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

REPLY BRIEF FOR PETITIONERS

DOUGLAS WILENS
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road
Suite 500
Boca Raton, Florida 33432
(561) 750-3000

JONATHAN GARDNER
CAROL C. VILLEGAS
ALEC T. COQUIN
LABATON SUCHAROW LLP
140 Broadway, 34th Floor
New York, New York 10005
(212) 907-0700

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

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RULE 29.6 STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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OTHER MATERIALS

The decision below deepens two circuit splits regarding the standard for pleading loss causation under the federal securities laws. The first concerns when investors may plead loss causation based on the disclosure of a government investigation. The second concerns whether investors may plead loss causation based on analyst reports gleaned from public sources. On both issues, the Eleventh Circuit has adopted onerous pleading rules that conflict with decisions of other circuits and this Court.

Respondents' 37-page opposition strains to conjure uniformity among the circuits by rewriting the decision below as a fact-bound application of normal pleading standards. That characterization conflicts with respondents' own arguments below and with what the panel actually said. Viewing the Eleventh Circuit's loss-causation rules as the court articulated them – rather than as now re-imagined by respondents – makes clear that the courts of appeals are divided. It also confirms that the decision below, read on its own terms, is "contrary to Supreme Court precedent." App. 19a (Martin, J., concurring in judgment). Indeed, respondents do not even acknowledge *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"), which squarely forecloses the panel's holding.

Nor do respondents dispute the importance of the recurring questions this case presents. As petitioners' *amici* explain, the Eleventh Circuit's erroneous loss-causation rules threaten the integrity of the national securities markets by allowing issuers to evade liability for serious fraud – just as HMA did here. And, now that nearly 12 years have passed since this Court last addressed loss causation, the time is ripe for additional guidance. Certiorari is warranted.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S GOVERNMENT-INVESTIGATION RULE WARRANTS REVIEW

A. The Circuits Are Divided Over When Investors May Plead Loss Causation Based On Government Investigations

1. The courts of appeals take divergent views of when an investor may plead loss causation based on the announcement of a government investigation. The Eleventh Circuit holds that such an investigation cannot raise an inference of loss causation unless "'coupled with a later finding of fraud or wrongdoing.'" Pet. 13-14 (quoting *Meyer v. Greene*, 710 F.3d 1189, 1201 n.13 (11th Cir. 2013)). The Fifth and Ninth Circuits, by contrast, allow an inference of loss causation when an investigation is coupled with *some* additional corrective disclosure – even without a finding of wrongdoing. Pet. 15-17; *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).

Respondents do not dispute that *Amedisys* and *Lloyd* sustained loss-causation allegations based on government investigations that produced no finding of wrongdoing. *See Amedisys*, 769 F.3d at 324 (rejecting "rule that government investigations can never constitute a corrective disclosure in the absence of a discovery of actual fraud"). Nor do they dispute that, if the Eleventh Circuit does require a finding of wrongdoing, the resulting conflict would merit certiorari. Instead, respondents merely deny that the decision below imposed such a requirement, insisting (at 16) that the Eleventh Circuit allows "an investor [to] plead loss causation based on government investigations that do not find wrongdoing."

Respondents' characterization of Eleventh Circuit precedent is incorrect. The decision below could scarcely have been clearer: the majority rejected petitioners' allegations about the OIG investigation because that investigation did "*not show any actual wrongdoing* and cannot qualify as a corrective disclosure." App. 16a (emphasis added). When petitioners then argued that the Skolnick Report supplied the "more" that *Meyer* demands, 710 F.3d at 1201, the majority responded that the Skolnick Report did not convert the OIG investigation into a corrective disclosure because it too was "not proof of fraud." App. 16a. As Judge Martin thus observed – in a characterization the majority pointedly did not dispute – the panel's decision "require[d] a conclusive finding of fraud at the pleadings stage." App. 19a.

That conclusion flowed from *Meyer*'s holding "that the disclosure of an SEC investigation, standing alone and *without any subsequent disclosure of actual wrongdoing*, does not . . . qualify as a corrective disclosure." 710 F.3d at 1201 n.13 (emphasis added). Respondents gloss over that holding and pretend (at 15) that the court merely required "*some* type of subsequent disclosure." But *Meyer* itself characterized the only two examples it gave – a guilty plea and an earnings restatement – as admitted "finding[s] of fraud or wrongdoing." 710 F.3d at 1201 n.13. And in the very next sentence, the court explained that where "there is no later finding of wrongdoing, that theory is obviously inapplicable." *Id*. The only credible way to read those statements is as requiring a "later finding of actual fraud." App. 25a (Martin, J.).

