No. 20-1364

IN THE

Supreme Court of the United States

BOFI HOLDING, INC., *et al.*,

Petitioners,

v.

HOUSTON MUNICIPAL EMPLOYEES PENSION SYSTEM,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Whether "disputed public allegations about an issuer or its business, without any additional corroborating disclosure or event," can establish the loss-causation element of a 10b-5 securities fraud claim.

2. Whether the magnitude of a defendant company's stock price drop can be considered when asking whether a plaintiff has adequately pleaded loss causation.

3. Whether the Court should overrule *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) to the extent it recognizes the "efficient capital markets hypothesis."

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INTRODUCTION

Petitioners present three questions, each less worthy of this Court's attention than the last. Only one involves an alleged circuit conflict, and on examination, the only "conflict" it presents is between, on one hand, two very sound decisions from highly respected judges (Judge Kethledge of the Sixth Circuit and Judge Watford of the Ninth Circuit), and an out-of-context line of dictum from an unpublished Eleventh Circuit decision on the other. Moreover, even if there were some more generalized tension between the opinions at issue, it is one this Court has already recently declined to resolve.[1] Meanwhile, petitioners' second question presented seeks nothing more than error correction based on a highly dubious misreading of one of this Court's cases. And their third asks this Court to overrule a statutory construction precedent it recently reaffirmed in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (*Halliburton II*). The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. The plaintiffs here are shareholders who sued petitioners under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. §240.10b-5. Pet. App. 5a.

Section 10(b) and Rule 10b-5 "prohibit making any material misstatement or omission in connection

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[1] *See Cmty. Health Sys., Inc. v. N.Y.C. Emps.' Ret. Sys.*, 139 S. Ct. 310 (2018) (No. 17-1453).

with the purchase or sale of any security." *Halliburton II*, 573 U.S. at 267. This Court has "long recognized an implied private cause of action to enforce" these prohibitions. *Id.*

To state such a claim, a plaintiff must adequately plead six elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." 573 U.S. at 267 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460-61 (2013)). This case principally raises issues arising from the sixth element (loss causation), but the fourth element (reliance) is implicated, too.

2. "The reliance element 'ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury.'" *Halliburton II*, 573 U.S. at 267 (quoting *Amgen*, 568 U.S. at 461). The most straightforward showing of reliance is that a plaintiff "was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation." *Id.* (citation omitted). In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), however, this Court recognized that requiring such proof in every case "would place an unnecessary unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market," *id.* at 245, and would bar plaintiffs "from proceeding with a class action" because "individual issues … would … overwhelm[] the common ones," rendering Fed. R. Civ. P. 23(b)(3) certification impossible, *id.* at 242.

Basic therefore stands for the proposition "that securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation." *Halliburton II*, 573 U.S. at 268. That presumption is based on the "'fraud-on-the-market' theory, which holds that 'the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.'" *Id.* (quoting *Basic*, 485 U.S. at 246). In 2014, this Court reaffirmed the continuing vitality of *Basic* and the presumption after granting certiorari to consider whether *Basic* should be modified or overruled. *Id.* at 269.

To invoke the presumption, a plaintiff must show: "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton II*, 573 U.S. at 268. And even if a plaintiff makes that prima facie showing, defendants can rebut the presumption with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Id.* at 269 (quoting *Basic*, 485 U.S. at 248) (brackets in original). Defendants can, for example, "prove a lack of price impact" at the class-certification stage. *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. ____ (2021), slip op. at 11.

3. "Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011) (*Halliburton I*). Much like proximate cause in the tort context, loss causation "requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss" to the plaintiff herself. *Id.*; *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-46 (2005). Plaintiffs often show this by demonstrating that a defendant's misstatements artificially inflated the share price, which in turn led to a price drop after a "corrective disclosure." In that scenario, a loss has been caused for any plaintiff who purchased in the interim between when the defendant started making false or misleading statements and when the fraud became known to the market. And in this vein, a large price drop after the market receives information that contradicts what the defendant has been saying of course constitutes strong *prima facie* evidence that those allegedly fraudulent statements had been inflating the stock price, causing a loss to anyone who purchased *after* the price started being artificially inflated and *before* the fraud was publicly revealed. Pet. App. 11a-12a.

At one point, certain courts of appeals took a broader view and considered loss causation established by the purchase of a price-inflated stock alone. In other words, they did not require plaintiffs to *also* allege that they held shares through the popping of the bubble that the fraud had blown up. In *Dura*, however, this Court clarified that merely purchasing during the inflation "will not itself constitute or proximately cause the relevant economic loss." 544 U.S. at 342. Instead, a plaintiff needs to "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind" between the loss and the misrepresentation. *Id.* at 347. And in the ordinary case, that requires alleging both that a plaintiff purchased while the stock price was inflated, and that the revelation of the alleged fraud caused the price to fall back down while the plaintiff still held her shares.

B. Factual and Procedural Background

1. BofI Holding, Inc. offers consumer and business checking, savings, and time-deposit accounts, as well as financing for real estate, businesses, and vehicles.[2] Pet. 7.

From September 4, 2013 to February 3, 2016 (the "Class Period"), BofI and several of its executives misled investors into believing that BofI was a safer investment than it was. Pet. App. 5a. Specifically, "defendants made false or misleading statements touting the bank's conservative loan underwriting standards, its effective system of internal controls, and its robust compliance infrastructure." *Id*. For example, with regard to the Company's underwriting standards, BofI made statements such as: "We continue to maintain our conservative underwriting criteria and have not loosened credit quality to enhance yields or increase loan volumes." *Id.* at 6a. And concerning its internal controls and compliance infrastructure, the Company

[2] BofI Holding, Inc. has since changed its name to Axos Financial, Inc. To avoid confusion, this brief refers to the corporate petitioner (as well as its subsidiary, previously known as BofI Federal Bank) as "BofI." *See* Pet. 7 n.1.

claimed to "have made significant investments in [its] overall compliance infrastructure," and to "have spent a significant amount of money on [Bank Secrecy Act and anti-money laundering] compliance upgrades and new systems and new personnel." *Id.* at 6a-7a.

