No. 25-977

In the Supreme Court of the United States

JOHNSON & JOHNSON, et al., PETITIONERS

v.

SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION, et al.

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

BRIEF FOR FORMER SEC OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individuals with a strong interest in the issues presented in this petition: former officials of the U.S. Securities and Exchange Commission ("SEC") and law professors whose scholarship and teaching focus on the federal securities laws. In alphabetical order, the *amici curiae* are:

- Brian G. Cartwright: General Counsel of the SEC (2006-2009).
- Ronald J. Colombo: Professor of Law at Maurice A. Deane School of Law at Hofstra University.
- Elizabeth Cosenza: Associate Professor and Area Chair, Law and Ethics, at Fordham University.
- Richard A. Epstein: The Laurence A. Tisch Professor of Law at the New York University School of Law; the Peter and Kirsten Bedford Senior Fellow at The Hoover Institution; and the James Parker Hall Distinguished Service Professor of Law, Emeritus, and Senior Lecturer at the University of Chicago Law School.
- The Honorable Joseph A. Grundfest: Former Commissioner of the SEC (1985-1990) and the William A. Franke Professor of Law and Business at Stanford Law School.

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel made a monetary contribution to the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Consistent with Rule 37.2, all counsel of record received timely notice of *amici*'s intent to file this brief.

- Paul G. Mahoney: David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law.
- Matthew Turk: Associate Professor of Business Law and Ethics at the Indiana University Kelley School of Business.

Amici have a longstanding interest in the proper and consistent interpretation and enforcement of the federal securities laws. Given the SEC's limited resources, lawsuits initiated by private parties are an important complement to the agency's own enforcement actions. But it is vital to the integrity of the securities laws that private enforcement actions remain within proper bounds. When courts nullify the guardrails that protect companies and their shareholders from certification of gigantic classes in the kinds of event-driven cases that are most prone to abuse, that has a devastating effect on the securities markets.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Following allegations of a product defect, a company might expect consumers to bring tort-law class claims. But that does not mean the company also should face securities-fraud class claims from shareholders. Even more so, a company's potential liability for securities fraud should not depend on the vagaries of an unanticipated jury verdict in a products liability case. Yet this kind of "event-driven" securities litigation, in which liability is predicated on events several steps away from disclosures to shareholders, is becoming pervasive. This case encapsulates that phenomena, and it is now proceeding as a class action only because

[2] The views expressed in this brief do not necessarily reflect the views of the institutions with which *amici* are or have been affiliated.

the majority on a panel of the Third Circuit, over the dissent of Judge Chung, eliminated an important guardrail this Court established to protect companies from these often meritless piggyback actions. The Third Circuit's decision also creates a clear split with the Second Circuit. That is harmful to securities markets, because companies now risk crushing liability for pile-on securities claims based on events far removed from their investor disclosures.

Defendants' petition demonstrates why this Court's review is warranted. *Amici* submit this brief to highlight the consequences if this Court allows the Third Circuit's erroneous decision to stand.

In event-driven securities litigation, shareholders sue after an adverse event or corporate trauma—accidents, oil spills, product recalls, data breaches, C-suite scandals—and claim to have been defrauded by earlier statements made touching on the same general subject. *See* Emily Strauss, *Is Everything Securities Fraud?*, 12 UC Irvine L. Rev. 1331, 1333-1334 (2022). To invoke the *Basic* presumption of reliance, which holds that all material information about a company is incorporated into its stock price, plaintiffs contend that the company's statements "maintained" an inflated stock price. When the controversy surfaced, the purported truth was revealed, leading to a stock-price decline.

Here, for example, plaintiffs contend that Johnson & Johnson's ("J&J") statements about its R&D efforts and talc-product safety maintained an inflated stock price by hiding that its talc products allegedly contained asbestos. These statements were supposedly revealed as false when a jury rendered a multi-billion punitive damages award against the company in a closely followed trial. As should have been self-evident, the resulting stock drop occurred because the

market did not predict the jury's massive verdict, not because the risk of the trial was unknown or the market learned that J&J's statements about talc were untrue. In fact, allegations of a link between talc and cancer had been reported in the press long before that verdict—including when made by tort plaintiffs in prior trials with less success—but the shareholder plaintiffs here strategically chose to not designate those events as corrective of the statements because there was no associated stock price decline.

