,
23 that the plaintiff actually satisfied the burden
24 of persuasion. So I think it's probably, if I
25 understood your question, closer to the latter.

1 If I could give you an analogy. The
2 Basic prerequisites are sort of like the first
3 half of a basketball game in which plaintiffs
4 might take the lead and thereby, you know,
5 satisfy their burden. Now, for defendants, in
6 the second half, because they're behind, they
7 can bring in evidence of price impact, but it
8 has to --

9 JUSTICE ALITO: My -- my time is going
10 to -- my time is going to expire and I'm not
11 going to be able to get your full answer. I'll
12 pick up with Mr. Goldstein, and I think you've
13 got an interesting analogy there, but, in order
14 to decide that, I have to know by how much the
15 one team is ahead at halftime in order to decide
16 what has to happen at -- in -- in the second
17 half, but my time is up. Thank you.

18 MR. JOSHI: It -- it --

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor.

21 JUSTICE SOTOMAYOR: Counsel, as I
22 think you were trying to tease this out, you
23 said the Second Circuit's opinion can be read to
24 say that generic -- that the generic nature of
25 an alleged misstatement cannot be considered at

1 all.

2 But I don't take it to be your
3 position to be that that's the -- that the
4 Second Circuit decision can only be read that
5 way.

6 MR. JOSHI: That's correct.

7 JUSTICE SOTOMAYOR: Do you think it's
8 the best reading of what it did?

9 MR. JOSHI: I don't know, but given
10 that this Court has the case before it, we think
11 the most efficient path forward would be for
12 this Court to just make clear that the generic
13 nature of a --

14 JUSTICE SOTOMAYOR: Well, counsel,
15 let's say I -- I disagree with you that it's the
16 most efficient way forward. Let's stop with the
17 fact that they've been litigating class
18 certification now for five years and that
19 Petitioners' counsel concedes the Second Circuit
20 got it right the first time when it remanded.
21 It said exactly what you want us to say the
22 first time. It's hard to imagine they forgot it
23 the second time.

24 So wouldn't the most efficient answer
25 be state the law, and the best way to read the

1 Second Circuit's opinion is the way it said the
2 first time and just let this case -- this issue
3 die -- not die -- end and go on with the case?

4 MR. JOSHI: So, Justice Sotomayor, as
5 long as this Court states the correct view of
6 the law, whether as an independent matter or
7 whether by saying you choose to read the Second
8 Circuit's opinion that way, the United States
9 doesn't have a particular interest in that.

10 We are most interested in a correct
11 statement of the law. We don't have an interest
12 in how this particular case comes out. So, as
13 long as this Court correctly states the law, I
14 don't think we have an issue with that, whether
15 it's a vacatur or I think what Your Honor might
16 be suggesting is an affirmance but with a
17 clarification of what the law is and what you
18 believe the Second Circuit did. And I just --

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 JUSTICE KAGAN: Mr. Joshi, on your
23 Rule 301 argument, if I could better understand
24 that. You might be saying one of two things.
25 You might be saying that the Basic rule and that

1 all that comes from the Basic rule is the -- the
2 underlying -- it -- it -- it has its source in a
3 federal statute, and so that phrase of Rule 301,
4 "unless a federal statute provides otherwise,"
5 that phrase is satisfied. Or you might be
6 saying, like, no, we don't have to satisfy that
7 phrase; 301 is entirely irrelevant to this.

8 So which argument are you making?

9 MR. JOSHI: So, with respect, Justice
10 Kagan, I don't think it matters. The -- the --
11 the -- the proviso in the first sentence of Rule
12 301 applies only to the assignment of the burden
13 of production. But, of course, everyone agrees
14 that the defendants bear the burden of
15 production here.

16 That proviso doesn't apply to the
17 second sentence of 301, which I think is the
18 critical one here. That sentence makes clear
19 that the rule does not shift or otherwise assign
20 the burden of persuasion but remains on the
21 party who had it originally.

22 And, critically, that text does not
23 say "remains on the party invoking the
24 presumption." Had it said that, Petitioners
25 would have a strong argument.

1 But it says on the party who had it
2 originally. And so it's totally agnostic and
3 recognizes that either party might have the
4 burden of persuasion.

5 So, to figure that answer out, you
6 have to go to the substantive law, which is
7 Basic and Halliburton II. And at that point, it
8 doesn't really matter whether they are linked to
9 a statute, an interpretation of a statute, or
10 purely judge-made. The fact is Basic and
11 Halliburton II set forth the substantive law,
12 and that's all that matters.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Good morning,
17 counsel. So, you know, at step one, Basic says
18 that the plaintiff has a presumption that a
19 misstatement made by the defendant affects
20 market price.

21 Step two, the defendant comes in and
22 says, I have proof that it didn't in this case
23 because it's so generic.

24 You agree, I assume, that a judge
25 could, in appropriate circumstances, find that

1 that second production by the defendant does
2 overcome the presumption that Basic provides?

3 MR. JOSHI: Yes.

4 JUSTICE GORSUCH: Okay. So the
5 presumption isn't irrebuttable or irrefutable.
6 It is rebuttable somehow?

7 MR. JOSHI: That's right.

8 JUSTICE GORSUCH: Okay. If that's the
9 case, why wouldn't we follow 301 and -- and put
10 the burden of ultimate persuasion back on the
11 plaintiff, given that, of course, it's class
12 certification and they bear the burden on class
13 certification?