Plaintiffs allege (plausibly, according to district court holdings petitioners do not challenge here, *see* Pet. App. 6a-7a) that those statements were untrue. Indeed, on two separate occasions, *id.* at 37a-38a, the district court held below that plaintiffs sufficiently alleged that those statements were actionably false or misleading. *Id.* at 6a-7a. It did so based on confidential witness statements from previous BofI employees with personal knowledge of contemporaneous facts. *Id.* At trial, plaintiffs will attempt to prove that this insider testimony was credible and correct, so that they can prove BofI's contrary public statements were misleading or false.

Plaintiffs relied on different insider allegations, however, when it came to alleging loss causation. On that score, plaintiffs alleged that a whistleblower complaint filed publicly by Charles Erhart—a former BofI auditor—let the air out of a BofI's artificially inflated stock price, which had been kept aloft by the false statements above.[3] Pet. App. 9a; *see also Erhart v.*

[3] Plaintiffs also alleged other corrective disclosures in the form of eight anonymous blog posts that charged BofI with "allegations of potential regulatory violations" and "evidence of risky loan origination partnerships." Pet. App. 9a. The complaint alleged that after each blog post appeared, BofI's stock price dropped meaningfully. *Id.* at 10a. The Ninth Circuit held that the posts did not constitute corrective disclosures because they relied on information the public already had and because "[t]he

BofI Holding Inc., No. 15-cv-2287 (S.D. Cal. Oct. 13, 2015).

That complaint "alleged rampant and egregious wrongdoing at the company, including that BofI had doctored reports submitted to the bank's primary regulator … and that BofI had made high-risk and illegal loans to foreign nationals." Pet. App. 9a. Those allegations cannot be squared with BofI's public statements. *Id.* at 14a-15a. For example, Erhart alleged that he prepared a memorandum summarizing a third-party vendor's report on BofI operations which had identified about 30% of BofI's customers as having red flags, and that when he gave that list to his superior, the superior demanded that the list be altered before going to the regulator. *Id.* at 15a. Erhart further alleged retaliation from BofI for his attempts to report compliance violations. *Id.* If believed, such allegations plainly "render BofI's prior assertions about the strength of its underwriting standards, internal controls, and compliance infrastructure false or misleading." *Id.*

And they were believed: The complaint, along with a contemporaneous *New York Times* article that published the details of it, was promptly digested and credited by the market. Pet. App. 9a. By the close of trading the next day, BofI's stock price had fallen over 30% on "extremely high trading volume." *Id.* This suit followed.

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posts were authored by anonymous short-sellers who had a financial incentive to convince others to sell," such that a "reasonable investor reading these posts would have likely taken their contents with a healthy grain of salt." *Id.* at 27a-28a. As such, those posts are not at issue here.

2. In a series of orders before the order at issue here, the district court held that plaintiffs adequately pleaded the first five elements of a 10b-5 claim. Pet. App. 5a. As to "falsity," the court held that a number of the bank's statements concerning its underwriting standards, as well as its internal controls and compliance systems, were adequately alleged to be actionably false. *Id.* at 6a. It reached that conclusion largely by crediting the allegations of confidential former BofI employees, finding them reliable and based on personal knowledge. *Id.* at 7a. The court also found that shareholders adequately alleged scienter with respect to BofI's CEO, and thus the company as well. *Id.* at 8a. All other elements save loss causation—including the use of *Basic* to prove reliance—were uncontested. *See id.*

On loss causation, however, the district court ruled for BofI. Ignoring that the market had clearly believed Erhart's allegations, the court reasoned that the disclosures in his complaint could not be used to establish loss causation because "unconfirmed accusations of fraud" could not disclose to the market that BofI's prior statements were false. Pet. App. 10a. The district court therefore dismissed. *Id.*

3. The Ninth Circuit reversed in relevant part, holding that plaintiffs "adequately pleaded a viable" 10b-5 claim "for the two categories of misstatements the district court found actionable, with the Erhart lawsuit serving as a potential corrective disclosure." Pet. App. 29a. The court of appeals first "agree[d] with the district court that [plaintiffs] adequately alleged falsity and scienter with respect to misstatements concerning BofI's underwriting standards, internal controls, and compliance infrastructure." *Id.* at 10a.

Thus, in assessing loss causation, the court began "with the premise that BofI's misstatements were false" (as plaintiffs had sufficiently alleged), "and ask[ed] whether the market at some point learned of their falsity." *Id.* at 16a (emphasis omitted). When "[v]iewed through that prism," the court found, "the relevant question for loss causation purposes is whether the market reasonably *perceived* Erhart's allegations as true and acted upon them accordingly." *Id.* And the court easily concluded that the answer to that question was "yes." *Id.*

In particular, the court of appeals determined that the complaint plausibly (and with particularity, under Fed. R. Civ. P. 9(b), as required by the Ninth Circuit) alleged that the market found Erhart's allegations credible and acted upon them because (1) the Erhart allegations were "highly detailed and specific"; (2) they were based on firsthand knowledge; (3) the timing and magnitude of the price drop, as well as the high trading volume, "bolster[ed]" the credibility inference; and (4) Erhart's potential monetary motivations for suing BofI were not strong enough to discount those credibility determinations. Pet. App. 16a-17a. The court also rejected a categorical rule that contested allegations in a lawsuit can never qualify as corrective disclosures, reasoning that "short of an admission by the defendant or a formal finding of fraud," all corrective disclosures would be contestable. *Id.* at 17a. The court then distinguished its own cases in which it held that mere announcements of investigations or complaints by outsiders had not sufficed to support a plausible allegation of loss causation. *Id.* at 18a-19a.