By their nature, these event-driven suits collide with this Court's admonition that the "implied" private right of action under Section 10(b) of the Exchange Act of 1934 should be construed narrowly, and "not be extended beyond its present boundaries." *Stoneridge Inv. Partners, LLC* v. *Sci.-Atlanta, Inc.*, 552 U.S. 148, 165, 167 (2008). Nonetheless, these event-driven cases were sometimes certified for class treatment without permitting defendants to show that the challenged statements did not impact the stock price (by maintaining supposed inflation).

In *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*, 594 U.S. 113 (2021), the Court instituted guardrails to protect defendants' right to rebut the *Basic* presumption at class certification, especially in cases proceeding under the inflation-maintenance theory. Reaffirming its prior holding in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) (*Halliburton II*), that if a "misrepresentation had no price impact, then *Basic*'s fundamental premise 'completely collapses, rendering class certification inappropriate,'" the Court instructed lower courts to consider the degree of "mismatch" between the alleged misstatements supposedly maintaining the inflated price and the alleged corrective disclosures.

Goldman, 594 U.S. at 119, 123. The Court gave as an example of a fatal mismatch a generic statement that "we have faith in our business model," followed by a specific "corrective disclosure" that "our fourth quarter earnings did not meet expectations." *Id.* at 123. Where there is such a "mismatch between the contents of the misrepresentation and the corrective disclosure," the inference "that the back-end price drop equals front-end inflation [] starts to break down." *Id.*

Here, the Third Circuit wrongly concluded that alleged misrepresentations "match" alleged corrective disclosures simply because they "relat[e] to" the same "subject" (*i.e.*, the safety of talc). Pet. App. 9-10. That ruling improperly expands the private action, guts the mismatch test this Court established in *Goldman*, and squarely conflicts with the Second Circuit, which held, on remand from *Goldman*, that "requiring only a general front-end—back-end subject matter match . . . does not meaningfully account for the Supreme Court's guidance." *Ark. Tchr. Ret. Sys.* v. *Goldman Sachs Grp., Inc.*, 77 F.4th 74, 100-101 (2d Cir. 2023) (*Goldman II*). The Third Circuit's decision will further exacerbate confusion in the district courts over how to apply this Court's mismatch test.

Specifically, the Third Circuit failed entirely to analyze whether the drops in J&J's stock price that coincided with the alleged corrective disclosures were reasonable proxies for purported inflation attributed to the challenged statements, which is the purpose of the mismatch test. Instead of undertaking the required mismatch analysis, the Third Circuit simply observed that J&J's "stock price decline[d]" in response to "new, value relevant information" on plaintiff's alleged corrective disclosure dates. Pet. App. 10-12. As Judge

Chung correctly explained, a "finding that a [corrective] disclosure had an associated price drop" does not "reveal[] anything about the price inflation caused by an earlier misrepresentation." Pet. App. 19, 25. Judge Chung, along with Judge Bibas and Judge Krause, would have granted *en banc* review. Pet. App. 70.

The Third Circuit's misapplication of the mismatch test will have far-reaching consequences. If an adverse products-liability jury verdict can be "corrective," then any negative event can support certification of shareholder classes seeking millions or billions in damages. By requiring only a general subject-matter match and a stock drop in response to negative news, class certification risks becoming near-automatic in the kinds of event-driven inflation-maintenance cases that are the least likely to be meritorious, yet especially prone to abuse. These kinds of cases are easy to conjure up; they often involve class periods spanning multiple years, resulting in very large potential damages; and they often result in double-punishment on companies, namely consumers and shareholders seeking recovery from the same negative event. This Court should grant review and reverse.

ARGUMENT

I. Section 10(b) Is An Implied Private Right Of Action That Must Be Construed Narrowly.

"The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge*, 552 U.S. at 164. As such, it must be given a "narrow" construction, and "should not be extended beyond its present boundaries." *Id.* at 165, 167. This Court warned against the "federal power" being used to "invite litigation beyond the immediate sphere of securities litigation" to reach

any mishap in the "realm of ordinary business operations," an "area[] already governed by functioning and effective state-law guarantees." *Id.* at 161.

