No. 18-164

IN THE

Supreme Court of the United States

FIRST SOLAR, INC.; MICHAEL J. AHEARN; ROBERT J. GILLETTE; MARK R. WIDMAR; JENS MEYERHOFF; JAMES ZHU; BRUCE SOHN; AND DAVID EAGLESHAM

Petitioners,

v.

MINEWORKERS' PENSION SCHEME; BRITISH COAL STAFF SUPERANNUATION SCHEME,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

Respondents' brief in opposition demonstrates that there are many ways to prove the element of loss causation in securities-fraud cases. But the question here is not *how* plaintiffs can meet their burden; the question is *what* they must establish. As respondents' own analysis confirms, the courts of appeals are irreconcilably divided—four to four to two—over whether loss causation requires proof that the market learned of and reacted to "the defendant's misrepresentation (or other fraudulent conduct)," or whether some lesser showing can establish that the fraud "proximately caused the plaintiff's economic

loss." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005).

This longstanding split encourages forum-shopping, promotes meritless litigation, drives up the cost of capital, and ultimately destroys shareholder value. The Ninth Circuit's decision here—already acclaimed as a "game-changer" by members of the plaintiffs' bar—only deepens the divide. Carol Villegas & James Christie, *9th Circ. Decision Could Be Game-Changer For Investors,* Law360 (Feb. 2, 2018), *available at* https://bit.ly/2NDYDIm. And the growing volume of securities-fraud filings makes the question all the more important. *See* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2017 YEAR IN REVIEW (2018), *available at* https://bit.ly/2kSPg7w. Small wonder, then, that a broad coalition of business and industry groups is urging this Court's intervention. *See* Br. of Sec. Indus. & Fin. Mkts. Ass'n, et al.

This Court regularly grants certiorari to maintain uniform standards under the securities laws. *See* Pet. 22. And it has repeatedly reviewed questions regarding the proper application of proximate-cause principles to statute-based damages actions. *See, e.g.*, *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296 (2017); *Paroline* v. *United States*, 134 S. Ct. 1710 (2014); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1 (2010). This Court should grant the petition and clarify the loss-causation standard once and for all.

ARGUMENT

I. THE COURTS OF APPEALS ARE IRRECONCILABLY DIVIDED

Respondents claim that every circuit applies the same proximate-cause standard in securities-fraud cases. But the petition showed that courts apply the "proximate cause" label to at least three distinct loss-causation standards. To recap, one group (the First, Fourth, Seventh, and Eleventh Circuits) holds that a plaintiff can establish the required proximate connection between a misrepresentation and a drop in share price only by proving that the market learned of the defendant's fraud. Another (the Second, Fifth, Sixth, and Tenth Circuits) holds that it is enough to prove that the market learned the truth concealed by the defendant's fraud, even if the fraud itself remains undisclosed. And a third group (the Third and Ninth Circuits) holds that it is enough to prove that the market learned of some fact that can be "trac[ed] * * * back" to the fraud, even if the market remains unaware of both the fraud and the facts concealed. Pet. App. 5a. These are major, outcome-determinative differences in legal tests despite the fact that there is just one set of federal laws at issue.

1. All that respondents' analysis of the First, Fourth, Seventh, and Eleventh Circuits shows is that plaintiffs in those courts are not confined to a single *means* of proving that the fraudulent nature of the defendant's conduct was revealed to the market. That does nothing to dispel the split.

a. Thus, for example, respondents point out that the First Circuit does not require a plaintiff to identify "a direct admission that a previous statement is untrue." Opp. 13 (quoting *Mass. Ret. Sys.* v. *CVS*

Caremark Corp., 716 F.3d 229, 240 (1st Cir. 2013)). But whether a disclosure is a "mirror-image" or merely "relate[s] to the same subject matter as the alleged misrepresentation," it must nevertheless "reveal[] that [the defendant's] previous statements *were misrepresentations*." *CVS Caremark*, 716 F.3d at 239-240 (emphasis added).

