16-685

No. __-____

IN THE

Supreme Court of the United States

NORFOLK COUNTY RETIREMENT SYSTEM, NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND, AND OPERATING ENGINEERS TRUST FUNDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

HEALTH MANAGEMENT ASSOCIATES, INC., GARY D. NEWSOME, KELLY E. CURRY, AND ROBERT E. FARNHAM,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Eleven years ago, this Court held that private securities-fraud plaintiffs must plead "loss causation." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 338 (2005). To do so, most plaintiffs allege that they bought the defendant's securities at prices inflated by fraud, and then had those securities lose value after a "corrective disclosure" revealed the truth to the market and caused the share price to decline.

The Eleventh Circuit has adopted two legal rules for pleading loss causation over which courts are deeply divided. Under the first rule, an investor cannot allege loss causation based on the announcement of a government investigation unless the investigation has resulted in a finding of "actual wrongdoing." App. 16a. Under the second, applicable when an investor invokes the fraud-on-the-market presumption of reliance, an investor cannot allege loss causation based on an analyst report exposing the defendant's fraud if the report is drawn from "already-public information." App. 17a. A divided panel below deepened the circuit splits on both issues by applying those rules to reject petitioners' loss-causation allegations as a matter of law.

The questions presented are:

1. Whether a finding of actual wrongdoing is a legal prerequisite to an investor pleading loss causation based on the announcement of a government investigation into the defendant's fraudulent practices.

2. Whether an investor who invokes a fraud-on-the-market presumption of reliance is barred from pleading loss causation based on a corrective disclosure that analyzes information already in the public domain but not widely known to the market.

PARTIES TO THE PROCEEDINGS

Petitioners Norfolk County Retirement System, New England Teamsters & Trucking Industry Pension Fund, and Operating Engineers Trust Funds, individually and on behalf of all others similarly situated, were the plaintiffs in the district court proceedings and the appellants in the court of appeals proceedings.

Respondents Health Management Associates, Inc., Gary D. Newsome, Kelly E. Curry, and Robert E. Farnham were the defendants in the district court proceedings and the appellees in the court of appeals proceedings.

RULE 29.6 STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Norfolk County Retirement System, New England Teamsters & Trucking Industry Pension Fund, and Operating Engineers Trust Funds state the following:

None of the petitioners is a corporation, and there is no publicly held corporation that owns 10% or more of any of petitioners' stock (of which there is none).

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Norfolk County Retirement System, New England Teamsters & Trucking Industry Pension Fund, and Operating Engineers Trust Funds, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit.

INTRODUCTION

This case presents two important questions concerning the standard for pleading loss causation under the federal securities laws. For years, respondents propped up Health Management Associates' ("HMA") revenues through a fraudulent scheme to overbill Medicare for hospital services. They further concealed that scheme from investors by inventing innocent explanations for HMA's inflated revenue numbers, which in turn caused HMA's stock price to trade at artificially inflated prices. Petitioners are institutional investors that bought shares at the inflated price; the value of their shares plunged when the truth began to emerge.

Petitioners allege loss causation by tying that share-price decline to two corrective disclosures. The first disclosure announced a government investigation into HMA's fraudulent hospital-admission practices. The second was an analyst report describing a previously unpublicized state-court lawsuit alleging respondents' Medicare fraud. Both disclosures revealed part of the truth that respondents' misstatements had concealed, and both caused HMA's stock price to drop precipitously. But a divided Eleventh Circuit, while holding that petitioners adequately pleaded all other elements of respondents' securities fraud, rejected both disclosures as a matter of law and affirmed the dismissal of their claims on loss-causation grounds.

The panel's decision rested on two erroneous legal rules for pleading loss causation in the Eleventh Circuit. Under the first rule, the disclosure of a government investigation can never raise an inference of loss causation – even at the pleading stage – unless and until it finds "actual wrongdoing." App. 16a. Because the investigation here is still ongoing (and so has not yet produced such a finding), that rule disqualified petitioners' first corrective disclosure. Under the second rule, investors alleging an efficient market cannot plead loss causation based on an analyst report drawn from "already-public information." App. 17a. Because the report here described a lawsuit that was theoretically accessible to someone scouring state-courthouse paper records – even though that lawsuit did not move the market when filed – the panel held that the report disclosed nothing "new" and so could not be a corrective disclosure. *Id.*

Both rules warrant this Court's review. *First*, the Eleventh Circuit's loss-causation pleading rules implicate two entrenched circuit splits. With respect to government investigations, the Eleventh Circuit's rule conflicts with decisions of the Fifth and Ninth Circuits, as well as the consensus view among district courts in the Second Circuit. In those circuits, an investor may plead loss causation based on the disclosure of an investigation, irrespective of whether it produces a finding of wrongdoing. Concerning the analyst-report rule, a four-to-two circuit split exists over whether investors may plead loss causation based on a report gleaned from information in the public domain. In the Fifth and Ninth Circuits, such a report may support loss causation at the pleading stage if it is plausible the market had not previously

absorbed the source information. Petitioners' allegations would be sufficient under that standard.

Second, the Eleventh Circuit's loss-causation rules are "contrary to Supreme Court precedent." App. 19a (Martin, J., concurring in judgment). Its government-investigation rule not only improperly requires investors to *prove* their case at the *pleading* stage, but also rests on an artificial legal construct detached from the reality of how markets actually respond to investigations. Similarly, the Eleventh Circuit's analyst-report rule conflicts with this Court's precedents on the workings of efficient markets. Even in an efficient market, not every piece of information (like an obscure state-court lawsuit) is immediately incorporated into the share price. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414 (2014). Accordingly, when a report describes previously unnoticed information that has not already affected the share price, that disclosure can create a plausible inference of loss causation.

Third, this case raises questions of profound importance to the integrity of the national securities markets. Loss causation is an often-litigated, critical threshold issue in securities-fraud cases, but the Court has not addressed the topic in more than 11 years. In the interim, several lower courts (led by the Eleventh Circuit) have filled the gap by adopting unrealistic pleading rules that thwart the vital federal interest in deterring and redressing fraud by publicly traded companies. The Court should grant certiorari to resolve the lower-court confusion and restore the "ability of private actions to serve as an independent check on market integrity." App. 19a (Martin, J., concurring in judgment).

OPINIONS BELOW

The court of appeals' opinion (App. 1a-27a) is available at 608 F. App'x 855. The district court's opinion and order (App. 28a-67a) is reported at 22 F. Supp. 3d 1210.

JURISDICTION

The court of appeals entered its judgment on May 11, 2015, and denied a rehearing petition on June 24, 2016 (App. 68a-69a). On September 15, 2016, Justice Thomas extended the time for filing a certiorari petition to and including November 21, 2016. App. 74a. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, are set forth at App. 72a-73a.