Securities fraud suits like here that attempt to turn everything into securities fraud conflict with that instruction in *Stoneridge*. That is why some courts correctly squash attempts to reverse-engineer a securities fraud suit based on a stock drop coinciding with negative company news (*e.g.*, a C-suite scandal), and shareholders claiming to have been defrauded based on an earlier company statement implicating the subject of the negative event (*e.g.*, statements about acting with "integrity"). *See Singh* v. *Cigna Corp.*, 918 F.3d 57, 59-60 (2d Cir. 2019) (rejecting plaintiff's "creative attempt to recast corporate mismanagement as securities fraud" by invoking "a simple equation: first, point to banal and vague corporate statements affirming the importance of regulatory compliance; next, point to significant regulatory violations; and *voila*, you have alleged a prima facie case of securities fraud!"); *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund* v. *Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017) (allowing securities fraud claims based on generic statements in a company's code of conduct is "untenable" and "could turn all corporate wrongdoing into securities fraud").

Respecting the narrow construction of the implied right of action protects companies (and their shareholders) from potentially abusive litigation and the *in terrorem* effect that securities class actions pose: "that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge*, 552 U.S. at 163; *see Speerly* v. *Gen. Motors, LLC*, 143 F.4th 306, 324 (6th Cir. 2025)

(*en banc*) ("'[C]oerced settlements substantially raise the costs of doing business' for companies, which 'in turn pass on those costs to consumers,' investors, and workers."). The Third Circuit ignored that principle here by loosely interpreting the *Goldman* mismatch test so as to make it almost *pro forma* for plaintiffs to obtain class certification in abusive event-driven cases.

II. The Third Circuit's Decision Construes Section 10(b) Expansively, Nullifying This Court's "Mismatch" Safeguard.

A. In *Halliburton II*, the Court held that a defendant can rebut the *Basic* presumption of reliance at class certification by showing that the misrepresentation "did not affect the stock's market price." 573 U.S. 258, 279 (2014). After *Halliburton II*, however, lower courts almost never found that a defendant successfully rebutted the *Basic* presumption. *See Ark. Tchr. Ret. Sys.* v. *Goldman Sachs Grp., Inc.*, 955 F.3d 254, 266 n.9 (2d Cir. 2020) (citing statistics), *rev'd*, 594 U.S. 113 (2021).

Seven years later, in *Goldman*, this Court revisited this important issue and clarified that a defendant's rebuttal right was not an empty promise and does not impose on defendants a nearly impossible burden to disprove all possibility of price impact, as some district courts had required. *See Monroe Cnty.* v. *S. Co.*, 332 F.R.D. 370, 395 (N.D. Ga. 2019) (defendants failed to "rule out" all possibility of "price impact whatsoever").

Instead, the Court made clear in *Goldman* that the "court's task is simply to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentations had a price impact." 594 U.S. at 126-127. Courts also "must take into account *all* record evidence relevant to price impact . . . —qualitative as well as

quantitative—aided by a good dose of common sense." *Id.* at 122, 124.

Without endorsing the inflation-maintenance theory, the Court further addressed how the price impact analysis works if invoked by plaintiffs. When an alleged misstatement does not cause the stock price to increase, that could mean one of two things: (i) the statement had no price impact because the statement was immaterial, or (ii) the statement was material and impacted the stock price by allegedly maintaining inflation already embedded in the stock price. To show the latter, "[p]laintiffs typically try to prove" price impact "indirectly" under the inflation-maintenance theory by focusing on the back-end stock price decline following negative news about the company. *Goldman*, 594 U.S. at 123. "They point to a negative disclosure about a company and an associated drop in its stock price; allege that the disclosure corrected an earlier misrepresentation; and then claim that the price drop is equal to the amount of inflation maintained by the earlier misrepresentation." *Id.* "But that final inference—that the back-end price drop equals front-end inflation—starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Id.* Thus, the "mismatch" test answers the question: when is it reasonable to look to a stock price decline as an indirect proxy for inflation introduced when the allegedly fraudulent statements were made?

