

No. 26-90022

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IN THE  
**United States Court of Appeals for the Eleventh Circuit**

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NORFOLK SOUTHERN CORPORATION, JAMES A. SQUIRES,  
ALAN H. SHAW, CYNTHIA M. SANBORN,

*Petitioners,*

*v.*

BUCKS COUNTY EMPLOYEES RETIREMENT SYSTEM, et al.,

*Respondents.*

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On Petition for Permission to Appeal from the  
United States District Court for the Northern District of Georgia  
Case No. 1:23-cv-04175-SDG, Hon. Steven D. Grimberg

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**BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS  
CURIAE IN SUPPORT OF DEFENDANTS-PETITIONERS'  
PETITION FOR PERMISSION TO APPEAL**

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1. Kramer, James N., Counsel for Amicus Curiae;
2. Orrick, Herrington & Sutcliffe LLP, Counsel for Amicus  
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3. Rubens, Daniel A., Counsel for Amicus Curiae;
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Dated: October 20, 2026

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## TABLE OF CONTENTS

|                                                                                                                                                                                           | <b>Page</b> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| TABLE OF AUTHORITIES .....                                                                                                                                                                | ii          |
| IDENTITY AND INTEREST OF AMICUS CURIAE .....                                                                                                                                              | 1           |
| QUESTION PRESENTED.....                                                                                                                                                                   | 2           |
| INTRODUCTION AND SUMMARY OF THE ARGUMENT .....                                                                                                                                            | 2           |
| ARGUMENT .....                                                                                                                                                                            | 5           |
| I. District Courts Need This Court’s Guidance On How<br>To Implement <i>Goldman</i> ’s Price Impact Analysis.....                                                                         | 5           |
| II. The District Court Erred By Misapplying <i>Goldman</i> To<br>Make The <i>Basic</i> Presumption Essentially Irrebuttable. ....                                                         | 7           |
| III. Rule 23(f) Is The Only Realistic Mechanism For This<br>Court To Review These Questions, Which Have Far-<br>Reaching Implications For The U.S. Securities Markets<br>And Economy..... | 11          |
| CONCLUSION .....                                                                                                                                                                          | 14          |
| CERTIFICATE OF COMPLIANCE                                                                                                                                                                 |             |

## TABLE OF AUTHORITIES

|                                                                                                                     | Page(s)                 |
|---------------------------------------------------------------------------------------------------------------------|-------------------------|
| <b>Cases</b>                                                                                                        |                         |
| <i>Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.</i> ,<br>77 F.4th 74 (2d Cir. 2023).....                        | 9, 11                   |
| <i>AT&amp;T Mobility LLC v. Concepcion</i> ,<br>563 U.S. 333 (2011).....                                            | 11                      |
| <i>Basic Inc. v. Levinson</i> ,<br>485 U.S. 224 (1988).....                                                         | 2, 5                    |
| <i>Epic Sys. Corp. v. Lewis</i> ,<br>584 U.S. 497 (2018).....                                                       | 11                      |
| <i>Ferris v. Wynn Resorts Ltd.</i> ,<br>2023 WL 2337364 (D. Nev. Mar. 1, 2023) .....                                | 6                       |
| <i>*Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.</i> ,<br>594 U.S. 113 (2021).....                              | 1, 3, 4, 5, 6, 8, 9, 13 |
| <i>Halliburton Co. v. Erica P. John Fund, Inc.</i> ,<br>573 U.S. 258 (2014).....                                    | 3, 7                    |
| <i>Lab’y Corp. of Am. Holdings v. Davis</i> ,<br>605 U.S. 327 (2025).....                                           | 11                      |
| <i>In re NVIDIA Corp. Sec. Litig.</i> ,<br>825 F. Supp. 3d 1047 (N.D. Cal. 2026) .....                              | 6                       |
| <i>*Prado-Steiman v. Bush</i> ,<br>221 F.3d 1266 (11th Cir. 2000).....                                              | 6, 7, 11                |
| <i>San Diego Cnty. Emps. Ret. Ass’n v. Johnson &amp; Johnson</i> ,<br>2025 WL 2176586 (3d Cir. July 30, 2025) ..... | 10                      |
| <i>Slack Techs., LLC v. Pirani</i> ,<br>598 U.S. 759 (2023).....                                                    | 1                       |

