No. 16-685

IN THE

Supreme Court of the United States

NORFOLK COUNTY RETIREMENT SYSTEM, ET AL.,

Petitioners,

v.

HEALTH MANAGEMENT ASSOCIATES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

AMICI CURIAE BRIEF OF LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, SAN BERNARDINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION, AND OFFICE OF THE TREASURER AS TRUSTEE FOR THE STATE OF CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS

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CORPORATE DISCLOSURE STATEMENT

None of the amici curiae have a parent company, and no publicly traded company owns 10% or more of any of the amici's stock.

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INTEREST OF THE AMICI[1]

Amici are public pension funds responsible for providing for the retirement and long-term security of more than 950,000 members. To meet that responsibility, amici invest the trust fund assets of their respective retirement systems (approximately $146 billion in total) in a wide variety of stocks, bonds, and other assets. As major investors with a long-term investment outlook, amici are concerned with the proper and efficient functioning of U.S. capital markets, and are particularly concerned that investors not be harmed by the unlawful conduct of issuers and sellers of publicly traded securities.

Amici take a balanced approach to private securities actions, recognizing that they operate as an essential check on fraud and mechanism for investor recovery, but also that permitting meritless actions to proceed would undermine the value of companies that have done nothing wrong—to the ultimate detriment of investors and the markets. Because the Eleventh Circuit's decisions in this case and in *Meyer v. Greene*, 710 F.3d 1189 (11th Cir. 2013), upend that balance by making it unduly difficult for investors who have been deceived by fraud to recover their losses, amici respectfully urge this Court to grant certiorari and reverse.

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[1] All parties were timely notified of amici's intent to file this brief, and all parties granted consent. No person other than the amici or their counsel authored this brief in whole or in part, and no person other than amici and their counsel contributed any money toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Meyer* and in this case, the Eleventh Circuit held that: (1) the announcement or acknowledgment of a government investigation cannot constitute a corrective disclosure because the mere existence of an investigation does not prove that the defendant actually committed fraud; and (2) the publication of a report to investors cannot constitute a corrective disclosure if the report is based on publicly available information—even if the information was not well-known and did not affect the market price for the stock when it first became publicly available. Although the alleged corrective disclosures in this case precipitated substantial drops in respondent Health Management Associates, Inc.'s (HMA) stock price, the Eleventh Circuit held that petitioners failed to plead the element of loss causation. The petition sets forth a compelling case for certiorari, explaining that the Eleventh Circuit's decision implicates two circuit conflicts on important and recurring questions of federal law, and conflicts with this Court's decisions as well.

Amici submit this brief to emphasize two points. First, it is critically important that pleading standards in securities fraud cases be uniform across circuits, and reasonable in every circuit, so that investors have adequate recourse to the courts when issuers prop up stock prices by fraudulently concealing misconduct and mismanagement. The issues in this case arise frequently—not only because every securities fraud case must go through the pleadings stage, but also because the facts of this case are typical. Investors frequently seek to recover their losses after a government investigation or an analyst's report conflicts with a previous misrepresentation and triggers a substantial drop in stock price. Many of those suits are meritorious because the defendant actually did engage in fraud, and the announcement of the investigation or the analyst's report constitutes the principal disclosure to the public, and therefore has the greatest effect on the stock price of any event on the timeline.

Disallowing lawsuits filed on the basis of such disclosures disadvantages investors, undermines transparency by encouraging defendants to conceal or sugar-coat bad news, and hinders shareholders' efforts to encourage good corporate governance. Indeed, the Eleventh Circuit's rule would especially harm investors with well-diversified portfolios, which would have to monitor and potentially react to every public fact, however obscure, about every company they invest in.

Second, the Eleventh Circuit's stringent standard for pleading loss causation is wrong. The court of appeals has done exactly what this Court has discouraged in recent securities cases: required plaintiffs to prove their case early, just to get in the door. The result is that lawsuits are being dismissed even when the complaints provide the defendants with ample notice of the nature of the claims against them, and allege with particularity that the defendants' misrepresentations inflated the stock price.