This Court's "mismatch" test establishes an important guardrail. Absent this guardrail, the inference that the "back-end price drop equals front-end inflation," *Goldman*, 594 U.S. at 123, becomes irrefutable, because allegations of wrongdoing nearly always conflict, at some level of generality, with a company's

statement. If a court eschews a meaningful comparison of the content and specificity of the front-end alleged misstatement and back-end allegedly corrective event, as the Third Circuit did below, massive securities fraud class actions will be certified based on barely more than the fact that the stock price declined at the end of the plaintiff's proposed class period in response to negative news about the company. That directly conflicts with this Court's admonition that the federal securities laws were not enacted "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005). For this reason, lower courts have acknowledged that this Court's mismatch test applies in all cases where plaintiffs invoke the inflation-maintenance theory of price impact, not just in cases where the challenged statements are generic. *See, e.g.*, *In re Kirkland Lake Gold Ltd. Sec. Litig.*, 2024 WL 1342800, at *6-7, 11 (S.D.N.Y. Mar. 29, 2024). Even a specific statement about a product can fail to "[]match [the informational] content" of a negative event that prompts a stock price decline, *id.* at *11, such as a multi-billion jury verdict.

On remand from this Court's *Goldman* decision, the Second Circuit recognized the danger of a loose subject-matter test. Were the rule otherwise, "securities plaintiffs could find a road to success in the rearview mirror: they would need only find negative news, such as the revelation that a company may have [violated a law], and then point to any previous disclosure from the company which touches upon a similar subject, such as that company's commitment to complying with the law—no matter how generic that statement is." *Goldman II*, 77 F.4th at 101.

B. The Third Circuit here erred—creating a clear split with the Second Circuit—by gutting this Court's mismatch test through two sentences of cursory analysis. The Third Circuit observed that the corrective disclosures "relat[e] to" the same "subject" as alleged misrepresentations. Pet. App. 9-10. The court then concluded, based on that loose connection, that "unlike in *Goldman*, 594 U.S. at 123, there is no mismatch between the subject of the alleged misrepresentation and the content of the disclosures." *Id.* at 10. From there, the Third Circuit found that the challenged statements had price impact based on the uncontested fact that the market for J&J stock was efficient—*i.e.*, that the "stock price decline[d]" in response to supposedly "new, value relevant information" about the company. Pet. App. 10-12; *see Halliburton II*, 573 U.S. at 280 (defining an efficient market as one in which "the market price . . . respond[s] to pertinent publicly reported events").

In other words, the Third Circuit held that the plaintiff defeated J&J's price-impact rebuttal simply by citing the two factual predicates that are the basis for every securities fraud action: (i) the company made statements "related to" the subject of the negative event that prompted the lawsuit (here, talc products); and (ii) the negative event that prompted the lawsuit (here, the jury verdict finding that J&J's talc caused the plaintiffs' cancer) coincided with a stock price decline. As Judge Chung explained in dissent, the panel majority affirmed certification of a huge class on "just a finding of an associated price drop," which "does not answer the question of whether J&J rebutted a presumption of reliance because it does not address whether" the jury's verdict "corrected a prior misrepresentation." Pet. App. 27.

C. Worse still, the Third Circuit's reliance on the stock price decline after a jury verdict as a proxy for inflation introduced by the alleged misstatements contradicts the core theoretical underpinning of *Basic*. *Basic*'s "fraud on the market" theory of reliance asserts that every stock trade is presumably made in reliance on "all publicly available information." *Basic* v. *Levinson*, 485 U.S. 224, 247 (1988). The "prerequisite" for that presumption is that the stock price does, in fact, "fully reflect all publicly available information." *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 8-11 & n.16 (1st Cir. 2005); *see West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) ("The theme of *Basic* and other fraud-on-the-market decisions is that public information reaches professional investors, whose evaluations of that information and trades quickly influence securities prices."); *see also* Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. Corp. L. 635, 639-640 (2003).

