No. 20-222

IN THE

Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., ET AL.,

Petitioners,

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, ET AL.,

Respondents.

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

BRIEF OF FORMER SEC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former commissioners and senior officials of the U.S. Securities and Exchange Commission (SEC) who served under both Republican and Democratic Presidents and went on to serve as leaders in industry and the academy. Collectively, they have decades of experience in administering and enforcing securities laws. Signatories include:

- William H. Donaldson, who served as Chairman of the SEC from 2003-2005, was appointed by President George W. Bush. He has also served as Chairman and CEO of the New York Stock Exchange; Chairman, President, and CEO of Aetna Inc.; and Co-Founder, Chairman and CEO of Donaldson Lufkin and Jenrette (DLJ). He was the founding Dean and tenured Professor of Management at the Yale Graduate School of Management.
- Arthur Levitt, Jr., who served as Chairman of the SEC from 1993-2001, was appointed by President William J. Clinton. He has also served as Chairman of the American Stock Exchange and Chairman of the New York City Economic Development Corporation.
- Bevis Longstreth, who served as Commissioner of the SEC from 1981-1984, was appointed twice by President Ronald Reagan. He has also served as an

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution. All parties have consented to the filing of this brief.

Adjunct Professor at Columbia University School of Law and on various boards, including the Board of Governors of the American Stock Exchange and the Pension Finance Committee of The World Bank.

- Luis A. Aguilar, who served as a Commissioner of the SEC from 2008-2015. He was originally appointed by President George W. Bush and then reappointed by President Barack Obama. He has been a partner at McKenna Long & Aldridge, LLP (subsequently merged with Dentons US LLP); Alston & Bird LLP; Kilpatrick Townsend & Stockton LLP; and Powell Goldstein Frazer & Murphy LLP (subsequently merged with Bryan Cave LLP). During his time at the SEC, Commissioner Aguilar represented the Commission as its liaison to both the North American Securities Administrators Association and to the Council of Securities Regulators of the Americas. He also served as the primary sponsor of the SEC's first Investor Advisory Committee. He began his legal career as an attorney at the SEC.

- Kara Stein, who served as Commissioner of the SEC from 2013-2019, was appointed by President Barack Obama. She has since served as a senior research fellow at the Center of Innovation at UC Hastings School of Law, lecturer at Harvard Law School, and distinguished visiting policy fellow at University of Pennsylvania Law School. She also serves on the ten-member Task Force on Financial Stability organized by the Brookings Institution.

- Robert Jackson Jr., who served as Commissioner of the SEC from 2018-2020, was appointed by President Donald J. Trump. He is now the Pierrepont Family Professor of Law and Co-Director of the Institute for Corporate Governance and Finance at the New York University School of

Law. Previously, he served as a senior policy advisor in the U.S. Treasury Department.

- Lynn E. Turner, who served as Chief Accountant of the SEC from 1998-2001, and principally advised the Chairman and Commission on accounting, disclosures, financial reporting, and corporate governance matters. He was appointed to the U.S. Treasury's Committee on the Auditing Profession and has also chaired the audit committees of various public companies and mutual funds.
- Jane B. Adams, who served as Acting Chief Accountant of the SEC in 1998, and Deputy Chief Accountant from 1997-2000. She advised and represented the Chairman and Commission on accounting, disclosures, financial reporting, and corporate governance matters.
- Michael H. Sutton, who served as Chief Accountant of the SEC from 1995-1998. Previously, he was National Director of the Accounting and Auditing Professional Practice of Deloitte and worked with the Financial Accounting Standards Board in several capacities.
- Andy Bailey, who served as Deputy Chief Accountant of the SEC from 2004-2005. He was also the President of the American Accounting Association and the Head of the Department of Accountancy at the University of Arizona, as well as at the University of Illinois.
- Scott W. Bauguess, who served as the SEC's Deputy Chief Economist, and Deputy Director for the Division of Economic and Risk Analysis, from 2013-2019. He is a Clinical Associate Professor of Finance at the McCombs School of Business, University of Texas at Austin, and Director for the

Program on Financial Market Regulation at the Salem Center for Policy.