Respondents themselves advanced that reading of *Meyer* below. Before the district court, respondents argued that *Meyer* "requires a 'subsequent disclosure

of *actual* wrongdoing' and a '*finding* of fraud.'" Dist. Ct. Doc. 71, at 3 (quoting *Meyer*, 710 F.3d at 1201 n.13). Similarly, respondents argued to the Eleventh Circuit that petitioners' allegations were insufficient because "there has been no admission or finding of wrongdoing." Resp. C.A. Br. 1. And they asserted – quoting the very language they now dismiss (at 15) as a "straw man" – that *Meyer* foreclosed reliance on the Skolnick Report because that report did not "constitute a 'finding of fraud or wrongdoing.'" Resp. C.A. Br. 22-23 (quoting *Meyer*, 710 F.3d at 1201 n.13). There is no question that those arguments, which the panel accepted, conflict with the law of the Fifth and Ninth Circuits. Respondents' attempt to obscure the conflict by abandoning their own (accurate) reading of *Meyer* is unpersuasive.

2. District courts in the Second Circuit go even further and hold that the announcement of a government investigation, standing alone, can raise an inference of loss causation. Pet. 17-19. Respondents do not dispute that those decisions conflict directly with the Eleventh Circuit's rule. Pet. 18 & n.7 (collecting cases). Indeed, respondents cannot cite a single decision in the Second Circuit dismissing loss-causation allegations that involved a relevant government investigation.[1] Rather, they invoke (at 18) this Court's practice of denying review where the sole conflict is between a court of appeals and "'a

[1] Respondents mischaracterize (at 18) *Janbay v. Canadian Solar, Inc.*, No. 10 Civ. 4430, 2012 WL 1080306 (S.D.N.Y. Mar. 30, 2012), which held that investigations *can* be corrective disclosures if the announcement "link[s] the subpoena or investigation to the actual fraudulent conduct alleged in the complaint." *Id.* at *15. That is consistent with the circuit split petitioners assert; the OIG announcement was undisputedly related to respondents' fraud. Pet. 19 n.8.

district court.'" Opp. 18 (quoting Stephen M. Shapiro et al., *Supreme Court Practice* 257 (10th ed. 2013)).

Notwithstanding that general practice, "district court decisions" can be potent "indicators of lower court confusion" that strengthen the case for certiorari. Shapiro, *Supreme Court Practice* 258. That principle applies here with particular force. The Southern and Eastern Districts of New York are crucial districts for securities fraud, and they unanimously reject the Eleventh Circuit's government-investigation rule. Moreover, district courts functionally guide the law of the Second Circuit on this issue. Because those courts invariably *deny* any motion to dismiss raising the *Meyer* loss-causation argument, they effectively deprive the Second Circuit of any opportunity to review the pleading standard.[2] As a practical matter, then, investors who sue in the Second and Eleventh Circuits will continue to obtain different results – without any realistic prospect for Second Circuit intervention in the near future. That conflict provides strong support for certiorari.

B. The Decision Below Conflicts With This Court's Precedents

The Eleventh Circuit's government-investigation rule flouts this Court's instruction that pleading loss causation should not "'impose a great burden upon a plaintiff.'" Pet. 26 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). By requiring investors to *prove* wrongdoing at the *pleading* stage,

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[2] *See Toussie v. Powell*, 323 F.3d 178, 184 (2d Cir. 2003) ("denial of a motion to dismiss" is not "immediately appealable"); *ClearOne Communications, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011) ("as a general rule, a defendant may not, after a plaintiff has prevailed at trial, appeal from the pretrial denial of a Rule 12(b)(6) motion to dismiss").

the *Meyer* rule often impedes investors from bringing otherwise valid claims. Pet. 28-29. Here, although both courts below found that petitioners pleaded a serious Medicare fraud, they absolved respondents because the OIG investigation had not yet produced a "disclosure of actual wrongdoing" by the time petitioners brought suit. App. 12a; *see* Pet. 29-30. That exemplifies why other courts roundly reject the *Meyer* rule: requiring a "government finding of fraud" merely "reward[s] defendants who are able to successfully conceal their fraudulent activities" from the government. *Amedisys*, 769 F.3d at 324-25; *see Massachusetts Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 240 (1st Cir. 2013) ("[A] defendant's failure to admit to making a misrepresentation . . . does not necessarily preclude loss causation.").