b. Respondents note (at 13) that the Fourth Circuit has "acknowledge[d] the possibility that a plaintiff could successfully allege loss causation" without identifying any specific disclosure "by pleading that a previously concealed risk materialized." *Teachers' Ret. Sys. of La.* v. *Hunter*, 477 F.3d 162, 187 n.3 (4th Cir. 2007)). But the reason that alternative is viable is that "news of the materialized risk *would itself be the revelation of fraud* that caused plaintiffs' loss." *Id.* (emphasis added). It is, in other words, just another way of showing that "the market reacted to new facts * * * that revealed [the defendant's] previous representations to have been fraudulent." Pet. 10 (quoting *Hunter*, 477 F.3d at 187).

c. Respondents' discussion of the Seventh Circuit's precedent is likewise consistent with the petition. The question in the case respondents highlight was whether the plaintiffs' damages model properly accounted for the cumulative effect on the defendant's share price of a series of false statements. *See Glickenhaus & Co.* v. *Household Int'l, Inc.*, 787 F.3d 408, 414, 417-419 (2015). The opinion's only reference to the issue here was in a parenthetical observing that "[p]laintiffs must show both that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined *once the market learned of the deception*." *Id.* at 415 (emphasis added) (quoting *Ray*

v. *Citigroup Glob. Mkts., Inc.*, 482 F.3d 991, 995 (7th Cir. 2007)). That is no different from the Seventh Circuit's admonition in *Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824 (7th Cir. 2007), that plaintiffs must show that they "experienced [a] loss as a result of the exposure of [the defendant's] misrepresentations." *Id.* at 844; *see* Pet. 11.

d. The quotation that respondents chose from the Eleventh Circuit likewise confirms that evidence of a disclosure can support a loss-causation finding only "*so long as it reveal[s] to the market the falsity of the prior misstatements*." Opp. 14 (emphasis added) (quoting *FindWhat Inv'r Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1311 & n.28 (11th Cir. 2011)). Thus, in *Meyer* v. *Greene*, 710 F.3d 1189 (11th Cir. 2013), the court agreed that a short-seller's critical comments about a defendant company's finances could, in theory, count as a disclosure of the company's accounting irregularities. *Id.* at 1197-1200. But the court ultimately concluded that the plaintiffs had not met their burden because, among other things, the comments "were not necessarily revelatory of any past fraud." *Id.* at 1200.

2. Respondents' opposition likewise confirms the petition's conclusion that—unlike the strict revelation-of-fraud standard that applies in the First, Fourth, Seventh, and Eleventh Circuits—the Second, Fifth, Sixth, and Tenth Circuits require plaintiffs to establish only that the market learned the *facts* concealed by the alleged fraud.

a. Respondents largely duplicate (at 16) the petition's description of the Second Circuit's decision in *In re Vivendi, S.A. Securities Litigation*, 838 F.3d

223, 261-263 (2d Cir. 2016). As the petition explained, the *Vivendi* court affirmed a jury's loss-causation finding based on evidence that the defendant had engaged in conduct that "revealed the truth about [its] liquidity risk"—"the subject of [the] alleged misstatements." 838 F.3d at 263 (internal quotation marks and emphasis omitted); *see* Pet. 13.

Although the *means* by which the plaintiffs in *Vivendi* proved their case were "context-specific," Opp. 16, the *standard* by which the Second Circuit judged the evidence was not. The court sustained the verdict only because "although no specific corrective disclosure ever exposed the precise extent of [the] alleged fraud, Plaintiffs' theory of loss causation nevertheless rested on *the revelation of the truth*." *Vivendi*, 838 F.3d at 262 (emphasis added).

b. Respondents' discussion (at 16-18) of Fifth Circuit precedent hews even closer to the petition's analysis. As respondents show, the Fifth Circuit requires plaintiffs to identify disclosures that reveal "*the truth obscured* by the fraudulent statements." Opp. 17 (emphasis added) (quoting *Alaska Elec. Pension Fund* v. *Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (per curiam)).

