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This *Report* summarizes opinions issued on December 14 and 18, 2020 (Part I); and cases granted review on December 11 and 16, 2020 (Part II).

I. Opinions

● *Trump v. New York*, 20-366. The President issued a memorandum directing the categorical exclusion of all undocumented immigrants from the congressional apportionment base tabulated following the 2020 census. By a 6-3 vote, the Court held that the challenge to that directive must be dismissed because standing has not been shown and the case is not ripe. Federal law provides that the Secretary of Commerce must take the decennial census and then report to the President "[t]he tabulation of total population by States" under the census "as required for apportionment." 13 U.S.C. §§141(a), (b). The President then transmits to Congress a "statement showing the whole number of persons in each State . . . as ascertained" under the census. 2 U.S.C. §2a(a). This statement is used to calculate the number of House seats for each state. In July 2020, the President issued a memorandum announcing a policy of excluding "from the apportionment base aliens who are not in a lawful immigration status." To facilitate implementation "to the maximum extent feasible," the President ordered the Secretary "to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy." Toward this end, the President directed the Secretary to include such information in addition to the tabulation of population that counts all residents, including undocumented aliens. Various states, local governments, organizations, and individuals challenged the memorandum. A three-judge district court held that the plaintiffs "had standing to proceed in federal court because the memorandum was chilling aliens and their families from responding to the census, thereby degrading the quality of census data used to allocate federal funds." The district court went on to hold that "the memorandum violates §141(b) by ordering the Secretary to produce two sets of numbers—a valid tabulation derived from the census, and an invalid tabulation excluding aliens based on administrative records outside the census." The court also held "that the exclusion of aliens on the basis of legal status would contravene the requirement in §2a(a) that the President state the 'whole number of persons in each State' for purposes of apportionment." Through a *per curiam* opinion, the Court vacated that judgment for lack of jurisdiction.

As an initial matter, even the plaintiffs conceded that "any chilling effect from the memorandum dissipated upon the conclusion of the census response period." The plaintiffs

therefore relied on a different theory of standing, alleging they are injured by "the threatened impact of an unlawful apportionment on congressional representation and federal funding." The Court concluded, however, that the case "does not—at this time—present a dispute 'appropriately resolved through the judicial process.'" That is because, "[a]t present, this case is riddled with contingencies and speculation that impede judicial review." In particular, the President directed the Secretary to gather information "to the extent practicable" so that aliens could be excluded "to the extent feasible." But there is no way to know at this time what will be practicable and feasible. First, "the policy may not prove feasible to implement in any manner whatsoever": "the record is silent on which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner." And it is not certain "which (and how many) aliens the President will exclude from the census if the Secretary manages to gather and match suitable administrative records." The Court noted that all agree that the government cannot feasibly exclude all 10.5 million aliens without lawful status. And "[n]othing in the record addresses the consequences of a partial implementation of the memorandum, much less supports the dissent's speculation that excluding aliens in ICE detention will impact interstate apportionment." The Court found that the "impact on funding is no more certain" for much the same reason. "At the end of the day," stated the Court, "the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature." The Court said that it expresses no views on the merits of the dispute, and "hold[s] only that they are not suitable for adjudication at this time."

Justice Breyer filed a dissenting opinion, which Justices Sotomayor and Kagan joined. In their view, the case "is ripe for resolution" and "the plaintiffs should also prevail on the merits." Justice Breyer stated that the "inquiry into the threatened injury is unusually straightforward" based on the plain words of the President's memorandum. And "the Government has not backed away from its stated aim to exclude aliens without lawful status from apportionment" in order "to diminish the 'political influence' and 'congressional representation' of States 'home to' unauthorized immigrants." The test for standing or ripeness, said Justice Breyer, is whether "there is a 'substantial risk' that the harm will occur." And he found that standard amply met here because "[t]he Government's current plans suggest it will be able to exclude a significant number of people under its policy." For example, "the Government has said that as of early December, it was already feasible to exclude aliens without lawful status housed in ICE detention centers on census day, a 'category [that] is likely in the tens of thousands, spread out over multiple States.'" And the government has identified other categories of undocumented aliens, such as persons subject to final orders of removal and DACA recipients, as to whom it has administrative records. Justice Breyer added that a change as small as a few thousand people can affect a state's share of federal resources. In the end, maintained the dissent, "[w]here, as here,

the Government acknowledges it is working to achieve an allegedly illegal goal, this Court should not decline to resolve the case simply because the Government speculates that it might not fully succeed."