Beyond their attempt to excise the finding-of-wrongdoing requirement from the decision below, respondents offer virtually no answer. They argue (at 20) that the "OIG investigation did not *reveal* any previously concealed *truth*," but that improper factual contention just demonstrates why petitioners deserve discovery. Market participants often view government investigations as shedding light on the accuracy of a company's statements, and they routinely draw corrective inferences based on such investigations.[3] Rather than grapple with those points, respondents simply repeat the Eleventh Circuit's blanket assertion – based on no evidence whatsoever – that the announcement of an investigation "'reveals . . . nothing more'" than the investigation's existence. Opp. 9 (quoting *Meyer*, 710 F.3d at 1201). That may prove true in some cases, depending

[3] *See* Pet. 27-28 & n.13; Fin. Economists Amicus Br. 20-23 ("Economists' Br."); Los Angeles Cnty. Emps. Ret. Ass'n et al. Amicus Br. 4-10 ("Investors' Br.").

on what discovery shows. But the panel erred in dismissing petitioners' claims without even giving them a chance to develop evidence on the issue.

Respondents' observation (at 19) that "some disclosures do not constitute corrective disclosures *as a matter of law*" is not to the contrary. No one disputes that *some* disclosures fail to raise a plausible inference of loss causation. Pet. 30-31. Nor do petitioners seek "broad insurance against market losses." Opp. 22; *see* Investors' Br. 16-17 (refuting that argument). Petitioners undeniably have pleaded a serious Medicare fraud, and they stand ready to substantiate their claims in discovery. But the Eleventh Circuit did not even pretend to engage with the specific inferences suggested by petitioners' allegations. Instead, it rejected those allegations "as a matter of law," Opp. 20, based on a legal view of government investigations that conflicts with this Court's cases and needlessly inoculates issuers like HMA from liability for egregious fraud. Pet. 28-30.

II. THE ELEVENTH CIRCUIT'S ANALYST-REPORT RULE WARRANTS REVIEW

A. The Circuits Are Divided Over Whether Reports Based On Public Sources May Serve As Corrective Disclosures

1. The decision below also heightens a four-to-two circuit split over whether an investor who invokes the fraud-on-the-market theory may plead loss causation based on a publicly sourced analyst report. Pet. 20-26. The Eleventh Circuit, joined by three other courts of appeals, rejects such allegations as a matter of law. Pet. 20-22. The Fifth and Ninth Circuits, by contrast, sustain such allegations so long as they raise a plausible inference that the market had not previously absorbed the source information.

Pet. 22-25; *see Amedisys*, 769 F.3d at 323; *In re Gilead Sci. Sec. Litig.*, 536 F.3d 1049 (9th Cir. 2008).

Respondents' effort (at 23-32) to harmonize those holdings is unpersuasive. To be sure, *Amedisys* recognized "it is *generally true* that in an efficient market, any information released to the public is presumed to be immediately digested and incorporated into the price of a security." 769 F.3d at 323 (emphasis added). But a pivotal qualifier immediately followed: a report based on public-domain information can nonetheless raise an inference of loss causation where the source information was not "readily digestible by the marketplace." *Id.*; *see Gilead*, 536 F.3d at 1057-58 (similar). The Eleventh Circuit agrees with the general statement, but it rejects the qualifier. Indeed, the Eleventh Circuit views market efficiency in absolute, binary terms, *see Meyer*, 710 F.3d at 1199 ("Either the market is efficient or it is not."), and its binary view precludes the inferences drawn by the Fifth and Ninth Circuits. Pet. 20-22, 25-26. For that reason, respondents cannot cite any case in the Eleventh Circuit sustaining loss-causation allegations based on a publicly sourced report.

Respondents further attempt (at 25-26) to confine *Amedisys* to its facts, which involved "complex economic data understandable only through expert analysis." 769 F.3d at 323. But the Fifth Circuit used those facts to articulate a broader legal rule, which respondents ignore: that the market does not immediately absorb all information "technically available to the public." *Id.* *Amedisys* drew such an inference based not only on the complexity of the source data, but also on its limited dissemination to "a narrow segment of the public" and analyst characterizations of the later disclosure as "'new news.'"

Id. Those facts illuminate the circuit conflict: here, it is plausible that Meyer's wrongful-termination lawsuit (like the *Amedisys* data) was not widely disseminated to the market, and Skolnick (like the *Amedisys* analysts) characterized her report as disclosing new facts. Pet. 25-26. Accordingly, had petitioners brought suit in the Fifth Circuit, they would have surmounted a motion to dismiss.

Respondents' reading (at 26-27) of *Gilead* is similarly flawed. Again, the factual details are less important than the Ninth Circuit's legal holding that the "ideal of a free and open public market" does not cause all public information to affect a company's "stock value" immediately. 536 F.3d at 1057-58. The Ninth Circuit later applied that holding in a context without any complex data, affirming a loss-causation finding based on "UBS reports" about student-recruiting practices that had already been reported in "various newspaper articles." *In re Apollo Grp., Inc. Sec. Litig.*, No. 08-16971, 2010 WL 5927988, at *1 (9th Cir. June 23, 2010); *see* Pet. 24-25. If an analysis of prior newspaper articles can be a corrective disclosure in the Ninth Circuit, surely the same is true of an analyst report describing an unnoticed employment lawsuit.