STATEMENT

1. The federal securities laws "seek to maintain public confidence in the marketplace" by redressing fraud committed by publicly traded companies. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). Section 10(b) of the Exchange Act implements that objective by (among other things) prohibiting public companies from making false statements to investors. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. It also affords a "private cause of action" to investors who are injured by such fraud. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191-92 (2013). A private securities-fraud claim has six elements: (1) a material misstatement or omission; (2) scienter; (3) a connection with the purchase or

sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. *Id.* at 1191-92.

This case concerns the final element. In most securities-fraud cases, loss causation works as follows: first, the company makes a false statement that deceives the market into overvaluing its securities. *See Dura*, 544 U.S. at 342-43. Then, an investor unwittingly buys some shares at the "inflated purchase price" that reflects the defendant's fraud. *Id.* at 342. Finally, after the "truth makes its way into the marketplace" and removes (or reduces) the inflation from the share price, the investor suffers an economic loss. *Id.* at 342-43. To show loss causation in such a scenario, "investors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011).

Investors commonly attempt to satisfy that requirement by alleging a so-called "corrective disclosure[]" that alerts the market (in whole or in part) to the truth previously concealed by the defendant's fraud, which causes the company's "stock price to drop and, consequently, investors to lose money." *Id.* at 808. This case turns on when such a disclosure provides a sufficient basis for pleading loss causation under the Exchange Act.

2.a. HMA is a publicly traded company whose subsidiaries operate acute care hospitals and other healthcare facilities throughout the southeastern United States. Compl. ¶ 27.[1] Petitioners are institu-

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[1] "Compl. ¶ __" refers to petitioners' Second Amended Complaint. *See* Dist. Ct. Doc. 49. In January 2014, HMA was reorganized (through a merger) as a subsidiary of Community Health Systems, Inc. *See* Community Health Systems, Inc. Form 8-K at 1 (Jan. 27, 2014).

tional investors in HMA common stock that were harmed by respondents' scheme to inflate HMA's revenues between July 27, 2009, and January 9, 2012 (the "Class Period"). *Id.* ¶¶ 1, 26. Before the Class Period, HMA was a struggling company with a growing debt load and declining cash flows. *Id.* ¶¶ 74-76. Respondents sought to engineer a turnaround by fraudulently boosting the company's revenues from Medicare reimbursements. *Id.* ¶ 6. Petitioners' Complaint describes that scheme in great detail, based in part on 19 confidential witnesses who observed the fraud first-hand. *Id.* ¶¶ 39-58.

Respondents' scheme worked by admitting to HMA hospitals patients whose medical condition did not actually require hospitalization; such admissions allowed HMA to overbill Medicare for the unnecessary care provided to those patients. *Id.* ¶ 6. Respondents implemented the scheme by mandating secret admission quotas, hiring consultants to pressure physicians, and rigging HMA's emergency-room software (called "Pro-MED") to flag targets for improper admission. *Id.* ¶ 80. Statistical analysis suggests those techniques yielded $40 million of fraudulent Medicare billings in 2009 alone. *Id.* ¶ 102.

Respondents' secret policy of overbilling Medicare materially inflated HMA's reported revenues during the Class Period. *Id.* ¶¶ 200-214. Rather than disclose to investors that HMA's revenue growth stemmed from Medicare fraud, however, respondents repeatedly attributed the company's growth to innocuous initiatives such as management's plan to improve service quality. *Id.* ¶¶ 78-89. Those false statements caused HMA's stock to trade at artificially inflated prices during the Class Period. *Id.* ¶ 19.

b. Respondents' scheme began to unravel in 2011, when HMA received a pair of subpoenas from the Office of the Inspector General for the Department of Health and Human Services ("OIG") commencing an investigation into HMA's fraudulent admission practices. Compl. ¶ 337. On August 3, 2011, HMA informed the market of those subpoenas, which prompted HMA's stock price to fall 9.1% on high trading volume. *Id.* ¶ 340. The next day, one analyst downgraded HMA in a report entitled "How Can We Believe You Now, HMA? Failure to Disclose July OIG Pro-MED Subpoena With Earnings Crushes our Confidence." *Id.*

On October 19, 2011, HMA's former Director of Compliance, Paul Meyer, sued HMA for wrongful termination in a state court in Broward County, Florida. *Id.* ¶ 154.[2] Before coming to HMA, Meyer was a 30-year FBI veteran who had supervised the health-care fraud unit in Miami. *Id.* ¶ 15. Meyer alleged that HMA fired him in retaliation for uncovering and reporting respondents' Medicare fraud to HMA management. *Id.* The market, however, did not immediately react to Meyer's lawsuit, which was filed as an individual employment action on a non-electronic docket in a different county from HMA's headquarters. *Id.* ¶¶ 351-352. Nor did HMA apprise investors of his allegations. On October 25, 2011, HMA suggested that the two OIG subpoenas "may relate to investigations of alleged violations

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[2] Compl., *Meyer v. Health Mgmt. Assocs., Inc.*, No. 11-25334 (Fla. 17th Jud. Cir. Ct. filed Oct. 19, 2011). On November 28, 2011, HMA removed Meyer's lawsuit to federal court; the district court remanded it back on January 20, 2012. *See Meyer v. Health Mgmt. Assocs., Inc.*, 841 F. Supp. 2d 1262 (S.D. Fla. 2012).

of the Anti-Kickback Statute and the False Claims Act" and "may have been served under the qui tam provisions of the False Claims Act." *Id.* ¶ 350. But it gave no specifics and made no mention of Meyer, his wrongful-termination lawsuit (which did not arise under the two cited statutes), or his detailed allegations of fraud by HMA. *Id.* ¶ 351.

Roughly three months later, securities analyst Sheryl Skolnick reported Meyer's lawsuit to the market for the first time. *Id.* ¶ 385. On January 9, 2012 (a Monday), Skolnick released a report explaining she had just "bec[o]me aware" of the Meyer lawsuit the preceding "Friday after the close." C.A. App. Tab C at 1 ("Skolnick Rep."). Skolnick described Meyer's "claim of Medicare fraud" and his allegations of HMA's "systemic billing" for unnecessary care. *Id.* She also tied those allegations to the "existing OIG investigations" of HMA. *Id.* Meyer's lawsuit, when viewed alongside those investigations, raised concerns for Skolnick that "where there's smoke, there's fire." *Id.*

HMA's stock price plunged 7% the day of the Skolnick Report. Compl. ¶ 386. The next day, HMA disclosed that its general counsel had just announced his intention to resign "effective immediately." *Id.* ¶ 387. On the combined news, HMA's share price dropped another 13%. *Id.* ¶ 388.

c. On September 16, 2014 – after the district court dismissed petitioners' Complaint below – HMA settled Meyer's wrongful-termination action for an undisclosed amount. *See* Community Health Systems, Inc. Form 10-Q at 84 (Nov. 4, 2014). In recent years, several whistleblowers (including Meyer) have also filed federal *qui tam* lawsuits against HMA alleging a similar Medicare-fraud scheme. *See In re*

Health Mgmt. Assocs., Inc. Qui Tam Litig. (No. II), No. 14-MC-339-RBW (D.D.C.) ("*HMA No. II*"). Those lawsuits are now stayed in light of the Department of Justice's "ongoing criminal investigation" of HMA's Medicare-reimbursement practices. Updated Jt. Mgmt. Rep. 2, *HMA No. II* (D.D.C. filed Sept. 12, 2016). As the company recently reported, the "Criminal Division continues to investigate former executive-level employees of HMA[] and continues to consider whether any HMA entities should be held criminally liable" for defrauding Medicare. Community Health Systems, Inc. Form 10-Q at 40 (Nov. 2, 2016).