ARGUMENT

I. The Eleventh Circuit's Loss Causation Rule Threatens To Derail A Large Number Of Meritorious Investor Lawsuits.

In the Private Securities Litigation Reform Act, Congress codified the judge-made loss causation element of a securities fraud claim. *See* 15 U.S.C. § 78u-4(b)(4). The meaning of this element was important enough for this Court to consider in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). And "[i]n the wake of *Dura*, loss causation has become a critical consideration in both pleading and proof in securities fraud class actions brought under the 'fraud-on-the-market theory.'" Robert N. Rapp, *Plausible Cause: Exploring the Limits of Loss Causation in Pleading and Proving Market Fraud Claims Under Securities Exchange Act § 10(b) and SEC Rule 10b-5*, 41 Ohio N.U. L. Rev. 389, 392 (2015). Indeed, litigation about loss causation has "exploded," creating "a doctrinal and practical mess" that warrants this Court's renewed attention. Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 Ariz. L. Rev. 37, 45 (2015). This case provides an opportunity to resolve two questions about loss causation. Each one is sufficiently important to warrant this Court's review—both collectively present a truly compelling case for certiorari.

1. The first question is whether, as a matter of law, the announcement of a government investigation can ever constitute a corrective disclosure before the investigation produces an actual finding of wrongdoing.

This issue arises frequently because securities class actions often begin after the revelation of an investigation into substantial impropriety that undermines confidence in an issuer's business or financial reporting. Such disclosures can take myriad forms (*e.g.*, civil complaints, articles in the popular or trade press, announcements of investigations or subpoenas), and issuers are quick to argue that anything short of an outright admission or adjudication of guilt is insufficient as a matter of law to constitute a corrective disclosure—regardless of effect on stock price.

In the Fifth and Ninth Circuits, and in most district courts in the Second Circuit, that argument will fail. But in the Eleventh Circuit (the second-most populous circuit in the nation, and the circuit that has seen the fourth-most securities class action filings since 1996, *see* Stanford Law School Securities Class Action Clearinghouse, Heat Map by Circuit, http://securities.stanford.edu/circuits.html), it will succeed. And in every other jurisdiction, as long as the pleading standards remain unclear, the argument will continue to arise, and to sometimes trigger dismissal of lawsuits when actual fraud harmed investors, but the corrective disclosures—which caused a substantial drop in the stock price—were not sufficiently definitive to *prove* fraud.

The Eleventh Circuit's decision in *Meyer* provides a vivid example. In *Meyer*, the defendant, St. Joe Company, was a real estate developer that was aggressively invested in the Florida market. When the real estate market crashed in 2008, the value of St. Joe's real estate holdings tumbled, but the company's officers refused to take an impairment charge as required by Generally Accepted Accounting Principles, sending a message to the market that the company could recover the carrying value of those assets. *See* 710 F.3d at 1192-93. The truth about St. Joe's overvalued real estate holdings was revealed in an October 13, 2010 presentation by a famous short-seller, David Einhorn, arguing that St. Joe's assets should have been impaired—after which the stock price dropped 20% on high volume. *Id*. at 1193. Then, on January 10, 2011, St. Joe's disclosed that the SEC had initiated an informal inquiry "into St. Joe's policies and practices concerning impairment of investment in real estate assets." *Id*. Six months later, St. Joe's announced that an SEC investigation had become more formal. *Id*.

A group of investors who had purchased St. Joe's stock after February 19, 2008 (in reliance on its financial reporting) sued, and argued that the subsequent statements challenging the validity of St. Joe's refusal to take impairment charges amounted to corrective disclosures sufficient to allege loss causation. But the district court dismissed the complaint, determining that Einhorn's presentation was insufficient as a matter of law because it was based only on publicly available information, and the SEC investigation indicated only a "risk" of fraud—not actual fraud. *See id*. at 1193-94.

Shortly after the district court dismissed the action, Einhorn's presentation—and the investors' complaint—proved prescient: St. Joe announced that it would take an impairment charge between $325 million and $375 million on its real estate assets. *Id*. at 1194. The company dressed up the announcement in a Form 8-K Report to the SEC, and stated that the impairment charges were part of "a new real estate investment strategy." St. Joe Co., SEC Form 8-K (Jan. 25, 2012), *available at* http://www.sec.gov/Archives/edgar/data/745308/000119312512026302/d290609d8k.htm. The plaintiffs sought to reopen the district court proceedings, but their motion was denied.