|                                                                                     |    |
|-------------------------------------------------------------------------------------|----|
| <i>Tellabs, Inc. v. Makor Issues &amp; Rts., Ltd.</i> ,<br>551 U.S. 308 (2007)..... | 14 |
|-------------------------------------------------------------------------------------|----|

|                                                                     |   |
|---------------------------------------------------------------------|---|
| <i>Wal-Mart Stores, Inc. v. Dukes</i> ,<br>564 U.S. 338 (2011)..... | 2 |
|---------------------------------------------------------------------|---|

## Rules and Regulations

|                             |              |
|-----------------------------|--------------|
| Fed. R. Civ. P. 23(f) ..... | 4, 6, 11, 14 |
|-----------------------------|--------------|

## Other Authorities

|                                                                                                                                                                               |   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| Per Axelson & Matthew D. Cain, <i>What Is Price Impact? How<br/>the Goldman Decisions Are Reshaping Shareholder Class<br/>Actions</i> , 22 Berkeley Bus. L.J. 441 (2025)..... | 6 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|

|                                                                                                                                                                            |        |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Cornerstone Research, <i>Securities Class Action Filings—2025<br/>Year in Review</i> (2026), <a href="https://tinyurl.com/fru6dk7x">https://tinyurl.com/fru6dk7x</a> ..... | 12, 13 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|

|                                   |    |
|-----------------------------------|----|
| H.R. Rep. No. 104-369 (1995)..... | 14 |
|-----------------------------------|----|

|                                                                                                                                           |    |
|-------------------------------------------------------------------------------------------------------------------------------------------|----|
| Kevin S. Haeberle & M. Todd Henderson, <i>A New Market-<br/>Based Approach to Securities Law</i> , 85 U. Chi. L. Rev. 1313<br>(2018)..... | 12 |
|-------------------------------------------------------------------------------------------------------------------------------------------|----|

|                                                                                                                                      |    |
|--------------------------------------------------------------------------------------------------------------------------------------|----|
| Note, <i>Congress, the Supreme Court, and the Rise of<br/>Securities-Fraud Class Actions</i> , 132 Harv. L. Rev. 1067<br>(2019)..... | 13 |
|--------------------------------------------------------------------------------------------------------------------------------------|----|

|                                                                                                     |    |
|-----------------------------------------------------------------------------------------------------|----|
| Emily Strauss, <i>Is Everything Securities Fraud?</i> , 12 U.C.<br>Irvine L. Rev. 1331 (2022) ..... | 13 |
|-----------------------------------------------------------------------------------------------------|----|

## IDENTITY AND INTEREST OF AMICUS CURIAE<sup>1</sup>

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae in important disputes over the proper scope of the federal securities laws and the certification of securities class actions. *See, e.g., Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023); *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113 (2021) (*Goldman*).

Amicus is concerned that the decision below, unless reviewed and corrected by this Court, will compound uncertainty among district courts on the proper application of the *Basic* presumption after *Goldman*. Decisions like the one below unfairly constrain defendants' opportunity to rebut the *Basic* presumption and defeat class certification in securities-fraud cases. That dilution of class-certification requirements will, in turn, inflict significant and unnecessary costs on businesses, shareholders, and the U.S. economy.

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<sup>1</sup> No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus and its counsel contributed money intended to fund preparing or submitting this brief.

## QUESTION PRESENTED

Whether the district court erred in analyzing price impact under *Goldman* and certifying a class based on certain statements about safety that it described as “operational,” finding a “plausible” linkage between those statements and the alleged corrective disclosures.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Class actions are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quotation marks omitted). In securities-fraud cases, class certification often turns on the reliance element, which asks whether each plaintiff personally relied on the alleged misrepresentation in deciding to trade—an inquiry that ordinarily requires individualized proof. The *Basic* presumption permits classwide proof of reliance in certain circumstances, on the theory that in an efficient market, a material misrepresentation affects the trading price for every investor. *See Basic Inc. v. Levinson*, 485 U.S. 224, 241-47 (1988). If the misrepresentation has no price impact, “*Basic’s* fundamental premise ... completely collapses, rendering class

certification inappropriate.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) (citation modified).