On the merits, Justice Breyer found several reason why the relevant federal statute, first enacted in 1929, forecloses the government's policy. First, the text provides that the apportionment base shall include "the whole number of persons in each State." And "the phrase 'in each State,' both in 1929 and now, does not turn on immigration status. Rather, . . . that phrase has always been understood to connote some idea of 'usual residence,' picking up a person who is an 'inhabitant' of the State." And "[n]either 'resident' nor 'inhabitant' takes account of whether someone is lawfully, as opposed to unlawfully, present." The dissent next pointed to historical practice: "From the founding era until now, enumeration in the decennial census has always been concerned with residency, not immigration status." No prior census "excluded residents solely because of immigration status." Third, "the records from the legislative debate confirm that Congress was aware that the words of the statute bore this meaning." And fourth, following the 1929 Act, the Executive and Legislative Branches have expressed the view that the law doesn't allow for the exclusion of aliens based on unlawful status. The dissent dismissed the government's principal argument, which relied on Vattel's founding-era treatise, which distinguished between the "inhabitants" and "citizens" of a nation. Justice Breyer found that the Framers did not rely on Vattel when creating our nation's apportionment scheme, an issue "not intrinsically related to the law of nations." To be sure, found Justice Breyer, the statutory scheme gives the President and Secretary discretion. But "discretion to interpret and apply a statutory command is not a blank check to depart from it."

- *Texas v. New Mexico*, 65 Original. By a 7-1 vote, the Court held that under the Pecos River Compact, New Mexico receives delivery credit for water that evaporated in New Mexico while New Mexico was temporarily storing water at Texas's request when a tropical storm hit. The 1949 Pecos River Compact provides for equitable apportionment of the use of the Pecos River's water by New Mexico and Texas. Under the Compact, New Mexico has annual delivery obligations of Pecos River water to Texas in an amount that depends on how much water is in the river in New Mexico. In 1987, in the wake of disputes between the two states, the Court issued a decree setting forth the states' rights and duties, appointed a River Master, and provided that the River Master must abide by the River Master's Manual, which the Court approved in 1988. Section C.5 of the Manual, titled "Texas Water Stored in New Mexico Reservoirs," provides that when water is stored in New Mexico "at the request of Texas," New Mexico's delivery obligation "will be reduced by the amount of reservoir losses attributable to its storage." In the fall of 2014, Tropical Storm Odile filled Texas's Red Bluff Reservoir. To prevent flooding, Texas's Pecos River Commissioner asked his New Mexico counterpart to store water in New Mexico. New Mexico stored water at its Brantley

Reservoir until it was released to Texas beginning in August 2015. During the tme the water was stored in New Mexico, a significant amount of it evaporated. From early 2015 through 2018, the two states negotiated but failed to agree on how to treat the evaporated water. Finally, in 2018 New Mexico filed a motion with the River Master seeking delivery credit for the evaporated water. The River Master ruled in favor of New Mexico based on Section C.5 of the Manual. Texas invoked the Court's original jurisdiction and filed a motion for review. In an opinion by Justice Kavanaugh, the Court denied Texas's motion.

The Court first rejected Texas's contention that New Mexico's 2018 motion to the River Master was untimely because the amended decree contains a 30-day deadline for a state to file objections to the relevant preliminary report. The Court stated that "Texas's argument disregards the history of the proceedings in this case," which show that both states "agreed to postpone the River Master's resolution of the evaporated water issue while they negotiated and sought an agreement"—which the River Master's annual reports "repeatedly explained." Nor, held the Court, are the amended decree's deadlines jurisdictional and therefore non-waivable.

On the merits, the Court said that it "agree[s] with the River Master that the text of §C.5 of the Manual easily resolves this case." Texas requested that the water be stored in New Mexico; and under §C.5 the quantity of the Texas allocation "will be reduced by the amount of reservoir losses attributable to its storage." The Court made quick work of Texas's arguments. First, the Court disagreed with Texas that "the stored water was not actually part of the 'Texas allocation' referred to in §C.5 of the Manual." Second, the Court rejected Texas's contention that, to be "stored" within the meaning of §C.5, water must be held "long-term for beneficial use." Section C.5 "of the Manual," said the Court, "does not purport to define 'stored' in any way other than its ordinary meaning of holding water for Texas." Finally, the Court rejected Texas's contention that it didn't request that water be stored in New Mexico after March 2015. The Court noted that "[e]ven as late as July 2015, shortly before the water was released, Texas still had not requested the release of the water."