Despite clear allegations that the defendants' fraud had caused investor losses, as indicated by these corrective disclosures, the Eleventh Circuit affirmed in a precedential opinion that essentially replicated the reasoning of the district court. With respect to Einhorn's presentation, the Eleventh Circuit held that because the market for St. Joe's stock is efficient, it should be presumed to perfectly incorporate all publicly available information. Because the presentation was based on publicly available facts, the court of appeals determined that it said nothing new about the falsity of St. Joe's prior statements, and therefore deemed the presentation insufficient to constitute a corrective disclosure. *Meyer*, 710 F.3d at 1198-99.

With respect to the SEC investigation, the court of appeals held that "[t]he announcement of an investigation reveals just that—an investigation—and nothing more," and did not "reveal to the market that a company's previous statements were false or fraudulent." *Id*. at 1201. Because the announcements relating to the SEC investigation did not definitively establish that St. Joe's previous statements about the value of its real estate holdings were false, the court of appeals held that they were "insufficient as a matter of law to constitute corrective disclosures." *Id*. at 1202.

What is perhaps most remarkable about the Eleventh Circuit's holding in *Meyer* is that it acknowledged—but gave no weight—to St. Joe's own admission, made after the complaint was dismissed, that a substantial impairment charge was warranted. *Compare id.* at 1194 (acknowledging the fact) *with id.* at 1202 n.14 (finding no fault with the district court's decision to ignore that fact). That illustrates the danger inherent in the Eleventh Circuit's rule: even when subsequent events vindicate the plaintiffs' allegations, circuit precedent compels dismissal if the disclosures in the complaint that trigger an economic loss do not also include an actual finding of fraud.

Meyer is egregious, but the Eleventh Circuit's decision in this case proves that *Meyer* is no outlier. In this case, a former HMA employee filed a state-court employment retaliation lawsuit on October 19, 2011, and the complaint alleged that HMA was defrauding Medicare by admitting patients who had no business being admitted to drive up costs. Pet. App. 6a. On October 25, 2011, HMA disclosed in its quarterly report that it had received subpoenas from the Department of Health and Human Services Office of Inspector General. *Id*. The stock price declined by approximately 9%. *Id*. Then, on January 9, 2012, an equity analyst learned of the existence of the lawsuit for the first time, and issued a report to investors noting the likelihood that HMA had been defrauding Medicare as alleged in the employee's complaint. *Id*. 7a. HMA's share price dropped by 7%. *Id*. The following day, HMA revealed that its general counsel was resigning immediately, causing an additional 13% price drop. *Id*. Based on these facts, petitioners alleged that HMA had engaged in fraud, and that the fraud had inflated the stock price. The Eleventh Circuit's decision is *Meyer* all over again: the court of appeals held that because the government's investigation has not yet found fraud, the fraud cannot have caused a loss. It is effectively the same as saying that unless the government proves fraud, investors cannot even plead it.

Thus, if a defendant successfully defeats an investigation on a technicality, the defendant is not liable to investors in the Eleventh Circuit. If a defendant successfully negotiates a settlement with the government that does not include an admission of fault, the defendant is not liable in the Eleventh Circuit. And so on. *Meyer* effectively creates a roadmap to avoiding shareholder liability for companies and their officers that have engaged in misconduct: because the only way to be held liable is to be found guilty, they have an incentive to conceal fraud for as long as possible, and never admit wrongdoing. That result, of course, is terrible for investors and for transparency in securities markets. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (noting "that private securities litigation" is "crucial to the integrity of domestic capital markets") (quotation marks omitted).

It also is anathema to sound corporate governance. One salutary function of shareholder suits is that they are among "the most powerful tools we have to deter and expose corporate corruption." Daniel J. Morrissey, *Shareholder Litigation After the Meltdown*, 114 W. Va. L. Rev. 531, 571 (2012). Large investors like amici have a substantial interest in ensuring that the companies they invest in are well-run, and shareholder litigation is one of the principal ways they can pursue that interest. But those lawsuits cannot exert the necessary influence over company management if private claims are artificially constrained by crabbed pleading standards that encourage the concealment of misconduct and fraud.

2. The second question presented—when a corrective disclosure can be based upon facts that are publicly available—is likewise critically important and arises frequently. Investors today are awash in information reported in myriad outlets. Some of that information is accurate; some is not; and all of it is inevitably packaged and spun in ways that advance the author's interests. It is extremely difficult even for investment professionals to know what to trust or how to interpret all of the facts available about a publicly traded company. Consequently, in a substantial percentage of cases, facts that might relate to critical business problems may be available to the public, but will not have been apprehended by a sufficient number of investors to move the market price of the stock. But if those same facts are later analyzed by a credible source with a substantial platform (*e.g.*, the government, a respected publication, or an investor with a track record of success), then the stock price may move dramatically.