The Supreme Court recognized as much in *Goldman*. It reaffirmed that defendants may defeat the reliance presumption at class certification, directed courts to weigh “all probative evidence” of price impact even when that evidence overlaps with the merits, and warned that the inference of front-end inflation from a back-end price drop “starts to break down” when a generic statement is paired with a specific disclosure. 594 U.S. at 122-24. Those instructions carry added weight in “event-driven” litigation, where plaintiffs seize on stock drops following a negative corporate event and assert that the company misrepresented or concealed the relevant risks.

This case is a textbook example. Plaintiffs allege that Norfolk Southern’s statements that it operated “safely” while implementing Precision Scheduled Railroading (PSR) were exposed as false by the East Palestine derailment and the response to that event. The district court correctly held that statements about company values were too generic to affect the stock price. Op.47. But it then certified a class based on a set of “operational” statements, reasoning that they were

specific because they mentioned details such as train length and workforce size, and that later disclosures “link[ing] PSR to increased safety risks” supplied a match. Op.48-51. Plaintiffs do not allege that any of those operational facts were false. The alleged falsity derives from the same generic assurances of safety that the court elsewhere found incapable of moving the market.

In nonetheless certifying a class, the district court added to mounting confusion among lower courts over how to apply *Goldman*—an issue that cries out for this Court’s guidance. *Goldman* reaffirmed that defendants may rebut the *Basic* presumption by proving a lack of price impact “by a preponderance of the evidence.” 594 U.S. at 117. But the court below effectively denied Norfolk Southern that opportunity, requiring it to refute price impact “entirely.” Op.38.

Other courts of appeals have granted Rule 23(f) review to address these recurring questions. *See, e.g., Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, No. 21-3105 (2d Cir. Mar. 9, 2022), Dkt. 101; *Hall v. Johnson & Johnson*, No. 24-8001 (3d Cir. Feb. 21, 2024), Dkt. 10; *Jaeger v. Zillow Grp., Inc.*, No. 24-5473 (9th Cir. Oct. 24, 2024), Dkt. 9. This Court should do so here. Without the appellate precedent

necessary to impose clear guardrails, district courts will continue to commit these errors, and improperly certified classes will impose unnecessary costs on companies, investors, and the broader U.S. economy.

## ARGUMENT

### I. District Courts Need This Court's Guidance On How To Implement *Goldman's* Price Impact Analysis.

*Goldman* was clear about many things. Defendants may rebut the *Basic* presumption at class certification through “[a]ny showing that severs the link” between the misrepresentation and the price. 594 U.S. at 118 (quoting *Basic*, 485 U.S. at 248). Defendants bear the burden of persuasion, but only by a preponderance, and that allocation should rarely decide the outcome. *Id.* at 117, 126-27. Courts must consider all probative evidence—“qualitative as well as quantitative”—even when that evidence overlaps with the merits. *Id.* at 122. And “[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory.” *Id.* at 123.

But *Goldman* also left some important questions open. The Court did not explain how to measure the extent to which a statement is

“generic,” or how closely a front-end statement and a back-end disclosure must correspond to avoid a “mismatch.” *See* 594 U.S. at 123-24. It is no surprise, then, that in conducting those inquiries, the district court repeatedly commented on the blank slate it faced. Among other things, the district court observed that the Supreme Court “provided little by way of example for how lower courts should consider evidence of a specificity mismatch,” and noted the absence of “in-Circuit guidance.” Op.40. Other courts have voiced similar uncertainty about how to conduct the mismatch inquiry. *See, e.g., In re NVIDIA Corp. Sec. Litig.*, 825 F. Supp. 3d 1047, 1067 n.12 (N.D. Cal. 2026); *Ferris v. Wynn Resorts Ltd.*, 2023 WL 2337364, at \*7 (D. Nev. Mar. 1, 2023). And even Plaintiffs’ own expert has acknowledged “a lack of consensus” among post-*Goldman* class-certification decisions. Per Axelson & Matthew D. Cain, *What Is Price Impact? How the Goldman Decisions Are Reshaping Shareholder Class Actions*, 22 Berkeley Bus. L.J. 441, 465 (2025).

