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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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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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INTRODUCTION

The Government asserts (at 6) that private plaintiffs can establish loss causation in fraud-on-the-market cases "by pleading and proving the existence of a disclosure that reveals to the market the falsity of a prior statement." Petitioners agree. That is no different from the rule the District Court found would entitle petitioners to summary judgment "in full." Pet. App. 36a. And it is that same rule that governs in the First, Fourth, Seventh, and Eleventh Circuits. But it cannot be reconciled with the standard that applies in the Second, Fifth, Sixth, or Tenth Circuits, which do not require that the market learn the falsity of any prior statement. And it is even

farther from the rule in the Ninth Circuit, which holds that showing a drop in share price following "the revelation of an earnings miss" is among the "infinite variety" of ways to prove loss causation. *Id.* at 7a. That outlier holding deepens a longstanding split that our Nation's business leaders believe this Court must resolve now. *See* Br. of Sec. Indus. & Fin. Mkts. Ass'n (SIFMA), U.S. Chamber of Commerce, Pharm. Research & Mfrs. of Am. (PhRMA), Nat'l Ass'n of Mfrs., & Bus. Roundtable.

Instead of engaging with the split or the decision below, however, the Government sidesteps the question presented. Seizing on a technical interpretation of "fraud," the Government devotes its brief to attacking the premise that a plaintiff must establish that the market learned of the defendant's wrongful state of mind. That semantic move does not respond to the petition. Courts frequently speak of the revelation of "fraud" in the loss-causation context to refer to disclosures that reveal that the defendant engaged in the *conduct* Section 10(b) forbids, without intending to invoke the separate *scienter* requirement. Indeed, the Government's own merits amicus brief in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), spoke of the various means through which "the fraud can be revealed" for loss-causation purposes in precisely the same way. U.S. *Amicus* Br. 19, *Dura*, 544 U.S. 336 (No. 03-932) (merits stage), 2004 WL 2069564.

The Government takes this approach presumably because it cannot dispel the outcome-determinative difference between those courts that require disclosures "that revealed [the defendant's] previous representations to have been fraudulent," *Teachers' Ret. Sys. of La.* v. *Hunter*, 477 F.3d 162, 187 (4th Cir.

2007); those that do *not* require disclosures to "reveal the falsity in a prior statement," so long as they reveal the facts concealed by the defendant, *Pub. Emps.' Ret. Sys. of Miss.* v. *Amedisys, Inc.*, 769 F.3d 313, 324-325 & n.5 (5th Cir. 2014); and those that permit plaintiffs to "prove loss causation by showing that the stock price fell upon the revelation of an earnings miss" even if the market never learned about the true cause of the miss or the defendant's misrepresentations. Pet. App. 7a.

Nor can the Government defend the Ninth Circuit's holding without abandoning the loss-causation standards it has previously advocated to this Court and ignoring the legal framework all agree is controlling. *See* U.S. *Amicus* Br. 19, *Dura*, 544 U.S. 336 (No. 03-932) (merits stage), 2004 WL 2069564; U.S. *Amicus* Br. 25-26, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (No. 06-43) (merits stage), 2007 WL 2329639.

This Court has long recognized the vital importance of uniform standards in private securities-fraud litigation. That is why, over the last decade, it has granted all but one of the securities-law petitions significant enough to prompt a call for the views of the United States—including all four cases in which the Solicitor General recommended against certiorari. *See Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377 (2014); *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135 (2011); *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010); *Betz* v. *Trainer Wortham & Co.*, 519 F.3d 863 (9th Cir. 2008), *cert. granted, judgment vacated and remanded*, 559 U.S. 1103 (2010). It should do so here, too.

ARGUMENT

I. THE GOVERNMENT'S EFFORTS TO DISPEL THE SPLIT ARE UNPERSUASIVE

The Government's principal response to the split described in the petition is to claim (at 13) that no court requires a showing that the market learned that the defendant acted with the state of mind required to impose liability. That is beside the point. Courts routinely use terms like "fraud" and "fraudulent" to refer to the kinds of statements or omissions Section 10(b) forbids, without invoking the *scienter* requirement. What matters is that the courts cannot agree whether the market must learn of that fraud, or whether some lesser showing is enough.

1. The Government does not engage with the First, Fourth, Seventh, and Eleventh Circuits' requirement that plaintiffs identify disclosures that reveal some fraud or misrepresentation. Pet. 9-12.

The Government suggests (at 13) that the plaintiffs in *Massachusetts Retirement Systems* v. *CVS Caremark Corp.*, 716 F.3d 229 (1st Cir. 2013), satisfied their burden by alleging simply that the market learned the "truth" about a merger. That is not all. A key point for the First Circuit was that plaintiffs plausibly alleged that statements on an earnings call "revealed that [the defendant's] previous statements were misrepresentations." *CVS Caremark*, 716 F.3d at 239.

The Government does not dispute that the Eleventh Circuit likewise holds that plaintiffs must show that the market learned of "some previously concealed fraud or misrepresentation." *Meyer* v. *Greene*, 710 F.3d 1189, 1200 (11th Cir. 2013). The Government contends (at 15) that such disclosures need not

reveal whether the defendants acted with scienter. But that does not alleviate the burden to identify disclosures that "reveal to the market that [the defendant's] previous statements were false or fraudulent." *Meyer*, 710 F.3d at 1201.