14 MR. JOSHI: So, Justice Gorsuch, I
15 actually agree with you that plaintiffs bear the
16 ultimate burden. But perhaps to pick up on my
17 answer to an analogy with -- and conversation
18 with Justice Alito --

19 JUSTICE GORSUCH: Let's skip the
20 analogies. Okay?

21 MR. JOSHI: Yeah, sure, sure.

22 JUSTICE GORSUCH: Let's just talk
23 about, given that the law places a burden to --
24 to -- to seek class certification on the
25 plaintiff, and, of course, under 10b-5, the

1 burden resides with the plaintiff to prove his
2 case, why wouldn't the burden in the face of a
3 generic statement come back to the plaintiff to
4 say, okay, I have this evidence of a material
5 misstatement, and you -- you normally assume it
6 affects the market, but there's some contrary
7 evidence and now the plaintiff has to -- has to
8 ultimately persuade the judge that, no, that --
9 that -- that -- that generic statement, in fact,
10 affected price?

11 MR. JOSHI: Because the plaintiffs
12 have already satisfied that burden by showing
13 the Basic prerequisite.

14 JUSTICE GORSUCH: Well, but that --

15 MR. JOSHI: Then it leads to --

16 JUSTICE GORSUCH: -- but -- but --
17 but, no, you just said that that was rebuttable.
18 You said that could be overcome. So it -- are
19 -- then -- then you're saying it's not a
20 presumption, it's an absolute rule.

21 MR. JOSHI: No -- no, Justice Gorsuch.
22 I -- I apologize if I misspoke. What I'm saying
23 is that the plaintiffs are capable of -- of
24 satisfying their burden by proving the
25 prerequisites.

1 Now defendants can come back with
2 price impact evidence. But given that
3 plaintiffs have already satisfied their
4 requirement by showing the Basic prerequisites,
5 defendants will have to do something more than
6 equipoise on the direct issue of --

7 JUSTICE GORSUCH: I -- I'm afraid my
8 time's expired.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you, Chief
12 Justice.

13 Good morning, Mr. Joshi. You agree in
14 the brief that we should vacate and not affirm,
15 correct?

16 MR. JOSHI: That's our suggestion,
17 right.

18 JUSTICE KAVANAUGH: Okay. And do you
19 object to a formulation under which we would say
20 what Petitioners' brief said, which is the
21 generic nature of an alleged misstatement is
22 important evidence of a lack of price impact?
23 Should we say that or not say that?

24 MR. JOSHI: I think that would be
25 fine, but I think it would be better if the

1 Court could make clear that the reason the
2 generic nature of a statement, and the more
3 generic a statement, the -- you know, it's
4 evidence of price impact is because of the
5 likelihood that it had a price impact.

6 In other words, the more generic a
7 statement, the less likely it actually had a
8 price impact in the particular case.

9 JUSTICE KAVANAUGH: Okay.

10 MR. JOSHI: And that's one --

11 JUSTICE KAVANAUGH: So the first
12 sentence -- the sentence I gave you, plus the
13 more likely sentence that you have, you would
14 suggest?

15 MR. JOSHI: Yes, that's right.

16 JUSTICE KAVANAUGH: Okay. Well,
17 especially in March, I'm always game for a
18 basketball analogy, so can you give the second
19 half of your answer to Justice Alito's question?

20 MR. JOSHI: Certainly. My -- my point
21 was that, by hypothesis, plaintiffs have already
22 taken the lead on showing price impact through
23 the indirect route of the Basic prerequisites.

24 And so, if defendants want to rebut it
25 with direct evidence of price impact, and

1 plaintiffs will come forward with their own
2 direct evidence relating to price impact,
3 defendants will have to do more than just trade
4 baskets in the second half. They'll have to do
5 more than merely equipoise because, for the
6 whole game, plaintiffs would have had the lead,
7 right?

8 And so the idea is you don't need to
9 know how much they're winning by, as Justice
10 Alito suggested. All you need to know is that a
11 tie in the second half is not enough to get a
12 tie for the game.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett.

16 JUSTICE BARRETT: Good morning, Mr.
17 Joshi. I want to think about the implications
18 of this case for other cases.

19 So Judge Hamilton has a very
20 thoughtful opinion in the Seventh Circuit in
21 Allstate where he talks about how the tension
22 between Amgen and Halliburton II requires the
23 district court to split some very fine hairs,
24 very, very difficult to navigate because, you
25 know, all of these questions boil down to did

1 the statement matter, even at the certification
2 stage, all the while, as Judge Hamilton
3 colorfully puts it, you know, the judge is
4 supposed to be not thinking about the pink
5 elephant, not thinking about how any of this
6 bears, for example, on materiality.

7 So here's my question: The nature and
8 content of the statement and how general it is,
9 do you think that is essentially a question of
10 materiality?

11 MR. JOSHI: Not exactly, Justice
12 Barrett. And I -- I would add that we agree
13 completely with Judge Hamilton's opinion in
14 Allstate and we think that's a good model to
15 follow.

16 But I think the generic nature of a
17 statement, of course, would go to materiality in
18 that, the more generic a statement, the, you
19 know, less reasonable it would be for a
20 reasonable investor to rely on it.

21 But it also goes to the entirely
22 separate question of price impact, which is
23 whether, in this particular instance, did the
24 statement have an effect on the price of the
25 security.

1 JUSTICE BARRETT: You know, but, as
2 Justice Breyer said earlier, it's very
3 difficult. You think about price impacts, and
4 you think about this distinction, and I agree
5 you can make a logical distinction between what
6 actually happened in price impact and what a
7 reasonable -- how a reasonable investor would
8 react, which would be more the materiality
9 question, but they're very close, right?

10 I mean, if a question -- if -- if a
11 statement is immaterial, it's -- it's far less
12 likely that it will actually have an impact on
13 the price, right?