Here, J&J's risk of tort liability to consumers alleging that its talc products caused them cancer was fully known to the market well before the jury's verdict in the Missouri state court *Ingham* trial (the alleged corrective event). There had been 13 prior trials by other plaintiffs based on the same evidence allegedly linking talc to cancer, the vast majority of which J&J won (at trial or on appeal). *See In re Johnson & Johnson Talc Stockholder Derivative Litig.*, No. 3:19-cv-18874 (D.N.J.), Dkt. 40-6 at pp. 149-151 & nn.208-210. Moreover, the *Ingham* case had been heavily followed in the press, including reporting of the evidence that the *Ingham* plaintiffs alleged showed a link between talc

and cancer. A3696, A3719.[3] As a result, the market was fully informed about the underlying allegations of products liability, the competing evidence, and the risks of an adverse verdict before the jury rendered its decision. The only thing that neither J&J nor the market knew was what the jury would decide. In other words, the only unknown in the mix was the unpredictability of the *Ingham* jury. But there was no way for J&J to disclose to the market in advance what the result of the trial would be. Any prediction could itself have been misleading given that the unpredictability of juries in punitive-damages personal-injury litigation is well documented. *See Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 499 (2008) (discussing the "stark unpredictability of punitive awards"); Marta Krason, *On Frand-Ly Terms: Examining the Role of Juries in Standard-Essential Patent Disputes*, 92 U. Chi. L. Rev. 1439, 1441 (2025) ("[T]here is a higher degree of unpredictability in jury trial outcomes.").

Consequently, the jury's outlier verdict in *Ingham* could not have corrected any prior statement J&J had made about its talc products. In the efficient market on which Plaintiffs' claims rely, J&J's stock price already reflected the risk that J&J could be held liable for talc-based cancer claims, because the evidence of that alleged link had been reported on before the trial and introduced at the public trial (and covered in the press during the trial). *See Eckstein* v. *Balcor Film*

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[3] Citations to "A___" are to the appendix filed below in the Third Circuit, No. 24-1409, Dkt. 21 (3d Cir.). *See also J&J Was Alerted to Risk of Asbestos in Talc in '70s, Files Show*, Bloomberg (Sept. 22, 2017) <tinyurl.com/2y587rnm> (reporting on evidence unsealed in the *Ingham* case); *In Missouri, J&J Faces Biggest Trial Yet Alleging Talc Caused Cancer*, Reuters (June 6, 2018) <tinyurl.com/mwe5e5wh>. The *St. Louis Record* covered the daily blow-by-blow as the *Ingham* trial unfolded. *See* A3252-3499.

Invs., 8 F.3d 1121, 1129 (7th Cir. 1993) ("Competition among savvy investors leads to a price that impounds all available information, even knowledge that is difficult to articulate."). As a result, the only new information that impacted the stock price was the market processing that the known risk of a multi-billion punitive damages award had occurred. "That loss, however, is not one for which the plaintiffs in [a securities fraud] case are entitled to compensation." *Tchrs.' Ret. Sys. of La.* v. *Hunter*, 477 F.3d 162, 188 (4th Cir. 2007); *see Ponsa-Rabell* v. *Santander Sec. LLC*, 35 F.4th 26, 34 (1st Cir. 2022) ("Rule 10b-5 and Section 10(b) are not insurance against an investment loss.") (quotation and brackets omitted).

The evidence in the record confirms what should have been obvious. After the jury's verdict in *Ingham*, securities analysts covering J&J did not conclude that one jury verdict against J&J—in contrast to the others that decided in favor of J&J—meant that it was now established scientific fact that talc caused cancer and that J&J had lied to the market. Drawing that conclusion would be unwarranted. *See* Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 Daedalus 164, 167 (Fall 2018) (concern that juries "might be overwhelmed by unfamiliar scientific evidence and confused or frustrated by testimony beyond their comprehension . . . may seriously endanger sound fact-finding"). Instead, analysts reacted to the eye-popping size of the verdict and how this new benchmark adjusted their assessments of the potential costs to resolve the company's talc litigation. *See* A3723-3724 (Credit Suisse analysts stating that "[d]amages from unfavorable talc verdicts have been high (relative to [cases involving] mesh [products]) at ~$118MM per case even before today's verdict, but

JNJ has been able to overturn most of these unfavorable rulings"); *see also Consorti* v. *Armstrong World Indus., Inc.*, 64 F.3d 781, 789 (2d Cir. 1995) (commenting that the "unpredictability of jury awards . . . make it difficult for risk bearers to structure their behavior to efficiently manage risk"). In sum, the market reaction to the verdict reflected concern over the implications of the jury verdict for future litigation costs, not a reaction to the revelation that J&J's statements had been untrue.

