No. 17-1453

IN THE

Supreme Court of the United States

COMMUNITY HEALTH SYSTEMS, INC.,
WAYNE T. SMITH, AND W. LARRY CASH,

Petitioners,

v.

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the legal standards governing the requirements for (a) pleading loss causation, and (b) "relation back" under Rule 15(c)(1) of otherwise time-barred claims added on behalf of new plaintiffs, are significant and recurring questions of federal law. Nor do they dispute that the circuits' divergent approaches to these issues—starkly illustrated by the conflicting trial and appellate decisions below and repeatedly acknowledged by other courts and commentators (Pet. 6-8, 19-20 & n.7, 31)—will, if left uncorrected, create uncertainty and invite forum-shopping.

Instead, respondents downplay the divisions of authority by recharacterizing this case as a dispute over the facts, rather than law. They also suggest that this case—despite raising pure questions of law on an unusually limited and manageable record—is a poor vehicle because it raises questions that are hypothetical or premature. And they attempt to defend the outcome below by inventing new and even more troubling rationales to support the Sixth Circuit's flawed reasoning. These arguments are all unavailing. The petition should be granted.

I. COURTS ARE DIVIDED ON THE REQUIREMENTS FOR PLEADING LOSS CAUSATION

1. As the district court explained, "many courts," including the Ninth and Eleventh Circuits, "have held that loss causation . . . cannot be based on the filing of a civil complaint or the commencement of an investigation." App. 67a.; see also App. 67a-72a (discussing cases); Pet. 12-14 (same).

Respondents concede that the Sixth Circuit expressly rejected that "'categorical' rule"—namely, "that complaints like Tenet's contain 'only allegations' that cannot expose a company's prior false or misleading statements." BIO 10 (quoting App. 18a). They also concede that the Sixth Circuit instead applied a "fact-based, context-specific approach" to determine whether the Tenet complaint was credible enough to have been "plausibl[y]" perceived as true. BIO 14. Respondents nevertheless suggest that that conflict—a categorical rule in some circuits, a case-by-case inquiry in others—is either no split at all, or simply "irrelevant." BIO 14, 19.

Respondents' arguments are entirely beside the point. They note, for example, that courts agree that loss causation is a form of proximate causation (BIO 13-14); that corrective revelations "can come in a series of partial disclosures" (BIO 15); and that a corrective disclosure needn't provide a "direct admission" of falsity (BIO 16).

But we never claimed that courts are divided on those questions. We said that the circuits are divided on a different question: whether courts should conduct a case-by-case inquiry at the motion-to-dismiss stage to determine whether specific features of a legal complaint render it "credible" enough to qualify as a corrective disclosure (as the Sixth Circuit did here), or should instead treat legal complaints as failing to qualify as corrective disclosures as a matter of law (as the Eleventh Circuit held in *Sapssov* v. *Health*

Management Associates, Inc., 608 F. App'x 855, 863 (2015) (per curiam)).[1]

Respondents also attempt to distinguish *Sapssov* on the facts. The Tenet complaint, they say, is distinguishable from the whistleblower complaint in *Sapssov* because the Tenet complaint was "*inherently credible* due to the independent work by highly credentialed experts." BIO 18 (emphasis added).[2]

But that's just it: In *Sapssov*, the Eleventh Circuit did *not* ask (as the Sixth Circuit did here) whether specific features of the whistleblower complaint there rendered it more or less "credible" than other complaints. Rather, it held that the complaint cannot be a corrective disclosure because "a civil suit is not proof of liability"—full stop. 608 F. App'x at 863. And the Eleventh Circuit took exactly the same approach in *Meyer* v. *Greene*, 710 F.3d 1189 (2013), where the complaint included detailed expert analysis by a noted professional short seller. See Pet.

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[1] Respondents also contend that "lawsuits have served as corrective disclosures" in still other circuits. BIO 17. If true, that would only *deepen* the split.

[2] Respondents' blithe assertion that Tenet's experts were "independent" and therefore inherently credible ignores litigation realities as well as the possibility that expert testimony may be excluded as unreliable even if offered by an expert who is qualified and highly credentialed. See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147-158 (1999); Subcomm. on Annual Review, Am. Bar Ass'n Comm. on Fed. Regulation of Sec., *Caselaw Developments 2017*, 73 BUS. LAW. 877, 936 (2018) (criticizing decision below) ("Given that litigators can almost always find a pliable expert to render a helpful opinion, the inclusion of an 'expert analysis' in such a complaint seems, by itself, to add little.").