14 MR. JOSHI: That's exactly right.

15 JUSTICE BARRETT: And so, if we say
16 this, if we say -- I mean, I understand both
17 sides are conceding it, but if we say that the
18 nature and content of a statement here, if
19 general in nature, is relevant and fair game on
20 the question of price impact, does that have
21 implications for materiality down the road?

22 MR. JOSHI: I -- I don't think so
23 other than the way that every fact that would be
24 found might have some, you know, estop --
25 collateral estoppel effect down the line or --

1 you know, but -- but the Court made clear in, I
2 think, Amgen and Halliburton II that just
3 because a particular issue might bear on the
4 merits, that's no reason not to allow the
5 defendant or the plaintiff to bring that issue
6 in at class certification.

7 And, of course, Comcast and Wal-Mart
8 say the same thing.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, Mr. Joshi.

12 MR. JOSHI: Thank you, Mr. Chief
13 Justice.

14 The parties largely seem to agree with
15 each other and with us on the first question
16 presented, and the only lingering disagreement
17 appears to be whether the generic nature of a
18 misstatement must be introduced solely through
19 expert evidence.

20 And in our view, there's no sound
21 reason to impose that kind of artificial limit.
22 The more generic a statement is, the less likely
23 it is to have had a price impact.

24 And there's nothing wrong with the
25 Court taking that likelihood into account as

1 part of its calculus about which one of two
2 competing narratives to credit, just like it
3 would do with credibility or the Daubert
4 factors.

5 On the second question, Rule 301
6 doesn't answer the question because it says the
7 burden remains on the party who had it
8 originally. And to find that out, you have to
9 look to substantive law.

10 And to the extent Halliburton II
11 doesn't already dictate an answer, this Court
12 shouldn't adopt one that would essentially work
13 the radical alteration of Basic that Halliburton
14 II itself was loathe to effectuate.

15 And we think that's why every court of
16 appeals to consider the question, including the
17 Seventh Circuit in Allstate, has held that
18 defendants bear the burden. And that's what we
19 think this Court should hold as well.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Goldstein.

23 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

24 ON BEHALF OF THE RESPONDENTS

25 MR. GOLDSTEIN: Mr. Chief Justice, may

1 it please the Court:

2 On the substance of the first question
3 presented, there is no difference between the
4 parties and the United States. We agree with
5 them that the generic nature of the statement as
6 they use the term is relevant evidence to price
7 impact.

8 We do believe that that ought to be
9 addressed in the first instance and principally
10 by expert testimony, but judges can evaluate
11 that testimony on the basis of common sense.
12 And we can imagine cases, particularly where
13 materiality hasn't been decided, where there is
14 no expert testimony that's necessary.

15 Now how did we get to the point where
16 everybody agrees? We got here because the
17 Petitioners have abandoned their argument in the
18 court of appeals and in the cert petition that
19 what the Court should do is just evaluate
20 materiality and determine as a per se matter
21 that the statement is too generic to ever have
22 price impact.

23 What we do need to understand is that
24 the court of appeals already applies the rule
25 that everyone is asking for here, and the United

1 States, I think, has properly moved to the point
2 of saying, well, there is some ambiguity in
3 parts of the Second Circuit's opinion, but you
4 can resolve that just by making clear how you
5 understand the court of appeals to rule.

6 And so I want to focus on what
7 actually is the rule in the Second Circuit. Now
8 you have to start with the Second Circuit's
9 first decision in this case, which holds that
10 all evidence is relevant to price impact,
11 notwithstanding that it overlaps with
12 materiality.

13 Judge Crotty then received an expert
14 report from the Petitioners on this exact
15 question. Nobody excluded that evidence or
16 tried to exclude it, and it was admitted, and
17 Judge Crotty evaluated all of the evidence
18 together.

19 The Petitioners did not argue on
20 appeal and do not argue to you that the district
21 court's assessment of the evidence on price
22 impact was clearly erroneous. And so I do not
23 understand how it is that they believe that they
24 can get to the conclusion that you should remand
25 to the Second Circuit in the hope that Judge

1 Crotty's price impact determination will be
2 overturned.

3 Now it is, I think, really important
4 --

5 CHIEF JUSTICE ROBERTS: Now, Mr.
6 Goldstein, I'd like to see what you disagree
7 with. Your -- the Petitioners say that under
8 the court of appeals' holding -- this is a quote
9 from page 5 of their -- their brief, "Plaintiffs
10 need only identify a drop in a company's stock
11 price following a negative event, then assert
12 that the stock price had been improperly
13 maintained by a company's generic statements,
14 without having to show when or how the inflation
15 entered the company's stock price."

16 Now is that true?

17 MR. GOLDSTEIN: That is correct in the
18 sense that it has nothing to do with disproving
19 price impact. What the defendant does do is
20 show -- and the defendants attempted to do so
21 here -- that there was an alternative cause for
22 the decrease in the price.

23 The question of what caused the
24 inflation in the first instance is a loss
25 causation question. And this Court held in

1 Halliburton I and then reaffirmed in Amgen that
2 that is not a question for class certification.
3 There are plenty of ways of disproving price
4 impact, and courts have found a lack of price
5 impact.

6 CHIEF JUSTICE ROBERTS: So only a drop
7 in the company's price, and then you can rely
8 entirely on a statement along Justice Alito's
9 line that "we are a nice company"?

10 MR. GOLDSTEIN: No. So that statement
11 would have been deemed to have been immaterial
12 as a matter of law. The Court will have to
13 conclude that the --

14 CHIEF JUSTICE ROBERTS: Well, okay,
15 then not that extreme; something, you know, like
16 "we take conflicts seriously, we put the
17 customers first." Are -- are those different in
18 -- in substance?