Justice Alito issued an opinion concurring in the judgment in part and dissenting in part. He agreed that New Mexico's objection to the River Master was timely. But on the merits, he faulted the Court for ignoring "critical facts," namely, that "[t]he decision to store the water, as well as the decision eventually to release it, was made by the federal Bureau of Reclamation." Justice Alito would remand to the River Master to assess the relevance of those facts in the first instance.

- *Shinn v. Kayer*, 19-1302. By a 6-3 vote, the Court summarily reversed a Ninth Circuit decision that had granted habeas relief based on a capital defendant's ineffective-

assistance-of-counsel-at-sentencing claim. Respondent George Kayer murdered Delbert Haas in 1994 while they were on a trip to gamble. Having already lost money gambling, Kayer decided to kill and rob Haas, which he did by shooting him pointblank in the head after Haas exited the vehicle to urinate. Kayer stole Haas's wallet, watch, and jewelry and drove away, but returned when he realized he had forgotten to take Haas's house keys. He returned and shot Haas in the head again (to make sure he was dead) and retrieved the keys. Kayer then went to Haas's home and stole various items of value. Kayer was later arrested, tried, and found guilty in Arizona of first-degree murder and related offenses. At the sentencing proceeding, the judge found two aggravating factors: that Kayer had prevously been convicted of a serious offense (first-degree burglary); and he murdered Haas for "pecuniary gain." The judge found that Kayer showed only one, non-statutory, mitigating factor: his importance to his son's life. Weighing the aggravating and mitigating factors, the judge sentenced Kayer to death. Kayer filed a petition for post-conviction relief in state court, which held a 9-day evidentiary hearing. Kayer tried to bolster his mitigation case by showing that he was addicted to alcohol and gambling; had suffered a heart attack shortly before the murder; had bipolar disorder; and members of his family suffered from similar addictions and illnesses. The court denied relief, finding that trial counsel's performance was not deficient because Kayer had refused to cooperate with his mitigation team, and finding no prejudice. A federal district court denied habeas relief, but a Ninth Circuit panel reversed. On deficient performance, it held that Kayer's attorneys should have begun to pursue mitigation evidence right away. On the prejudice prong, the court—based on a comparison of Kayer's case with other Arizona cases—concluded "that there was a reasonable probability that the Arizona Supreme Court would have vacated Kayer's death sentence on direct review had it been presented with the mitigating evidence offered at the state postconviction relief hearing." Twelve judges dissented from the denial of rehearing en banc. Through a *per curiam* opinion, the Court vacated and remanded.

The Court faulted the Ninth Circuit panel for "'essentially evaluat[ing] the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable.'" "Indeed," found the Court, "the panel repeatedly reached conclusions . . . without ever framing the relevant question as whether a fairminded jurist could reach a different conclusion." The Court then applied "the proper standard of review," focused on the prejudice issue, and vacated the Ninth Circuit panel's judgment. The Court noted that the state postconviction court did not articulate its reasoning on prejudice, and so the Court had to "'determine what arguments or theories . . . could have supported the state court's determination that Kayer failed to show prejudice" and then assess "whether 'fairminded jurists could disagree' on the correctness of the state court's decision if based on one of those arguments or theories."

The Court found that "[p]erhaps the most probable reason for [the state postconviction court's] no-prejudice determination is simply that the new mitigation evidence offered in the postconviction proceeding did not create a substantial likelihood of a different sentencing outcome." The Ninth Circuit panel found Kayer's prior-offense aggravator "relatively weak," but a fairminded jurist could place substantial weight on a prior burglary during which Kayer was armed with a .41 caliber handgun. And, ruled the Court, fairminded jurists "could debate the extent to which" Kayer's bipolar disorder and addictions "significantly impaired his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the law at the time of the murder." The Court pointed to Kayer's "extensive opportunities to consider his actions" and his planning, which "display a measure of control and intentionality." Finally, the Court rejected Kayer's contention that the Arizona Supreme Court would have reweighed the evidence on direct appeal and, as it did in similar cases, ruled for him. The Court said "it suffices to say that, because the facts in each capital sentencing case are unique, the weighing of aggravating and mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state court would weigh the evidence in a later case." Justices Breyer, Sotomayor, and Kagan dissented without opinion.