In so doing, the court highlighted the numerous factors that may bear on the appropriate determination of this question. *Id.* at 14a-19a.

Judge Lee concurred in part and dissented in part. With respect to the Erhart allegations, he wrote that "if a securities fraud lawsuit turns on insider allegations of wrongdoing in a whistleblower lawsuit, I would prefer a bright-line rule that requires an external disclosure or evidence that confirms those allegations." Pet. App. 35a. While Judge Lee would not require "a *mea culpa* from the company," he would like "perhaps a surprise restatement of earnings, an unexplained announcement about an increase in reserves, or some other information that confirms those allegations and thus acts as a corrective disclosure." *Id.*

4. The Ninth Circuit denied petitioners' request for rehearing and rehearing *en banc*. Pet. 12; Pet. App. 73a. This petition followed.

REASONS FOR DENYING THE WRIT

I. The First Question Presented Does Not Warrant Review.

A. There Is No Circuit Conflict.

Without defining their terms, petitioners first ask whether "disputed public allegations" can be used to establish the loss-causation element of a 10b-5 claim, at least without "any additional corroborating disclosure or event." Pet. i. They allege a shallow conflict on this broad question between the Ninth and Sixth Circuits on one hand and the Eleventh Circuit on the other. Pet. 13-16. But this purported split does not hold up to even modest scrutiny. First, it conflates two rather different kinds of cases: one involving specific factual allegations made in a whistleblower complaint (as here), and the other involving mere announcements of investigations into the defendant companies. And this conflation is necessary to support the petition because it is quite clear that the Ninth and Eleventh Circuits treat the latter category of cases the same, and the Eleventh Circuit's only published decision concerns just such a case. Accordingly, the split depends entirely on an *unpublished* Eleventh Circuit decision that is easily distinguished from this case. And even if there were some nascent conflict here, this overly broad question requires additional percolation, particularly because—as petitioners themselves have highlighted—the Ninth Circuit's take on the very broad question petitioners have chosen to confusingly present is itself far from clear—likely because, at such a high level of abstraction, this is really just a fact-bound determination that varies with each particular case.

1. *Investigation Announcements*

The Eleventh and Ninth Circuits have both published decisions in cases where the alleged corrective disclosure for purposes of loss causation is the announcement of an investigation into the defendant firm. And both courts held that those announcements could not play the corrective-disclosure role. That is the beginning and end of petitioners' alleged circuit split.

The Eleventh Circuit case in this pair is *Meyer v. Greene*, 710 F.3d 1189 (11th Cir. 2013), which did not address allegations in a whistleblower complaint or any kind of separate complaint at all. Instead, *Meyer* held that (1) the disclosure of information in a presentation made by an outsider that was "gleaned entirely from public filings and other publicly available information" could not show loss causation because, under the fraud-on-the-market theory, any publicly available information would have already been factored into the issuer's stock price ahead of that presentation, *id.* at 1197-1200; and (2) the announcement of an informal SEC inquiry and the later announcement of an SEC private order of investigation could not constitute a corrective disclosure because "the SEC never issued any finding of wrongdoing or in any way indicated that the Company had violated the federal securities laws," *id.* at 1200-02. As the court explained, "[t]he announcement of an investigation reveals just that—an investigation—and nothing more." *Id.* at 1201.

The Ninth Circuit agrees. In *Loos v. Immersion Corp.*, 762 F.3d 880, 883 (9th Cir. 2014), the court considered whether a company's announcement that it was "conducting an internal investigation into certain previous revenue transactions" could alone establish loss causation, *id.* at 885. The court decided that "the mere announcement of an investigation is not enough." *Id.* at 889. In so holding, it explicitly relied on *Meyer*. *Id.* at 890 ("We agree with the Eleventh Circuit's reasoning."). The Ninth Circuit thus explained that "at the moment an investigation is announced, the market cannot possibly know what the investigation will ultimately reveal." *Id.* And yet it also highlighted that, while an investigation announcement *itself* is insufficient, "[t]o the extent an announcement contains an express disclosure of actual wrongdoing, the announcement alone might suffice." *Id.* at 890 n.3.

Notably, in the opinion below, the Ninth Circuit expressly maintained the continuing vitality of this rule. Pet. App. 18a. It thus distinguished cases involving investigation announcements from cases (like this one) involving independent, and highly detailed, allegations of wrongdoing that contradict the allegedly fraudulent statements that are set out in a securities suit against the defendant. *Id.* The Eleventh and Ninth Circuits' respective analyses entail nothing more than fact-bound variations among cases with different fact patterns—not a "split" on a dispositive rule.

Meyer is the only published case on petitioners' side of their own imagined split. And as the foregoing shows, the Ninth and Eleventh Circuits agree on how to treat a case like *Meyer*, whose facts are not even implicated here. That is enough to deny review on petitioners' first question.

2. *Allegations Within a Separate Complaint*

Petitioners' effort to show otherwise requires wrenching dicta in an unpublished Eleventh Circuit decision out of context. And even if petitioners were not wrong about what that case says, that is not the kind of circuit conflict this Court should resolve.

a. As explained *supra* 8-10, the Ninth Circuit below held that allegations within a whistleblower complaint can, in appropriate instances, suffice to allege disclosure of the fraud for purposes of alleging loss causation. Pet. App. 17a. And it decided that, in this case, the complaint at issue was in fact sufficiently credible to sustain plaintiffs' pleading-stage allegation that the market "perceived Erhart's allegations as credible and acted upon them on the assumption that they were true." *Id.* at 16a.