19 MR. GOLDSTEIN: Absolutely. There is
20 expert testimony here, there are analysts'
21 reports that identify why there was a premium in
22 the Goldman Sachs -- Sachs stock price precisely
23 because of this issue.

24 But turn, Mr. Chief Justice, to what
25 it is that the defendant here attempted to do to

1 disprove price impact, and that is to prove an
2 alternative cause for the decrease on that day.

3 They just have a very hard price
4 impact case to make out here when the corrective
5 disclosures occurred on this exact subject and
6 the price declined precipitously on that day.
7 It's no surprise that this is not a case that's
8 going to have a lack of price impact.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas.

11 JUSTICE THOMAS: Chief Justice, I have
12 no questions.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.

15 JUSTICE BREYER: Well, I'm not sure,
16 what do you think? And I -- and maybe on
17 rebuttal the others -- I mean, this seems like
18 an area that the more that I read about it, the
19 less that we write, the better based on very
20 peripheral issues.

21 And in this instance, you're so much
22 in agreement. Why -- what -- what do you think
23 about our not answering the question? You're
24 going to say great, don't, but, I mean, I want
25 to raise that question, throw it out.

1 MR. GOLDSTEIN: I -- I would make the
2 following judgment, Justice Breyer: If you
3 agree with us that the court of appeals is doing
4 the right thing, then you can DIG the case or
5 you can simply affirm on that basis.

6 Judge Hamilton in the Allstate case
7 does say, look, these are very, very, very fine
8 distinctions. And it is, I think, important for
9 the Court not to do something that suggests that
10 you ought to reintroduce a materiality inquiry
11 specifically in the class certification. And
12 there is a view that you can just continue to
13 reiterate that.

14 And so I do suppose there would be a
15 valuable opinion that just says this: Look,
16 don't, on a class certification, ask the
17 materiality question. On the other hand, don't
18 throw common sense out. And don't ignore the
19 generic nature of the statements. Then say:
20 That's the Second Circuit's rule. That's why it
21 vacated the first class certification.

22 That's why Judge Crotty received the
23 Starks report. Judge Crotty evaluated the
24 evidence, and then Goldman abandoned the
25 argument that that was clearly erroneous.

1 That, I suppose, would advance the
2 ball some, or simply dismiss the case because
3 all the courts of appeals already agree on the
4 correct rule.

5 JUSTICE BREYER: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Alito.

7 JUSTICE ALITO: Well, you just told us
8 we should say don't reintroduce the materiality
9 issue. Do you mean to say that we should
10 provide the following instruction: In
11 considering whether the Basic presumption has
12 been rebutted, you may not consider any evidence
13 that would also go to the issue of materiality?

14 MR. GOLDSTEIN: No.

15 JUSTICE ALITO: But should we --

16 MR. GOLDSTEIN: Absolutely not.

17 JUSTICE ALITO: -- should we say the
18 opposite of that? That there is no -- that
19 there is no reason to disregard evidence that
20 goes to price impact that would rebut the Basic
21 presumption just because it would also go to the
22 issue of materiality.

23 MR. GOLDSTEIN: Yes. That's the
24 Second Circuit's first holding in this case, and
25 we agree it was correct.

1 JUSTICE ALITO: Okay. Great. That's
2 helpful. Now could I ask you to respond to the
3 question I asked to -- I asked Mr. Joshi? Do
4 you want me to repeat it, or do you remember
5 what it was?

6 MR. GOLDSTEIN: I do remember it, and
7 I remember the halves of the basketball game.
8 I'll do my best. Please correct me if I do it
9 incorrectly.

10 Here's what happens: When the
11 plaintiff is establishing the Basic presumption
12 at class certification, that's a really
13 important caveat here, at class certification,
14 they show that the market is generally efficient
15 and the statement was public.

16 Remember there is not that much
17 evidence to show reliance then. What you're
18 showing is that reliance is a common question.

19 Because the plaintiff isn't proving
20 materiality at class certification, it's not
21 like that the plaintiff has done a ton to
22 establish the actual fact of reliance. All
23 they've shown is that this is a case that we
24 ought to be litigating on a class-wide basis.

25 What the defendant then tries to do

1 and Halliburton II allows them to do is say:
2 Well, look, Basic just has nothing to do with
3 this case because this is not a case where there
4 was actual price movement in response to the
5 statement.

6 So their -- it's an apples-and-oranges
7 thing. It's not a Rule 301 case where the
8 plaintiff is introducing some evidence and that
9 really does suggest the truth of reliance and
10 then the defendant is disproving reliance.

11 What the plaintiff --

12 JUSTICE ALITO: Then how is -- that's
13 helpful, but then I don't understand -- if I
14 were the -- the district judge, I would be
15 somewhat baffled because I don't know how to
16 weigh the evidence that the defendant has
17 introduced against some thing that is before me
18 as a result of the plaintiffs having satisfied
19 the Basic requirement, unless I am commissioned
20 to make my own evaluation of the strength of the
21 natural inference of price impact that relies
22 from whatever the plaintiff has shown. That's
23 the problem to which I don't know the answer.

24 MR. GOLDSTEIN: I do. And you're
25 exactly right. And what happens is that the

1 plaintiffs turn around and introduce rebuttal
2 expert reports.

3 This is how it works: There is the
4 Basic presumption at class certification, if we
5 want to call it a presumption, that comes from
6 the efficiency of the market and the publicity
7 of the statement. The defendant comes along
8 with something like the Starks report, the Choi
9 report, that sort of thing. Then the plaintiffs
10 introduce their own evidence.

11 If it was just the plaintiffs standing
12 on the efficiency of the market, it would be a
13 mess and the defendants would probably win.
14 That's never what happens.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice --
17 Justice Sotomayor.