3. Petitioners filed this action on behalf of a class of investors alleging that respondents' false statements violated the Exchange Act. "After an extensive review of the Complaint and defendants' arguments," the district court found that petitioners pleaded their "securities fraud claims" with "the requisite particularity." App. 54a. The court also held that petitioners adequately alleged a litany of misstatements falsely attributing HMA's revenues to "Emergency Department initiatives" rather than "the fraudulent admission of Medicare patients." App. 56a. It further held that the Complaint raised a "strong inference of scienter." App. 58a.

The court nonetheless dismissed petitioners' claims on loss-causation grounds. The Complaint alleges loss causation based on two partial corrective disclosures: (1) HMA's August 3, 2011 disclosure of the OIG investigation; and (2) the January 9, 2012 Skolnick Report describing Meyer's Medicare-fraud allegations. Compl. ¶¶ 381-386. With respect to the OIG investigation, the court invoked the Eleventh Circuit's pleading rule that "'[t]he announcement of an investigation'" can qualify as a corrective disclosure only

if coupled with a "subsequent disclosure of actual wrongdoing." App. 62a (quoting *Meyer v. Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013)).[3] With respect to the Skolnick Report, the court ruled that "the mere repackaging of information obtained from a public docket by an analyst is simply insufficient to constitute a corrective disclosure." App. 63a (citing *Meyer*, 710 F.3d at 1199).

4. A divided panel of the Eleventh Circuit affirmed. The panel "agree[d] with the district judge's analysis regarding the second-amended complaint as to particularity, material misrepresentation, and scienter." App. 12a. But the majority affirmed the dismissal of petitioners' claims on loss-causation grounds. App. 15a-18a. The majority held "the disclosure of an investigation constitutes a corrective disclosure" only if coupled with a later finding "show[ing] . . . actual wrongdoing" by the company. App. 16a (citing *Meyer*, 710 F.3d at 1201). That test disqualified the OIG investigation because there was no "proof of fraud" definitively establishing that HMA's "previous statements were 'false' or 'fraudulent'" by the time the Complaint was filed. *Id.*

As for the Skolnick Report, the majority held that it too was not "proof of fraud" capable of establishing loss causation. *Id.* Instead, the Skolnick Report merely "summarized facts from the Meyer [lawsuit] that had existed in publicly accessible court dockets." App. 16a-17a. That was fatal under Eleventh Circuit precedent, because an "analyst's report" cannot be "'a corrective disclosure'" if it is "'based on already-

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[3] The plaintiff in *Meyer v. Greene* is not related to Paul Meyer, the former HMA employee who sued for wrongful termination.

public information.'" App. 17a-18a (quoting *Meyer*, 710 F.3d at 1199).

Judge Martin concurred in the judgment only. She agreed that, under the Eleventh Circuit's "binding precedent" in *Meyer*, petitioners' claims should be dismissed because neither corrective disclosure definitively "revealed actual wrongdoing" to the market. App. 18a-19a. But she also explained her belief that "Meyer was wrongly decided" and "contrary to Supreme Court precedent." App. 19a. Judge Martin reasoned that *Meyer*, by requiring investors to plead loss causation based on a "conclusive finding of fraud," improperly "force[s] inquiry into plaintiffs' proof at the pleadings stage." App. 19a, 24a. Judge Martin further observed that "a number of other courts" have "[r]ecogniz[ed] the prohibitive burden that the Meyer rule imposes" and have "rejected the argument" the majority embraced. App. 26a (citing, *e.g.*, *Public Emps.' Ret. Sys. of Mississippi v. Amedisys, Inc.*, 769 F.3d 313, 324-25 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2892 (2015)).

Were she not bound by circuit precedent, Judge Martin would have required investors instead to allege facts providing defendants with "'notice of what the relevant economic loss might be' and 'what the causal connection might be between that loss' and the alleged misrepresentations." App. 26a-27a (quoting *Dura*, 544 U.S. at 347). In Judge Martin's view, petitioners' allegations satisfied that "burden at this very early stage" of the litigation. App. 27a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS TWO CIRCUIT CONFLICTS OVER THE REQUIREMENTS FOR PLEADING LOSS CAUSATION UNDER THE EXCHANGE ACT

Litigation over "loss causation" has "exploded in the aftermath of th[is] Court's *Dura Pharmaceuticals v. Broudo* decision." 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). In the 11 years since *Dura*, two circuit splits have developed on the loss-causation questions this case presents. *See* App. 26a (Martin, J., concurring in judgment) ("other courts" have "rejected" Eleventh Circuit's rule).

First, lower courts are divided over when an investor may "plead loss causation" based on "the disclosure of a government investigation." *Caplin v. TranS1, Inc.*, 973 F. Supp. 2d 596, 606-07 (E.D.N.C. 2013) ("courts are fairly evenly split"). Second, courts are divided over whether an investor may plead loss causation by alleging a corrective disclosure drawn from information already in the public domain. *See* Michael A. Kitson, *Controversial Orthodoxy: The Efficient Capital Markets Hypothesis and Loss Causation*, 18 Fordham J. Corp. & Fin. L. 191, 205 (2012) ("This question has split those circuits that have provided an opinion into two camps."). Certiorari is warranted to address both questions.

A. The Circuits Are Divided Over When An Investor May Plead Loss Causation Based On The Disclosure Of A Government Investigation

1. The Eleventh Circuit prohibits investors from pleading loss causation based on government investigations unless they produce a finding of wrongdoing

In *Meyer v. Greene*, 710 F.3d 1189 (11th Cir. 2013), the Eleventh Circuit virtually prohibited investors from pleading loss causation based on the disclosure of a government investigation. There, the alleged fraud concerned the defendant's overstated real-estate holdings. *Id.* at 1192-93. The plaintiffs alleged loss causation based in part on "two SEC investigations" into "the value of [the defendant's] real-estate holdings." *Id.* at 1200. The issuer's stock price dropped 7% and 9% after news of the investigations broke. *Id.* at 1201.