- Tim Forde, who served as Counsel to Chairman Levitt from 1997-1998 and advised on a wide range of policy issues, including investment management. He has since served in various capacities in the private sector, including at the Investment Company Institute.
- Tyler Gellasch, who served as Counsel to Commissioner Kara Stein from 2013 to 2014. He currently is Executive Director of the Healthy Markets Association and a Fellow of the Global Financial Markets Center at Duke Law.[2]

Together, *amici* have a longstanding interest in the integrity of public markets and the legal authority of the SEC to address securities fraud – including perennial questions about the fraud-on-the-market doctrine.

SUMMARY OF ARGUMENT

From the inception of the federal securities laws, Congress recognized that securities markets incorporate publicly available information into their pricing. Congressional regulation thus targets the manipulation of securities prices through false or misleading statements and omissions. More specifically, federal reporting and disclosure regimes are designed to ensure that publicly available information is truthful and accurate. When that goal is achieved, securities are more efficiently priced -- and are perceived by investors as fairer -- ensuring the

[2] The views expressed by *amici* do not necessarily reflect the views of the institutions with which they are or were associated, whose names are included solely for identification purposes.

integrity of the securities markets. Recent history illustrates the wisdom of these principles and the dramatic and destructive impact that false or misleading statements or omissions can have on markets and investor confidence.

Such false or misleading statements and omissions come in two primary forms: Falsehoods that are propagated by affirmative comments that artificially *boost* a stock price (known as "inflation-introducing statements"). And falsehoods that are disseminated by confirmative remarks, actions, or omissions that *maintain* an artificially-elevated stock price (known as "inflation-maintaining statements"). But regardless of form, the economic and legal effects are the same: the fair price of securities is skewed to the detriment of shareholders and investor confidence is undermined.

Amici, drawing upon their considerable experience at the helm of the SEC, address two key points in this case:

First, combating inflation-maintaining statements is important to preserving efficient securities markets. In some cases, the SEC itself explicitly files suit on the basis of inflation-maintaining statements. In other cases, the SEC relies upon the core logic of inflation-maintenance, either in combination with other securities law claims or in pursuit of market manipulation more broadly. Were this Court to cast doubt upon the validity of such claims, it could adversely limit the range of tools at the SEC's disposal.

Robust deterrence of inflation-maintaining statements is also important because companies and corporate executives can have considerable incentives to maintain a falsehood that is propping up a stock price in order to reap short-term benefits.

Second, private suits are a valuable complement to the SEC's enforcement actions and resources, as this Court and the SEC have recognized on numerous occasions – and that also applies to individual and collective suits about inflation-maintenance. Although Petitioners and their *amici* have raised the specter of unsubstantiated securities litigation, Congress has already addressed such concerns and the existing judicial management tools are more than sufficient safeguards.

All told, *amici* urge this Court to tread carefully in this area of securities regulation where federal enforcement, private litigation, and public trust intersect, and to decline Petitioners' invitation to create special rules for class certification in cases involving inflation-maintaining statements.

ARGUMENT

For half a century, SEC commissioners and staff have recognized that American securities markets are the envy of the world because of the trust the public places in them and the disclosure requirements that public listings entail. *See, e.g.*, Chair Mary Jo White, *Testimony on SEC Budget*, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives (May 7, 2013), https://www.sec.gov/news/testimony/2013-ts050713mjwhtm ("The U.S. markets are the envy of the world precisely because of the SEC's work effectively regulating the markets, requiring comprehensive disclosure, and vigorously enforcing the securities laws."); Commissioner Robert J. Jackson Jr., *Statement on Volcker Rule Amendments* (Sept. 19, 2019), https://www.sec.gov/news/public-statement/statement-jackson-091919 ("The benefits of investor trust in our financial markets are hard to quantify, but they're doubtless a reason why our markets are the envy of the world."); Chairman Christopher Cox, *Statement to SEC Staff* (Aug. 4, 2005), https://www.sec.gov/news/speech/spch080405cc.htm ("So why is it that our markets are the gold standard? It boils down to trust. Investor confidence. The integrity of the system. The world has faith in our markets because it has faith in the integrity of the people minding the store."); Commissioner Allison Herren Lee, *Investing in the Public Option: Promoting Growth in Our Public Markets*, Remarks at The SEC Speaks in 2020 (Oct. 8, 2020), https://www.sec.gov/news/speech/lee-investing-public-option-sec-speaks-100820#_ftn3 ("[C]reated a comparatively level playing field for investors—even the smallest investors—and allowed them to participate in returns in our public markets, often described as the envy of the world.").

