No. 16-685

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

BRIEF OF FINANCIAL ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici are academic financial economists who teach and write about public securities markets.[1] Other amici are law professors whose teaching and scholarship also analyze the economics of the securities markets as they bear on the regime of federal securities regulation. This brief is intended to assist the Court by bringing our scholarship to bear on problems arising under that regulatory regime. *Amici* include:

Sanjai Bhagat, Provost Professor of Finance, University of Colorado Leeds School of Business.

Charles Calomiris, Henry Kaufman Professor of Financial Institutions, Director of Program for Financial Studies and its Initiative on Finance and Growth in Emerging Markets, Professor of International and Public Affairs, Columbia Business School.

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[1] This brief has been filed with the written consent of the parties, and those written consents are being filed contemporaneously with this brief. Pursuant to Rule 37.2(a), counsel for *amici* provided notice to all parties of *amici*'s intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

This case raises two related issues concerning the facts plaintiffs must plead to raise a plausible inference of loss causation in securities fraud cases. The first concerns statements of securities analysts who collect and analyze information from sources that are at least nominally available to the public. At issue is whether such statements—analysts'

reports—may serve as "corrective disclosures" that reveal the material falsity of the defendant's prior representations, thereby plausibly establishing, at the pleading stage, that those misrepresentations caused plaintiffs' loss. The second issue concerns ongoing government investigations. The question is whether announcements of investigations that have not yet produced a conclusive finding of wrongdoing may serve as corrective disclosures in pleadings that adequately allege material falsity.

Amici contend that both analyst statements and government investigations can and often do convey important information to the financial markets, and that both may serve as important means of correcting prior misrepresentations. Markets do not become efficient on their own; rather, they process information through the efforts of participants in the market who seek it out, assess its meaning, sometimes trade on it and/or disseminate it to others. Certain forms of information—while nominally available to the public—will not be fully assimilated by the market until they are analyzed and/or publicized by sources upon whom market participants are prepared to rely. Both market analysts and government investigators play important roles in this regard.

With respect to analyst reports, the Eleventh Circuit borrowed the efficient market hypothesis ordinarily used to establish reliance under the fraud-

on-the-market doctrine and applied it in analyzing loss causation. However, it applied the efficient market hypothesis in a manner inconsistent with well-established economic learning regarding the means by which information is assimilated in capital markets and the speed with which such assimilation occurs. With respect to government investigations, the Eleventh Circuit inappropriately conflated the burdens of proof that ordinarily require *courts* to suspend judgments about an investigation until its conclusion with the empirical reality that *investors* rely on the commencement of an investigation as valuable information about a company's underlying behavior. It is the latter fact, however, that is relevant to establishing loss causation.

In real markets, it is commonplace that analyst statements and government investigations will move the market for a security, even if the information upon which analysis rests was already nominally available or if the investigation has not yet reached a formal conclusion. Both analyst statements and government investigations, therefore, can play a legitimate role in establishing loss causation.

ARGUMENT

I. THE ANALYST ISSUE

If markets instantly assimilated all publicly-available information about a company, then analyst statements would not affect the stock price unless

they disclosed some previously unknown fact. But few economists believe that markets are this efficient in reality. Decades of empirical research have confirmed both the basic efficiency of public securities markets and the varying degrees of efficiency that they display in certain circumstances. This learning includes the crucial role of analysts in *making* markets efficient by unearthing, analyzing, and disseminating material information to the market. From an economic perspective, excluding their statements from analysis of loss causation whenever they are based on already-public information seriously distorts the inquiry.

A. The Eleventh Circuit's Rule Presumes an Unrealistic Degree of Market Efficiency.

The Eleventh Circuit's rule excluding analyst statements based on publicly available information rests on the efficient market hypothesis: If markets are truly efficient, the court of appeals reasoned, then the stock price incorporates all public information regarding the stock no matter how remote and leaves nothing for analyst reports to add. *See Meyer v. Greene*, 710 F.3d 1189, 1197-99 (11th Cir. 2013). This reasoning, especially as it applies to cases like the present one, presupposes a degree of market efficiency that is generally inconsistent with current thinking in financial economics.