17. *Sapssov*'s clear holding squarely conflicts with the decision below.

Respondents also emphasize that, in this case, they alleged multiple corrective disclosures, including Mr. Cash's supposed concession that CHSI "had used the Blue Book." BIO 18. That argument apparently draws on language from the Eleventh Circuit stating that the commencement of a lawsuit or investigation, "*without more*, is insufficient to constitute a corrective disclosure." *Meyer*, 710 F.3d at 1201 (emphasis added).

Here, according to respondents, there is more—a series of alleged disclosures that, taken together, somehow shore up the "credibility" of the Tenet complaint. "In contrast," they say, "*Sapssov* involved the announcement of government subpoenas followed by an analyst report"—summarizing the whistleblower complaint—"that, even considered together, revealed no new information showing prior falsity." BIO 18.

Here again, respondents misread *Sapssov*. As Judge Martin's concurring opinion made clear, the court's hands in *Sapssov* were tied by the Eleventh Circuit's earlier opinion in *Meyer*, which held that a mere allegation of fraud cannot constitute a corrective disclosure, even in conjunction with other alleged partial disclosures, unless "there were a later *finding* of actual fraud." *Sapssov*, 608 F. App'x at 866 (concurrence) (emphasis added). That rule compelled the conclusion that the *Sapssov* plaintiffs failed to plead loss causation because "neither the complaint nor the investigation revealed actual wrongdoing." *Id.* at 864 (concurrence).

So too here. Tenet's complaint did not reveal "actual wrongdoing" because, in the words of the Eleventh Circuit, "a civil suit is not proof of liability." *Sapssov*, 608 F. App'x at 863. If the Sixth Circuit had applied the rule from *Sapssov* and *Meyer*, this case would have come out differently. Indeed, the case *did* come out differently when the district court applied that rule, and held that the Tenet complaint does not constitute a corrective disclosure because it "revealed no truths, only allegations." App. 72a.

There are "several conflicting decisions in the various circuits" on the question whether allegations of fraud "are sufficient to plead loss causation." *In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 385 (E.D.N.Y. 2013). The decision below deepens this conflict and confusion.

2. The Sixth Circuit relied on Mr. Cash's acknowledgment that CHSI used the Blue Book, and on the Tenet complaint's inclusion of "expert" analysis, to buttress the credibility of the Tenet complaint. As we explained, however, a corrective disclosure must reveal *new* information to the market. And under the Eleventh Circuit's caselaw, those alleged disclosures flunk that requirement: CHSI's use of the Blue Book had already been disclosed by the earlier *Reuille* complaint, and the Tenet complaint's "expert" analysis was based on already-public information. See Pet. 14-20.

Respondents' chief response is no response at all. They protest that the "truth-on-the-market defense" is "fact-specific," and thus unavailable at the pleading stage. BIO 19. The problem with that argument is that *we never asserted a truth on the market defense*. As all the respondents' cases (BIO 21) make clear, the "truth-on-the-market" defense goes to whether the alleged misrepresentation was *material*, or whether the defendants can rebut the presumption of *reliance*. The question here is whether an alleged corrective disclosure is legally sufficient to plead *loss causation*. And the courts of appeals are split on that question.

Respondents also contend that "the differing outcomes in *Meyer* and *Sapssov* turn on the different facts involved." BIO 23. But that attempt to explain away the split falls flat. In *Sapssov*, the court held that an alleged disclosure (an analyst report) did not reveal new information to the market because it reported facts that were disclosed in a whistleblower "case that had existed in publicly accessible court dockets for three months" before the report. 608 F. App'x at 863.