These recurring legal questions will persist until this Court grants Rule 23(f) review, which is amply warranted here. The issues presented are not merely “novel or unsettled,” *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272 (11th Cir. 2000), nor do they “turn[] on case-specific matters

of fact and district court discretion,” *id.* at 1275-76. The Petition instead raises matters “as to which an appellate ruling sooner rather than later will substantially assist the bench and bar,” because these questions are “likely to arise repeatedly in the future.” *Id.* at 1275.

## **II. The District Court Erred By Misapplying *Goldman* To Make The *Basic* Presumption Essentially Irrebuttable.**

Under *Goldman*, defendants must have a meaningful opportunity to sever the link between the alleged misstatements and the stock price before a class is certified. The district court’s analysis reflected multiple subsidiary errors, several of which are emblematic of broader lower-court confusion. These mistakes, left uncorrected, would make the *Basic* presumption “largely irrebuttable,” *Halliburton*, 573 U.S. at 296 (Thomas, J., concurring in the judgment)—the result *Halliburton* and *Goldman* sought to prevent.

At the outset, the district court departed from *Goldman*’s preponderance standard. The court dismissed Defendants’ front-end showing because it was “plausible” that a price increase “could have been caused, at least in part,” by the challenged statements. Op.31. And it rejected Defendants’ evidence that the back-end declines reflected the materialization of a known risk because, in its view,

“Defendants are tasked here with refuting price impact entirely.”

Op.38.

These formulations fail to heed *Goldman*. Plausibility is a pleading standard, whereas a preponderance standard requires the court to weigh the evidence on both sides and decide which account is more likely. 594 U.S. at 117. Rather than conduct the requisite weighing, the court deferred important price-impact disputes as “merits question[s]” that need not be resolved at certification, Op.30-31; *see also* Op.36. But *Goldman* requires courts to decide price impact “even when that requires inquiry into the merits,” 594 U.S. at 122, and teaches that the burden of persuasion “will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise,” *id.* at 127. A rule that the presumption survives whenever impact is “plausible” or present “in part” makes price impact nearly impossible to refute. In an event-driven case like this one, it can always be hypothesized that some fraction of a post-event stock decline plausibly reflects the market’s reassessment of prior corporate statements.

The district court also lacked a principled basis to treat certain “operational” statements as specific enough to match the alleged

corrective disclosures, while disregarding other safety-related statements as overly generic. As the Second Circuit has recognized, *Goldman* calls on courts to compare the genericness of an alleged misrepresentation to the specificity of the alleged corrective disclosure. *See Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 93 (2d Cir. 2023) (*Goldman II*). The district court acknowledged that task and its difficulty. Op.40, 45. Even so, the court’s conclusions cannot be squared with the “good dose of common sense” that *Goldman* demands. 594 U.S. at 122.

The district court’s efforts to parse between “company values statements,” on the one hand, and “operational” statements, on the other, ultimately rest on a distinction without a difference. *See* Op.8-9. The district court found that so-called “operational” statements sufficiently matched the back-end disclosures because they “discuss safety in the context of PSR strategies and results,” while the disclosures linked PSR to increased safety risks. Op.48. But the PSR implementation details in those statements are not alleged to be false. What Plaintiffs challenge is the accompanying assurance that Norfolk Southern did these things “safely.” A generic word does not become

specific because it coincides with an accurate—and often equally generic—statement of operational facts. *E.g.*, Op.12 (treating as specific the statement: “[I]f an operating practice is unsafe, we will change it ... We also spend enormous amounts of capital to expand and enhance the capacity and capability of our network; virtually all of those [capital] investments directly or indirectly improve safety in some way.”).