Federal securities law has incorporated the basic idea of efficient capital markets since its inception.[2] The economics literature distinguishes among several versions of the efficient market hypothesis:

> "Weak-form" efficiency requires that historical prices are not predictive of future prices. Excess profits cannot be earned using strategies based on historical prices.
>
> "Semi-strong form" efficiency implies that all public information is reflected in a stock's current market price, and that security prices adjust to new publicly available information so that it is impossible to earn excess returns by trading on that information.
>
> "Strong-form" efficiency implies that all information in the market, whether public or private, is accounted for in the market price. Investors cannot consistently earn excess profits over a long period of time—even if they have inside information.[3]

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[2] *See, e.g.*, William O. Douglas, *Protecting the Investor*, 23 Yale L. Rev. 522, 524 (1934).

[3] Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383 (1970). *See also Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, J.)

References to the efficient market hypothesis in the context of describing how financial markets actually operate typically refer to the "semi-strong" version (SSEMH).[4] The SSEMH has been employed in a variety of different contexts for a variety of different purposes. In recent years, the "behavioral economics" movement has questioned the extent to which markets are efficient; indeed, in 2013 the Nobel Prize in economics went jointly to Eugene Fama, the "father" of the efficient market hypothesis, and Robert Shiller, one of that hypothesis's leading skeptics.[5] Critically, this Court determined two years ago that although aspects of the SSEMH are

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(explaining the differences between these three forms of market efficiency).

[4] *See* Eugene Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1575 (1991) ("I take the market efficiency hypothesis to be the simple statement that security prices fully reflect all available information . . . . A weaker and economically sensible version of the efficiency hypothesis says that prices reflect information to the point where the marginal benefits of acting on the information (the profits to be made) do not exceed the marginal cost."). Standard finance textbooks provide similar definitions. *See, e.g.*, Richard Brealey, Stewart Myers & Franklin Allen, *Principles of Corporate Finance* 317-18 (10th ed. 2011); Stephen A. Ross, Randolph W. Westerfield & Jeffrey Jaffe, *Corporate Finance* 430-31 (9th ed. 2010).

[5] *See* Robert J. Shiller, *Sharing Nobel Honors, and Agreeing to Disagree*, N.Y. Times, Oct. 26, 2013, available at http://www.nytimes.com/2013/10/27/business/sharing-nobel-honors-and-agreeing-to-disagree.html?_r =0.

debated, the fraud-on-the-market doctrine of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), rests on modest assumptions about market efficiency that most economists, including *Amici*, embrace. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2409-11 (2014) ("*Halliburton II*").

This case focuses on an application of market efficiency that *Halliburton II* did not directly address. *Halliburton II* addressed the fraud-on-the-market doctrine in the context of class certification, where the critical issue is whether reliance on the defendant's alleged misrepresentation can be taken to be a unitary question common to all class members. The economic soundness of fraud-on-the-market in that context depends only on the proposition that material and public information generally affects securities prices to some degree and in a predictable direction. The Court rightly found that this proposition is uncontroversial, even among critics of the efficient market hypothesis. *See* 134 S. Ct. at 2410. Determining whether analysts' statements regarding publicly-available information can serve as a corrective disclosure for loss causation purposes, in contrast, requires consideration of the mechanisms by which information is assimilated by the market, as well as the speed at which this assimilation occurs.

Nonetheless, as in *Halliburton II*, this Court can resolve the legal issues in this case without taking

sides on issues that are actually disputed among contemporary economists. In the present case, as well as in its governing precedent *Meyer v. Greene*, the Eleventh Circuit took a view of market efficiency that virtually no contemporary economist would endorse. The court of appeals in the present case simply relied upon *Meyer* for its holding that analysts' statements cannot be corrective disclosures if they rely on information previously available to the public. App. 19a-20a. In *Meyer*, the court of appeals explained that "any information released to the public is immediately digested and incorporated into the price of a security." 710 F.3d at 1197. Hence, "'disclosure of confirmatory information—or information already known by the market—will not cause a change in the stock price.'" *Id.* (quoting *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011)). The court of appeals emphasized that the plaintiffs in *Meyer* had relied on the fraud-on-the-market presumption of reliance to establish reliance, noting that "[t]he efficient market theory . . . is a Delphic sword: it cuts both ways. . . . Either the market is efficient or it is not." *Id.* at 1198-99.

