NO. 18-164

In the Supreme Court of the United States

FIRST SOLAR, INC., ET AL.,

Petitioners,

V.

MINEWORKERS' PENSION SCHEME, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief for *Amici Curiae* Securities Industry and Financial Markets Association, Chamber of Commerce of the United States of America, Pharmaceutical Research and Manufacturers of America, National Association of Manufacturers, and Business Roundtable in Support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association (SIFMA) is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's nearly one million employees, SIFMA advocates on issues affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA's mission is to support a strong financial industry while promoting fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. To further that mission, SIFMA regularly files *amicus* briefs in cases that raise issues of concern to securities industry participants.

The Chamber of Commerce of the United States of America (Chamber) is the largest business federation in the world. It represents 300,000 members directly, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the

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[1] Pursuant to Rule 37.6 of this Court, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties received timely notice of the intent to file this brief under Rule 37.2(a), and all parties have consented to the filing.

Chamber regularly files *amicus* briefs in cases that raise issues of concern to the business community.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate for public policies that encourage the discovery of life-saving and life-enhancing medicines that help patients lead longer, healthier, and more productive lives. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates as *amicus* in cases raising matters of significance to its members.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States. The NAM regularly files *amicus* briefs in cases that raise issues important to manufacturers.

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have more than $6 trillion in annual revenues, employ nearly 15 million employees, and

pay more than $220 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy and should participate in litigation as *amici* where important business interests are at stake.

This case involves the critically important issue of what proof is required to establish loss causation in private securities actions. The element of loss causation, which requires a direct causal link between a defendant's alleged misrepresentation and a plaintiff's loss, is a "key sentinel" in ensuring that such actions operate only to "deter[] fraud and promot[e] confidence in the marketplace" and not as a means to obtain settlements through vexatious litigation. *Meyer* v. *Greene*, 710 F.3d 1189, 1202 (11th Cir. 2013) (quoting *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005)). The issue at stake here is directly relevant to *amici*'s missions: the *amici* seek to promote fair markets that support capital for business growth, and each of the *amici* has many members that are public companies with exposure to private securities actions.

SUMMARY OF ARGUMENT

In 2017, more federal securities class actions were filed than in any previous year since the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), and one in about 15 S&P 500 companies (6.4 percent) was subject to such a suit. See Cornerstone Research, *Securities Class Action Filings* 1 (2017) (*2017 Year in Review*), available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-YIR; see also

John Gould, *Federal Class Action Securities Fraud Filings Hit Record Pace in H1 2017* (2017), available at https://corpgov.law.harvard.edu/2017/08/07/federal-class-action-securities-fraud-filings-hit-record-pace-in-h1-2017/. That trend has continued in 2018. See Cornerstone Research, *Securities Class Action Filings: 2018 Midyear Assessment* 1 (2018) (*2018 Midyear Assessment*), available at https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-Action-Filings%E2%80%942018-Midyear-Assessment.

In light of the increasing number of such suits, it is vital that the elements of a private securities-fraud claim be defined clearly and correctly. The Ninth Circuit decision at issue here addresses the statutorily required element of loss causation—that is, proof that "the act or omission of the defendant * * * caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. 78u-4(b)(4). A showing of loss causation ensures that a defendant is held responsible only for "economic losses that misrepresentations actually cause," rather than being forced "to provide investors with broad insurance against market losses." *Dura*, 544 U.S. at 345; see *id.* at 343 (explaining that to prove loss causation a plaintiff must point to a price decrease that was caused by the revelation of the relevant truth, and not by "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events").

The Ninth Circuit's decision sets forth a broad loss-causation standard under which there is no need to establish that any alleged fraud was ever disclosed to the market. See Pet. App. 5a-8a. That decision

directly conflicts with decisions in a number of other circuits, which have rejected the Ninth Circuit's broad standard in favor of the requirement that a plaintiff show that the market became aware of the existence of fraud or, at least, of the facts that the defendant allegedly misrepresented. The law on loss causation is therefore in a confusing state of disarray that gives rise to disparate treatment of defendants depending only on the venue in which they are sued. That split in authority calls out for resolution by this Court.