The Eleventh Circuit affirmed dismissal because a government "investigation, without more, is insufficient to constitute a corrective disclosure for purposes of § 10(b)." *Id.* In the Eleventh Circuit's view, an investigation merely "portend[s] an added *risk* of future corrective action" but does not definitively "reveal to the market that a company's previous statements were false or fraudulent." *Id.* Under that reasoning, a stock-price decline after the announcement of an investigation into a company's fraudulent practices is not a "*corrective* effect for purposes of loss causation." *Id.* at 1202.

Meyer did not go so far as to rule that an "investigation could never form the basis for a corrective disclosure." *Id.* at 1201 n.13. But it made clear that such an investigation supports loss causation only

when "coupled with a later *finding of fraud or wrongdoing*." *Id.* (emphasis added); *see id.* at 1201 ("'[A] disclosure of an investigation, absent an actual revelation of fraud, is not a corrective disclosure.'") (quoting *In re Almost Family, Inc. Sec. Litig.*, 2012 WL 443461, at *13 (W.D. Ky. Feb. 10, 2012)). Because neither investigation in *Meyer* produced a "later finding of wrongdoing," the Eleventh Circuit held they were not corrective disclosures as a matter of law. *Id.* at 1201 n.13.

The decision below represents a straightforward application of that ruling. After citing *Meyer* repeatedly, the majority held that "[r]evelation of the OIG investigation ... does not show any actual wrongdoing and cannot qualify as a corrective disclosure," App. 16a – even though petitioners' allegations themselves raised a strong inference of fraud. The majority then rejected petitioners' argument that the OIG investigation sufficed when "combined with" the later Meyer lawsuit and "Skolnick Report." *Id.* The court deemed those subsequent disclosures insufficient to satisfy *Meyer*'s narrow exception because they involved mere allegations, not "proof of fraud." *Id.*; *see id.* ("[A] civil suit is not proof of liability."). The majority's holding thus brought *Meyer*'s rule into sharp relief: in the Eleventh Circuit, investors cannot plead loss causation based on a government investigation unless it has produced a "finding of actual fraud" by the time the complaint is filed. App. 23a (Martin, J.).

2. The Fifth and Ninth Circuits allow investors to plead loss causation based on government investigations if they allege additional corrective disclosures

In contrast to the Eleventh Circuit, the Fifth and Ninth Circuits have held that an investor may plead loss causation based on government investigations that do not necessarily result in a finding of wrongdoing. *See Public Emps.' Ret. Sys. of Mississippi v. Amedisys, Inc.*, 769 F.3d 313 (5th Cir. 2014); *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200 (9th Cir. 2016).

a. In *Amedisys*, the defendants allegedly defrauded Medicare by billing for "medically unnecessary treatment visits" to home-health-service patients, which "inflated the price of Amedisys stock." 769 F.3d at 317. The plaintiff alleged loss causation based on a series of partial corrective disclosures, including (1) a *Wall Street Journal* analysis of public data "indicating that the company might be taking advantage of the Medicare reimbursement system," and (2) an announcement of government "investigations into Amedisys's billing practices." *Id.* at 318.[4] The district court rejected the latter disclosures

[4] The other alleged disclosures were an "inconclusive" analyst report "[s]peculat[ing]" about possible fraud, *Amedisys*, 769 F.3d at 322; unexplained "resignations" of two executives, *id.* at 322-23; and disclosure of "disappointing second quarter 2010 operating results," *id.* at 324. The Fifth Circuit held that, though none of those events was a corrective disclosure standing alone, they formed part of the overall "series of events" against which the article and investigations should be viewed. *Id.* at 325. Petitioners allege a substantially similar theory here: that the OIG subpoenas and Skolnick Report support loss causation when viewed as part of an analogous series of events. *See* Compl. ¶¶ 340 (analyst speculation), 359 (resignation of general counsel), 360 (disappointing growth projection).

because the investigations did not "reveal[] any actual fraud." *Bach v. Amedisys, Inc.*, 2012 WL 6947008, at *12 (M.D. La. June 28, 2012).

The Fifth Circuit reversed and held that "[t]he district court erred in imposing an overly rigid rule that government investigations can never constitute a corrective disclosure in the absence of a discovery of actual fraud." 769 F.3d at 324. As the Fifth Circuit explained, to "require, in all circumstances, a conclusive government finding of fraud merely to plead loss causation would effectively reward defendants who are able to successfully conceal their fraudulent activities." *Id.* at 324-25. The court thus viewed the government investigations "together with the totality of the other alleged partial disclosures" and held that the plaintiff had adequately pleaded loss causation. *Id.* at 324.

b. The Ninth Circuit likewise allows investors to plead loss causation based on government investigations that do not find wrongdoing. *See Lloyd*, 811 F.3d at 1209-11. In *Lloyd*, the defendant misleadingly stated in SEC filings that there was no "serious doubt" its largest debtor could "repay its borrowings." *Id.* at 1202. The plaintiff alleged the truth leaked out through two corrective disclosures: (1) the defendant's announcement it had received an SEC subpoena seeking information on its loan practices, and (2) its announcement a month later that it was "charg[ing] off" some of the debtor's loans. *Id.* at 1204-05. "The only significant fall in [the defendant's] share price occurred after the . . . announcement of the SEC subpoena." *Id.* at 1209. The district court dismissed the complaint and "found that the announcement of the subpoena could not constitute a corrective disclosure." *Id.*

The Ninth Circuit reversed. It held that the announcement of the SEC subpoena, though insufficient to create loss causation on its own,[5] was "sufficient when 'viewed together with the totality of the other alleged partial disclosure[].'" *Id.* at 1210 (quoting *Amedisys*, 769 F.3d at 324). The Ninth Circuit reached that conclusion even though the plaintiff alleged no later finding of wrongdoing: "[d]espite the . . . SEC subpoena, no formal agency proceedings were instituted against [the defendant]." *Id.* at 1205. Instead, it was enough that the subsequent write-down of the debtor's loans was plausibly viewed as a "revelation of the inaccuracy" of the defendant's prior statements. *Id.* at 1203. When combined with such a revelation, the Ninth Circuit held, "the announcement of an SEC investigation . . . can serve as a corrective disclosure." *Id.*

3. District courts in the Second Circuit allow investors to plead loss causation based on government investigations standing alone

District courts in the Southern and Eastern Districts of New York – two of the most important districts in the country for securities-fraud cases – have sharpened the conflict even further. In those districts, courts generally agree that investors may plead loss causation based on government investigations alone. *See Plumbers & Pipefitters Nat'l Pension Fund v. Orthofix Int'l N.V.*, 89 F. Supp. 3d 602, 620 (S.D.N.Y. 2015) ("courts within this District have