18 JUSTICE SOTOMAYOR: Counsel, can we
19 get to the specifics of this case with your
20 answer? The other side, at the beginning, said
21 that you had no expert testimony to rebut their
22 expert -- expert's position that the generic
23 nature of this evidence could not and did not
24 affect the price.

25 That's, I think --

1 MR. GOLDSTEIN: Yeah, that --

2 JUSTICE SOTOMAYOR: -- what your --
3 your adversary said. Could you --

4 MR. GOLDSTEIN: Yeah, that --

5 JUSTICE SOTOMAYOR: Is that --

6 MR. GOLDSTEIN: Sorry, I apologize for
7 interrupting. That made my head hurt. I -- I
8 just don't understand it. We have the rebuttal
9 declaration of Dr. Finnerty, which we quote in
10 our brief, that at length addresses the stock --
11 Starks report and goes through why Starks is
12 wrong and why it is that these statements are so
13 important to the stock price.

14 I would also point you to the evidence
15 that is at JA 948 and 949 that goes through in
16 detail analysts' responses to what happened here
17 when the enforcement actions occurred and were
18 discussed in press releases and there was going
19 to be DOJ action talking about how it was that
20 this premium was so important, how Goldman
21 stocks had lost value because it had a business
22 model that often put its own interests in
23 conflict with its own clients, and so these
24 systems that it claimed to have for resolving
25 the client -- the conflicts were so important.

1 We addressed this issue in terms --
2 and I -- you should realize and focus, I think,
3 on the fact that they did not argue either to
4 the Second Circuit or to you that Judge Crotty's
5 analysis of this in his second attempt at this,
6 which has been going on, as you said, Justice
7 Sotomayor, for five years, was clearly
8 erroneous. There is extensive evidence on our
9 side.

10 JUSTICE SOTOMAYOR: So, counsel,
11 assuming that, tell me why the Ninth -- the
12 Second Circuit's decision has to be read in the
13 way you say and is not ambiguous in the way the
14 SG says?

15 MR. GOLDSTEIN: First, there is an
16 actual holding --

17 JUSTICE SOTOMAYOR: There are those
18 two statements, so --

19 MR. GOLDSTEIN: Sure.

20 JUSTICE SOTOMAYOR: -- you know,
21 address those.

22 MR. GOLDSTEIN: Yes, address, right.
23 So we have the first holding.

24 Second, the way that the Second
25 Circuit rejects Judge Sullivan on this issue is

1 to say that Judge Crotty's decision is not
2 clearly erroneous. They quote only a single
3 sentence from the Second Circuit's opinion,
4 which ought to be the first indication that they
5 are not dealing with the actual holding.

6 The sentence that they are talking
7 about rejects Judge Sullivan's invocation of the
8 materiality as a matter of law standard, which
9 now the Petitioners themselves abandoned. And
10 they -- the -- the -- that sentence is followed
11 by this.

12 That is why materiality is irrelevant
13 at the Rule 23 stage. Win or lose, that issue
14 is common to all class members. That's all the
15 Second Circuit is saying. We will account for
16 the generic nature of the statement, but just
17 don't ask the materiality legal question because
18 Halliburton II reaffirms Amgen's holding that
19 that is off limits.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 JUSTICE KAGAN: Mr. Goldstein, you --
23 you might be right about these statements. On
24 the other hand, I suppose, as the SG says, they
25 could be read the other way.

1 And it's hard to find in the second
2 opinion the correct statement of the law. You
3 have to go back to the first opinion to find the
4 correct statement of the law.

5 So -- so why shouldn't we just vacate
6 and say, you know, here's what the law really
7 is, we want you to make sure to do it under that
8 appropriate standard?

9 MR. GOLDSTEIN: Justice Kagan, there's
10 a good reason they don't say it that way. It's
11 because the Petitioners didn't make this
12 argument. The Petitioners did not argue to the
13 Second Circuit that the generic nature of the
14 statement, as a common-sense matter, ought to
15 weigh in the balance.

16 It is very hard to complain to the
17 Second Circuit and somewhat insulting to the
18 Second Circuit to reverse them on a ground that
19 they don't have a clear articulation of why an
20 argument is wrong that was not made to them when
21 the same argument was not made to the district
22 court either.

23 What they do do is respond to Judge
24 Sullivan. Judge Sullivan invoked the
25 materiality as a matter of law standard. And

1 they say you shouldn't do that. The Petitioners
2 now agree with that.

3 They do address Judge Sullivan's
4 overall view that the evidence favored Goldman,
5 including the generic nature of the statement,
6 and they say, okay, you know, maybe Judge
7 Sullivan would come out that way if he was the
8 district judge. But we have the clearly
9 erroneous standard of review. That's not
10 addressed in the cert petition or the merits
11 brief.

12 You do -- everyone now agrees that the
13 Second Circuit has the correct holding in the
14 first decision. I acknowledge the literary
15 criticism that they don't reiterate it in the
16 second decision, but it's because they weren't
17 asked to address that issue by the Petitioners.

18 JUSTICE KAGAN: And if I could change
19 track a little bit, when -- when you said we all
20 agree on Question 1 and you said including the
21 fact that the common sense can come in outside
22 of expert reports, I -- I -- I -- I just am a
23 little bit suspicious that you really all agree
24 on everything.

25 I mean, suppose there were expert

1 reports on the question of, you know, how
2 generic these statements are and whether they
3 could have a price impact regardless, and the
4 judge says, you know, I've been looking at these
5 reports and I've been getting bleary-eyed, and
6 there seem am -- there seem to be ambiguities,
7 there seem to be gaps, and I'm going to fill
8 that in with my gut intuition of what really
9 matters to investors in the real world.