This remarkable public trust and market integrity rest on the Securities Act of 1933 and the Securities Exchange Act of 1934, which provide the SEC and investors with a range of tools and responsibilities. For example, the SEC has the affirmative power to require registration, oversee a range of market actors, and empower self-regulatory organizations. The SEC also has the disciplinary authority to seek injunctions, disgorgement, and damages against deceptive, manipulative, or otherwise prohibited conduct – including materially false or misleading statements. *See generally* Congressional Research Service, *Introduction to Financial Services: The Securities and Exchange Commission (SEC)* (April 15, 2020); Federal Judicial Center, *Securities Litigation* at 5-6 (2017), https://www.fjc.gov/sites/default/files/2017/Securities_Litigation_Pocket_Guide.pdf. Shareholders have a variety of express and implied rights of action to bring suit to defend either rights – either individually or collectively. *See, e.g.*, Federal Judicial Center, *supra*, at 4-5.

This case, while brought by private shareholders, thus involves an area of market regulation where federal enforcement, private litigation, and public trust intersect: the prohibition against making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements . . . not misleading . . . ." *See* 17 C.F.R. 240.10b–5(b); 15 U.S.C. 78j(b).[3]

Misleading or deceptive statements come in various shapes and sizes, some of which immediately and artificially inflate a stock price and cause an eventual price drop when the truth is disclosed. Others involve falsehoods which, by omission or commission, artificially maintain an inflated stock price until the truth later comes out and the price drops. The latter type is known as an "inflation-maintaining statement," which is legally actionable under the "inflation maintenance theory" or "price-maintenance theory."[4]

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[3] Courts and scholars alike have recognized multiple policies undergirding the rule against securities fraud: "(1) maintaining free securities markets; (2) equalizing access to information; (3) [ensuring] equal bargaining strength; (4) providing for disclosure; (5) protecting investors; (6) assuring fairness; (7) building investor confidence; and (8) deterring violations while compensating victims." 5B Arnold S. Jacobs, *Disclosure and Remedies Under the Securities Laws* § 6:4 (2012).

[4] *See Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 955 F.3d 254, 262 n.5 (2020) (explaining the use of the term "inflation-maintaining statements," *inter alia*, because "price-maintenance" has a different meaning in antitrust law).

There is no difference between the possible economic outcomes from these different types of statements. There is no difference in the ways in which they undermine the functioning of the securities markets. *Cf. Halliburton Co v. Erica P. John Fund, Inc.,* 573 U.S. 258, 272 (2014) (*Halliburton II*) ("Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices."). Nor should there be any difference in the rules and procedures courts use in managing them.