D. This case is not a one-off, but emblematic of nearly all event-driven suits. It is implausible to infer that, because a stock price decline followed a highly specific negative event, statements touching on the same subject matter made years earlier by the company propped up the stock price. "[F]or an event-driven suit, th[e] price drop is almost never a reasonable measure of the misstatement's share price inflation," because much or all of the price drop is due to *the event itself*, not a dissipation of inflation in the stock price due to the market's underestimation of the risk of the bad event. Merritt Fox & Joshua Mitts, *Event-Driven Suits and the Rethinking of Securities Litigation*, 78 Bus. Law. 1, 4 (2023); *see* Richard A. Booth, *Price Inflation and Price Maintenance in Securities Fraud Class Actions*, 30 Stan. J.L. Econ. & Bus. 133, 147-148 (2025) (because the negative "event would have occurred anyway," there is a disconnect between that "loss" and "anything [defendant] *said* to the market").

The Third Circuit's decision thus effectively turns the price impact inquiry into a readily satisfied box-checking exercise that fails to address whether "investors relied upon the [challenged] disclosure *as written*." *Goldman II*, 77 F.4th at 100. By jumping to the back-end stock drop without asking whether there is

an evidentiary or "common sense" basis to use that price decline as a proxy for front-end inflation when the statement was made, *Goldman*, 594 U.S. at 122, the Third Circuit missed the very issue it was required to decide under *Basic*: whether a *challenged statement impacted the stock price* when made, such that "an investor presumptively relies on a misrepresentation . . . through his reliance on the integrity of the market price." *Halliburton II*, 573 U.S. at 278 (quotation and alterations omitted). The mismatch test exists to determine "*whether* there is a basis to infer that the back-end price [drop] equals front-end inflation." *Goldman II*, 77 F.4th at 99 n.11 (emphasis added). Without an accurate match, as Judge Chung explained, "there is no reason to conclude that the price drop caused by a disclosure reveals anything about the price inflation caused by an earlier misrepresentation." Pet. App. 19.

That is why *Goldman* requires not simply that the statements relate to the same "subject matter," but that they match in content and specificity, reflecting that the stock price drop is potentially a proxy for the purported inflation attributed to the challenged statements. *See Goldman II*, 77 F.4th at 98. As the Second Circuit correctly recognized, a properly conducted "mismatch inquir[y]" is the critical check on "the value of the back-end price drop as indirect evidence of a front-end, inflation-maintaining price impact." *Id.* at 93; *see Event-Driven Suits*, 78 Bus. Law. at 4 ("[B]y focusing on the price drop at the time of a corrective disclosure, courts have lost track of the critical point that the real issue is whether the misstatement inflated the share price by a meaningful amount in the first place.").

The Third Circuit's adoption of a loose subject-matter test that asks only whether a negative event that

coincides with a stock drop "relates to" the subject of an earlier company statement was legal error that warrants this Court's review. Even before the Third Circuit's legally erroneous decision, there has been considerable confusion in the district courts about how to apply the "mismatch" test. *See* Per Axelson & Matthew D. Cain, *What Is Price Impact? How the* Goldman *Decisions Are Reshaping Shareholder Class Actions*, 22 Berkeley Bus. L.J. 441, 465 (2025) (post-*Goldman*, there is "a lack of consensus in court opinions regarding the meaning of price impact and how to address it at the class certification stage").[4] If allowed to stand, the Third Circuit's loose standard that empties the mismatch test of almost all meaning will exacerbate that confusion.