10 Would that be appropriate?

11 MR. GOLDSTEIN: I don't think so. I
12 think the more there is expert testimony --
13 which I think will be very common, particularly
14 after the Court's decision in this case -- the
15 more the judge ought to be evaluating the
16 experts. That's where I think common sense
17 comes in, Your Honor.

18 I think that if there are competing
19 expert reports, the judge is not required to
20 turn himself or herself into a computer, can
21 assess that -- those sorts of reports in the way
22 that judges evaluate expert testimony overall.

23 I just don't think that what we should
24 have is judges saying, look, you know, I just
25 know how economic markets work. Look to the

1 amicus brief of the Petitioners' expert
2 economists, who say, look, generally speaking,
3 this is really -- it requires a lot of
4 experience, a lot of context. You want to know
5 how important these issues are to these
6 companies, how analysts have analyzed this
7 issue, what has happened in similar
8 circumstances.

9 JUSTICE KAGAN: Thank you, Mr.
10 Goldstein. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: Good morning, Mr.
14 Goldstein. You know, as I understand it, you
15 know, the plaintiff bears the burden of proving
16 that this is a class that needs to be certified.

17 Then comes in a presumption as part of
18 that that a misstatement of fact affects price
19 because of the efficient market theory. Fine.

20 Then the defendant comes forward with
21 direct evidence saying, well, in this case, this
22 misstatement did not affect price. And the
23 question then is, what -- what happens next?

24 And it seems to me one of two things
25 could happen. One, the plaintiff can come

1 forward with evidence, as you did here, trying
2 to rebut that direct evidence and say, uh-uh,
3 you're wrong, that -- that -- that, here, it
4 did, in fact, affect price. And -- and -- and
5 you may carry your burden of proof and win the
6 day.

7 The other alternative, though, is, if
8 we flip the burden and put it on the defendant
9 here, the plaintiff might be able to do nothing
10 and just rest on the presumption that there's a
11 price impact in the face of direct evidence that
12 there wasn't, and then the district judge is,
13 where Justice Alito worried about, is weighing
14 direct evidence of no price impact versus a
15 theory, a presumption. And I'm not sure I
16 understand how a district judge can do that.

17 And isn't that some evidence that we
18 should require, consistent with Rule 301, that
19 the defendant carry its burden, as you say -- as
20 you say you did here, of showing that the direct
21 evidence isn't to be credited and that the
22 presumption should win out as a result?

23 MR. GOLDSTEIN: If I could just answer
24 that, Justice Gorsuch, in kind of reverse order.
25 I will remind you, of course, that Halliburton

1 II expressly holds in turn --

2 JUSTICE GORSUCH: Put -- put -- put
3 aside Halliburton II for a moment because I --

4 MR. GOLDSTEIN: Okay.

5 JUSTICE GORSUCH: -- I think we can
6 argue that one all day long.

7 MR. GOLDSTEIN: Okay.

8 JUSTICE GORSUCH: And just adopt --
9 just focus, if you would, on -- on the -- on the
10 theory here.

11 MR. GOLDSTEIN: Here's how it will
12 work, Justice Gorsuch, is that the plaintiffs
13 will come forward with the evidence of the
14 efficient market and publicity. And if the
15 defendants come forward with expert testimony
16 and other evidence that there was no price
17 impact here, I think there's a -- a decent
18 chance they're just going to win.

19 I could imagine --

20 JUSTICE GORSUCH: Well, how --

21 MR. GOLDSTEIN: -- with -- with --
22 with --

23 JUSTICE GORSUCH: -- how does that
24 work, though, if the plaintiff doesn't come
25 forward with its own direct evidence, the

1 plaintiff just rests on the theory? How is a
2 judge supposed to assess that?

3 MR. GOLDSTEIN: Right, that's exactly
4 what I was coming to. There will be cases where
5 the defendant's evidence does not actually prove
6 a complete lack of price impact on its face.

7 JUSTICE GORSUCH: I under --

8 MR. GOLDSTEIN: And that's what we're
9 trying to --

10 JUSTICE GORSUCH: -- I understand
11 that. Put that aside too, okay?

12 MR. GOLDSTEIN: Okay.

13 JUSTICE GORSUCH: It's still not quite
14 getting to my -- my question. The defendant
15 comes forward with credible evidence that
16 there's no direct impact. The plaintiff does
17 nothing. How is a district judge supposed to
18 analyze that? If there's a burden of proof on
19 the plaintiff, I understand it. If it's on the
20 defendant, I don't.

21 MR. GOLDSTEIN: Well, the defendant
22 may have carried its burden of proof,
23 absolutely. The defendant may --

24 JUSTICE GORSUCH: Well, how is a
25 district judge supposed to -- maybe I -- I'll

1 give you one more shot at it.

2 MR. GOLDSTEIN: I apologize.

3 JUSTICE GORSUCH: The credible
4 evidence of no direct impact against a theory.
5 What's a district judge supposed to do?

6 MR. GOLDSTEIN: It may well -- it --
7 it absolutely can find that the defendants
8 prevail.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 Good morning, Mr. Goldstein. To
15 follow up on Justice Kagan's question on whether
16 you really agree, do you agree that the generic
17 nature of an alleged misstatement is important
18 evidence of lack of price impact? Can we say it
19 in those words?

20 MR. GOLDSTEIN: Depending on context.
21 It frequently will be, but the United States
22 correctly identifies contexts in which it won't
23 be. For example, if the defendant says, you
24 know, we put our clients first in the sense of
25 having conflict-of-interest policies, that can

1 be a sweeping statement and quite important.