The Ninth Circuit's decision also sets the bar too low for alleging and proving loss causation—and does so on the basis of an abbreviated analysis that is untethered from the text and purposes of the relevant statute. If the loss-causation standard is weakened in that way, the result will be the very harms that Congress sought to avoid when it enacted the PSLRA in the first place: a greater number of meritless suits, a decreased opportunity to dispose of such suits at the pleading stage, increased pressure on defendants to settle, and resulting harm to the economy and the public. That threat is particularly acute in the Ninth Circuit, which over the last several years has been the locus of more securities-fraud class actions than almost any other court of appeals. See *2017 Year in Review* at 34; *2018 Midyear Assessment* at 23, 28.

In short, the decision of the court of appeals creates a conflict in the law and involves a question of critical importance not only to the business community but also to the public as a whole. This Court's review is warranted.

ARGUMENT

I. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

As the petition explains (Pet. 9-19), the Ninth Circuit's holding in this case on the standard for proving loss causation is in conflict with decisions in other circuits and leaves the law in a state of disarray. Corporations that are or may become defendants in private securities actions—including *amici*'s members—therefore are subject to varying legal standards, and varying outcomes, depending solely on the geographical location of the court considering a plaintiff's allegations. This Court should grant review to remedy the resulting confusion and unfairness.

Under this Court's decision in *Dura*, a plaintiff cannot establish loss causation merely by claiming that he purchased a security at a price that was artificially inflated by a corporation's misrepresentation. The plaintiff must also show that the decline in the security's price for which damages are sought occurred *because of* the alleged misrepresentation—that is, when "the truth" ultimately "became known"—and not because of some other factor. See *Dura*, 544 U.S. at 342-343, 347.

The Ninth Circuit nevertheless ruled in this case that loss causation does not require any showing of a revelation of fraud to the market, or even any showing of a revelation of the facts concealed by an alleged misrepresentation. The court explained that, "[t]o prove loss causation, plaintiffs need only show a causal connection between the fraud and the loss, * * * by tracing the loss back to the very facts about

which the defendant lied * * * . Disclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss." Pet. App. 5a-6a (internal quotation marks omitted). For instance, the court asserted, "[a] plaintiff may * * * prove loss causation by showing that the stock price fell upon the revelation of an earnings miss, even if the market was unaware at the time that fraud had concealed the miss." *Id.* at 7a. The court concluded that "[r]evelation of fraud in the marketplace is simply one of the infinite variety of causation theories a plaintiff might allege to satisfy proximate cause." *Id.* at 6a-7a (internal quotation marks omitted).[2]

Applying that test, the district court in this case permitted respondents to advance a highly attenuated theory of loss causation—one in which the connection between the alleged misrepresentation and the alleged loss is virtually nonexistent. See Pet. App. 8a (stating that the "the district court

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[2] That decision represents a significant weakening of Ninth Circuit law on loss causation. Other Ninth Circuit decisions, which the decision below recharacterized as nothing more than "fact specific variants of the basic proximate cause test," Pet. App. 6a-7a, had stated that loss causation can be established only if the market learns of, and reacts to, the existence of the alleged fraud. See *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 392 (9th Cir. 2010) (rejecting the argument that plaintiffs "should be able to prove loss causation by showing that the market reacted to the purported 'impact' of the alleged fraud—the earnings miss—rather than to the fraudulent acts themselves"); see also *Loos* v. *Immersion Corp.*, 762 F.3d 880, 887-888 (9th Cir. 2014); *Metzler Inv. GMBH* v. *Corinthian Colls., Inc.*, 540 F.3d 1049, 1063 (9th Cir. 2008).