II. Cases Granted Review

- *NCAA v. Alston*, 20-512; *American Athletic Conference v. Alston*, 20-520. Under review is a Ninth Circuit decision holding that the NCAA's student-athlete payment limits violate the Sherman Act. The NCAA regulates college sports. In *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), the Court stated that NCAA rules "are justifiable means of fostering competition among amateur athletic teams." To implement this amateurism principle, "the NCAA consistently has maintained a body of eligibility rules designed to prohibit student-athletes from being paid for their play, while allowing schools to reimburse student-athletes for their reasonable and necessary academic and athletic expenses." Critically, the NCAA placed limits on the types of academic expenses that schools may reimburse. A group of individuals filed suit against the NCAA and 11 collegiate athletic conferences as representatives of several classes of NCAA Division I football and basketball players, alleging that the NCAA student-athlete payment limits are an anticompetitive restraint of trade.

Following a 10-day bench trial, the district court applied the rule of reason's three-step burden-shifting approach to assess the plaintiffs' claim. The court concluded that "limits on education-related benefits did not serve any procompetitive purpose, including the NCAA's professed purpose of preserving the distinction between college and professional sports." The court held there is a less-restrictive alternative under which the NCAA could continue to limit benefits unrelated to education but would be "prohibit[ed] . . .

from limiting education-related benefits," except that the NCAA "could limit . . . academic or graduation awards or incentives, provided in cash or cash-equivalent," at the "current or future cap[] on athletics participation awards" (about $5600). The court provided a list of permissible compensation and benefits "related to education" that had not previously been reimbursable, including computers; post-eligibility scholarships to complete undergraduate or graduate degrees at any school; expenses for pre- and post-eligibility tutoring; and paid post-eligibility internships. This list could be amended by the NCAA with the court's permission. The Ninth Circuit affirmed. 958 F.3d 1239. The Ninth Circuit agreed that "the record supports a much narrower conception of amateurism that still gives rise to procompetitive effects: Not paying student-athletes unlimited payments unrelated to education." The court reasoned that even unlimited "education-related benefits . . . could not be confused with a professional athlete's salary." And it ruled that "[t]he district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do."

The NCAA argues that "[a]t issue in this case is whether the nationwide rules that define who is eligible to participate in NCAA sports will henceforth be set by the NCAA or by one federal judge in California, assisted by the imagination of plaintiffs' lawyers and subject only to deferential Ninth Circuit review." It maintains that *Board of Regents* teaches that challenges to the NCAA's amateurism rules should be rejected at the motion-to-dismiss stage, without trial or discovery and intensive rule of reason review. The NCAA warns that the Ninth Circuit decision allows student-athletes to be paid "unlimited amounts of cash" for post-eligibility internships, effectively creating pay-for-play of the sort the NCAA has always tried to bar in the name of amateurism. "Redefining a core characteristic of defendants' product in this way," says the NCAA, "was clear judicial overreach." Quoting the Court, it says that "[a]ntitrust courts are 'ill-suited' to 'act as central planners.'" The athletic conferences add that, in their view, "the Ninth Circuit erred by effectively requiring defendants to prove that they had adopted the *least* restrictive alternative that would preserve college sports, an approach that departs from principles announced by this Court and other courts of appeals."

- *TransUnion LLC v. Ramirez*, 20-297. The Court agreed to resolve "[w]hether either Article III or [Federal Rule of Civil Procedure] 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." The U.S. Treasury Department's Office of Foreign Assets Control (OFAC) publishes a list of specifically designated nationals—terrorists, drug traffickers, and the like—with whom U.S. businesses are forbidden to transact. In 2002 petitioner TransUnion, one of the nation's "Big Three" credit reporting agencies, began including "OFAC alerts" in its credit reports, noting when a consumer's first and last name were either identical or similar to a name on the OFAC list. But neither TransUnion nor the