The Government suggests (at 16) that a plaintiff in the Seventh Circuit need show only that "it was the very facts about which the defendant lied which caused its injuries." *Tricontinental Indus., Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 842 (7th Cir. 2007) (internal quotation marks omitted). But that is just a part of a plaintiff's obligation to establish that it "experienced loss as a result of the exposure of [the defendant's] misrepresentations." *Id.* at 844. If the Government were right, *Tricontinental* would have come out differently. The plaintiffs there alleged that they were injured by the facts concealed by the defendants' false statements in a 1997 audit. Yet the Seventh Circuit found that insufficient to establish loss causation because the plaintiffs could not point to a disclosure that "made 'generally known' any problems or irregularities in" that audit. *Id.* at 843-844.

Finally, the Government acknowledges (at 17-18) that the Fourth Circuit requires plaintiffs to connect their losses to the disclosure of some previously concealed fact. More than that, plaintiffs must show that they were injured when "the market reacted to new facts * * * that revealed [the defendant's] previous representations to have been fraudulent." *Hunter*, 477 F.3d at 187; *see also Katyle* v. *Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011) (disclosure must "reveal to the market in some sense the fraudulent nature of" the defendant's conduct).

2. The Second, Fifth, Sixth, and Tenth Circuits take a different view. They allow a plaintiff to establish loss causation by showing that its shares lost value in response to revelations of the *facts* concealed by a misrepresentation, whether or not the market learned that the defendant concealed those facts. Pet. 12-14. The Government appears to agree; it acknowledges (at 18-19) that these courts require proof that some fact concealed by the defendant "negatively affected the value of the security" when that fact was "disclosed." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 261-262 (2d Cir. 2016) (internal quotation marks omitted).

That is far different from the test applied in the First, Fourth, Seventh, and Eleventh Circuits. *See* Pet. 17-18; Br. of SIFMA et al. 8-9. Thus, for example, respondents could survive summary judgment in the Second, Fifth, Sixth, and Tenth Circuits if they showed they suffered losses after First Solar disclosed the LPM defect because that defect was "the subject of [First Solar's] alleged misstatements." *Vivendi*, 838 F.3d at 263 (internal quotation marks and emphasis omitted); *see* Pet. App. 42a. But respondents' claims would fail in the First, Fourth, Seventh, and Eleventh Circuits because the District Court found that *none* of the alleged disclosures revealed any "fraudulent practices," whether misstatements or omissions. Pet. App. 36a. The Government cannot dispute, and does not address, that outcome-determinative difference. Yet the split means that plaintiffs' choice of venue will dictate the results in securities-fraud litigation.

3. The Government barely mentions the exceptionally low bar for loss causation that applies in the Third and Ninth Circuits. The Government asks this

Court (at 20) to ignore the Third Circuit's statement that plaintiffs "might" be able to survive a motion to dismiss by alleging that their shares fell on an earnings miss and that allegedly concealed facts were "among the reasons for" the miss. *McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418, 436 (3d Cir. 2007) (internal quotation marks and brackets omitted). The fact that the plaintiffs in *McCabe* did not prevail does not alleviate the uncertainty that public companies face based on the legal standard that *McCabe* endorsed.

The Government quibbles (at 21) with one of the petition's examples of the differences between the Third and Ninth Circuit's rule and the revelation-of-the-facts standard from the Second, Fifth, Sixth, and Tenth Circuits. It suggests that the losses following First Solar's December 2011 guidance update would suffice to show loss causation in all six circuits because the complaint alleged both the (undisclosed) hot-climate issue and "the financial impacts of those defects." But the Government ignores that there was no disclosure *at all* regarding the hot-climate issue. First Solar disclosed updated financial guidance generally, not some previously concealed financial impact of that defect, *see* Pet. App. 48a-49a, so that allegation does not undercut the point. And even if there was no difference among these courts, there would still be a massive 4-6 split.

Finally, the Government suggests (at 22) that the number of "cross-circuit citations" means the circuits must agree. But the fact that courts agree on the broad strokes of loss-causation does not answer the obvious and outcome-determinative differences in their dispositive language. The split is deep, developed, and unsustainable.

II. THE GOVERNMENT DOES NOT DEFEND THE NINTH CIRCUIT'S DECISION

The Government's brief spends all of one paragraph (at 9-10) defending the Ninth Circuit's ruling before switching to attacking what it claims is petitioners' proposed rule. That is because the Ninth Circuit's decision is indefensible. It held that, among the "infinite variety of causation theories" available, a plaintiff may "prove loss causation" merely "by showing that the stock price fell upon the revelation of an earnings miss," even if the market never learns the underlying cause. Pet. App. 7a (internal quotation marks omitted). The Government cannot reconcile that standard with its own position, this Court's precedent, the Private Securities Litigation Reform Act (PSLRA), or basic proximate-cause principles.