Indeed, that is essentially what happened in both *Meyer* and in this case. In *Meyer*, short seller David

Einhorn was able to interpret publicly available data in a way that nobody else had before, opening the world's eyes to the fact that St. Joe Company had very likely been concealing flaws in its real estate portfolio. In response, the stock moved 20%. 710 F.3d at 1193. But the Eleventh Circuit held that his market-moving presentation did not prove anything about the effect of St. Joe's false statements because the underlying data had already been publicly available. *See id*. at 1198. The court reached this conclusion because it mistakenly believed that under "the efficient market theory," all publicly available information about a company is always already "reflected by the price." *Id*.

In this case, the Eleventh Circuit similarly held that because the state-court retaliation complaint set forth the relevant facts, the subsequent equity analyst report could not qualify as a corrective disclosure as a matter of law—even though the analyst herself noted that she had only become aware of the state court complaint months after it had been filed. *See* Pet. App. 16a-17a. Again, based on a flawed understanding of market efficiency principles, the Eleventh Circuit discounted the importance of the analyst report to zero, even though it was far more visible and significant to the market than the state-court lawsuit. *Id*. 18a.

These fact patterns are commonplace because publicly traded companies are being sued, investigated, and written about constantly. Different sources of information have varying degrees of availability, accessibility, credibility, and significance. Consequently, even professional analysts may not become aware of new information for months after it becomes publicly available. But that does not mean that false statements by the officers of publicly traded companies have no effect on stock prices. To the contrary, it demonstrates that absent a visible and credible corrective disclosure, such false statements will continue to inflate stock prices even in the face of contrary facts.

It is vitally important that the pleading standards in securities cases account for these basic realities of investing in the information age. The Eleventh Circuit's loss causation rule, however, ignores them. Instead, it rests on assumptions derived from a misunderstanding of the efficient markets hypothesis that this Court expressly disclaimed in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2410 (2014) ("*Halliburton II*"), and that no real-world investor takes seriously. Moreover, the Eleventh Circuit is not alone: three other courts of appeals have joined it—in conflict with at least two circuits—in holding that a statement cannot be a corrective disclosure unless it presents previously non-public information. Certiorari is warranted to correct that misimpression.

If allowed to stand, the Eleventh Circuit's publicly-available-information rule could create an unintentional safe harbor for fraud. By disclosing unfavorable facts in outlets that are technically publicly available, but practically obscure or generally not regarded as credible, companies could insulate themselves from shareholder liability altogether by arguing that the efficient market priced in those facts at the time of the obscure disclosure.

The Eleventh Circuit's rule also creates a separate problem for investors like the amici that hold diversified portfolios of securities because the Eleventh Circuit's rule effectively means that unless investors monitor and react to every potential data point about every one of their holdings, they may find ourselves out of luck if a subsequent publication triggers a stock-price drop based on older information revealing a fraud. In this case, for example, the only way for investors to protect themselves from respondents' fraud would have been to monitor state court dockets for any case against HMA, and to sell their stock upon reading the retaliation complaint filed in Florida. To pull that off, an investor would not only have to monitor every court docket (many of which are not available electronically), but also review every case filed, and then make a decision about whether the allegations in individual complaints were credible enough to warrant divesting from HMA—even though HMA itself was not disclosing that it had anything to worry about. And of course, the burden would not be limited to court filings: instead of suing for retaliation, the employee might have complained about HMA's fraud in a letter to a newspaper editor, or on the Internet. Investors would have to monitor all of those sources, for every single company in which they hold stock. That would effectively transform diversification into a liability, and might deter investors from buying shares in companies that do not have established track records, potentially hindering the efficient operation of the capital markets. At a minimum, the additional monitoring burden would impose unnecessary costs on all investors, diminishing returns and deterring smaller investors from pursuing optimal diversification.