I. THE INFLATION-MAINTENANCE THEORY IS IMPORTANT TO PRESERVING WELL-FUNCTIONING SECURITIES MARKETS

Inflation-maintaining statements can undermine well-functioning markets and violate the securities laws. "[A]s the Second, Seventh, and Eleventh Circuits . . . recognize, misrepresentations that are effectively repeated over many months or years may 'cause' inflation . . . simply by maintaining existing market expectations, even if the level of inflation in the stock price does not increase immediately following the misrepresentation." Matthew L. Mustokoff and Margaret E. Mazzeo, *Loss Causation on Trial in Rule 10b-5 Litigation a Decade After* Dura, 70 Rutgers U. L. Rev. 175, 218-19 (2017). Likewise, a recent survey found "not a single district court rejected the [inflation-maintenance] theory" – and that this "resounding consensus was not for lack of trying on the part of defendants . . . ." *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Action*s, 132 Harv. L. Rev. 1067, 1077–78 (2019). This Court's decision in *Basic v. Levinson* itself involved a form of price-maintenance, since the shareholders there "were injured by selling Basic shares at artificially depressed prices in a market affected by [the company's] misleading statements," 485 U.S. 224, 228 (1988).

While Petitioners now impliedly ask the Court to denounce this type of claim, *e.g.*, Pets. Br. 4 ("a theory this Court has never endorsed"), the United States and the SEC conspicuously choose not to cast doubt on the core validity of the claim in their brief. Br. of U.S. at 16, 33. *See also* Br. of the U.S., *First Solar, Inc. v. Mineworkers' Pension Scheme*, 2019 WL 2153153 at *10 (U.S. 2019). This Court should likewise decline the invitation for two added reasons, *infra I.A-B*.

A. Combating Inflation-Maintaining Statements is an Important Enforcement Tool for the SEC

Combating inflation-maintaining statements is central to the SEC's central responsibility for maintaining public trust in the markets.

In some cases, the SEC squarely brings a 10b-5 enforcement action on the basis of an inflation-maintenance theory. *See, e.g.*, *Sec. & Exch. Comm'n v. Compass Capital Grp., Inc.*, No. 2:08-CV-457-ECR-PAL, 2009 WL 10693516, at *2 (D. Nev. Mar. 24, 2009) ("The SEC alleges that [defendants] agreed on issuing press releases pursuant to a set schedule, which misled the public and served to maintain [their] stock price at an [artificially] inflated value."); *id.* at *4 ("The SEC also alleges [defendant] violated section 10(b) and Rule 10b–5 by reviewing and approving [] false and misleading press releases."); *id.* (concluding that "[t]hese allegations [about the false and misleading press releases] are pleaded with the requisite particularity.").

In other cases, the SEC relies upon the logic of inflation-maintenance and/or continued misrepresentations in ways that mix 10b-5 claims with other Securities Act and Exchange Act violations. *See, e.g.*, *In the Matter of L&L Energy, Inc. et al.*, Release No. 9565 (Mar. 27, 2014) at 2 (company "continued to misrepresent that the purported Acting CFO was in fact the company's Acting CFO"); *id.* at 7 ("[defendant] directed [] not disclose this information to anyone . . . [and said] that if this information became publicly known, [the company's] stock price would drop."); *id.* at 7-9 ("By engaging in the conduct described above [defendants] violated . . . Section 10(b) of the Exchange Act and Rule 10b-5 thereunder," as well as Section 17(a) of the Securities Act, Section 13(a) of the Exchange Act, Section 302 of Regulation S-T of the Exchange Act, and other rules). *See also SEC v. Nacchio et al.*, Civil Action No. 05-MK-480 (Mar. 15, 2005) at 15 ("[defendants] continued the fraudulent scheme to keep [] stock price high to complete the announced merger"); *SEC v. Goldstone et al.*, Case No. 12-257 (Mar. 13, 2012) at 26-27 ("[Defendants] Continued to Deceive . . . the Investing Public and Implicitly Acknowledged that [their Filings] Did Not Fully and Accurately Reflect [the Company's] Financial Condition"). The SEC can base these claims on a variety of public statements, ranging from press releases to required reports and annual filings, like Form 10-K.[5]

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[5] The SEC often relies upon the risk factors that companies articulate in a 10-K filing as statements of fact and retrospective depictions that are actionable for enforcement purposes and closely scrutinized by the market. *See e.g.*, Br. of U.S. at 16-17 ("Reasonable investors may sometimes attach significance to even very general statements about a company's practices."). While some risk factors may appear more sweeping than others, if courts were to consider them categorically irrelevant as a matter of a law, as Petitioners urged below, *Arkansas Teacher Retirement System*, 955 F.3d at 267 ("in Goldman's words, 'immaterial as a matter of law'"), and *Amici* Former SEC Officials