applied the correct test in making [its] determination"). Respondents alleged that petitioners engaged in securities fraud by failing to disclose supposed defects in First Solar's solar panels over a defined period. See *id.* at 2a-3a, 12a-18a. The district court concluded that a reasonable jury could find that respondents' claimed loss was somehow caused by those specific alleged omissions, even with respect to loss arising from drops in stock price attributable to corporate releases that never mentioned the defects and gave no indication at all that any facts about the defects had ever been misrepresented. See *id.* at 48a-49a (discussing December 4, 2011, reduction in earnings and revenue guidance, in which the company stated that it was "recalibrating [its] business to focus on building and serving sustainable markets rather than pursuing subsidized markets"); see also *id.* at 44a-45a (discussing May 3, 2011, earnings release, which announced some additional expenses related to one of the defects but did not discuss the other). The court acknowledged, however, that under a loss-causation test requiring that petitioners' "alleged fraudulent practices became known to the market during the class period," the court would have granted summary judgment in full to petitioners. *Id.* at 35a-36a.

The Ninth Circuit's decision in this case conflicts with the decisions of other circuits. As the petition explains (Pet. 9-16), various other courts of appeals follow the statutory text and this Court's precedents on the loss-causation element, requiring revelation to the market that fraud occurred or, at the least, revelation of the specific facts that a defendant is

alleged to have concealed or misstated. Under such an approach, the analysis described above would come out differently and petitioners' exposure to liability in this case would be eliminated or reduced. See Pet. 17-18.

To take just two of the many examples detailed in the petition, the approaches taken in the Fourth Circuit and the Tenth Circuit cannot be reconciled with the Ninth Circuit's holding. In *Katyle* v. *Penn National Gaming, Inc.*, 637 F.3d 462 (4th Cir. 2011), the Fourth Circuit held that in order for loss causation to be established a plaintiff must point to a disclosure that "reveal[s] to the market in some sense the fraudulent nature of the practices about which [the] plaintiff complains." *Id.* at 473. On that basis, the court of appeals ruled that the plaintiffs had not adequately alleged loss causation. The plaintiffs claimed that the defendant violated the securities laws by omitting to inform the market that a planned transaction would not in fact close—information that the plaintiffs contended ultimately came to light through a series of disclosures. See *id.* at 468-470. But the court explained that the disclosures in question "did not 'relate back' to [the defendant's] earlier omissions of the alleged truth because they did not even inferentially suggest that [the defendant's] prior press releases were fraudulent and that the [transaction] would not close." *Id.* at 475. The court concluded that the complaint "fail[ed] to adequately plead loss causation because it [did] not allege facts" suggesting that the defendant's allegedly "fraudulent omissions over the course of [earlier] press releases ever became generally known." *Id.* at 478 (citation and internal quotation

marks omitted); see *ibid.* (because disclosures did not "reveal to the market any undisclosed truth about [the defendant's] undisclosed knowledge and resulting fraudulent omissions, any subsequent decline in [the defendant's] share price cannot be attributed to those omissions"); see also, *e.g.*, *Singer* v. *Reali*, 883 F.3d 425, 445-446 (4th Cir. 2018). Under the rule applied in *Katlye*, courts in the Fourth Circuit would not accept—as the Ninth Circuit did here—that the mere disclosure of an "earnings miss" is sufficient to establish loss causation absent exposure of some underlying misconduct. Pet. App. 7a.