That is *exactly* what happened in this case. As in *Sapssov*, CHSI's use of the Blue Book was revealed in a whistleblower action (here, the *Reuille* action). And, just as in *Sapssov*, that complaint was "placed on the public court docket three months *before* Tenet filed its complaint" (or Mr. Cash made his supposed "confession"). Pet. 16.[3] Under the Eleventh Circuit's rule, that is fatal: Having invoked the efficient-market theory in their complaint, respondents cannot "cast the theory aside when it no longer suits their

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[3] Respondents cite *Sapssov*'s statement that courts may "countenance some lag in the capacity of the market to digest publicly available information," (BIO 23) but they chop off the *rest of that sentence*, which continues: "the Meyer [whistleblower] action was publicly available," and thus the analyst report was *not* a corrective disclosure as a matter of law. 608 F. App'x at 863.

needs for purposes of loss causation." *Meyer*, 710 F.3d at 1198-1199.[4]

Respondents also point out that the Sixth Circuit found that the *Reuille* complaint involved only "isolated allegations at one hospital," and concluded that, "at the pleading stage, it 'remains *plausible* that the market first learned the full extent of [CHSI's] alleged fraud from Tenet's Complaint.'" BIO 22 (quoting App. 21a) (emphasis added).

That demonstrably mistaken reading of the *Reuille* complaint (see Pet. 16, 22-23 & n.9) provides no basis to distinguish *Sapssov* or *Meyer*. First, respondents *admitted* that the *Reuille* complaint raised "*the*[] *same allegations* of improper admissions practices" as the Tenet complaint. App. 65a (emphasis added); see Pet. 16-17. Thus, the only question is whether, given that it already disclosed the same allegations as Tenet, the *Reuille* complaint was "publicly available." *Sapssov* compels the conclusion that it was.

Second, rather than treat the newness inquiry as a pure question of law, the Sixth Circuit asked only whether it was "at least plausible" that the alleged disclosures came as news to the market. App. 20a.[5]

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[4] Respondents protest that CHSI itself did not learn about *Reuille* until after Tenet's complaint was filed. BIO 22. But *Sapssov* did not ask whether any *particular* market participant was aware of the complaint. The court just asked whether it was placed on a public docket and thus available to the public. It was—and thus, *as a matter of law*, was not news to the market.

[5] Respondents do not dispute that the circuits are divided on whether loss-causation allegations are governed by Rule 8 or Rule 9, or that the Sixth Circuit's analysis rests on the

Finding that it was, it kicked the can down the road to trial. But the Eleventh Circuit holds that as a matter of law the filing of a legal complaint on a public docket is "public" for purposes of determining whether a subsequent disclosure reveals new information.[6]

Finally, respondents point to the Sixth Circuit's invocation of certain CHSI statements in October 2011 in connection with third-quarter earnings as an *additional* basis for its loss causation ruling. BIO 1, 6-7, 10-11, 17-18. That factor, which the court of appeals mentioned in passing but did not discuss (Pet. 9 n.2; App. 17a-22a), hardly makes this case a poor vehicle for resolving both of the embedded legal issues (legal sufficiency of allegations in a complaint and "newness") on which the Sixth Circuit focused its analysis and rested its decision.

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assumption that Rule 8's plausibility standard applied. See Pet. 18-19 & n.6.

[6] The Sixth Circuit also held that it was "at least plausible" that the disclosures caused investors' losses given "the speed at which Community's share price fell after them." App. 17a. But, pointing out that the share price fell after the Tenet complaint begs the question whether it fell "after the truth became known." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005). See *Loos* v. *Immersion Corp.*, 762 F.3d 880, 890 (9th Cir. 2014) ("any decline in a corporation's share price following the announcement of an investigation"—or lawsuit—"can only be attributed to market speculation about" either "whether fraud has occurred" or the impact of any potential future remedial action).

II. COURTS ARE DIVIDED ON THE RELATION-BACK REQUIREMENTS FOR NEWLY ADDED PLAINTIFFS

1. Respondents argue that "relation back" under Rule 15 applies differently to new *class members* than it does to new *parties*. BIO 29-31, 33-34.

But that just proves our point: As we explained, some courts (the Ninth and Eleventh Circuits) *have* applied Rule 15 to limit the addition of new class members (just as it limits the addition of new parties), while others (the Sixth and Seventh) have not. See Pet. 26-31. Indeed, respondents also acknowledge that—in contrast to the decision below—other courts have required more than mere compliance with Rule 15(c)(1)(B) when "the same plaintiff expanded the class to add class members." BIO 34 (citing *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922 (9th Cir. 1996)). Respondents may disagree with that rule, but cannot simply wish away the clear circuit split.