2 But I think that the Court can very
3 helpfully say the generic nature of the
4 statement is relevant and in many cases may be
5 quite important.

6 JUSTICE KAVANAUGH: And on the how we
7 got here question that you start -- started
8 with, I think we're here in part maybe because
9 of confusion in some of the lower courts about
10 how to read Amgen and Halliburton II together.
11 On the one hand, don't consider materiality. On
12 the other hand, do consider evidence of lack of
13 price impact.

14 And the problem, as you know, is that
15 the two inquiries overlap very significantly
16 potentially. Can we say that the fact that the
17 evidence on lack of price impact from generic
18 statements overlaps with materiality does not
19 matter?

20 MR. GOLDSTEIN: Yes. And you could
21 quote the Second Circuit's decision in its first
22 opinion in this case and affirm.

23 JUSTICE KAVANAUGH: And in -- in its
24 second opinion, though, in the case, the one
25 that -- the opinion that's actually before us,

1 it seemed to me that the Second Circuit, in
2 rejecting the absolute argument that you
3 characterize Petitioners as having made there,
4 that the Second Circuit went to the opposite
5 absolute argument or at least, as the Solicitor
6 General says, it could -- it could be read that
7 way.

8 Isn't the sounder course to -- to make
9 sure?

10 MR. GOLDSTEIN: You can make sure the
11 United States has said at oral argument by just
12 specifying it in your opinion. And to be clear,
13 Justice Kavanaugh, both opinions --

14 JUSTICE KAVANAUGH: That could -- that
15 could mean the wrong answer in this case.

16 MR. GOLDSTEIN: I -- I don't
17 understand how that's true, Justice Kavanaugh,
18 with respect. Remember, both opinions are in
19 front of you, not just one of them.

20 And, again, the reason that the Second
21 Circuit doesn't have clearer verbiage the second
22 time around is that this argument wasn't made to
23 it. All the parties agree the Second Circuit
24 has squarely held. And just take this point,
25 Justice Kavanaugh, to remand, you must be

1 willing to suggest that Judge Crotty clearly
2 erred. How could he have clearly erred when he
3 took an expert report on this question and --
4 JUSTICE KAVANAUGH: What about on --
5 MR. GOLDSTEIN: -- wrote that --
6 JUSTICE KAVANAUGH: -- Judge Sullivan
7 -- Judge Sullivan said in dissent that no
8 reasonable investor would have attached any
9 significance to the generic statements on which
10 plaintiffs' claims were based? Your response to
11 that?
12 MR. GOLDSTEIN: That the Second
13 Circuit correctly held that that's the
14 materiality standard. Now the Petitioners agree
15 with that --
16 JUSTICE KAVANAUGH: That can be --
17 MR. GOLDSTEIN: -- too.
18 JUSTICE KAVANAUGH: -- that can be
19 both, right? Didn't we just settle that, that
20 it can be part of both?
21 MR. GOLDSTEIN: Right. The Second
22 Circuit majority rejects that legal inquiry. As
23 to the factual conclusion at pages 36, 37, and
24 8, it just says there's no clear error here.
25 Judge Crotty looked at the evidence and came

1 reasonably to the opposite conclusion, and
2 that's correct too. They haven't preserved any
3 clear error argument to the court of appeals or
4 to you.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Good morning,
9 Mr. Goldstein. So I think, you know, there's
10 been a lot of discussion today about how much
11 daylight there is between you and the
12 Petitioners on QP 1. And you say that it's the
13 Petitioners' fault that they forfeited this
14 argument, that it's different than what they did
15 in the Second Circuit.

16 But it seems to me that you've both
17 moved towards the middle. I mean, they've
18 backed off on how important they think
19 generality is and whether it can be decided
20 categorically. But you've also conceded that
21 generality is relevant, and you've given on the
22 common sense, on the role of the court's common
23 sense.

24 So now we are left, you know, in this
25 position where you've both moved more closely

1 together, and now we have to decide what to do
2 about the Second Circuit's opinion.

3 Don't you think, Mr. Goldstein, that
4 it might be helpful, given the positions that
5 you've both taken, to make clear that language
6 like this in the Second Circuit's opinion where
7 it says "whether alleged misstatements are too
8 general to demonstrate price impact has nothing
9 to do with the issue of whether common questions
10 predominate over individual ones," so whether
11 that's -- you know, you called it -- you know,
12 maybe their literary effort needed to be
13 polished a bit, I mean, no matter what the
14 cause, don't you think it would be worth our
15 while in clarifying what the standard is that
16 you now both appear to agree on?

17 MR. GOLDSTEIN: So, to answer that
18 question, sure, I don't have any problem with
19 that. And the United States quite clearly says,
20 well, in your opinion affirming, you can just
21 say we obviously don't read that to under-rule
22 the Second Circuit's first decision in this
23 case.

24 But, Justice Barrett, the reason that
25 it's important that we have moved is that we are

1 not challenging the Second Circuit's rule. It's
2 true, in our first appeal, we attempted to argue
3 that evidence that overlapped with materiality
4 is per se irrelevant to price impact.

5 We abandoned that argument. We're
6 just embracing the Second Circuit's decision in
7 this case. I would also just encourage you to
8 read the paragraph before and the paragraph
9 after. And those make pellucid that all that is
10 happening here is that the Second Circuit
11 majority is rejecting Judge Sullivan's
12 invocation of the materiality of a matter of law
13 -- as a matter of law standard, that now the
14 Petitioners themselves have abandoned.

15 They are -- what's happening is just
16 what Allstate suggests, and that is that they
17 are hermetically sealing off the legal test for
18 materiality from the question of looking at the
19 statements and their generic nature, all of that
20 is perfectly fine. No one has a problem with
21 it.