third-party vendor it used cross-checked date of birth or a social security number to ensure they had the right person, rather than someone else with a similar name. That proved a problem when Sergio Ramirez and his wife visited a car dealership along with his father-in-law. The dealership ran a TransUnion credit report, which included an OFAC alert referencing two different specifically designated nationals with Ramirez's name (but who had different birth dates). The dealership told him that it "would not sell the car to Ramirez because he was on 'a terrorist list.'" When Ramirez asked TransUnion for a copy of his file, TransUnion sent him two distinct documents in separate mailings. The first document was his credit file which did not include an OFAC alert, and was accompanied by the Federal Credit Reporting Act (FCRA)-mandated summary of rights. The second document was a separate letter that informed Ramirez that his name "is considered a potential match" with two different specifically designated nationals listed by OFAC, and that TransUnion would include these OFAC records on reports sold about him in the future. With the help of a lawyer, Ramirez eventually got TransUnion to remove the OFAC alert from his file.

In 2012, Ramirez filed a class action lawsuit alleging that TransUnion's practices with respect to the OFAC list violated the Fair Credit Reporting Act in several ways. The class included Ramirez and 8,184 other consumers to whom TransUnion sent the same separate OFAC letter between January 1, 2011 and July 26, 2011. "The class complaint alleged three claims against TransUnion: (i) that it willfully failed to follow reasonable procedures to ensure the accuracy of its OFAC alerts by using rudimentary name-only searches, in violation of 15 U.S.C. §1681e(b); (ii) that it willfully failed to disclose the full contents of its files to class members who asked for them by omitting the OFAC alerts, in violation of 15 U.S.C. §1681g(a)(1); and (iii) that it willfully failed to provide class members with a summary of their rights with the letter it sent informing them of the OFAC alert in their credit file, in violation of 15 U.S.C. §1681g(c)(2)." Critically, "Ramirez stipulated that less than 25% of class members had a report disseminated to a third party during the class period, and he offered no evidence that anyone besides himself was ever hindered in obtaining credit due to an OFAC alert." (Citation omitted.) TransUnion therefore argued that "the other class members lacked standing and that Ramirez was radically atypical of the class he purported to represent," for he suffered concrete injuries—the embarassment of credit complications at a retail outlet in front of his wife and father-in-law, and cancelling a planned vacation due to the alert. The district court nonetheless certified the class. At trial, much of the argument and testimony focused on Ramirez's experience, "with scant evidence of anyone else's experiences in between." The jury found for the class and awarded every class member $984.22 in statutory damages—just below the $1,000 statutory maximum. It then awarded each class member $6,353.08 in punitive damages. A divided panel of the Ninth Circuit affirmed, though it reduced the punitive damages to $3,936.88 per class member. 951 F.3d 1008.

The Ninth Circuit "conclude[d] that all 8,185 class members suffered a material risk of harm to their concrete interests protected by §1681e(b) as a result of TransUnion's failure to follow reasonable procedures to assure maximum possible accuracy of OFAC information." It found that TransUnion's sending "all class members a letter informing them that they were considered potential SDNs . . . ran a real risk of causing the uncertainty and stress that Congress aimed to prevent in enacting the FCRA." Further, found the court, "TransUnion created a risk of harm to all class members by allowing third parties to readily access the reports." The court also found that all class members had standing to assert claims under §§1681g(a)(1) and 1681g(c)(2), for TransUnion created a "serious risk that consumers not only would be unaware that this damaging label was on their credit reports, but also would be left completely in the dark about how they could get the label off their reports."

TransUnion argues in its petition that "the majority's conclusion that every class member suffered Article III injury-in-fact simply because TransUnion's credit files contained allegedly inaccurate information about them cannot be reconciled with this Court's precedent or decisions of other courts faithfully applying it. As this Court has made clear, Article III requires an injury that is both 'concrete and particularized,' *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1545 (2016) (emphasis omitted), and 'certainly impending,' *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 409 (2013). Applying those principles, the D.C. Circuit has squarely held that plaintiffs lack standing to seek damages under FCRA based on the bare existence in their credit files of information never disseminated to any third party. And multiple circuits have concluded that plaintiffs lack standing to challenge allegedly deficient disclosures when there is no evidence that they even read, let alone failed to understand, them." As TransUnion put it later in its petition, "while having an inaccurate report actually sent to a potential creditor certainly could hinder someone in obtaining credit, that could happen only if a report was actually disseminated to a third party—which concededly did not occur for more than 75% of the class. Even for the minority who did have a report sent to someone, moreover, Ramirez made no effort to prove that anyone suffered any adverse consequence as a result." Further, argues TransUnion, "[e]ven if absent class members who never had their credit information disseminated to a third party somehow crossed the Article III threshold, their injuries were nothing like the actual, concrete injuries suffered by the named plaintiff. Yet the Ninth Circuit found no problem with a trial focused on Ramirez's 'unique circumstances' to the exclusion of any 'story of the absent class members.'" Such an atypical class member, says TransUnion, cannot be a class representative under Rule 23.