2. Next, respondents attempt to explain away the split as a mere "difference[] in emphasis." BIO 34. All that courts really require, they say, is "[a]dequate [n]otice." BIO 31.

But the tests applied in other circuits cannot be reduced to that single inquiry; while adequate notice may be necessary, it is not sufficient. In *Syntex*, for example, the Ninth Circuit declined to permit relation back because the new class members did not share an "identity of interests" with the old ones. 95 F.3d at 935. The court did not even mention "adequate notice" except to state that it was *also* required. *Ibid.*

Respondents do not dispute that the Ninth Circuit imposed that identity-of-interest requirement (and that the Sixth Circuit did not), but insist that the outcome would remain the same anyway: Both new and old class members, they say, "have an identical interest with their respective claims insofar as they were victims of the same alleged fraudulent behavior." BIO 34. But courts have interpreted the identity-of-interest element much more narrowly. As the D.C. Circuit explained, "[t]he point of the courts' consideration of identity of interest is that that factor ensures that the old and new plaintiffs are sufficiently related so that the new plaintiff was in effect involved in the proceedings unofficially from an early stage." *Leachman* v. *Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1982).

Nor can the approach of other courts be squared with respondents' adequate-notice-only theory. Other courts have "extended" what is now Rule 15(c)(1)(C)—which by its terms "does not expressly contemplate an amendment that adds or changes plaintiffs"—to "address this type of amendment." *Cliff* v. *Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1131-1132 (11th Cir. 2004). And in addition to requiring compliance with Rule 15(c)(1)(B), Rule 15(c)(1)(C) demands (among other things) that a new defendant "knew or should have known that the action would have been brought against it, *but for a mistake concerning the proper party's identity*," Rule 15(c)(1)(C)(ii) (emphasis added). Respondents do not even attempt to explain how they satisfied that requirement.

Regardless of the test that applies, amendments changing the identities of plaintiffs are typically "limited to corrections of misnomers or misdescriptions." *Asher* v. *Unarco Material*

Handling, Inc., 596 F.3d 313, 319 (6th Cir. 2010). In exempting class actions from those requirements, the Sixth and Seventh Circuits have expanded relation back far beyond these parameters. That approach—which conflicts with that of the Ninth and Eleventh Circuits—can have significant consequences in securities fraud class actions such as this one, where the requested class damages total almost $1 billion following amendment.

3. Respondents also fall back on various vehicle arguments.

First, they contend that it is "pure speculation" that the new class members they have fought so hard to add here even exist. BIO 28. That remarkable assertion is at odds with the district court's observation that the expanded class period "adds hundreds of millions of dollars in potential damages." App. 78a. In any event, courts routinely modify the scope of a class without *evidence* about the existence of absent putative class members.

Second, respondents argue that further review is "premature" because the matter might be mooted by motions pending in the district court. But this Court has not hesitated to grant review of interlocutory decisions in securities fraud cases. See, *e.g.*, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Amgen, Inc.* v. *Conn. Ret. Plans & Tr.*, 568 U.S. 455 (2013); *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27 (2011); see also U.S. Brief, *Dura Pharm, Inc.* v. *Broudo* (No. 03-932), 2004 WL 1205204, at *15 & n.2 (petition-stage brief) (collecting cases).

4. Unable to deny the circuit conflict, identify any real vehicle problem, or defend the historical basis for the flawed "class actions" exception (see Pet. 27 n.11), respondents offer several far-reaching merits theories that, to our knowledge, no court has ever endorsed. They suggest that the members of a plaintiff class (other than the class representatives) are not "parties" under Rule 15(c). But that is inconsistent with the Ninth and Eleventh Circuits' decisions, which treat members of an expanded class as new plaintiffs subject to Rule 15. And while it is true that Rule 15(c)(1) expressly refers to "parties," not to class members (BIO 30), that rule does not explicitly mention new "plaintiffs" either. And yet, most circuits agree that relation back for new plaintiffs should not be freely granted. See Pet. 29-30 & nn. 13-14; Rule 15 advisory committee's notes ("[T]he chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."). If credited, respondents' merits arguments would go far toward undermining the policies animating statutes of limitations in class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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