22 JUSTICE BARRETT: Okay, but, I mean --

23 MR. GOLDSTEIN: Judge Crotty --

24 JUSTICE BARRETT: -- and I -- and I --
25 I joined Allstate and I agree with it, but I

1 guess, you know, to the extent that you've
2 suggested it would be insulting to the Second
3 Circuit for us to clarify that, I guess I don't
4 understand that. It seems like it would be
5 valuable.

6 MR. GOLDSTEIN: Well, I don't mean to
7 say --

8 JUSTICE BARRETT: Do you think it
9 would be an insult?

10 MR. GOLDSTEIN: No, no, no. Clarify
11 it. Clarify it all that you will. We will all
12 benefit from it. The question is whether you
13 reverse their decision on the basis of an
14 argument that was not made to them or to Judge
15 Crotty. And the United States, I think, is --

16 JUSTICE BARRETT: So vacating it would
17 be okay with you? Vacating it --

18 MR. GOLDSTEIN: No, no, no, they --

19 JUSTICE BARRETT: -- with a clarified
20 --

21 MR. GOLDSTEIN: No, I -- no, there's
22 --

23 JUSTICE BARRETT: You want us to
24 affirm?

25 MR. GOLDSTEIN: No. I want -- I would

1 like you to affirm, of course, but you can
2 accomplish everything that you need to in simply
3 saying we don't read that one sentence out of
4 all of the rest of the Second Circuit's opinion
5 and Judge Crotty's opinion and its first holding
6 to completely reject the court of appeals'
7 earlier conclusion in the case.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, Mr. Goldstein.

11 MR. GOLDSTEIN: Thank you, Mr. Chief
12 Justice.

13 I do want to make sure that we don't
14 leave unanswered the Petitioners' argument that
15 these statements are just truly generic. At JA
16 29, we have the statement: "We have extensive
17 procedures and controls that are designed to
18 identify and address conflicts of interest,
19 including those designed to prevent improper
20 sharing of information."

21 And there's a similar one at JA 59.
22 And then I would just encourage the Court to go
23 to all of the statements in the press and --
24 that are reflecting analysts' reports at JA 948
25 and 949, saying that this price drop is a -- is

1 the result of the loss of the premium in Goldman
2 Sachs' share price that resulted from their
3 representations about they have -- their having
4 methods to resolve conflicts of interest.

5 The Second Circuit has always applied
6 the correct rule here. All that's necessary is
7 to issue an opinion clarifying any ambiguity
8 that you perceive and affirm.

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Rebuttal, Mr. Shanmugam.

13 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

14 ON BEHALF OF THE PETITIONERS

15 MR. SHANMUGAM: Thank you, Mr. Chief
16 Justice.

17 On rebuttal, I want to explain why
18 this case is more significant than Mr. Goldstein
19 suggests and why the Court needs to answer the
20 first question as well as the indisputably
21 presented second one.

22 Since Halliburton II, defendants have
23 been able to rebut the Basic presumption by
24 showing no price impact in only five cases.
25 Plaintiffs have used the inflation maintenance

1 theory to make it very difficult to rebut that
2 presumption because that theory prohibits a
3 defendant from showing that a statement had no
4 price impact at the time it was made.

5 The court of appeals' holdings on the
6 two questions presented, taken together, take a
7 defendant's burden from very difficult to
8 effectively impossible.

9 In an inflation maintenance case, the
10 only way a defendant can rebut the presumption
11 is by showing that a corrective disclosure had
12 no impact on the stock price. But it is
13 impossible to make that showing without taking
14 the nature of the statements into account and
15 comparing the statements to the corrective
16 disclosures.

17 And if a defendant bears the burden of
18 persuasion, despite the plain language of Rule
19 301, plaintiffs will be able to do exactly what
20 Respondents did here: to obtain class
21 certification by coming forward with an expert
22 who identifies a stock drop but offers only a
23 theory and no evidence about its cause. Mr.
24 Goldstein argues as much today, that a stock
25 drop, plus a generic statement, is sufficient to

1 support class certification.

2 And in its second opinion, written by
3 a different panel from the first opinion, the
4 Second Circuit didn't simply make stray
5 statements about the relevance of the nature of
6 the statements. It did not engage in an
7 analysis of the statements, how general they
8 were, or how they line up with the alleged
9 corrective disclosures. And neither did the
10 district court.

11 This Court should bring this
12 multi-year fight over class certification to an
13 end because, in this case, it could not be
14 clearer that there is a complete mismatch
15 between the misstatements and the corrective
16 disclosures, particularly once the abundant
17 information already in the public domain is
18 taken into account.

19 And Respondents' sole expert,
20 Dr. Finnerty, offered nothing more than
21 speculation about the cause of the price drop.
22 This is an easy case because Respondents
23 presented abundant and unrebutted evidence of
24 the absence of price impact.

25 If this Court permits the class

1 certification to stand or permits the court of
2 appeals to reinstate it on remand, anything a
3 company does that leads to a stock drop is
4 securities fraud and gives rise to a valid class
5 action. That is decidedly not the legal regime
6 in any other jurisdiction of which we are aware,
7 and it should not be the regime here either,
8 particularly on a judicially created cause of
9 action.

10 The Court should provide much-needed
11 clarification. It should hold, first, that the
12 nature of the statements is important evidence
13 that should be taken into account in assessing
14 price impacts and, second, that the Basic
15 presumption, like any other judicially created
16 presumption, is governed by Rule 301.

17 And the Court should reverse the court
18 of appeals' judgment. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:23 a.m., the case
22 was submitted.)

23
24
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