3. Separate from and in addition to the importance of the individual questions presented, it is important that the securities laws apply uniformly across the circuits. One of the principal objectives of the federal securities laws is to create a single national market for securities, governed by a uniform set of rules and standards. When, as here, the pleading standards are applied differently based on nothing more than geography, that objective is undermined, and investor confidence is too. Moreover, by reaffirming *Meyer* in this case despite a forceful contrary opinion from Judge Martin, and then by denying rehearing, Pet. App. 69a, the Eleventh Circuit has now effectively confirmed its intention to adhere to its rule. This Court's immediate intervention is warranted to restore uniformity to the law.

II. The Eleventh Circuit's Decision Conflicts With This Court's Precedents By Requiring Investors To Prove The Falsity Of The Defendant's Representations In Order To Plead Loss Causation.

The petition clearly lays out the ways in which the Eleventh Circuit's loss causation standard conflicts with this Court's precedents. Rather than repeat points already made, we emphasize just one over-arching consideration.

The purpose of pleadings is to inform defendants of the claims against them; and the purpose of motions on the pleadings is to weed out meritless claims by asking whether the plaintiff's allegations, *if true*, would state a valid claim under the law. Thus, in a securities fraud case, like this one, where every element of the claim other than loss causation has been adequately pled, the question to address on a motion on the pleadings is whether the plaintiff has alleged, with sufficient clarity and particularity to inform the defendant of the allegations against it, that the statements alleged to be false in the complaint caused an economic loss to the plaintiff. Nothing more.

The Eleventh Circuit's government-investigation rule is wrong because it addresses a fundamentally different question. By holding that the announcement of a government investigation cannot constitute a corrective disclosure because an investigation, alone, does not prove that the defendants' statements were false, the Eleventh Circuit effectively asks whether the allegations in the complaint prove falsity. But the complaint has already alleged falsity with particularity, so there is no reason to ask whether the government investigation also establishes it. The question instead ought to be whether, *assuming the defendant's statements were false*, a government investigation of those statements—the mere announcement of which causes a drop in the stock price—could plausibly prove that the false statements had been inflating the price all along. And the answer to that question ought to be "yes" every time. It may turn out that the defendants' statements were not false, or perhaps the market price reacted to some exogenous variable. But when the complaint alleges otherwise, those conclusions can only be reached later, based on the proofs.

The Eleventh Circuit's publicly-available-information rule is wrong for a similar reason. The complaint in this case alleges that the 2012 equity analyst's report, which was the first public report to connect the dots between the employee retaliation case and respondents' fraud, constituted a corrective disclosure because it revealed that HMA had been defrauding Medicare while pretending not to. That allegation informs respondents of the nature of the claim against them, and it is at least plausible that investors in the market would be more likely to read and to believe a published report by an equity analyst than they would a civil complaint filed by an aggrieved former employee in a Florida state court. It may be the case that the 2012 report did not affect the stock price—and respondents surely must have a chance to argue the point—but that is the type of factual contention that cannot be resolved on the face of the pleadings.

The Eleventh Circuit's opinions defend its loss causation standard on the ground that otherwise, securities fraud class actions might be transmuted into a general form of insurance against market losses. *See Meyer*, 710 F.3d at 1202. That is a non-sequitur because it establishes, at most, the need for the element of loss causation to be proven as part of a securities fraud claim. It does not establish the need for an unusual pleading standard vis-à-vis loss causation or any other element. In fact, the Court was explicit in *Dura* that with respect to loss causation, as long as a complaint provides "fair notice of what the plaintiff's claim is and the grounds upon which it rests," then it passes the "simple test" of notice pleading—a rule that is "not meant to impose a great burden upon a plaintiff." 544 U.S. at 346-47 (quotation marks omitted).

Moreover, when defendants have attempted to move the goalposts in order to force plaintiffs to prove their securities claims early, this Court has rebuffed them. In *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("*Halliburton I*"), the Court held unanimously that plaintiffs need not prove loss causation as a condition of class certification in fraud-on-the-market cases. In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013), the Court held that plaintiffs need not prove materiality as a prerequisite to class certification. And in *Halliburton II*, the Court rejected the argument that plaintiffs must prove price impact before class certification, refusing to place the burden on investors to show that a misrepresentation had affected the price of a stock prior to the merits stage. *See* 134 S. Ct. at 2414.

The Court should reach a similar result here and hold that the pleading standards applicable to loss causation do not require the plaintiff to prove either the falsity of the defendant's statements or the effect of the alleged corrective disclosures on the stock price. That burden of proof does not attach until trial.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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