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[5] *See Loos v. Immersion Corp.*, 762 F.3d 880, 890 (9th Cir. 2014) ("agree[ing]" with *Meyer* that an "investigation, without more, is insufficient to establish loss causation").

concluded that the disclosure of an investigation . . . can be sufficient to allege loss causation").[6]

In re Gentiva Securities Litigation, 932 F. Supp. 2d 352 (E.D.N.Y. 2013), is instructive. There, the court acknowledged the Eleventh Circuit's holding that "an investigation alone is not sufficient to plead loss causation." *Id.* at 385 (citing *Meyer*, 710 F.3d at 1201). But it disagreed with *Meyer* and "reject[ed] the idea that the disclosure of an investigation, absent an actual revelation of fraud, is not a corrective disclosure." *Id.* at 387. The court instead concluded "that a mere announcement" of a government investigation "can suffice for loss causation, especially if it is immediately followed by a decline in stock price." *Id.*

Gentiva now represents the dominant view within the Second Circuit. *See, e.g., Kux-Kardos v. Vimpel-Com, Ltd.*, 151 F. Supp. 3d 471, 477 (S.D.N.Y. 2016) ("as various courts have found, 'the announcement of investigations may qualify as partial disclosures'") (quoting *Gentiva*, 932 F. Supp. 2d at 388) (ellipsis omitted).[7] Indeed, petitioners have not located a

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[6] District courts in other circuits are divided among the various approaches. *Compare, e.g., Epstein v. World Acceptance Corp.*, 2016 WL 4458312, at *15-16 (D.S.C. Aug. 24, 2016) (adopting Fifth and Ninth Circuit approach), *with Norfolk Cnty. Ret. Sys. v. Community Health Sys. Inc.*, 2016 WL 4098584, at *19 (M.D. Tenn. June 16, 2016) (adopting Eleventh Circuit approach), *and Almost Family*, 2012 WL 443461, at *13 (similar).

[7] *See also Orthofix*, 89 F. Supp. 3d at 620-21; *In re New Oriental Educ. & Tech. Grp. Sec. Litig.*, 988 F. Supp. 2d 406, 428 (S.D.N.Y. 2013) ("disclosure of an SEC investigation . . . can be sufficient to allege loss causation"); *Police & Fire Ret. Sys. of City of Detroit v. SafeNet, Inc.*, 645 F. Supp. 2d 210, 230-31 (S.D.N.Y. 2009) (news that "the SDNY and the SEC were investigating" "alone suffices to show" loss causation);

single decision in the Second Circuit agreeing with *Meyer* that a government investigation must produce a finding of fraud to be a corrective disclosure.[8]

* * *

In sum, courts follow three distinct approaches in determining when an investor may plead loss causation based on government investigations. The Eleventh Circuit requires the investigation to have led to a finding of wrongdoing. The Fifth and Ninth Circuits require merely that an investor plead additional disclosures – even if none involves a finding of wrongdoing. Finally, courts in the Second Circuit allow investors to plead loss causation based on government investigations alone. The Court should grant review to resolve that conflict.

In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 288 (S.D.N.Y. 2008) (rejecting rule that investigation "is insufficient, on its own, to plead loss causation"); *In re Openwave Sys. Sec. Litig.*, 528 F. Supp. 2d 236, 252-53 (S.D.N.Y. 2007) (disclosure of "subpoenas from two United States Attorneys" was sufficient).

[8] When an investigation does not concern the same "subject matter" as the alleged fraud, *Gentiva*, 932 F. Supp. 2d at 388, it is "insufficiently linked" to the misrepresentation to raise a plausible inference of loss causation, *Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Fin. Holdings Ltd.*, 886 F. Supp. 2d 328, 338 (S.D.N.Y. 2012). There is no dispute here that the OIG investigation concerned the same subject as respondents' fraud. Compl. ¶¶ 381-382.

B. The Circuits Are Divided Over Whether An Investor May Plead Loss Causation Based On A Report Drawn From Public Sources

1. The Eleventh Circuit and three other circuits hold that analyst reports based on public sources cannot be corrective disclosures

a. In *Meyer*, the Eleventh Circuit also prohibited securities-class-action plaintiffs from pleading loss causation based on reports whose "sources" are "already public." 710 F.3d at 1198. The plaintiffs there alleged that the truth emerged in part through an investor's public "presentation . . . suggest[ing] that [the defendant's real-estate] assets were significantly overvalued." *Id.* at 1193. The court rejected that allegation as a matter of law because the "information in the presentation was 'obtained from publicly available sources'" such as "county property appraiser's sales lists." *Id.* at 1198 & n.9. For the Eleventh Circuit, "the fact that the sources used in the [presentation] were already public [was] fatal to the Investors' claim of loss causation." *Id.* at 1198.

The court's holding rested on the Eleventh Circuit's understanding of the "efficient market hypothesis." *Id.* at 1197. That hypothesis supplies the foundation for modern securities class actions. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405-06 (2014) ("*Halliburton II*"). It permits investors to satisfy Section 10(b)'s "reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information." *Id.* at 2405 (citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)). In an efficient market, "anyone who buys or sells the stock at the market price may be considered to have relied" on "material misstatements." *Id.* That oft-invoked

theory of reliance is called "the fraud-on-the-market theory." *Id.* at 2408.

Meyer held that, when a plaintiff invokes the fraud-on-the-market theory, it follows automatically that "*any* information released to the public is *immediately* digested and incorporated into the price of a security." 710 F.3d at 1197 (emphases added). From there, the Eleventh Circuit reasoned that "a corrective disclosure obviously must disclose new information" – because the market must have already incorporated all public-domain information into the stock price. *Id.* at 1198. Accordingly, under the Eleventh Circuit's binary view of market efficiency – which holds that "[e]ither the market is efficient or it is not" – any report based on "already-public information" becomes "insufficient to constitute a corrective disclosure." *Id.* at 1199.

The decision below applied that bright-line rule to bar petitioners from using the Skolnick Report to plead loss causation. App. 16a-18a. The Skolnick Report was based on Meyer's wrongful-termination lawsuit, which the court viewed as "easily obtainable" and thus presumptively already reflected in HMA's stock price. App. 17a. Because the report was "'based on already-public information,'" it could not even support an *allegation* of loss causation. App. 17a-18a (quoting *Meyer*, 710 F.3d at 1199).

b. The First, Second, and Fourth Circuits adhere to a similar view and bar analyses of information in the public domain from serving as corrective disclosures. *See Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 89 (1st Cir. 2014) ("[O]nce a misstatement or corrective disclosure is publicly known in an efficient market, courts will assume that the stock price reacts

immediately, and any claim that an event moved the stock price when the event was not actually a new disclosure will necessarily fail."); *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 512 (2d Cir. 2010) ("negative characterization of already-public information" cannot support loss causation); *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011) ("[c]orrective disclosures must present facts to the market that are new, that is, publicly revealed for the first time").