Contemporary economists do not accept this binary view of market efficiency. As we explain further below, it is now widely recognized that markets digest different sorts of information at

different speeds.[6] Moreover, it is equally well accepted that market efficiency is not automatic, but rather depends on the activities of actors, such as analysts, who uncover, analyze, and publicize information to the market.[7] Because the market depends, in many instances, on analysts to interpret public information, it is unsurprising that market prices frequently respond to analysts' reports even if they did not respond to initial availability of the underlying information.

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[6] *See, e.g.*, Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 567 (1984) (observing that "less 'available' information will require more time for 'full reflection' in price because its narrower distribution will force a qualitatively more circuitous form of price equilibration"); *see also* Elena Beccali, Peter Miller, & Ted O'leary, *How Analysts Process Information: Technical and Financial Disclosures in the Microprocessor Industry*, 24 Eur. Accounting Rev. 519 (2015) (finding that market analysts process technical and financial disclosures at different rates).

[7] *See, e.g.*, Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ. Rev. 393, 393 (June 1980) ("When informed individuals observe information that the return to a security is going to be high, they bid its price up, and conversely when they observe information that the return is going to be low. Thus the price system makes publicly available the information obtained by informed individuals to the uniformed. In general, however, it does this imperfectly; this is perhaps lucky, for were it to do it perfectly, an equilibrium would not exist."); Gilson & Kraakman, *Mechanisms*, *supra* (discussing the various mechanisms by which market prices adjust to information).

This Court recognized as much in both *Basic* and *Halliburton II*. Chief Justice Roberts' opinion in *Halliburton II* accepted the petitioners' argument in that case that "even a single market can process different kinds of information more or less efficiently, depending on how widely the information is disseminated and how easily it is understood." 134 S. Ct. at 2409. He rightly recognized, however, that this point was not inconsistent with *Basic*'s "fairly modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.* at 2410 (quoting *Basic*, 485 U.S. at 247 n.24). This language emphasized the role of "market professionals" in interpreting and disseminating information and the importance of information that is not only publicly available but also "publicly announced." The Eleventh Circuit's categorical rule excluding analyst reports that are based on nominally public information ignores both of these nuances in *Basic*.

B. Analysts Play a Key Role in Making Markets Efficient.

William O. Douglas, who was intimately involved in drafting the federal securities laws, noted in 1934 that

> even though an investor has neither the time, money, nor intelligence to

> assimilate the mass of information in the registration statement, there will be those who can and who will do so, whenever there is a broad market. The judgment of those experts will be reflected in the market price.[8]

The Eleventh Circuit's rule that these expert judgments cannot count as being causally connected to stock price declines presupposes that the market adjusts *by itself*—rendering expert judgments that do not disclose any new facts simply irrelevant. That is not how efficient market work.[9]

Writing in 1980, Sanford Grossman and Joseph Stiglitz outlined a basic paradox: Efficient market depend on the widespread dissemination of information. But unearthing and analyzing information is costly, so people will engage in these activities only if they can get some sort of return. Hence, if there are no returns to information (because the market is efficient), then no one will develop and disseminate that information—thereby

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[8] Douglas, 23 Yale L. Rev., at 524.

[9] *See, e.g.*, Ronald J. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J. Corp. L. 715, 716 (2003) (observing that market efficiency is not "a physical property of the universe" but rather "the outcome of institutional and market interactions").

preventing the market from being efficient.[10] This is a paradox, of course, only if one takes an absolutist view of market efficiency. Most economists believe that markets are sufficiently inefficient to incentivize market professionals to track down, analyze, and disseminate information to the market, but that markets are not so inefficient that outside investors can earn abnormal returns by investing based on that information.