Indeed, because the effects of inflation-maintaining statements are economically identical to other types of misstatements or market manipulation, the SEC's settlement orders across a range of factual scenarios do not always expressly distinguish between a 10b-5 inflation-maintenance claim and other forms of ongoing fraud or continued misrepresentations. These shades of gray further caution against this Court establishing a categorical bar to inflation-maintenance claims. *See also* Br. of U.S. at 17 ("The categorical rule for generic misstatements that petitioners advocated below therefore would be unsound even as a rule of materiality.").

The logic of inflation-maintenance imbues other securities actions too. In the context of market manipulation, for example, the SEC regularly brings enforcement actions about artificially maintaining stocks at an elevated price. *See, e.g.*, *S.E.C. v. Gordon*, 822 F. Supp. 2d 1144, 1152 (N.D. Okla. 2011), *aff'd*, 522 F. App'x 448 (10th Cir. 2013) ("[defendants] coordinated their sales of [stocks] to avoid flooding the market and provided buy-side support to maintain the artificially inflated share prices."); *In the Matter of Daniel R. Lehl et al., Opinion of the Commission* (Rel. No. 8102, May 17, 2002), https://www.sec.gov/litigation/opinions/33-8102.htm ("[respondent]

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and Law Professors hint here, Br. at 17-19, that would significantly complicate SEC enforcement. *See also* Br. of U.S. at 13 ("No categorical rule exists under which misstatements phrased in general terms can be deemed legally incapable of affecting a security's price, regardless of other evidence. On the contrary, courts considering particular facts may appropriately credit evidence that seemingly generic statements would have been significant to the trading decisions of reasonable investors, or that a generally efficient market acted inefficiently on specific occasions and reacted to the statements even though doing so was objectively unreasonable.").

purchased [] stock that was offered at a relatively low price in order to maintain [the stock's] artificially high value.").

The reliance upon inflation-maintenance logic across various domains of securities enforcement underscores the SEC's need to remain flexible in applying the range of tools at its disposal to fast-moving securities markets and products. *See also Lorenzo v. Sec. & Exch. Comm'n*, 139 S. Ct. 1094, 1104 (2019) ("Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job.").

The SEC relies on these types of claims for good reason, because they are a natural outgrowth of the plain text of 10b-5: It is unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . ." 17 C.F.R. § 240.10b–5(b). Especially in the context of a stock price that is already artificially high, the economic effects of affirmatively telling a lie, omitting the truth, and maintaining a misleading impression are the same.

Lower courts recognize this logical overlap too: "Every investor who purchases at an inflated price—whether at the beginning, middle, or end of the inflationary period—is at risk of [loss] when the truth underlying the misrepresentation comes to light." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1315 (11th Cir. 2011). "We decline to erect a per se rule that, once a market is already misinformed about a particular truth, corporations are free to knowingly and intentionally reinforce material misconceptions by repeating falsehoods with impunity." *Id.* "The 'maintenance' theory of inflation simply reflects the reality . . . that in a case where a company repeatedly makes statements that omit information about its liquidity risk, it is reasonable to conclude that each misstatement played a role in causing the inflation in the stock price (whether by adding to the inflation or helping to maintain it) . . . ." *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 562 (S.D.N.Y. 2011), aff'd sub nom. *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016).

B. Inflation-Maintaining Statements Can Cause Significant Harms to Markets, Investors, Employees, and Others.

Combating inflation-maintaining statements is also important for other practical and economic reasons.