The Second Circuit's ruling is illustrative. Like the Eleventh Circuit, the Second Circuit invoked the "fraud-on-the-market theory" to hold that a corrective disclosure must, by definition, "reveal some *then-undisclosed* fact with regard to the specific misrepresentations alleged in the complaint." *Omnicom*, 597 F.3d at 511 (emphasis added).[9] As applied, the Second Circuit's rule bars investors from pleading loss causation based on reports drawn from "public information," even if "that information (or its implication) [was] not well-disseminated into the market" prior to the report. *Fila*, 2016 WL 3962015, at *6.

2. The Fifth and Ninth Circuits allow investors to plead loss causation based on reports analyzing public sources

By contrast, the Fifth and Ninth Circuits have rejected the rule that a report gleaned from public sources is automatically disqualified as a corrective disclosure when a plaintiff invokes the fraud-on-the-

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[9] Although *Omnicom* was a summary-judgment decision, later courts have extended its holding to the pleading stage. *See Central States, Southeast & Southwest Areas Pension Fund v. FHLMC*, 543 F. App'x 72, 75 (2d Cir. 2013); *Fila v. Pingtan Marine Enter. Ltd.*, 2016 WL 3962015, at *5-6 (S.D.N.Y. July 19, 2016).

market theory. *See Amedisys*, 769 F.3d at 323; *In re Gilead Sci. Sec. Litig.*, 536 F.3d 1049, 1057-58 (9th Cir. 2008).

a. As noted above (at 15), one of the corrective disclosures in *Amedisys* was a *Wall Street Journal* article concluding from "publicly available Medicare records" that the defendant was likely overbilling Medicare. 769 F.3d at 323. The district court held the article could not "constitute a corrective disclosure" because it did "not reveal any new information." *Id.* The Fifth Circuit reversed because, "[w]hile it is generally true" that public information is "immediately digested and incorporated into the [stock] price," it was "plausible" that the public data the article analyzed was not "readily digestible" by the market. *Id.* Indeed, the complaint raised a plausible inference that "the efficient market was not aware of the hidden meaning of the Medicare data" – in part because the data required "expert analysis" and in part because it was "only available to a narrow segment of the public." *Id.* For those reasons, the court refused to "push[] aside" "the WSJ Article . . . simply because the data it was based upon may have been technically available to the public." *Id.*

b. The Ninth Circuit took a similar approach in *Gilead*. There, the plaintiffs alleged that the defendant drug company misled investors about the fact its marketing practices violated Food and Drug Administration ("FDA") rules. 536 F.3d at 1050-51. The truth first began to emerge when the FDA publicly released a "Warning Letter" exposing the defendant's unlawful practices. *Id.* at 1053. But the market did not immediately comprehend "the significance of the Warning Letter." *Id.* In fact, the defendant's stock price did not drop until nearly

three months later, after the defendant released a "press release" making clear "the impact of the [illegal] marketing and the Warning Letter." *Id.* at 1054. The district court dismissed the complaint on loss-causation grounds. *Id.* at 1057.

The Ninth Circuit reversed and "rejected a bright-line rule requiring an immediate market reaction" for loss-causation purposes. *Id.* at 1057-58. It observed that even generally efficient markets are "subject to distortions that prevent the ideal of a free and open public market from occurring." *Id.* Thus, a "limited temporal gap between the time a misrepresentation is publicly revealed and the subsequent decline in stock value does not render a plaintiff's theory of loss causation per se implausible." *Id.* at 1058. For that reason, the later press release – which was based on the already-public Warning Letter – could serve as a "corrective disclosure" because it helped the public "appreciate [the] significance" of previously disclosed facts. *Id.*

Gilead establishes the rule in the Ninth Circuit that an investor is not barred from showing loss causation based on corrective disclosures drawn from publicly available information. *See In re Apollo Grp., Inc. Sec. Litig.*, 2010 WL 5927988, at *1 (9th Cir. June 23, 2010) (citing *Gilead* as allowing "later disclosure" of already-public information to be "corrective when public initially failed to appreciate" that information). District courts in the Ninth Circuit have therefore allowed investors to plead loss causation based on the type of analyst reports the Eleventh Circuit has rejected. *See, e.g., In re Iso Ray, Inc. Sec. Litig.*, 2016 WL 3129425, at *14 (E.D. Wash. June 1, 2016) (sustaining allegations

based on analyst report that "did not disclose anything new").[10]

c. This case well-illustrates the distinction between those two competing approaches. The Complaint abounds with inferences that the "market was not aware" of Meyer's allegations until Skolnick reported them 82 days later. *Amedisys*, 769 F.3d at 323. Most significantly, Skolnick herself only "became aware" of Meyer's lawsuit the Friday before she published her report. Skolnick Rep. 1. That alone "plausibly counters the argument" that the market previously absorbed the information from that lawsuit. *Amedisys*, 769 F.3d at 323 (noting analysts' "characteriz[ation] [of] the WSJ Article as 'new news'"). HMA's failure to disclose Meyer's lawsuit reinforces that conclusion. Without any notice in HMA's SEC filings, it is plausible that investors did not immediately digest one lawsuit filed on a state-court docket. *See id.* (same conclusion as to data that was "only available to a narrow segment of the public").

Those inferences would be sufficient to survive a motion to dismiss under the "fact-specific inquiry" followed in the Fifth and Ninth Circuits. *Gilead*, 536 F.3d at 1058. But the panel below cast those inferences aside because it assumed – without any discovery – the "market was able to assimilate" Meyer's lawsuit "without the assistance of the 2012 Skolnick Report." App. 17a.[11] The panel further

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[10] *See also, e.g., In re Nuvelo, Inc. Sec. Litig.*, 668 F. Supp. 2d 1217, 1226-27 (N.D. Cal. 2009) (public information could plausibly "affect[] the stock price" only "after subsequent events . . . made [its] significance more apparent to the public").

[11] The panel cryptically cited *Amedisys* and *Gilead* in asserting the "market was able to assimilate" the *Meyer* lawsuit. App. 17a. Notwithstanding that unexplained citation, the majority's

assumed (again, without evidence) that the lawsuit's failure immediately to depress HMA's stock price must have meant the "market disregarded" it. App. 18a. Those assumptions, which rested on nothing more than the lawsuit's "exist[ence] in publicly accessible court dockets," App. 16a-17a, ignore the reality that even generally efficient markets do not always respond "immediately" to corrective information. *Gilead*, 536 F.3d at 1058. In light of that principle, the Fifth and Ninth Circuits would have allowed petitioners' claims to proceed.