Viewed from this perspective, analysts' reports of the sort at issue in this case and in *Meyer* play a critical role in maintaining the efficiency of the market.[11] The importance of that role will vary by the type of information at issue. Much information, such as an earnings report, may be widely announced and require little interpretation. But not all information is equally available to and digestible by the market in the first instance.[12] In this case, the

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[10] *See generally* Grossman & Stiglitz, *supra*.

[11] *See* Gilson & Kraakman, *Mechanisms*, 70 Va. L. Rev. at 608 (emphasizing the role of "information intermediaries such as financial analysts" in "reduc[ing] the total costs of acquiring information" in capital markets).

[12] *See, e.g.*, Gilson & Kraakman, *Mechanisms*, 70 Va. L. Rev. at 565 ("New information is 'available' to the capital market under an extraordinary variety of circumstances, ranging from the extreme of near-universal initial distribution of information . . . to the opposite extreme of initial distribution to only a very few traders."). Professors Gilson and Kraakman concluded, in their seminal article on the mechanisms rendering markets efficient,

lawsuit against HMA was available in a publicly-accessible docket file in a Florida state court, but one would hardly expect the market to be instantaneously aware of such a filing. [13] For example, securities analyst Sheryl Skolnick, who regularly followed the company, reported to the market that she had just "bec[o]me aware" of the Meyer lawsuit some three months after it was filed. C.A. App. Tab C at 1.

Similarly, the information underlying the analyst's presentation in *Meyer* was available to the public, but it was found in obscure county property records and its import was hardly obvious without expert analysis. No economist would expect these sorts of information to be integrated into market prices with the same speed as more public and obviously relevant announcements, such as a tender offer or a dividend increase.[14] It is precisely the work

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that "[s]ince efficiency in the capital market depends on the distribution of information, it is ultimately a function of the cost of information to traders. The lower the cost of particular information, the wider will be its distribution, the more effective will be the capital market mechanism operating to reflect it in prices, and the more efficient will be the market with respect to it." *Id.* at 593.

[13] Importantly, the filing was accessible at the courthouse, but *not* electronically.

[14] *See, e.g.*, Gilson & Kraakman, *Mechanisms*, 70 Va. L. Rev. at 572 (observing that "professional analysts conduct in-depth research that generates occasional informational monopolies,"

of analysts that disseminate such information to the broader market; hence, one often sees stock movements following analyst presentations rather than initial disclosures.[15]

This point is consistent with empirical work demonstrating that financial markets often have to be told multiple times before they fully reflect certain information. For example, an analysis of tender offers reveals that the stock prices of the participants do not fully incorporate the value of the transaction at the point that the transaction is announced, but rather move in stages reflecting the progress of the deal.[16] This reflects the probabilistic nature of the initial information and the importance of revised information that comes out later on. Similarly, even if the market is aware of an initial disclosure, subsequent reports by analysts may be read as reframing or validating the accuracy and value implication of the initial information. This vetting

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and in such case "information first enters the market through a very small number of traders whose own resources are not large enough to induce speedy price equilibration").

[15] *See, e.g.*, Gilson & Kraakman, *Twenty Years Later*, 28 J. Corp. L. at 735-36 (noting that the degree of analyst coverage is an important variable in determining the efficiency of markets in particular stocks).

[16] *See* Sanjai Bhagat, Ming Dong, David Hirshleifer, & Robert Noah, *Do Tender Offers Create Value? New Methods and Evidence*, 76 J. Fin. Econ. 3 (2005).

role that analysts often play is also important to the market and may be expected to affect the stock price in many instances. And sometimes initial disclosures may only partially penetrate the market, with the full price reaction not occurring until after the disclosure is picked up by major news outlets.[17]

Finally, the analyst's expertise may add both context, credibility, and a more digestible interpretation of previously available information. The Eleventh Circuit said that, if an analyst's opinion relies on information previously known to the market, then "the only thing actually disclosed to the market when the opinion is released is the opinion itself, and such an opinion, standing alone, cannot reveal to the market the falsity of a company's prior factual representations." *Meyer*, 710 F.3d at 1199 (italics and quotation marks omitted). This analysis assumes that markets do not value or take into account contextual information or synthesis provided by experts, but this is simply not the case. Much of the information that markets must assess is uncertain with respect to both its accuracy and its