Notably, in so doing, the Ninth Circuit distinguished its own decision in *Loos* on the basis that "an [investigation] announcement does not reveal to the market any *facts* that could call into question the veracity of the company's prior statements," whereas here, "Erhart's lawsuit disclosed facts that, if true, rendered false BofI's prior statements about its underwriting standards, internal controls, and compliance infrastructure." Pet. App. 18a. Put another way, the Ninth Circuit treats announcements regarding the beginning of an investigation as insufficient to establish loss causation because, taken as true, the statement "we are investigating Company X for misconduct" does not contradict any plausibly actionable misrepresentation (other than perhaps a company's wrongful concealment of the existence of an investigation)—even if the statement regarding the investigation is taken as true. In contrast, allegations within a complaint that are contrary to alleged (and, here, concededly actionable) misstatements do reflect public disclosure of the fraud on the (procedurally commanded) assumption that the statements in the complaint are true and the alleged misstatements are false.[4]

The Sixth Circuit has also rejected any categorical rule about allegations within separate complaints. *See Norfolk Cnty. Ret. Sys. v. Cmty. Health Sys., Inc.*, 877 F.3d 687, 696 (6th Cir. 2017) (Kethledge, J.), *cert. denied*, 139 S. Ct. 310 (2018). Like the Ninth Circuit, the Sixth Circuit holds that an allegation revealed in a

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[4] To the extent petitioners (in various half-hidden footnotes) do not concede that the falsity of their misstatements has been adequately alleged for present purposes, *see, e.g.*, Pet. 10 n.4, 11 n.5, that is of course a fatal problem for their petition. It shows that petitioners cannot coherently present their question without disputing premises that were litigated and decided below *and on which they have not sought certiorari here*. This Court would have to consider this *loss-causation* case on the assumption that petitioners in fact made actionably fraudulent misstatements. And petitioners' footnotes show that, on that assumption, their position makes no sense at all.

complaint should be considered on a case-by-case basis "to determine whether the market could have perceived it as true." *Id.* The court reasoned that "every representation of fact is in a sense an allegation, whether made in a complaint, newspaper report, press release, or under oath in a courtroom." *Id.* And it then noted that, as a general matter, some of those are more credible that others. But the court of appeals stressed that, even within each category, there can be different levels of credibility, so courts should consider whether the subject disclosure is a credible revelation of the fraud to the market for loss-causation purposes individually, not categorically. *Id.* The Sixth Circuit then held that plaintiffs had adequately alleged loss causation there. And, notably, the defendant in that case sought review of that decision—alleging the same disagreement with the Eleventh Circuit—and this Court denied review. *See supra* 1 n.1.

b. That is likely because, just like petitioners there, the only case petitioners can cite here as presenting any actual conflict with the Sixth Circuit's decision in *Norfolk* or the decision below is *Sapssov v. Health Management Associates*, 608 Fed. Appx. 855 (11th Cir. 2015) (per curiam), *cert. denied*, 137 S. Ct. 1331 (2017). And, among many other problems for petitioners, *Sapssov* is a non-precedential, unreported decision that cannot create a conflict warranting this Court's review. *See* 11th Cir. R. 36-2.

In any event, *Sapssov* is readily distinguishable. In *Sapssov*, the plaintiffs tried to forge a "corrective disclosure for the purpose of establishing loss causation" from "two partial disclosures"—an OIG investigation and 2012 "Skolnick" Report. 608 Fed. Appx. at 862. Under a straightforward application of *Meyer*, the Eleventh Circuit first held that the OIG investigation alone could not suffice because it was only an investigation announcement. *Id.* at 863. And it then rejected the Skolnick Report as well because it "summarized facts from [a whistleblower] case that had existed in publicly accessible court dockets for three months" before the Report came out, and the disclosure of already-public information cannot qualify as a corrective disclosure. *Id.* Thus, the court held that the "lack of new information" in the report was "fatal" to plaintiffs' loss-causation allegation. *Id.* (internal quotation marks omitted).

Neither holding is implicated here or in *Norfolk*. Indeed, while petitioners argue that *Norfolk* "confronted essentially the same loss causation theory advanced in *Sapssov*," Pet. 15, the Sixth Circuit expressly distinguished *Sapssov* on the ground that the analyst report at issue there "merely summarized a whistleblower complaint filed months before" and therefore "was not new information," *Norfolk*, 877 F.3d at 697. Petitioners use a broad brush in an attempt to paint *Sapssov* as reaching some expansive conclusion that the Sixth and Ninth Circuits have rejected. But the reality is that even the Sixth and Ninth Circuits do not believe that is true, and have instead harmonized their holdings with the Eleventh Circuit's. *See id.* (addressing *Sapssov*); Pet. App. 18a (explaining that *Loos* was in line with *Meyer*).

Petitioners' entire imagined circuit split therefore boils down to a single sentence from *Sapssov*, crowbarred out of its original context. In *Sapssov*, the panel wrote that the "whistleblower case, the basis of the 2012 Skolnick Report, was not proof of fraud, because a civil suit is not proof of liability." 608 Fed.