Similarly, in *In re Williams Securities Litigation—WCG Subclass*, 558 F.3d 1130 (10th Cir. 2009), the Tenth Circuit held that "loss causation requires proof that a market decline was the result of the revelation of a misrepresentation or omission." *Id.* at 1135; see *id.* at 1137 ("The plaintiff bears the burden of showing that his losses were attributable to the revelation of the fraud and not the myriad other factors that affect a company's stock price."); *id.* at 1143 ("[L]oss causation demands that plaintiffs show that their losses were caused by a revelation of the fraud."). The plaintiffs alleged that defendants misrepresented the reasons for a spin-off and the financial health and prospects of the spun-off entity. See *id.* at 1133. But the court of appeals rejected the plaintiffs' theory of loss causation on the ground that they did not adequately "show some mechanism for how [that] truth was revealed" and "did not show how disclosures should be considered 'corrective' such that corresponding losses could be reliably attributed to the revelation of fraud." *Id.* at 1138,

1139-1140; see *id.* at 1139 (pointing to plaintiffs' "failure to explain how the truth was revealed to the market and failure to then link the revelation of truth to a corresponding loss"). Under the Tenth Circuit's test, the proof of loss causation that the Ninth Circuit has endorsed, which does not require any revelation of a misrepresentation or even of the "true" facts that were allegedly misrepresented, would not be adequate.

Thus, in either the Fourth Circuit or the Tenth Circuit, any claims in this case premised not on a revelation of truth to the market, but rather on financial developments that can allegedly be traced back along an extended chain of causation to some fact that had been purportedly misrepresented in the past, would fail to survive summary judgment. See Pet. 10, 14; see also *id.* at 9-16 (explaining similar approach adopted by additional circuits). Continued application of such different legal standards by different courts of appeals, which gives rise to disparate results in different parts of the country, is untenable. And the Ninth Circuit's diluted standard will draw cases to that Circuit that plaintiffs otherwise would have filed elsewhere. See *infra* pp. 14, 20. This Court should intervene to resolve the division in authority. See Sup. Ct. R. 10.

II. Clarification Of The Loss-Causation Standard Is Critically Important

Determining the proper standard for loss causation is exceptionally important not only because of the division of authority on the issue but also because of the serious consequences of making the standard too easy to satisfy. The Ninth Circuit's

decision is wrong as a matter of statutory interpretation, and if left in place it would give rise to the precise harmful effects that Congress intended to avoid when enacting the loss-causation requirement.

Congress's purpose in enacting the PSLRA was to stem "the routine filing of lawsuits against issuers of securities * * * whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, at 31 (1995); see, *e.g.*, *Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377, 390 (2014) (stating that, through the PSLRA, "Congress sought to reduce frivolous suits and mitigate legal costs for firms and investment professionals that participate in the market for nationally traded securities"). In service of that purpose, Congress expressly imposed on securities-fraud plaintiffs a requirement that was previously implicit in Section 10(b) and Rule 10b-5: the burden of pleading and proving that "the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover." 15 U.S.C. 78u-4(b)(4); see 15 U.S.C. 78u-4(e)(1) (limiting damages to the difference between the stock purchase price and "the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market"); see also 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. The legislative history of the PSLRA describes the loss-causation

requirement as a "strong" one, S. Rep. No. 104-98, at 15 (1995), that is specifically "intended to reduce the cost of raising capital," *id.* at 7.

The standard set forth in the decision below, however, makes the loss-causation requirement in the Ninth Circuit a weak one. All companies are subject to risks, and an unrevealed fraud does not lurk beneath every disappointing piece of financial news. But any time a company's stock drops in price, a plaintiff can attempt to come up with some allegation that the facts giving rise to the drop in price were insufficiently anticipated and disclosed at some earlier point in time. See, *e.g.*, *Metzler Inv. GMBH* v. *Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 (9th Cir. 2008) ("So long as there is a drop in a stock's price, a plaintiff will always be able to contend that the market 'understood' a * * * statement precipitating a loss as a coded message revealing the fraud."); cf. *Bastian* v. *Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) ("No social purpose would be served by encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through offering memoranda with a fine-tooth comb in the hope of uncovering a misrepresentation.").