As a practical matter, companies and corporate executives can have enormous incentives to issue false or misleading statements to prevent a stock price fall and to reap the benefits. Specifically, companies can benefit from maintaining artificially-inflated stock prices by issuing overpriced stock to investors, or using it to acquire other target companies in stock-for-stock M&A transactions. Corporate executives can benefit from maintaining artificially-inflated stock prices by hitting stock price targets, receiving and exercising option grants, and selling their shares into the market at inflated prices. *See e.g.,* Urska Velikonja, *The Cost of Securities Fraud*, 54 Wm. & Mary L. Rev. 1887, 1903 (2013) ("managers and insiders benefit from false disclosures," so "[t]o reduce their incentive to lie, or to look the other way, enforcement is necessary to confront the malefactors with the cost of their violation."). SEC staff regularly consider benefits like this when seeking disgorgement and calculating a wrongdoer's net profits.

Moreover, the incentive of a company or its executives to maintain a falsehood is often *greater* than the incentive for attempting to falsely inflate a stock's price in the first place. *See, e.g.*, Velikonja*, supra*, at 1904 ("knowing that sanctions follow discovery, managers of fraudulent firms spend resources trying to conceal fraud and avoid punishment"). *See generally* Rachel Croson et al., *Cheap talk in bargaining experiments: lying and threats in ultimatum games*, 51 J. Econ. Behav. Organ. 143 (2003); Vincent P. Crawford, *Lying for Strategic Advantage: Rational and Boundedly Rational Misrepresentation of Intentions*, 93 Am. Econ. Rev. 1 (March 2003); University College London, *How lying takes our brains down a 'slippery slope,'* ScienceDaily (Oct. 24, 2016), www.sciencedaily.com/releases/2016/10/161024134012.htm (the negative neurological response to lying "fades as we continue to lie, and the more it falls the bigger our lies become," potentially "lead[ing] to a 'slippery slope' where small acts of dishonesty escalate into more significant lies.").

As an economic matter, inflation-maintaining falsehoods can be just as harmful to investors and employees, and to public confidence in the stock market, as inflation-inducing misstatements – both in terms of monetary damages and undermining market integrity. Namely, company employees who work hard for stock options or stock-based compensation are harmed when they receive equity that is worth less than they believed it to be. Additionally, as the SEC explained in *Basic Inc. v. Levinson*, "[t]he importance of accurate and complete issuer disclosure to the integrity of the securities markets cannot be overemphasized" because if "investors cannot rely upon the accuracy and completeness of issuer statements, they will be less likely to invest, thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike." 1987 WL 881068 at 18 n.20 (U.S. 1987) (citation omitted).

Economically, allowing false statements to persist – by omission or commission – can also disrupt the fair pricing of securities more broadly. The close relationship between market prices and publicly available information—including in particular the need to protect the integrity of market prices from the influences of false and fraudulent information—has been a cornerstone of federal securities regulation from the beginning. Indeed, Congress made its concern with the integrity of market prices explicit when it enacted the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78 et seq.

Section 2 of the Act, entitled "Necessity of regulation," 15 U.S.C. 78b, "focuses almost exclusively on the critical importance of market prices." Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 391 (1990). A key goal of the Act was to "insure the maintenance of fair and honest markets." 15 U.S.C. 78b. But Congress found that "the prices of securities on [securities exchanges and over-the-counter markets] are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities." 15 U.S.C. 78b(3). In particular, false and fraudulent information disseminated by market participants has an effect on securities prices, at least until the truth ultimately comes out. Congress found that the result of that distortion of market prices can be to precipitate or prolong "widespread unemployment and the dislocation of trade, transportation, and industry, and [to] burden interstate commerce and adversely affect the general welfare." 15 U.S.C. 78b(4). The system of federal securities regulation is thus designed in part to combat threats to the integrity of market prices, i.e., to ensure that honest, not fraudulent, information is reflected in market prices, on which investors may then rely.

The committee reports on the Exchange Act reflect the need to ensure that market prices reflect honest, not fraudulent, information. As the House Report explained, "[t]he idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers . . . brings about a situation where the market price reflects as nearly as possible a just price." H.R. Rep. No. 1383, 73rd Cong. 2d Sess. 11 (1934). Although "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, . . . truth does find relatively quick acceptance on the market." *Id. See also* S. Rep. No. 1455, 73rd Cong. 2d Sess. 68 (1934) ("Insofar as the judgment of either [buyer or seller] is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of the law of supply and demand.").