Appx. at 863. But, critically, the filing of the whistleblower suit was not the asserted corrective disclosure—the OIG investigation and Skolnick Report were. *Id.* at 862. The Eleventh Circuit thus had no occasion to consider whether the assertions in that complaint could have sufficed to plead a corrective disclosure for purposes of showing loss causation.[5]

Moreover, even if the Eleventh Circuit had separately considered whether the filing of the complaint could qualify as a corrective disclosure, it had no occasion to consider a complaint the market actually credited. Petitioners summarize *Sapssov* like this: The Eleventh Circuit "concluded that, whether '[t]aken independently or combined,' the investigation and the employee's allegations were 'inadequate to establish the falsity of [the hospital system's] disclosures.'" Pet. 14 (brackets in original); *see also* SIFMA Amicus Br. 5 ("The Eleventh Circuit affirmed the dismissal of the suit, holding that whether '[t]aken independently or

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[5] Notably, the plaintiffs in *Sapssov* petitioned this Court on the distinct questions "[w]hether a finding of actual wrongdoing is a legal prerequisite to an investor pleading loss causation *based on the announcement of a government investigation* into the defendant's fraudulent practices," and "[w]hether an investor who invokes a fraud-on-the-market presumption of reliance is barred from pleading loss causation based on a corrective disclosure that analyzes information *already in the public domain* but not widely known to the market." Pet. i, *Norfolk Cnty. Ret. Sys. v. Health Mgmt. Assocs.*, 137 S. Ct. 1331 (2017) (No. 16-685) (emphasis added). (Note that *Sapssov* was renamed in this Court and should not be confused with the similarly named case from the Sixth Circuit.) Absent from their questions presented was whether the filing of a whistleblower complaint suffices. *See id.* at 1-2 (describing the two corrective disclosures as the government investigation announcement and the analyst report, not the lawsuit itself, which "did not move the market when filed").

combined,' the subpoenas, whistleblower suit, and the analyst report do not suffice as corrective disclosures.") (brackets in original). But that paraphrase leaves out a critical qualification—what the court actually wrote was: "Plaintiffs-appellants' allegations show only there was an OIG investigation, a whistleblower lawsuit ***the market disregarded***, and a negative summary of already public information. Taken independently or combined, they are inadequate to establish the falsity of HMA disclosures." 608 Fed. Appx. at 864 (emphasis added). The emphasized text is the whole point for loss-causation purposes. And here, by contrast, plaintiffs have plausibly alleged that the market did, in fact, react to the whistleblower lawsuit.

Finally, it is unclear what the *Sapssov* dicta means. Notably, the court rejected the Skolnick Report because it contained public information generally—not because it revealed the contents of a complaint. Had the Eleventh Circuit meant to suggest that the contents of a complaint can never serve as loss-causation evidence (as petitioners suggest), it presumably would have just said that. Moreover, the Eleventh Circuit had previously instructed (in a published opinion the *Sapssov* Court cited) that a "corrective disclosure can come from any source, and can take any form from which the market can absorb the information and react … so long as it reveals to the market the falsity of the prior misstatements." *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1312 n.28 (11th Cir. 2011) (internal quotation marks and brackets omitted). That proposition strongly suggests that *Sapssov*'s unpublished dictum did not, in fact, announce a broad and contrary categorical rule that allegations in complaints can never constitute corrective disclosures.

3. This leads to a related weakness of the petition. To manufacture a circuit conflict, petitioners have been forced to draft an unwieldy and overbroad question presented that relies on several undefined and nebulous terms. The result is a question that *no* court has squarely considered, and certainly demands further development.

To begin, petitioners never explain what counts as a "disputed public allegation" for purpose of their alleged question presented. They of course would prefer to include whistleblower complaints. But what about a complaint brought by the Department of Justice or SEC after a governmental investigation? Or what about an exposé published in the *New York Times* using anonymous sources? Or even a verified complaint containing *sworn* allegations from an identified whistleblower? As Judge Kethledge presciently explained in *Norfolk*, each of these can be considered "disputed" unless the company decides to come clean. *See* 877 F.3d at 698. The "rule" petitioners ask this Court to decide thus has no known scope and would potentially swallow any number of future cases. Accordingly, a grant here would likely make things *less*, not more, clear.

Indeed, it's unclear that even *a defendant's admissions* would count as "undisputed" under petitioners' proposed standard. Imagine that the CFO of a company goes on CNBC and admits that the company cooked the books, at which point its stock price plummets. That seems like a clear-cut case, and securities-fraud plaintiffs would be unwise to wait for further disclosures while their statute of limitations starts to run. But suppose the CEO denies any such wrongdoing and accuses the CFO of having a personal vendetta. Do we now have a "disputed public allegation"? And if not, how is that categorically different from the case at bar?

These are just some of the consequences that petitioners' underbaked answer to their overbroad question does not contemplate. But there are more: For example, what is a "corroborating disclosure or event"? Do two "disputed public allegations" suffice? At one point, they suggest that "a finding by a regulator or an admission by the issuer," might do the trick, without explaining why. Pet. 3. And at times, they seem to suggest that what is needed is some objective indication that the company's misstatements caused further harm *to the company* beyond the price drop, Pet. 17-18, even though the 10b-5 action is there to redress the harm to *shareholders* who paid the fraudulently inflated price.[6] Such logical incoherence is not surprising, however; it is the result of petitioning on a poorly

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[6] The Ninth Circuit below fully explained petitioners' error on this point:

> [T]his [adverse business event requirement] misconstrues the significance of BofI's alleged misstatements. According to the shareholders, BofI misrepresented itself as a safe investment when in fact it was far riskier. The shareholders contend that, before the corrective disclosures, the price of BofI's stock was inflated by the market's belief that the company's statements were true, and that the price declined when the market learned that BofI's statements were false. On this account, the *shareholders* suffered an economic loss caused by the misstatements because they purchased their shares at an inflated price and are now unable to recoup the inflationary

theorized question that no lower court has considered at the level of generality that petitioners must use to contrive a circuit split.

Accordingly, at an absolute minimum, further percolation is necessary here. Indeed, at petitioners' level of generality, the Ninth Circuit's *own* rule remains unclear: If one agrees with petitioners' premise that announcements of investigations and whistleblower complaints should be treated the same, the Ninth Circuit has what petitioners *themselves* call an "unreconciled" intra-circuit conflict. Pet. 16 n.6. And such a lack of consensus in one of only three circuits in petitioners' asserted inter-circuit "split" would itself counsel against granting certiorari at this time.