If that kind of allegation is understood as one of an "infinite variety" of ways in which loss causation can be established, Pet. App. 6a-7a, then the loss-causation requirement will be easier to satisfy, particularly at the pleading stage of the case, than Congress intended. See, *e.g.*, Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10b-5 Causes-of-Action: The Implications of* Dura Pharmaceuticals, Inc. *v.* Broudo, 63 Bus. Law. 163,

174-175 (2007) (explaining that a theory similar to the one adopted by the Ninth Circuit here "effectively vitiates the loss causation requirement" because "[w]ithout imposing a requirement that there be a corrective disclosure * * * , one runs the risk that the loss causation requirement would have been deemed satisfied even if there would have been the same negative price market reaction to the negative news without the conduct that ran afoul of Rule 10b-5"). Indeed, plaintiffs' lawyers have already described the decision below as a "game changer" that "significantly raises the hurdle for defendants to challenge loss causation at the pleading stage." Carol Villegas & James Christie, *9th Circ. Decision Could Be Game-Changer For Investors*, Law360 (Feb. 2, 2018), available at https://www.law360.com/articles/1008644/9th-circ-decision-could-be-game-changer-for-investors.

Such a change in the law cannot be squared with the text of the PSLRA or with pertinent language in this Court's decisions.[3] First, the Ninth Circuit's decision is inconsistent with several provisions of the PSLRA. Section 78u-4(b)(4), which sets forth the requirement to prove loss causation in a private

[3] Notably, the Ninth Circuit did not engage in any standard statutory interpretation of the loss-causation provision; rather, it relied only on a single law review article written by lawyers at a firm that specializes in filing securities-fraud suits. See Pet. App. 7a; Jay W. Eisenhofer, Geoffrey C. Jarvis, & James R. Banko, *Securities Fraud, Stock Price Valuation, and Loss Causation: Toward a Corporate Finance-Based Theory of Loss Causation*, 59 Bus. Law. 1419, 1419 n.a1 (2004); GELaw.Com, *U.S. Securities Litigation*, http://www.gelaw.com/practice-areas/securities-litigation/.

securities action, suggests a tight connection between the alleged misrepresentation and the loss at issue, mandating proof that the specific "act or omission of the defendant alleged to violate this chapter"—that is, the misrepresentation itself—"caused the loss." 15 U.S.C. 78u-4(b)(4). And Section 78u-4(e)(1) makes clear that no actionable loss occurs unless the market actually learns of the fact that a misrepresentation was previously made, because it limits damages associated with the market price of a security to the difference between the original purchase or sale price and the price during a three-month period that begins when "the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. 78u-4(e)(1). Congress would hardly have linked damages to the dissemination of corrective information if a plaintiff could establish the necessary element of loss causation in the absence of any such dissemination. See Pet. 21.

Second, the standard set forth in the decision below cannot be reconciled with this Court's descriptions of the PSLRA's loss-causation provision. According to the Ninth Circuit, "[r]evelation of fraud in the marketplace is simply one of the infinite variety of causation theories a plaintiff might allege to satisfy proximate cause," and loss causation may be established even if "the alleged fraud is not necessarily revealed prior to the economic loss." Pet. App. 5a-7a. But in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804 (2011), the Court stated that the provision requires "the revelation of a misrepresentation," not simply the occurrence of some event that could potentially be the result of an

undisclosed fraud. *Id.* at 813. Such a "correction to a prior misleading statement" and "subsequent loss [that] could not otherwise be explained by some additional factors revealed then to the market," the Court explained, is "the loss causation requirement as we have described it." *Id.* at 811-812. And in *Dura*, the Court reasoned that under the PSLRA a plaintiff may recover only when a loss is the "result" of the market's reaction to "the truth" about the defendant's misrepresentations. *Dura*, 544 U.S. at 342, 344.