E. The Third Circuit's decision is problematic in other ways too. Allowing a price drop following a negative event to serve as a proxy for the price impact of prior statements addressing the same subject matter conflicts with disclosure rules and risks imposing new legal duties on public companies. Because all companies make statements about their products and business practices, a price-impact finding would become virtually automatic whenever there is a disclosure of potential legal liability concerning the company's products and business practices. Companies could avoid such a finding only by assuming an affirmative duty to disclose all uncharged misconduct, or, in this case, to inform the market that it expects to lose a contested jury trial. But issuers "do not have a duty to disclose

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[4] The Ninth Circuit is the only other appellate court to address price impact after *Goldman*. Its unpublished decision concluded that the "front-end and back-end statements are matched enough under *Goldman*," without explaining what "enough" would be. *Jaeger* v. *Zillow Grp., Inc.*, 2025 WL 2741642, at *2 (9th Cir. Sept. 26, 2025).

uncharged, unadjudicated wrongdoing." *Plumber & Steamfitters Loc. 773 Pension Fund* v. *Danske Bank A/S*, 11 F.4th 90, 98 (2d Cir. 2021). Nor is there a "duty to confess contested charges." *Anderson* v. *Abbott Lab'ys*, 140 F. Supp. 2d 894, 906 (N.D. Ill. 2001), *aff'd*, 269 F.3d 806 (7th Cir. 2001). Requiring companies to affirmatively disclose uncharged misconduct or preemptively admit liability in a jury trial to avoid certification of securities class actions would effectively compel such a legally unwarranted duty.

III. The Third Circuit's Decision Will Lead To Even More Abusive Event-Driven Securities Suits.

For decades, "securities class actions were largely about financial disclosures (*e.g.*, earnings, revenues, liabilities, etc.)," in which case "the biggest disaster was an accounting restatement." John Coffee, Jr., *The Changing Character of Securities Litigation in 2019*, CLS Blue Sky Blog (Jan. 22, 2019) <tinyurl.com/47n2v74t>. Not anymore.[5] Now, "the biggest disaster may be a literal disaster: an airplane crash, a major fire, or a medical calamity that is attributed to your product." *Id.*; *see* Matt Levine, *Everything Everywhere Is Securities Fraud*, Bloomberg (June 26, 2019) <tinyurl.com/yevzs89z> ("And so contributing to global warming is securities fraud, and sexual harassment by executives is securities fraud, and customer data breaches are securities fraud, and mistreating killer whales is securities fraud, and whatever else you've got."); Kevin LaCroix, *Ripped from the Headlines: Norfolk Southern Hit with Securities*

[5] In 2025, only 4% of securities fraud class actions involved restatements of earnings, and 16% involved allegations of accounting violations. *See* Cornerstone Research, *Securities Class Action Filings: 2025 Year in Review* at 12 (2026) <tinyurl.com/4phxabm8>.

Suit, The D&O Diary (Mar. 19, 2023) <tinyurl.com/333nate9> ("There was a time when most securities litigation was about financial fraud. . . . However, it increasingly seems that securities suits are more about the latest high-profile incident, giving the lawsuits a 'ripped from the headlines' feel.").

These event-driven cases are becoming increasingly common. *See* Gideon Mark, *Event-Driven Securities Litigation*, 24 U. Pa. J. Bus. L. 522, 528 (2022) ("[B]y 2018 [event-driven] suits accounted for more than one-quarter of all securities class actions filings."). But they are particularly prone to abuse. Without a proper application of the *Goldman* decision, they will wreak havoc on the markets.

First, event-driven suits often seek to impose double punishment on companies, because, as here, consumers allegedly injured by the asserted misconduct have already brought separate litigation under laws directly governing that conduct (*e.g.*, product-liability laws). This double punishment harms not only the company, but also shareholders and consumers. *See SEC* v. *Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010) (Boudin, J., and Lynch, J., concurring) ("No one sophisticated about markets believes that multiplying liability is free of cost. And the cost, initially borne by those who raise capital . . . , gets passed along to the public."); Amelia Miazad, *D&O Insurers As Climate Governance Monitors*, 104 B.U. L. Rev. 1181, 1209 (2024) (observing that "the increase in event-driven [securities] litigation is causing D&O insurance brokers to caution that policy terms 'will be tested'").