The district court was not alone in failing to apply *Goldman’s* guidance on mismatches and genericness. Other courts have also treated overlap in subject matter as enough to supply the price-impact link. *See, e.g., San Diego Cnty. Emps. Ret. Ass’n v. Johnson & Johnson*, 2025 WL 2176586, at \*4 (3d Cir. July 30, 2025) (relying on common subject matter between alleged misstatements and disclosures), *cert. denied*, 146 S. Ct. 2559 (2026). Under that permissive approach, the *Basic* presumption would become effectively irrebuttable in event-driven cases (i.e., what is now the most prevalent form of securities litigation), where some prior statement on the same topic as the adverse event can nearly always be found. To prevent other district courts from falling into that error, this Court should grant review and articulate a test that ensures mere subject-matter overlap does not preclude a

mismatch. *Cf. Goldman II*, 77 F.4th at 81 (on Rule 23(f) review, articulating a three-part test for evaluating price impact).

### **III. Rule 23(f) Is The Only Realistic Mechanism For This Court To Review These Questions, Which Have Far-Reaching Implications For The U.S. Securities Markets And Economy.**

Interlocutory review is also warranted because certification here “raises the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle”—the consideration this Court has called the “[f]irst, and most important.” *Prado-Steiman*, 221 F.3d at 1274. It is by now axiomatic that certification can coerce defendants into settling “even unmeritorious claims,” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018) (quotation marks omitted), because “a small chance of a devastating loss” is a risk few defendants can afford to run, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

Those coerced settlements come with significant social costs: “overbroad and incorrectly certified classes can ultimately harm consumers, retirees, and workers, among others.” *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333 (2025) (Kavanaugh, J., dissenting from dismissal of writ of certiorari). And overly permissive class

certification standards also chill valuable disclosures, discouraging companies from discussing safety at all even though such public commitments help shape corporate conduct. *See* Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. Chi. L. Rev. 1313, 1334 (2018) (“legal uncertainty” deters “disclosing more than that which is required”).

Settlement pressure is especially acute in securities litigation, where cases almost never reach a verdict. Only 0.4% of federal securities class actions from 1997 through 2025 went to trial, Cornerstone Research, *Securities Class Action Filings—2025 Year in Review* 16 (2026), <https://tinyurl.com/fru6dk7x>, and since 2020 issuers facing securities class actions have confronted an aggregate maximum exposure of well over \$1 trillion annually, *id.* at 10 fig. 9. Settling for even a fraction of that amount imposes heavy costs on American businesses—and, ultimately, on their investors and consumers.

The price impact issues here arise with increasing frequency. Inflation-maintenance theories like Plaintiffs’—under which a misstatement is said to have propped up an already-inflated price until a later disclosure causes it to deflate—have become a mainstay of

securities litigation. *See Goldman*, 594 U.S. at 123; *see also* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077 (2019). And the volume of securities litigation in this Circuit is growing: “core filings in the Eleventh Circuit ... nearly doubled in 2025 relative to 2024.”

Cornerstone Research, *supra*, at 22. If other courts in this Circuit follow the district court’s permissive analysis, that trend is likely to continue.

Uncertain certification standards also invite further event-driven lawsuits, a category that can impose particularly intense settlement pressure untethered to the merits of these hindsight-driven claims. *See, e.g.*, Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1334, 1350-52 (2022). Event-driven suits exemplify the abusive potential that Congress addressed in the Private Securities Litigation Reform Act of 1995: “the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price.” H.R. Rep. No. 104-369, at 31 (1995); *see Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007).

These considerations underscore the need for immediate review. Only this Court can supply the guidance needed to prevent district courts from disregarding *Goldman* and depriving defendants of a fair opportunity to rebut the *Basic* presumption. As companies routinely speak about safety in general terms, nearly any adverse event could support a certified class unless the price impact analysis is treated as more than a box-checking exercise. And because securities class actions are hardly ever litigated to final judgment, these questions are unlikely ever to reach this Court outside of a Rule 23(f) petition.

### CONCLUSION

This Court should grant the Petition.

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,569 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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