4. That is particularly so because there is no indication that this question comes up with regularity. Petitioners cite to no rash of securities fraud complaints in which loss causation is based on the filing of a whistleblower complaint. Such cases should not be hard to find. But the evident reality is that they are few and far between.

B. The Ninth Circuit's Decision Was Correct.

Even if there were a conflict, this Court should not grant certiorari because the decision below is correct. Petitioners' contrary view rests on several analytical errors carefully identified by Judge Kethledge in *Norfolk* and the court below.

> component in the market. That remains true regardless of whether the risks concealed by BofI's misstatements ever materialized and *harmed the bank's bottom line*.

Pet. App. 20a n.4 (emphasis added).

1. First, and most importantly, petitioners have utterly confused the falsity and loss-causation elements of a 10b-5 claim.

To establish a 10b-5 claim, a plaintiff must plead both "a material misrepresentation or omission by the defendant" and then "loss causation." *See supra* 2. The district court below held that plaintiffs adequately pleaded falsity by pointing to allegations attributed to confidential witnesses separate from the whistleblower complaint. Pet. App. 6a-7a. And petitioners have not sought certiorari on that holding in this Court. Accordingly, this Court must take as a given at this stage that the actionable statements identified by the district court were false and—like the Ninth Circuit—"begin with the premise that BofI's misstatements *were* false and ask whether the market at some point learned of their falsity" in analyzing loss causation. *Id.* at 16a. And here there is no contesting that the market learned of the statements' falsity because (1) the whistleblower complaint plainly contradicts the allegedly fraudulent statements; and (2) the market saw, believed, and immediately reacted to that same whistleblower complaint. *See supra* 7-10. Whether the contradictory statements in the whistleblower complaint are themselves true is just the question of whether defendants' actionable statements were false or not—a question assumed in plaintiffs' favor (assuming a plausible and particularized pleading) on a motion to dismiss.

Judge Lee's concern that the decision below "will have the unintended effect of giving the greenlight for securities fraud lawsuits based on unsubstantiated assertions that may turn out to be nothing more than wisps of innuendo and speculation," Pet. App. 30a, is therefore misplaced. Indeed, the answer to Judge Lee's question: "If there is no fraud, can a securities fraud lawsuit still proceed?" is obviously *no*, but not because of the loss-causation element. The critical insight is that plaintiffs still must plead that the defendants made false or misleading statements or omissions and that they acted with scienter. And more than that—plaintiffs must plead as much with particularity under Fed. R. Civ. P. 9(b) *and* under the heightened pleading standards set forth in the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §78u-4(b); *see also Dura*, 544 U.S. at 345-46. And those allegations will be fully tested under both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and (for scienter) the even more stringent standards of the PSLRA—as further articulated in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)—on a motion to dismiss, and then tested again on a motion for summary judgment.[7]

2. The Ninth Circuit's rule is, moreover, entirely in line with this Court's decision in *Dura*. In *Dura*, this Court held that "an inflated purchase price will not itself constitute or proximately cause the relevant market loss," giving the example of a purchaser who "sells the shares quickly before the relevant truth begins to leak out." 544 U.S. at 342. In that case, "the misrepresentation will not have led to any loss," and the loss-causation element operates to ensure that such a plaintiff cannot assert a claim based on benefits

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[7] Indeed, while this Court has not decided whether allegations regarding loss causation must satisfy Rule 9(b)'s particularity requirement, the Ninth Circuit has held they do. *See* Pet. App. 20a.

it received from selling at an artificially inflated price. *Id.* Accordingly, this Court explained that loss causation requires a sale "after the truth makes its way into the marketplace," *id.*, or "after the truth became known," *id.* at 347.

Petitioners here use that language to suggest that *Dura* was creating a rule that, in order to sufficiently *allege* loss causation and survive a motion to dismiss, a plaintiff must essentially *prove* that the revelation that caused the stock to drop precipitously revealed the real truth—and thus the falsity of the alleged fraudulent misstatements. For example, petitioners complain that "[t]reating unsubstantiated allegations of company misconduct as capable of revealing the 'truth' whenever the court divines that market participants 'perceived [them] as true' incorrectly equates proof of *perceived* 'truth' with proof that the actual 'truth became *known*.'" Pet. 17 (quoting *Dura*, 544 U.S. at 347 with emphasis added). This argument is plainly unmoored from *Dura*: It has nothing to do with the question whether the plaintiff can sue based on price inflation alone or must instead allege that they sold after a public revelation caused the inflated price to drop back down. It is also unmoored from the PSLRA, which requires only that a plaintiff show that defendants' actions "caused the loss." 15 U.S.C. §78u-4(b)(4). And perhaps worst of all, it is unmoored from any logical connection to the concept of loss causation itself: Both the Ninth and Sixth Circuits are correct that what matters for *loss causation* is what actually happened in the market—whether the revelation *caused* a *loss*—and not whether the revelations were ultimately true or false. *See supra* 22-23 (explaining that plaintiff must *separately* allege and then prove falsity); *Norfolk*, 877 F.3d at 696 (noting that the inquiry is "whether the market could have perceived it as true"). And the significance of this distinction is even more apparent at the pleading stage, where plaintiffs' particularized allegations of falsity must be assumed true in order to respect (among other things) their lack of pre-suit discovery and Seventh Amendment rights.