Second, event-driven cases involve increasingly long class periods (more than five years in this case), multiplying theoretical exposure, often to billions of dollars. *See Changing Character*, *supra* ("potential

damages [in event-driven cases] are often very high"); *Carpenters Pension Tr. Fund of St. Louis* v. *Barclays PLC*, 310 F.R.D. 69 (S.D.N.Y. 2015) (certifying 5-year class period); *In re Boeing Co. Sec. Litig.*, 2025 WL 2428481, at *3 (E.D. Va. Mar. 7, 2025) (certifying 3-year class period), *Rule 23(f) review granted*, No. 25-135 (4th Cir. May 2, 2025). Moreover, as plaintiffs allege ever-wider time gaps between alleged misstatements and corrective events, intervening events like "changed economic circumstances, changed investor expectations, [or] new industry-specific or firm-specific facts, conditions, or other events" make it more challenging to attribute stock price declines to "the earlier misrepresentation." *Dura*, 544 U.S. at 343.

Third, plaintiffs often challenge dozens or more statements—essentially every company statement touching on the negative event's subject matter—overwhelming the district court in hopes that at least one statement will stick and survive a motion to dismiss. *See, e.g.*, *In re The Boeing Co. Sec. Litig.*, No. 24-cv-151 (E.D. Va.), Dkt. No. 43 ¶¶ 575-999 (100+ challenged statements); *In re FirstEnergy Corp. Sec. Litig.*, No. 20-cv-3785 (S.D. Ohio), Dkt. No. 72 ¶¶ 95-135 (40+ statements).

And once a class is certified, that is "often the whole ballgame," as the aggregation of claims places "hydraulic pressure to settle" even "questionable claims." *Allen* v. *Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 908-909 (3d Cir. 2022) (Porter, J., concurring).[6]

In sum, the "difficulties associated with terminating event-driven securities litigation at the motion to dismiss or class certification stage, coupled with the costs

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[6] Nearly all securities class actions settle if a class is certified—only 0.4% of cases reach a trial verdict. *See Securities Class Action Filings*, *supra*, at 16.

of discovery and extremely large potential damage awards typical in this sort of litigation, means that the risk of vexatious litigation is high." Amanda Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1852-1853 (2021).

* * *

The Court's adoption of the "mismatch" test in *Goldman* provides a critical defense against meritless event-driven securities litigation. Without a properly conducted mismatch analysis, it is not difficult for plaintiffs to allege that a corporate trauma that coincides with a stock drop relates to the subject of a prior company statement. If allowed to stand, the decision below imposing only a loose subject-matter test will nullify the mismatch test in exactly the kinds of cases where it is most needed to protect issuers from abusive event-driven suits.

As explained in J&J's petition (at 33-35), this case is an ideal vehicle to rebalance the scales on price impact. This case presents none of the concerns about fact-bound error correction that plagued two cases last Term that the Court dismissed as improvidently granted. *See* Tr. 66, 79-83, *Facebook, Inc.* v. *Amalgamated Bank*, 604 U.S. 4 (2024) (No. 23-980); Tr. 42-43, *NVIDIA Corp.* v. *Ohman*, 604 U.S. 20 (2024) (No. 23-970). There are no relevant factual disputes here, and this Court's review is urgently needed. After *Halliburton II*, lower courts had construed the price-impact defense so narrowly that it could be disregarded. *See supra* 8. After this Court recalibrated the scales in *Goldman*, some lower courts are again diluting the legal standard to once again make class certification in securities fraud cases near-automatic, with the Third Circuit's decision below leading the charge. And be-

cause appellate courts rarely address price-impact issues due to the discretionary nature of appellate review of class certification orders under Federal Rule of Civil Procedure 23(f), *see* Robert Klonoff, *Federal Rule of Civil Procedure 23(f): Reflections after a Quarter Century*, 75 Syracuse L. Rev. 185, 198 (2025) (between 2020 and 2023, "appellate courts granted Rule 23(f) review about 24 percent of the time"), the Third Circuit's deeply flawed decision is likely to attain outsized influence in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 20, 2026