Respondents point out (at 18) that the Fifth Circuit has quoted the Eleventh Circuit's decision in *FindWhat* for the universally accepted proposition that a plaintiff can prove loss causation circumstantially. But the question is not what *evidence* plaintiffs can use, but what that evidence must *prove*. As respondents' own quotation shows, the Eleventh Circuit holds that, whatever form disclosures take, they must "reveal[] to the market the falsity of the prior misstatements." *FindWhat*, 658 F.3d at 1311

n.28 (internal quotation marks omitted); *see* Opp. 14; *supra*, p. 5. The Fifth Circuit sharply disagrees, holding that plaintiffs need not show disclosures that "reveal the falsity in a prior statement." Pet. 14 (quoting *Pub. Emps.' Ret. Sys. of Miss.* v. *Amedisys, Inc.*, 769 F.3d 313, 325 n.5 (5th Cir. 2014)). That is the textbook definition of a split.

c. Respondents' cursory discussion (at 18-19) of the Sixth and Tenth Circuits is to the same effect. Although there are many ways to meet the loss-causation standard, that flexibility does not relieve plaintiffs from the obligation to "explain how the truth was revealed to the market" and then "link the revelation of truth to a corresponding loss." *In re Williams Sec. Litig.–WCG Subclass*, 558 F.3d 1130, 1139 (10th Cir. 2009); *see Ohio Pub. Emps. Ret. Sys.* v. *Fed. Home Loan Mortg. Corp.* ("*OPERS*"), 830 F.3d 376, 388 (6th Cir. 2016).[1]

3. Respondents' brief discussion (at 20-21) of the Third and Ninth Circuits comes no closer to dispelling the split. While every circuit describes its standard as "proximate cause," the First, Fourth, Seventh and Eleventh Circuits hold as a matter of law that misrepresentations proximately cause a loss only where "the market *learned of the deception*." *Ray*, 482 F.3d at 995 (emphasis added); *see FindWhat*, 658 F.3d at 1311; *Hunter*, 477 F.3d at 187; *CVS Care-*

[1] Respondents claim in passing (at 19 n.*) that "materialization of the risk" describes the "relevant truth" that a plaintiff must show was revealed to the market. Respondents are wrong. "[M]aterialization of risk" is just another "method by which a plaintiff may prove losses resulting from the revelation of the truth." *Vivendi*, 838 F.3d at 261.

mark, 716 F.3d at 240. By contrast, the Second, Fifth, Sixth, and Tenth Circuits hold as a matter of law that a plaintiff can show proximate causation only if they "link the *revelation of truth* to a corresponding loss." *Williams*, 558 F.3d at 1139 (emphasis added); *see OPERS*, 830 F.3d at 388; *Vivendi*, 838 F.3d at 263; *Flowserve*, 572 F.3d at 230. Neither of those standards can be reconciled with the Third and Ninth Circuits' holdings that a plaintiff need only "trac[e] the loss back to 'the very facts about which the defendant lied,'" *regardless* of what the market knew. Pet. App. 5a (internal quotation marks omitted); *see McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418, 431 (3d Cir. 2007).

Respondents repeatedly protest (at 1-2, 20, 22) that the Third and Ninth Circuits' reference to "the very facts" misrepresented originates in a pre-*Dura* Seventh Circuit case. *See Caremark, Inc.* v. *Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997). But the Seventh Circuit has since distinguished *Caremark*, explaining that, in "the 'fraud-on-the-market scenario' * * * discussed in *Dura*" plaintiffs must show "that the value of the stock declined once the market *learned of the deception*." *Ray*, 482 F.3d at 995 (emphasis added). The Ninth Circuit rejected any such requirement below, holding that "[d]isclosure 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). The split is real.

II. RESPONDENTS DO NOT DEFEND THE NINTH CIRCUIT'S REASONING

The decision below not only deepens the split; it also breaks sharply with this Court's precedent, basic proximate-cause principles, and the structure of the Private Securities Litigation Reform Act (PSLRA). Yet respondents do not meaningfully address these fundamental problems. *See* Pet. 19-21.

1. Respondents' principal defense of the Ninth Circuit's ruling (at 21-23) is that this case would come out the same way in every circuit. But that argument ignores the District Court's central—and undisputed—finding that respondents "ha[d] not presented evidence from which a reasonable jury could find that Defendants' alleged fraudulent practices became known to the market during the class period." Pet. App. 36a. While that finding did not end respondents' case in the Ninth Circuit, it would be dispositive in the First, Fourth, Seventh, and Eleventh Circuits, each of which requires plaintiffs to identify disclosures that "reveal[ed] to the market in some sense the fraudulent nature of the" challenged conduct. *Katyle* v. *Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011); *see FindWhat*, 658 F.3d at 1311 & n.28; *Tricontinental*, 475 F.3d at 844; *CVS Caremark*, 716 F.3d at 239.