II. THE ELEVENTH CIRCUIT'S LOSS-CAUSATION PLEADING RULES CONFLICT WITH THIS COURT'S PRECEDENTS

A. The Disclosure Of A Government Investigation Can Raise A Plausible Inference Of Loss Causation

1. The Eleventh Circuit's near-prohibition on using government investigations to plead loss causation is "contrary to Supreme Court precedent." App. 19a (Martin, J.). Loss causation, this Court has emphasized, should not "impose a great burden upon a plaintiff" at the pleading stage. *Dura*, 544 U.S. at 347. To survive a motion to dismiss, a plaintiff need only "provide a defendant with some indication of the loss and the causal connection that the plaintiff

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reasoning conflicts directly with both cases. Neither case can be reconciled with the legal rule adopted in *Meyer* and applied below: that a report cannot be a corrective disclosure if it is "gleaned entirely from public filings." 710 F.3d at 1198. The same is true of the majority's suggestion that it theoretically "may countenance some lag in the capacity of the market to digest publicly available information." App. 16a-17a. Despite that hypothetical, the majority rejected petitioners' analyst-report allegations simply because "the Meyer action was publicly available and the impetus for the 2012 Skolnick Report." *Id.*

has in mind." *Id.*[12] That standard conforms to the general pleading requirements of the Federal Rules of Civil Procedure. Under those rules, a complaint raising a "plausible" inference of loss causation may proceed to discovery "even if it strikes a savvy judge that actual proof" of causation "is improbable." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

A disclosure of a relevant government investigation can raise such an inference. An investigation into a company's wrongful practices can "reveal to the market a potential problem" that had been "concealed by the defendants' alleged misstatements." *New Oriental*, 988 F. Supp. 2d at 428. When the market reacts to the news of such a problem by slashing a company's share price, it is plausible that the "earlier misrepresentation" about the very problem under investigation "caused the loss" incurred by investors forced to sell at the lower price. *Dura*, 544 U.S. at 342-43.

The Eleventh Circuit holds otherwise because an investigation, though "portend[ing] an added *risk* of future corrective action," does not conclusively "reveal to the market that a company's previous statements were false." *Meyer*, 710 F.3d at 1201. That reasoning ignores how markets work in practice. Markets respond to risks, not just certainties.[13]

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[12] *Dura* did not decide whether investors must also plead loss causation with particularity. 544 U.S. at 346. The Court would not need to decide that question here, as there is no question that petitioners' loss-causation allegations – which supply the date, source, and contents of the corrective disclosures – contain sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b). Compl. ¶¶ 337-340, 357-358, 381-386.

[13] *See* Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 184 ("[t]he very idea that markets wait for the formality" of the type of "corrective

Indeed, when news breaks of an "SEC inquiry" into a company's practices, market participants typically react by assessing the "probability and magnitude" of the potential problem under investigation. *In re IMAX Sec. Litig.*, 587 F. Supp. 2d 471, 485 (S.D.N.Y. 2008). When that assessment spawns suspicion (if not certainty) that a company's prior statement was false, the resulting decline in share price is fairly attributable to the alleged misstatement. *See Lloyd*, 811 F.3d at 1210-11; *SafeNet*, 645 F. Supp. 2d at 230-31.

The facts of *Lloyd* provide a good example. The defendant's stock price there plunged after disclosure of an "SEC subpoena" targeting its loan practices, but then "reacted hardly at all" a month later to the "bombshell disclosure" that the company was writing down its largest debtor's loans. *Lloyd*, 811 F.3d at 1210. That disparity "confirm[s] that investors understood the SEC announcement as at least a partial disclosure" that the company's loans were overvalued – and that the market failed to react to the subsequent write-down because it already had factored that very risk into the share price. *Id.* at 1210-11. In other words, the market had fully adjusted the share price by the time the company acknowledged its loans had become impaired. Such facts refute the Eleventh Circuit's unrealistic premise – which it applies before discovery, without any evidence – that markets can never adjust until they are *certain* that the "company's previous statements were false." *Meyer*, 710 F.3d at 1201.

2. The Eleventh Circuit's admission that a government investigation might support loss causation when "coupled with a later finding of fraud"

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disclosure" the Eleventh Circuit demands "defies the teachings of market efficiency").

confirms the irrationality of its approach. *Meyer*, 710 F.3d at 1201 n.13. Whether a corrective disclosure creates loss causation turns on the market's "understanding of [the] disclosure at the time it was made." *Lloyd*, 811 F.3d at 1210. Either the market contemporaneously perceives the disclosure of a government investigation as corrective, or it does not; either way, it "defies logic" to say that the "causal chain is somehow affected by the government's later finding of actual fraud," App. 25a (Martin, J.).

The Eleventh Circuit's "actual fraud" rule also "imposes a prohibitive burden on plaintiffs" by requiring "proof of a misrepresentation in order to plead securities fraud." App. 18a-19a (Martin, J.). By forcing plaintiffs to identify a "conclusive government finding of fraud merely to plead loss causation," *Meyer* "reward[s] defendants who are able to successfully conceal their fraudulent activities" from the government. *Amedisys*, 769 F.3d at 324-25. Such a rule flouts the ordinary principle that a plaintiff need not meet a "probability requirement at the pleading stage." *Twombly*, 550 U.S. at 556.

This case well-illustrates the point. The Department of Justice's Criminal Division is now involved in the investigation commenced by the 2011 OIG subpoenas, and indictments of senior HMA executives appear possible. *See supra* p. 9. Separately, the government has intervened in the *qui tam* lawsuits against HMA, *see HMA II*, No. 14-MC-339-RBW (D.D.C.), which confirms that the government now believes that HMA committed fraud. And both courts below found that petitioners' allegations themselves raised a strong inference of fraud. But the decision below still barred petitioners' claims because, when the

investigation was first reported, it had not yet found "actual wrongdoing." App. 16a.

That rule leaves investors in a near-impossible position. Even when they are armed (as petitioners were) with substantial evidence of securities fraud, *Meyer* keeps investors in limbo while the government investigates. In many cases, like this one, that requirement will prove fatal even to meritorious claims. Indeed, the investigation into HMA remains ongoing today, even as the five-year repose period applicable to petitioners' claims expires in less than two months. *See* 28 U.S.C. § 1658(b). Because the investigation likely will continue until after the repose period has run, *Meyer* will have made timely loss-causation allegations *impossible* – even if the government ultimately finds the very "wrongdoing" that *Meyer* demands. Such a rule defies this Court's instruction that pleading loss causation should "not prove burdensome." *Dura*, 544 U.S. at 347.