3. Petitioners' apocalyptic arguments about strategically false whistleblower complaints are unpersuasive. Pet. 28-31. They argue, for example, that "[c]ompetitors, prospective acquirers, disgruntled employees and short-sellers can publicize unsubstantiated allegations of insider wrongdoing, trigger a stock price drop and lie in wait for a potentially devastating 'bet the company' securities class action." Pet. 5. Again, this argument relies on the same trick: Petitioners act as though loss causation is the only element of a 10b-5 claim, and so once again ignore that plaintiffs must also plausibly plead—with particularity under the heightened pleading standards of the PSLRA—that the company made misleading statements or omissions with scienter. Contrary to petitioners' argument, then, the mere filing of a separate whistleblower complaint along with a price drop is still insufficient to maintain a 10b-5 class action, even under the Ninth Circuit's test.

Petitioners also fail to appreciate the irony of citing short-seller reports as potential fodder for an influx of securities cases. Pet. 5. The Ninth Circuit below *rejected* plaintiffs' loss-causation allegations based on such reports, reasoning that investors likely would not have attached the same level of credibility to reports by anonymous short sellers who may have an incentive to lower the price of BofI's stock. Pet. App. 21a-28a. That was so even though each of the short-seller disclosures was followed by a substantial price decline. Petitioners' (and Judge Lee's) concerns that the Ninth Circuit's ruling with respect to Erhart's complaint will open the floodgates to meritless "strike suits" following any rumor or speculation in the market is thus unfounded.

II. The Second Question Presented Is Not Certworthy.

1. On the second question—whether a court can consider the magnitude of a price drop in assessing loss causation—petitioners do not even try to manufacture a circuit conflict. Instead, they allege a "conflict between the decision below and *Dura* and a misapplication of *Basic*." Pet. 19. This request for error correction should be summarily rejected.

And in any event, there is no "conflict" between the decision below and *Dura*. Indeed, nothing in *Dura* even discusses whether the magnitude of a price drop can be a consideration in the loss-causation inquiry. Perhaps *Dura* could be read to say that a price drop *alone* is not enough to show that a disclosure caused the loss because, for example, the purchaser could have sold off its stock before the drop or because the drop could be attributable to other events in the market. 544 U.S. at 342-43. But nothing in *Dura* suggests that features of the price drop itself are *irrelevant* when asking whether the disclosure caused the drop. Petitioners' efforts to show otherwise rely on the (now familiar) effort to emphasize (and misconstrue) random dicta rather than the question *Dura* decided. *See, e.g.*, Pet. 20.

2. In any event, this question is not important enough for this Court's review, and the Ninth Circuit's analysis was exactly right.

To be clear, the Ninth Circuit below suggested that the magnitude and timing of a stock price drop are *factors* to be considered in analyzing whether the market plausibly perceived a whistleblower complaint's allegations to be credible. The court also considered other facts, such as the "highly detailed and specific" nature of the whistleblower's allegations and that "they are based on firsthand knowledge that [the whistleblower] could reasonably be expected to possess by virtue of his position as a mid-level auditor at the company." Pet. App. 16a. The court further considered the whistleblower's potential monetary motivations in filing the suit, and *then* "[t]he fact that BofI's stock price plunged by more than 30% on extremely high trading volume immediately after the market learned of Erhart's allegations." *Id.* at 17a. And the court said this last fact merely "bolster[ed] the inference that the market regarded his allegations as credible." *Id.* The court also noted that "the drop is not readily attributable to non-fraud-related factors." *Id.* Thus, the degree of the market's reaction was merely one consideration.[8]

Nowhere in the Ninth Circuit's opinion does the court indicate that it will "effectively presume[] loss

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[8] For this reason, this case is also a poor vehicle through which to consider this question. Because the Ninth Circuit found that the magnitude of the drop simply bolstered the inference that the disclosure caused the price drop, the outcome would likely be the same even if this Court (somehow) held that this fact should be excluded entirely.

causation in all fraud-on-the-market securities class actions," as petitioners exaggerate. Pet. 4. Nor is the loss causation inquiry now a "mere perfunctory exercise." *Id.* Indeed, this argument is belied by the very decision below, which went on to hold that petitioners' other loss-causation evidence (the anonymous blog posts) was *not sufficient* for loss-causation purposes because they would not be seen as credible, regardless of the accompanying stock drop. *See supra* 6-7 n.3. In truth, the Ninth Circuit made very clear that loss causation is a fact-bound, case-by-case inquiry in which the court considers whether the plaintiff plausibly alleged that the market considered the relevant revelations credible. And there is nothing remotely strange (or case dispositive) about including the extent of the market's immediate reaction to a revelation as meaningful evidence on that particular question.

For example, in this case, the court considered as weighing in favor of credibility the fact that the complaint was brought by an insider whistleblower who could reasonably be expected to have the information he alleged. Pet. App. 16a. That was in contrast to a case in which "plaintiffs accused Yelp of falsely representing that the reviews it posted were authentic and independent," and then, to establish loss causation, cited the "disclosure" of complaints to the Federal Trade Commission about Yelp manipulating reviews. *Id.* at 19a (citing *Curry v. Yelp Inc.*, 875 F.3d 1219 (9th Cir. 2017)). In that case (where the panel included the same Judge who authored the opinion here), the court found the disclosure insufficient because the complaining customers "were outsiders who lacked any firsthand knowledge of Yelp's practices," whereas here, "Erhart [was] a former insider of the company who had personal knowledge of the facts he alleged." *Id.* Contrary to petitioners' assertions, then, the Ninth Circuit is not merely rubberstamping loss-causation pleadings, but rather is engaging in a searching and entirely fact-bound inquiry in individual cases.

Meanwhile, the Ninth Circuit was absolutely right to consider the magnitude of the drop because it obviously effects the plausibility of an allegation that a particular disclosure caused the price to fall. That's because, in general, a big drop occurring immediately after a plausibly important disclosure is a much better indication that *something* unique happened than a smaller drop occurring over a period of weeks. In other words, the features of the price drop itself—including its magnitude, timing, and trading volume—clearly should be factors in sorting out the fact-bound question of loss causation associated with particular market events. Indeed, it is hard to conceptualize a loss-causation inquiry that doesn't at least look at the nature of the drop itself.