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[17] *See, e.g.*, Saeyoung Chang & David Y. Suk, *Stock Prices and the Secondary Dissemination of Information: The Wall Street Journal's "Insider Trading Spotlight" Column*, 33 Fin. Rev. 115 (1998) (demonstrating significant price shifts both after the filing of a Section 16 insider trading report with the SEC *and* days later when those reports were republished in the *Wall Street Journal*).

importance. "Study of existing information may provide new understanding of its implications or of its relationship to other information, thereby confirming or altering one's existing forecast of value."[18] Markets rely on the expertise, knowledge, and judgment of analysts to sort through this uncertainty.[19] The fact that stock prices so often move in response to expert analysis reflects the importance of such analysis to the market.[20]

A blanket rule that analyst opinions cannot provide markets with information that is causally connected to a stock price decline simply because they address facts previously available in some form would distort the loss causation inquiry. Loss causation is a question of the actual impact that misrepresentations have on stock prices, and as such it must take account of all the ways in which

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[18] Gilson & Kraakman, *Mechanisms*, 70 Va. L. Rev. at 564.

[19] *See, e.g.*, Beccalli, Miller, & O'leary, 24 Eur. Acct. Rev. 519 (demonstrating the impact of analysts' judgments on stock prices in the microprocessor industry).

[20] The court of appeals was likewise wrong to dismiss expert opinions as extraneous "confounding information" independent of the previously disclosed facts. *See Meyer*, 710 F.3d at 1199. An analyst's opinion about the accuracy or importance of previously disclosed facts is significant, but that significance lies in informing the market how to weigh the underlying facts. That is why analysts' opinions are valuable as corrective disclosures.

information relevant to the misrepresentation may actually move the market. To the extent that analysts' reports play this role empirically, they must be considered if the legal test is to reflect economic reality.

II. THE GOVERNMENT INVESTIGATION ISSUE

Markets treat the initiation of a government investigation as significant information about a company for similar reasons. Participants in securities markets recognize that government investigations commence only when officials have significant reason to suspect wrongdoing. Moreover, commencement of an investigation may, for the market, confirm other evidence of wrongdoing that would previously have been viewed as uncertain. Government investigations are thus relevant to the loss causation inquiry.

A. The Eleventh Circuit's Rule Reflects a Legal, Not an Economic, View of Investigations.

Courts appropriately attach no presumption of guilt to an investigation, because they have a legal obligation to respect the procedural steps of the law enforcement process. This is true in both the civil and the criminal realms, where the parties seeking to establish wrongdoing bear the burden of proof in a court of law. This burden is reflected, of course, in a securities fraud plaintiff's obligation to plead and

ultimately prove *all* the elements of fraud.[21] The question presented in this appeal, however, is quite different. It is whether the announcement of *another* proceeding—such as the Office of the Inspector General's investigation of HMA in this case—can count as a disclosure to the securities markets that relates to an earlier misrepresentation and establishes that such earlier misrepresentation caused plaintiffs' loss.

This latter question turns on how *the market* views the government investigation. To be sure, if the OIG investigation were to lead to a prosecution, the court hearing that case would not place any evidentiary weight on the government's decision to initiate the proceeding. But in *this* case, the question is whether the defendant's alleged fraud was revealed in such a way as to cause the plaintiffs' loss. For purposes of causation, we must ask how the market actually responds to investigations—not whether, as a matter of fairness, market participants *ought* to suspend judgment until the investigators release their findings. If, as an empirical matter, market participants tend to conclude that "where there's smoke, there's fire," the launching of an

[21] In the present case, the district court held that the plaintiffs had adequately pled each of these other elements.

investigation may be the corrective disclosure that in fact causes plaintiffs' loss.[22]

The court of appeals in this case, and in *Meyer*, improperly conflated the burden of proof *internal* to a government investigation with the informational significance of that investigation in the eyes of the market. From an economic standpoint, investors quite rationally see the initiation of investigations as conveying significant information about a company even before those investigations release any sort of conclusion.[23]

B. Investors Look to Investigations as Conveying Valuable Information About Companies' Underlying Conduct.

All government investigations require some judgment by officials that evidence of wrongdoing exists. Although the evidentiary standard and policies of prosecutorial discretion may vary from

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[22] It is true that initiation of an investigation might cause a loss even if there were no underlying falsehood for the investigation to reveal. But in that case, the plaintiff would not be able to prove the element of material misrepresentation in the first place. Here, of course, the district court found that element to adequately pleaded.