Respondents' argument likewise ignores the undisputed fact that neither the May 3 nor the December 11, 2011 revisions to First Solar's guidance revealed the heat degradation problem. Pet. App. 44a, 48a-49a; *see* Opp. 27-28. That did not stop the District Court from concluding that a jury could find that the "existence" of that problem contributed to the subsequent declines in share price. Pet. App. 45a. But it

would have barred recovery for such losses in the Second, Fifth, Sixth, and Tenth Circuits, which require plaintiffs to identify disclosures that reveal "the truth obscured by the fraudulent statements" and hold that "loss caused solely by a general impression in the market that 'something is wrong' is insufficient to establish causation." *Flowserve*, 572 F.3d at 230, 232; *see Vivendi*, 838 F.3d at 263; *OPERS*, 830 F.3d at 388; *Williams*, 558 F.3d at 1139.

2. Respondents sidestep the deeper problems with the Ninth Circuit's decision. Consistent with basic proximate-cause principles, this Court's precedents teach that a securities-fraud plaintiff must show that "the revelation of a misrepresentation" caused his losses. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 813 (2011); *see Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (holding that the "[t]he proper referent of the proximate-cause analysis" is the conduct that violates the statute).[2] Yet the decision below allows a plaintiff to proceed to trial even if there is *no* evidence that the market knew of the defendant's fraud or even the facts that it concealed. Respondents have no answer.

Nor do respondents explain how the Ninth Circuit's ruling can be squared with the PSLRA, which requires plaintiffs to connect their losses to "the act or

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[2] This language does not describe the Fifth Circuit's definition of reliance, as respondents claim (at 11). Rather, the Court explained that "[t]he fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation"—*i.e.* that the plaintiff cannot establish loss causation—"has nothing to do with whether an investor relied on the misrepresentation in the first place." *Erica P. John Fund*, 563 U.S. at 813.

omission of the defendant alleged to violate" Section 10(b) and ties the measure of damages to the point at which "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(b)(4), (e)(1).

Respondents suggest (at 23) that the only alternative to the Ninth Circuit's rule would require outright confessions by securities-fraud defendants. That straw man does not reflect First Solar's position. Rather, this Court's guidance and the congressional intent expressed in the PSLRA call for a standard that requires plaintiffs to tie any drop in market price to the revelation of a misrepresentation, no matter how it comes to be revealed.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT QUESTION

Despite leading with the claim (at 25) that factual disputes would remain regardless of this Court's decision, respondents fail to identify a single example. Nor can they. The District Court took "the unusual step of certifying the loss causation issue for immediate interlocutory appeal," Pet. App. 36a, because it recognized that this case presented "a controlling question of law." 28 U.S.C. § 1292(b). In accepting the court's certification, the Ninth Circuit evidently agreed. *See id.* That makes this case an ideal vehicle for review.

Respondents contend (at 25-26) that the Ninth Circuit's decision proves that the District Court was wrong in holding that First Solar would be entitled to summary judgment "in full" under the circuit's more demanding precedents. Pet. App. 36a. But even if the District Court misunderstood Ninth Circuit case law, it *found* there was no evidence "from which

a reasonable jury could find that Defendants' alleged fraudulent practices became known to the market during the class period." *Id.* Nothing in the Ninth Circuit's decision calls that finding into question.

Nor is there any merit to respondents' claim (at 28) that the totality of the disclosures here were all but an "actual admission of fraud." Again, the District Court found there was *no* evidence—none—that would permit a finding that the market learned of the alleged fraud. Pet. App. 36a.

Finally, respondents assert (at 29) that the interlocutory posture of this case counsels against review. But this Court routinely grants review from decisions in such appeals. *See Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1650-51 (2015); *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 22 (2004); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 374 (2004); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003). And respondents can identify no practical or legal reason to force First Solar into what the District Court described as unnecessary and "expensive expert discovery and a costly and complex trial." Pet. App. 36a. There are no factual disputes relevant to the question presented and no additional fact-finding that would aid this Court's review. That is, after all, why the District Court certified these questions on an interlocutory basis for appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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