III. There Is No Need To Reconsider A Precedent This Court Recently Reaffirmed.

After wading through two questions undeserving of this Court's attention, we get to the true source of petitioners' ire—the *Basic* presumption. But petitioners' request to overrule *Basic* does not deserve even passing consideration: If stare decisis means anything, it requires treating as settled a thirty-three-year-old precedent regarding a statute Congress has repeatedly amended when this Court *already* reaffirmed that precedent within the last decade.

1. In 2014, this Court in *Halliburton II* considered—and soundly rejected—the argument that "securities fraud plaintiffs should *always* have to prove direct reliance and that the *Basic* Court erred in allowing them to invoke a presumption of reliance instead." 573 U.S. at 269. And in so doing, it directly addressed petitioners' argument here—*i.e.*, that the efficient capital markets hypothesis is no longer tenable because markets are not actually fundamentally efficient. *Id.* at 270. The Court found Halliburton's argument regarding "the debate among economists about the degree to which the market price of a company's stock reflects public information about the company," unpersuasive. *Id.* at 271. Indeed, the Court observed, that argument was considered in *Basic* itself. *Id.* Focusing on that debate misses the point, as the *Basic* presumption is "based … on the fairly modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.'" *Id.* at 272 (quoting *Basic*, 485 U.S. at 247 n.24). Because that "modest premise" had not been refuted (indeed, even critics of the hypothesis agreed that public information affects stock prices), the Court found that "Halliburton ha[d] not identified the kind of fundamental shift in economic theory that could justify overruling a precedent." *Id.*

Principles of stare decisis weigh heavily against overruling decades-old precedent, especially precedents that Congress can change if it wants. *Halliburton II*, 573 U.S. at 274 ("The principle of *stare decisis* has 'special force' 'in respect to statutory interpretation' because 'Congress remains free to alter what we have done.'") (quoting *John R. Sand & Gravel Co. v.*

United States, 552 U.S. 130, 139 (2008)). But those principles weigh even more heavily against overruling more-recent cases that explicitly decided not to overrule such precedents, when all that has plausibly changed over the intervening time period is the composition of the Court. Notably, while petitioners argue that stare decisis "weighs less heavily against correcting errant economic analysis," Pet. 27, that argument ignores that this Court *already decided* the level of stare decisis to apply to the *Basic* presumption in *Halliburton II*. *See* 573 U.S. at 274 (holding that, because "Congress may overturn or modify any aspect of [the Court's] interpretations of the reliance requirement, including the *Basic* presumption itself," there was "no reason to exempt the *Basic* presumption from ordinary principles of *stare decisis*."). As this failing indicates, petitioners simply cannot avoid that they are asking for a redo on *Halliburton II*, which was *itself* a request for a redo on *Basic*. The Court can thus swiftly brush aside petitioners' request.

2. And in any event, none of the purported changes petitioners cite from the past seven years come close to the "special justification" required to overrule *Basic*.

First, petitioners note the "increasing extent" to which individual stock valuations "are influenced by inclusion in indices and exchange traded funds." Pet. 24. The concept and popularity of passive investing was well known to this Court in 2014 (indeed, petitioners' source for a "preference shift towards index fund investing" is an article *from 2012*, *id.*). *See A Remarkable History*, Vanguard, https://vgi.vg/3wNAGBF (last visited June 25, 2021) (noting that Vanguard launched the first index mutual fund in 1976); *see also* Transcript of Oral Argument at 6-7, *Halliburton II*, 573 U.S. 258 (2014) (No. 13-317) (Halliburton's counsel stating: "Many investors, such as … index fund investors … do not rely on the integrity of the market price"). Moreover, this argument does nothing to break down the "modest premise" of *Basic* that publicly available information generally affects stock prices—a principle on which index investing relies. *See, e.g.*, *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 602 (C.D. Cal. 2009) ("Defendants argue that because index purchases seek to match a predetermined index of securities, such purchases are not made in reliance on any misrepresentation." Not so, "because index purchases seek only to match the index and exclude other considerations (such as, for example, reliance on nonpublic information or other idiosyncratic motivations), index purchases rely *exclusively* upon the market to impound any representations (including misrepresentations) into securities' prices.").

Next, petitioners cite to behavior by social media-driven traders (such as what happened with GameStop stock), as well as short sellers. Pet. 24-25. But the *Halliburton II* Court already said that the continuing vitality of the *Basic* presumption is unaffected by the behavior of some traders. 573 U.S. at 273. Further, the Court rejected the argument that value investors (those who attempt "to beat the market" on the belief that stocks are under- or overvalued) do not rely on price integrity. *Id.* And as Judge Easterbrook, writing for the Seventh Circuit in *Schleicher v. Wendt*, 618 F.3d 679, 684-85 (7th Cir. 2010), explained:

> Defendants' insistence that short sellers don't rely on the market price suggests that they misunderstand the efficient capital market hypothesis, which underlies the fraud-on-the-market doctrine.... Short sellers play a role in aligning prices with information under any version of the efficient capital market hypothesis. That the resulting price may be inaccurate does not detract from the fact that false statements affect it, and cause loss, whether or not any given investor reads and relies on the false statement. That's all that *Basic* requires.

Finally, petitioners come to this Court complaining more broadly about "vexatious" securities class action litigation. Pet. 26. Again, as this Court already stated in *Halliburton II*, those concerns are best addressed to Congress. 573 U.S. at 276-77 (noting that concerns about abusive securities class actions "are more appropriately addressed to Congress, which has in fact responded," by passing the PSLRA and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227).

In short, petitioners' arguments run straight into *Halliburton II* at every turn. The third question presented should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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