Congress's concerns in the 1930s are, if anything, even more cogent today. In many ways, modern markets have increased the possibilities for fraud and manipulation by means of false, deceptive, or fraudulent information that infects the market and is quickly reflected in market prices. On the New York Stock Exchange alone, average daily trading volume has increased from 1.5 million shares in 1930-1939 to 2.3 billion today; another 1.7 billion shares trade on the NASDAQ, which did not even exist in the 1930s.[6] Ticker tapes have been replaced by instantaneous transmission of news and high-speed trading. The growth of the markets and technology since the 1930s have tightened the relationship between information flow and market price.

Furthermore, the modern tax code and other incentives encourage individuals to rely on the integrity of the markets. For instance, the nation's private retirement funding and college savings regime rests on tax-favored vehicles, such as IRAs, 401(k) plans, and 529 plans. These plans typically employ passive investment strategies and make routine purchases of well-diversified portfolios on a periodic (e.g., pay-period) basis. Typically, the investor does not exercise individual discretion or have specific knowledge of the securities being purchased, let alone the opportunity to closely scrutinize and rely upon an issuer's statements. The massive funds that are invested in registered securities each month through these plans are predicated on retail investors being able to rely upon the integrity of the market and of securities prices.

Indeed, the investor confidence concerns arising here are akin to institutional legitimacy concerns this Court has expressed with respect to other aspects of the securities laws and in other financial contexts. *See, e.g.*, *United States v. O'Hagan*, 541 U.S. 642, 658 (1997) (explaining that trading on misappropriated information can undermine investor confidence in the

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[6] The New York Stock Exchange volume was extracted from http://web.archive.org/web/20130620172530/http://www.nyse.com/financials/1022221393023.html and https://www.cboe.com/us/equities/market_share/. The NASDAQ data is available at http://www.nasdaqtrader.com/Trader.aspx?id=marketshare.

securities markets); *United States v. Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984) ("rather than protecting the investing public by ensuring the accuracy of corporate financial records, insulation of tax accrual workpapers from disclosure might well undermine the public's confidence in the independent auditing process"); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240–41, 108 S. Ct. 1780, 1788 (1988) ("The legislation under scrutiny is premised on the congressional finding that prompt suspension of indicted bank officers may be necessary . . . to maintain public confidence in our banking institutions. This interest is certainly as significant as [others] . . . we deemed sufficiently important . . . to justify a brief period of suspension prior to . . . a hearing."). Well-functioning and well-regulated securities markets and other financial institutions have wide-ranging benefits for the economy as a whole.

II. PRIVATE INFLATION-MAINTENANCE SUITS COMPLEMENT THE SEC'S ENFORCEMENT EFFORTS

The SEC and this Court have long recognized that "meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by the Department of Justice and the [SEC]." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see, e.g.*, *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) ("[W]e repeatedly have emphasized that implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

In recent years alone, the Commission has repeatedly informed the Court of its view that private actions serve an essential role in its filings in *Erica P. John Fund, Inc. v. Halliburton Co.*, 2014 WL 466853 (2011); *Merck & Co., Inc., v. Reynolds*, 2009 WL 3439204 (2010); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 2007 WL 460606 (2007); and *Dura Pharmaceuticals v. Broudo*, 2004 WL 2069564 (2005). As then-Chairman Richard Breeden explained in congressional testimony, the SEC "does not have adequate resources to detect and prosecute all violations of the federal securities laws," private actions therefore "perform a critical role in preserving the integrity of our securities markets," and such actions are "also necessary to compensate defrauded investors." *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing and Urban Affairs*, 102d Cong. 1st Sess. 15-16 (1991).