The descriptions in *Halliburton* and *Dura* of what loss causation requires are consistent with this Court's acceptance of the "fraud on the market" theory of the reliance element of a securities-fraud claim—that is, the theory that "whenever the investor buys or sells stock at the market price, his 'reliance on any public material misrepresent-tations . . . may be presumed for purposes of a Rule 10b-5 action.'" *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014) (citation omitted) (ellipses in original). If for purposes of establishing reliance the market price of a stock is considered to be inflated by the existence of a misrepresentation, then the price will be "corrected"—and an investor will suffer a loss that is causally linked to the misrepresentation—only if the market actually learns that a false statement was made. See *Meyer* v. *Greene*, 710 F.3d 1189, 1195-1198 (11th Cir. 2013) ("The efficient market theory * * * is a Delphic sword: it cuts both ways."); *FindWhat Inv'r Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1309-1312 (11th Cir. 2011); Thomas Lee Hazen, *Treatise on the Law of Securities Regulation*

§ 12:93 (May 2018) ("[L]oss causation cannot be established solely by a statement that plaintiff points to as revealing the company's 'true financial condition' where the statement does not directly reveal the prior misstatements. This is because loss causation requires a direct link between the corrective disclosure and the alleged fraud.").

The Ninth Circuit's departure from the requirements of the PSLRA is likely to have the very consequences that the statute was intended to deter. As this Court has often recognized, securities cases present a "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (citation omitted). A change in the law that makes it more difficult for defendants in such cases to prevail on a motion to dismiss or a summary judgment motion creates enormous pressure to settle—especially if the suit is a class action, in which the amount of damages sought is often very large. See, *e.g.*, S. Rep. No. 104-98, at 7 (1995) ("If a defendant cannot win an early dismissal of the case, the economics of litigation may dictate a settlement even if the defendant is relatively confident that it would prevail at trial.") (internal quotation marks omitted). That pressure to settle means that "plaintiffs with weak claims" are able "to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-164 (2008); see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (noting the danger of permitting a securities plaintiff "with a largely groundless claim to simply

take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value"); U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation* 5 (Feb. 2014) (*Economic Consequences*); Pet. 22-23.

When defendants must bear that burden, the economy as a whole suffers. That is because "uncertainty and excessive litigation can have ripple effects." *Central Bank*, 511 U.S. at 189. Expending time and resources in litigating and settling securities cases that lack merit not only negatively affects the defendant corporations themselves; it also increases the cost of capital, discourages beneficial economic activity, and otherwise inflicts economic damage that is ultimately "passed along to the public." *SEC* v. *Tambone*, 597 F.3d 436, 452-453 (1st Cir. 2010) (Boudin, J., concurring); see S. Rep. No. 104-98, at 4, 8, 14 (1995); Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 948 (1993) ("Unnecessary civil * * * liability diminishes the return to, and increases the cost of, capital."), *cited in Central Bank*, 511 U.S. at 189; Pet. 23. For example, a pharmaceutical company that uses funds to settle a meritless securities case triggered not by any fraud but only by "changed economic circumstances" that reduce the company's stock price, *Dura*, 544 U.S. at 343, thereby has fewer funds available to invest in the extraordinarily costly process of research and development of beneficial medications, see, *e.g.*, *Economic Consequences* at 20-21; Joseph A. DiMasi

et al., *Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs*, 47 J. Health Econ. 20, 31 (2016).

It is for precisely such reasons that this Court in *Dura* rejected, as inconsistent with the PSLRA, a loss-causation standard adopted by the Ninth Circuit that was insufficiently demanding. In *Dura*, the Court held that a plaintiff cannot satisfy the loss-causation requirement "simply by alleging in the complaint and subsequently establishing that the price of the security on the date of purchase was inflated because of [a] misrepresentation." *Dura*, 544 U.S. at 338 (internal quotation marks and emphasis omitted). "Given the tangle of factors affecting price" at the time the security is ultimately sold, the Court explained, an inflated purchase price at most "suggests that the misrepresentation * * * touches upon a later economic loss"—but to "touch upon a loss is not to *cause* a loss, and it is the latter that the law requires." *Id.* at 343 (internal quotation marks omitted). The Court emphasized that a weak loss-causation standard would "bring about harm of the very sort the statutes seek to avoid" by "tend[ing] to transform a private securities action into a partial downside insurance policy." *Id.* at 346-348.