- *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, 20-222. The questions presented are: (1) "Whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the alleged misstatements in showing that the

statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality." (2) "Whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion."

In *Basic*, the Court created a "rebuttable presumption" of classwide reliance on the defendant's misrepresentation in deciding to buy or sell a company's stock. Courts presume that "the price of stock traded in an efficient market reflects all public, material information—including material misstatements. In such a case, . . . anyone who buys or sells the stock at the market price may be considered to have relied on those misstatements." This case concerns how the defendant can rebut the presumption by showing that the misstatements at issue did not have a price impact. A group of Goldman Sachs shareholders sued the investment company and three senior executives (collectively, Goldman) under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and SEC Rule 10b-5. They allege that Goldman misled the public by issuing statements such as "[o]ur clients' interests always come first"; "[w]e are dedicated to complying fully with the letter and spirit of the laws"; and "[w]e have extensive procedures and controls designed to identify and address conflicts of interest." According to plaintiffs, Goldman issued those statements to "assur[e] the market that it had undertaken no undisclosed or otherwise improper conflicts with its clients" with respect to collateralized debt obligations (CDOs)—even though Goldman had extensive conflicts. Once the truth came out—through an SEC suit and news reports —"Goldman's stock price fell precipitously." The plaintiffs sought to certify a class of shareholders, and relied on the *Basic* presumption to do so. They relied on an "inflation maintenance" theory, "under which a misstatement can have price impact not only by artificially inflating a stock's price at the time it was made, but also by preventing the stock price from decreasing." A "defendant can rebut the presumption only by showing that the 'correction' of the alleged inflation-maintaining misstatement did not cause a subsequent drop in the stock price." And so that's what Goldman tried to do.

Goldman argued, among other things, that "the 'general, aspirational statements' alleged as misrepresentations had no price impact, notwithstanding any 'overlap with considerations relevant to . . . materiality'"—an issue the Court held in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), should be left to the merits stage. Goldman asserted that this argument was proper at the class certification stage under *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*), which held (in Goldman's words) that "[c]ourts may not 'artificially limit' the evidence used to rebut the presumption, even if such evidence is also relevant to one of the substantive elements of the securities claim[.]" The district court certified the class initially and again after a remand from the Second Circuit. A divided panel of the Second Circuit affirmed the class certification on its second trip to that court. 955 F.3d 254. The court described

Goldman's argument as an attempt to "smuggl[e] materiality into Rule 23," and said that whether misstatements are "too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate" because (as *Amgen* noted) the issue of materiality is "common to all class members."

Goldman argues in its petition that "a defendant is entitled to point to the generic nature of the alleged misstatements as part of its showing of no price impact, even though that evidence is also relevant to the substantive element of materiality." It maintains that the Second Circuit's contrary "rule flouts this Court's clear mandate [in *Halliburton II*] that a defendant is entitled to rebut the *Basic* presumption at the class-certification stage with any evidence, regardless of whether it is also 'highly relevant at the merits stage.'" And it insists that the ruling "render[s] the presumption effectively irrebuttable any time plaintiffs invoke the inflation-maintenance theory."

Goldman also takes issue with the Second Circuit's ruling (issued the first time the case went up to that court) that the defendant bears the burden of persuasion on whether the *Basic* presumption is rebutted. Goldman relies on Federal Rule of Evidence 301, which provides that, "unless a federal statute . . . provide[s] otherwise," "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," but the "burden of persuasion" does not "shift" and "remains on the party who had it originally." Goldman maintains that no statute shifts the burden of persuasion here. The plaintiffs counter that *Halliburton II* spoke in terms of the defendant having to "show" or "prove" that the misrepresentation had no impact. And they assert that "Rule 301 simply provides a default rule . . .; it does not purport to limit this Court's authority to establish burden-shifting frameworks consistent with its understanding of a federal statute."

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