Class actions in particular are an indispensable complement to SEC enforcement, because private litigation on an individual basis – one shareholder and one trial at a time – is frequently impracticable and an inefficient use of both judicial and private resources. *See, e.g.*, *Basic*, 485 U.S. at 242 (requiring individualized proof could overwhelm common questions).

Moreover, private enforcement of 10b-5 claims may be increasingly important in a world in which the SEC is torn between other historic crises and pressing priorities, such as COVID-19 response and disclosures and structural market stressors. *See, e.g.*, SEC, *Coronavirus (COVID-19) Response* (modified Dec. 29, 2020), https://www.sec.gov/sec-coronavirus-covid-19-response. While *amici* on the other side conjure up hypothetical litigation involving the travel and biotechnology industries' statements during COVID-19, *see* Amicus Brief of Former SEC Officials and Law Professors in Support of Petitioners at 17-18, if anything, their concerns point in the opposite direction. In the rapidly changing environment of the pandemic, publicly traded companies should be particularly circumspect about the accuracy of their statements.

Finally, Petitioners raise the specter of "effectively guarantee[d] class certification in virtually any securities class action based on inflation-maintenance theory." Pets. Br. 5. *Cf. Amicus* Brief of Former SEC Officials and Law Professors in Support of Petitioners at 19-20 (warning about rendering class certification "a mere formality in virtually any securities class action premised on the inflation maintenance theory"). In *amici*'s experience, however, such warnings about baseless litigation are unwarranted. Cases premised on immaterial statements can, should, and typically are dismissed before reaching the class certification stage.[7] *Compare* Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review* at 3 (Jan. 25, 2021), https://www.nera.com/content/dam/nera/publications/2021/PUB_2020_Full-Year_Trends_012221.pdf (showing approximately 160 filings per year for 10b-5 claims, between 2011 and 2020) *with* Laarni T. Bulan et al., *Securities Class Action Settlements—2019 Review and Analysis*, Harvard Law School Forum on Corporate Governance (Mar. 11, 2020), https://corpgov.law.harvard.edu/2020/03/11/securities-class-action-settlements-2019-review-and-

[7] As this Court reiterated in *Halliburton II*, materiality is a merits issue, not one of class certification. 573 U.S. at 282. But dismissal for failure to state a claim can occur before a court considers class certification.

analysis/ (showing approximately 58 settlements per year for 10b-5 claims between 2011 and 2019). To the extent that dismissal of questionable statements is denied on the ground that further factual development is needed, defendants can avoid trial through moving for summary judgment. *See* Fed. R. Civ. Proc. 56(b) ("a party may file a motion for summary judgment at any time until 30 days after the close of all discovery."). Petitioners offer no concrete grounds for concern that federal district courts will regularly certify classes based on statements that did not affect market prices or to allow cases based on immaterial statements to survive summary judgment.

Additionally, as this Court has noted before, complaints about the functioning of Rule 23 in the context of the securities laws are better directed to Congress than to the judiciary. *See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 474-78 (2013). Indeed, Congress responded to concerns about the abuse of securities class actions when it enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 109 Stat. 737. *Cf. Amgen*, 569 U.S. at 475-76 (describing specific provisions of PSLRA designed to curtail abusive litigation). Neither Petitioners nor their *amici* offer any support for the notion that this Court should alter the balance that Congress struck between addressing such abuse on the one hand and, on the other, "deterring wrongdoing and providing restitution to defrauded investors."[8] *Id.* at 475. Vague and

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[8] *Amici* Former SEC Officials and Law Professors claim that class certification based on "generic statements of corporate principle would be contrary to . . . congressional intent as reflected in the" PSLRA. Brief at 18. Notably, these *amici* do not claim that such class certification in such cases would violate the actual text of the statute, much less the careful balance that

unsubstantiated claims about abusive litigation cannot defeat Congress's considered legislative judgment.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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March 3, 2021

Congress struck. Nor, as noted *supra* n.5, is there any basis for a "generic statement" blanket exception either to the securities laws or to the possibility that a particular statement or statements had an impact on market price.