The same considerations apply here. Under the Ninth Circuit's decision, loss causation may be deemed adequately alleged despite the absence of a direct and causal link between any misrepresentation and a drop in stock price. And that approach would do exactly what this Court said in *Dura* should not be done with respect to the loss-causation requirement—draining it of so much force that defendants are effectively forced to provide

"investors with broad insurance against market losses." *Dura*, 544 U.S. at 345; see *id.* at 347-348.

The harm of that result is plain in light of the increasing number of securities class actions that corporations face. As noted above, more federal securities class actions were filed in 2017 than in any previous year since the enactment of the PSLRA, and one in about 15 S&P 500 companies (6.4 percent) was named a defendant in those actions. See *2017 Year in Review* at 1; *id.* at 3 (stating that "companies on U.S. exchanges were more likely to be the subject of a class action" in 2017 "than in any previous year"); *id.* at 14 (stating that 8.4 percent of U.S. exchange-listed companies were subject to federal securities class actions). In the first half of 2018, that high pace of filings continued, making the 24-month period from mid-2016 to mid-2018 the most active period for securities class-action suits since the PSLRA went into effect. See *2018 Midyear Assessment* at 1. If that pace is sustained in the second half of 2018, 9.6 percent of S&P 500 companies will be subject to such a suit this year. See *id.* at 2, 14, 19.

Moreover, the harm of a loose loss-causation standard is especially acute in the Ninth Circuit. More securities class actions are filed in that circuit than almost anywhere else in the country, see *2017 Year in Review* at 34, 43; *2018 Midyear Assessment* at 2—and the popularity of that forum has increased significantly in the wake of the decision below, see *2018 Midyear Assessment* at 23; *id.* at 28 (more securities class actions filed in the Ninth Circuit than in any other circuit in the first half of 2018). That popularity is only likely to continue to increase

if the court of appeals' decision remains in place, because plaintiffs view the Ninth Circuit's loss-causation standard as especially favorable to them. See *supra* p. 14; Pet. 23.

The Ninth Circuit is also the home of many start-ups and cutting-edge technology companies, which tend to have volatile stock prices and are therefore particularly vulnerable to meritless securities litigation. See S. Rep. No. 104-98, at 9 (1995) ("Smaller start-up companies bear the brunt of abusive securities fraud lawsuits. Many of these companies are high-technology companies which, by their very nature, have unpredictable business prospects and, consequently, volatile stock prices."); *id.* at 5 (stating that "high-tech, bio-tech and other growth companies * * * are sued disproportionately in 10b-5 litigation"); *2017 Year in Review* at 2, 31-32, 34 (noting high number of 2017 suits against biotechnology and pharmaceutical companies); *2018 Midyear Assessment* at 2 (noting significant number of suits in first half of 2018 against Internet companies). Given that disappointing corporate earnings or prospects are usually the result of ordinary business and market developments rather than fraud, it is imperative to guard against a situation in which such companies—or any other companies subject to suit in the Ninth Circuit—might be forced to pay out large settlement amounts simply because there is some after-the-fact claim that they did not adequately disclose an economic risk that is apparent only in hindsight.

For all of those reasons, this Court's review is warranted here. Interpretation of the loss-causation standard, which is at issue in every private

securities-fraud case, has real and serious practical consequences across a vast swath of the economy, and it is critical that the standard be defined clearly and properly. The Court should hear this case so as to resolve the confusion in the law and ensure that loss causation continues to be, consistent with Congress's intent and this Court's decision in *Dura*, a "strong" requirement, S. Rep. No. 104-98, at 15 (1995), that serves a strong gatekeeping function.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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