Finally, the Eleventh Circuit's artificial pleading rules are unnecessary to prevent "every investor who suffers a loss in the financial markets [from] su[ing] under § 10(b)." App. 17a-18a. Not every government investigation will create a plausible inference of loss causation, *see supra* note 8, and, even for those that do, investors are still required to allege with particularity that the defendant actually committed fraud. *See* App. 25a (Martin, J.) ("government's finding of fraud goes instead to the plaintiff's ability to prove misrepresentation – an entirely different element"). And, whatever the pleading standard, investors will be required to uncover evidence in discovery confirming that the investigation actually functioned as a corrective disclosure. That is a fact-intensive issue, and not every investor who loses

money in the wake of an investigation will be able to develop the necessary evidence. But the Eleventh Circuit errs in taking away that issue from the fact-finder by "forc[ing] inquiry into plaintiffs' proof at the pleadings stage." App. 24a (Martin, J.).

B. Reports Based On Public Sources Can Raise A Plausible Inference Of Loss Causation

The Eleventh Circuit's rule that publicly sourced reports cannot serve as corrective disclosures is equally flawed. It rests on the view that, once an investor invokes the fraud-on-the-market theory, a court must assume that "any information released to the public is immediately digested and incorporated into the price of a security." *Meyer*, 710 F.3d at 1197. And that view, in turn, reflects the Eleventh Circuit's belief that "[e]ither the market is efficient or it is not." *Id.* at 1199. If it is, then publicly sourced reports are disqualified as corrective disclosures because the source information – no matter how obscure or difficult to obtain – must already be reflected in the stock price. *See id.* at 1197-99.

Meyer's either-or, binary view of market efficiency conflicts with this Court's precedents. *See Halliburton II*, 134 S. Ct. at 2414 ("market efficiency is not a yes-or-no proposition"). Indeed, "even a single market can process different kinds of information more or less efficiently," and not all material information immediately affects securities prices "even in a generally efficient" market. *Id.* at 2409-10. Thus, when a plaintiff invokes the fraud-on-the-market presumption, it does not follow automatically that all public information is "immediately digested and incorporated into the price of a security." *Meyer*, 710 F.3d at 1197. Rather, the presumption rests on a

more "modest premise": that "'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.'" *Halliburton II*, 134 S. Ct. at 2410 (quoting *Basic*, 485 U.S. at 247 n.24).

That modest premise is inconsistent with the Eleventh Circuit's stringent loss-causation rule. Even a "generally efficient" market may not be able immediately to process all information that pertains to public court filings; that exemplifies why defendants have an "opportunity to rebut the presumption by showing . . . that the particular misrepresentation at issue did not affect the stock's market price." *Id.* at 2414. By the same token, it is not "per se implausible" for an investor to invoke the fraud-on-the-market presumption while also alleging that certain corrective information in the public domain took a few months for the market to process. *Gilead*, 536 F.3d at 1058. That theory of loss causation accords with this Court's teaching that "efficiency is a matter of degree" that should generally be made "a matter of proof." *Halliburton II*, 134 S. Ct. at 2410.

This case again demonstrates the point. Respondents' misstatements, which petitioners allege inflated HMA's stock price, appeared largely in closely scrutinized SEC filings and quarterly press releases. Compl. ¶¶ 215-361. The Skolnick Report, by contrast, was based on a single employment lawsuit that had not previously moved the market price and was available only to those scouring the Broward County court docket (or, for a brief time, a Florida federal docket). The market plausibly "process[ed]" the latter "less efficiently" than the former. *Halliburton II*, 134 S. Ct. at 2409; *see Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1197 n.6

(2013) ("a market may more readily process certain forms of widely disseminated and easily digestible information ... than information more difficult to acquire"). Indeed, Skolnick herself was an equity analyst professionally monitoring HMA, and she did not learn of Meyer's lawsuit until the Friday before her Monday report. *See supra* p. 8. The panel erred in assuming (without discovery) that the lawsuit was immediately incorporated into HMA's stock price merely because the market was "generally efficient." *Halliburton II*, 134 S. Ct. at 2409-10.

III. THIS CASE PRESENTS RECURRING QUESTIONS OF NATIONAL IMPORTANCE

The standard for pleading loss causation under the Exchange Act raises vital questions that merit this Court's review. Nationwide, more than 200 securities class actions are filed each year, with alleged investor losses totaling $183 billion in 2015.[14] Loss causation is often a crucial threshold issue in those cases.[15] Indeed, even public issuers that are typically defendants in securities cases agree that "[t]he issue of how loss causation must be pled in securities class actions is one of recurring importance." Amicus Br. of Nat'l Ass'n of Mfrs. & Chamber of Commerce at 2,

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[14] *See* Svetlana Starykh & Stefan Boettrich, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 3, 7 (Jan. 25, 2016) ("*Recent Trends*"), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

[15] *See* Langevoort, 57 Ariz. L. Rev. at 45 (litigation over "loss causation" has "exploded" after *Dura*); Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811, 825 (2009) (describing "loss causation as the key gatekeeping mechanism for private securities fraud litigation" that is often "litigated in response to a motion to dismiss").

Gilead Sciences, Inc. v. Trent St. Clare, No. 08-1021 (U.S. filed Mar. 16, 2009), 2009 WL 720914.

The Court should grant certiorari to address that issue in a way that furthers Congress's purpose of "maintain[ing] public confidence in the marketplace." *Dura*, 544 U.S. at 345. "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). The decision below undermines that interest by allowing public issuers like HMA to evade liability for securities fraud when they avoid (or delay) a formal finding of "actual wrongdoing." App. 16a. In that way, Judge Martin observed, the Eleventh Circuit's pleading rules threaten to "extinguish the ability of private actions to serve as an independent check on market integrity." App. 19a.

This case offers the Court a needed opportunity to correct those rules. It arises from a final judgment in which both courts below found that petitioners otherwise adequately pleaded respondents' fraud. It hinges on the validity of the stringent pleading rules the Eleventh Circuit announced in *Meyer*. And it comes to this Court after years of percolation in which most of the courts with the busiest securities dockets have weighed in on the questions presented. *See supra* Part I.[16] Allowing the conflicts among those courts to fester any longer would frustrate Congress's intent that the "federal securities laws" be given a "uniform interpretation." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct.

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[16] *See Recent Trends* 9 (reporting the Second, Fifth, Ninth, and Eleventh Circuits as four of the five busiest circuits in 2015 by number of securities-class-action filings).

1562, 1576-77 (2016) (Thomas, J., concurring in judgment).

Eleven years have passed since this Court first addressed the standard for showing loss causation under the Exchange Act. *See Dura*, 544 U.S. 336. In that intervening period, the Court has "granted certiorari repeatedly in cases concerning the construction of federal securities laws," Stephen M. Shapiro et al., *Supreme Court Practice* 271-72 (10th ed. 2013), but it has never returned to the crucial question of what an investor must do "to *allege* the[] requirements" that *Dura* identified, 544 U.S. at 346. Lower courts have thus taken up the task themselves, and the result is "by all accounts a doctrinal and practical mess." Langevoort, 57 Ariz. L. Rev. at 45. Review by this Court is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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