[23] *See, e.g.*, Sanjai Bhagat, James L. Brickley, & Jeffrey L. Coles, *The Costs of Inefficient Bargaining and Financial Stress: Evidence from Corporate Lawsuits*, 35 J. Fin. Econ. 221, 228 tbl.2 (1994).

regulatory agency to agency, securities markets are well aware that investigations, much less prosecutions, are not launched willy-nilly. Rather, the decision to move forward invariably signifies that some initial burden of proof has been met in order to justify the significant expenditure of resources that any investigation will entail.

The market appropriately treats these official judgments as revelatory—to at least some degree—of the underlying wrongdoing. Government regulators play a similar role to expert analysts in unearthing, analyzing, and disseminating information to the market; if anything, regulatory officials may be even more valuable in that they will sometimes have access to nonpublic information. The market thus relies on governmental investigations for many of the same reasons that it relies on analysts.

Empirical evidence confirms the special weight that market participants place on governmental judgments about corporate wrongdoing. One study indicates, for example, that the initiation of government litigation against a company has a greater impact on that company's stock price than does initiation of a private suit.[24] This suggests that market participants believe that government officials

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[24] *See* Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, Am. L. and Econ. Rev. V4 N1, 157 tbl.1 (2002).

do not initiate proceedings without strong reason to believe that wrongdoing has occurred. Certainly the significant drop in the stock price in this case following disclosure of the OIG investigation bears this suggestion out. From an economic perspective, this is a rational view for market participants to take.

In *Meyer*, the court of appeals suggested that market reactions to commencement of government investigations reflect "an added risk of future corrective action," *not* a confirmation that earlier misrepresentations were false. *See* 710 F.3d at 1201 (italics omitted). This view seems to presume that the future sanctions that might be imposed upon the target of an investigation (as well as the expense in responding to the investigation) are independent of the underlying conduct that leads to the investigation in the first place. Certainly innocent parties sometimes incur significant costs in connection with investigations, and some may be wrongly sanctioned. The market participants rationally consider that the risks of significant costs and sanctions are greatest when the target has, in fact, done something wrong. For this reason, the risks that an investigation creates cannot be viewed as wholly independent of the target's underlying conduct. Market participants view the initiation of a government investigation with concern *both* because of the future risks the investigation entails *and*

because of what the investigation says about the target's underlying conduct.

At the end of the day, the question is one of causation, not fairness; loss causation is a function not of what conclusions market participants *should* draw from the initiation of an investigation, but rather of what conclusions they *do* draw from investigations. And on this point it is commonplace to see significant drops in share price following the commencement of a regulatory investigation. Markets treat these investigations as evidence of prior wrongdoing—that is, as revealing that prior statements by the company may have been false or misleading. A later *finding* of wrongdoing may vindicate the market's earlier judgment, but that finding is not the cause of the earlier price movement.[25] Plaintiffs will, of course, have to prove *actual* falsity as part of their case in chief. But, fairly or not, investigations plainly play a role in loss causation. To exclude them from that calculus distorts the economic validity of the inquiry.

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[25] *See* App. 25a (Martin, J., concurring in judgment) (opining that "*Meyer* was wrongly decided" and noting that "[w]hat is important, then, is the market's reaction to a purported corrective disclosure at the time that the disclosure was made. . . . *Meyer* implies that this causal chain is somehow affected by the government's later finding of actual fraud. This defies logic. A later finding cannot change how the market reacted to an announcement at an earlier time. . . .").

CONCLUSION

This Court should grant *certiorari* and hold that both analyst statements and government investigations are relevant to establish loss causation in securities fraud cases.

Respectfully submitted,

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