2. The panel's citation (App. 17a) to *Amedisys* and *Gilead* does not eliminate the conflict. Pet. 25 n.11; *cf.* Opp. 29-31. The majority tried to distinguish those cases by asserting that the market here "was able to assimilate the [Meyer lawsuit] without the assistance of the 2012 Skolnick Report." App. 17a. But that is the very type of conclusion *Amedisys* and *Gilead* forbid. Whether the market "assimilate[d]" Meyer's allegations depends not only on whether market participants could comprehend them, but

also on "how widely the information [was] disseminated." *Halliburton II*, 134 S. Ct. at 2409. In the Fifth and Ninth Circuits, the answer to that question demands a "fact-specific inquiry." *Gilead*, 536 F.3d at 1057-58. The decision below, however, refused to engage in any such inquiry, even as it paid lip service to *Amedisys* and *Gilead*. *See* App. 17a (citing both cases and then invoking legal rule that reports based on "already-public information . . . [are] simply insufficient to constitute a corrective disclosure"). Rather than ameliorate the circuit split, the panel's distortion of those cases exacerbated it.

Meyer further confirms the point. There, the court held that an investor's presentation about the issuer's real-estate holdings was not a corrective disclosure because it analyzed raw land data contained in "county property appraiser's sales lists." *Meyer*, 710 F.3d at 1198 n.9. Much like in *Amedisys*, it is plausible that such raw data had "little to no probative value in its native state." *Amedisys*, 769 F.3d at 323. But the Eleventh Circuit again swept aside that inference based on a legal conclusion: "the fact that the sources used in the [investor presentation] were already public is fatal to the Investors' claim of loss causation." *Meyer*, 710 F.3d at 1198. *Meyer*'s holding – on facts comparable to those in *Amedisys* – refutes respondents' premise (at 24) that the Eleventh Circuit allows publicly sourced reports to be corrective disclosures when the source information "in its native state cannot be understood by the marketplace."

B. The Decision Below Conflicts With This Court's Market-Efficiency Cases

The Eleventh Circuit's analyst-report rule rests on a binary view of market efficiency this Court has rejected. Pet. 31-33. It assumes, in all circum-

stances, that an efficient market "immediately digest[s] and incorporate[s]" all publicly available information. *Meyer*, 710 F.3d at 1197. That is flatly contrary to *Halliburton II*, which held that efficient markets process information differently "depending on how widely the information is disseminated and how easily it is understood." 134 S. Ct. at 2409.

Respondents do not even attempt to argue otherwise. In fact, they make no mention of *Halliburton II* at all. Rather, they again re-frame (at 36-37) the decision below as a fact-bound determination that the "Meyer action was available to (and understandable by) the wider market before Skolnick summarized it." But those facts, even if true, would not disqualify the Skolnick Report as a corrective disclosure under the proper legal framework. A piece of information's mere availability on Florida judicial dockets does not guarantee that market participants will immediately locate and digest it. Pet. 31-32. Indeed, petitioners' allegations raise a strong inference that Meyer's state-law employment lawsuit was not "widely . . . disseminated" to the market until Skolnick reported it. *Halliburton II*, 134 S. Ct. at 2409. That alone renders petitioners' loss-causation allegations plausible.[4]

In short, respondents' point (at 34-37) that the market was theoretically capable of obtaining and understanding Meyer's lawsuit is irrelevant if market participants never learned of that lawsuit in the first place. The panel's refusal to acknowledge

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[4] To the extent the decision below also implied the Skolnick Report was not a corrective disclosure because it "comprised unverified allegations," Opp. 37 n.12, it was doubly wrong and merely exacerbated the circuit split. *See Amedisys*, 769 F.3d at 322 ("[a] corrective disclosure can come from any source," including "whistleblowers").

that distinction defied this Court's precedents and misapprehended the way efficient markets work. *See* Economists' Br. 4-18; Investors' Br. 10-14.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS WILENS
ROBBINS GELLER RUDMAN
& DOWD LLP
120 East Palmetto Park Road
Suite 500
Boca Raton, Florida 33432
(561) 750-3000

JONATHAN GARDNER
CAROL C. VILLEGAS
ALEC T. COQUIN
LABATON SUCHAROW LLP
140 Broadway, 34th Floor
New York, New York 10005
(212) 907-0700

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
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1615 M Street, N.W.
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(dfrederick@khhte.com)

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