1. The Government says (at 6) that a plaintiff must show "a disclosure that reveals to the market the falsity of a prior statement." That rule conflicts with the Ninth Circuit's holding that news of an earnings miss alone will do. After all, an earnings miss, standing alone, does not imply the falsity of any prior statement. Pet. App. 7a. Yet that is all the Ninth Circuit requires, as the cases that it cited show. In *Berson* v. *Applied Signal Technology, Inc.*, 527 F.3d 982 (9th Cir. 2008), the plaintiffs alleged a drop in share price following an earnings miss. They claimed the miss was caused by stop-work orders on certain contracts, known only to the plaintiffs thanks to confidential witnesses. *Id.* at 984-985. The Ninth Circuit held they plausibly alleged loss causation, even though the market never learned of the stop-work orders or of the defendant's efforts to conceal them. *Id.* at 989. Likewise, in *In re Daou Systems,*

Inc., 411 F.3d 1006 (9th Cir. 2005), the Ninth Circuit held that the plaintiffs adequately pleaded loss causation by alleging that an undisclosed accounting fraud caused an earnings miss and other issues that led to a drop in the share price. *Id.* at 1026; *see* Pet. App. 30a-31a. The Government could not endorse that standard without changing its position.

The Government's brief asserts without explanation (at 9) that the Ninth Circuit's holding is consistent with this Court's loss-causation precedent. It is not. This Court has explained that Section 10(b) allows recoveries only for "economic losses that misrepresentations actually cause." *Dura*, 544 U.S. at 345. When a plaintiff is relying on the market price of a security to establish loss, that principle requires the public "revelation of a misrepresentation." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 813 (2011); *see* Pet. 19-20. After all, if a misrepresentation remains concealed, there is no way to be sure the "fraud premium" it introduced into the market price was actually removed. The Government does not say how that squares with the Ninth's Circuit's view that plaintiffs can establish loss causation even where the market never learns that the defendant made *any* misrepresentations.[*]

[*] Nor does the Government reconcile that standard with its argument in *Stoneridge* that a securities-fraud complaint failed to allege loss-causation because it did "not even specifically allege how (and when) it was revealed that [the issuer] had misrepresented its operating cash flow," let alone that the "decline in [the issuer's] share price was attributable to the revelation that [it] had misrepresented its cash flow," U.S. *Amicus* Br. 25-26, *Stoneridge*, 552 U.S. 148 (No. 06-43) (merits stage), 2007 WL 2329639, or its argument in *Dura* that "there

The Ninth Circuit's rule is likewise incompatible with the PSLRA. The Government concedes that the "critical prerequisite" of the Act's cap on damages in fraud-on-the-market cases is "the revelation of information 'correcting the misstatement.' " U.S. Br. 11 (quoting 15 U.S.C. § 78u–4(e)(1)). But it fails to explain how that prerequisite applies in the Ninth Circuit, where a plaintiff need not show that any such correction was revealed.

Finally, the Government acknowledges (at 11) that common-law proximate-cause principles control the loss-causation inquiry, but it studiously ignores what this Court has said about those principles. Under this Court's cases, the "proper referent of the proximate-cause analysis is" the conduct that violates the statute. *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006); *see* Pet. 20. Failing to meet earnings expectations is not unlawful under the Exchange Act, yet the Ninth Circuit's rule recognizes losses caused by the market's reaction to an earnings miss alone, making it exceedingly difficult to attribute those losses to actual wrongdoing, as opposed to "other intervening causes." *Erica P. John Fund*, 563 U.S. at 812-813.

2. The Government's policy arguments (at 11-12) fail to grapple with the consequences of the Ninth Circuit's holding. The Government urged this Court to grant review in *Dura* because a lax loss-causation standard is "more likely to harm than to aid the intended beneficiaries of Rule 10b–5" by "requiring

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is no loss causation in a fraud-on-the-market case unless the truth was subsequently revealed," U.S. *Amicus* Br. 7, *Dura*, 544 U.S. 336 (No. 03-932) (merits stage), 2004 WL 2069564.

issuers of securities to expend time and resources litigating, and in most cases settling," meritless private securities class-actions. U.S. *Amicus* Br. 14, *Dura*, 544 U.S. 336 (No. 03-932) (cert. stage) ("*Dura* CVSG Br."), 2004 WL 1205204 (internal quotation marks omitted).

The decision here raises the same concern, as petitioners' *amici* explained. *See* Br. of SIFMA et al. 11-14. As long as it stands uncorrected, plaintiffs' lawyers will be able to spin bad news into securities-fraud claims, and loss causation will become—as in this case—a battle of experts to be resolved at trial. That will only increase the likelihood that the costs of "extensive discovery and the potential for uncertainty and disruption in a lawsuit [will] allow plaintiffs with weak claims to extort settlements from innocent companies," *Stoneridge*, 552 U.S. at 163—settlements ultimately paid for by shareholders.

III. THE GOVERNMENT'S BRIEFING IN *DURA* CONFIRMS THAT REVIEW IS WARRANTED

The Government told this Court in *Dura* that bad precedent in the Ninth Circuit is enough on its own to justify review because "the pleading requirements for loss causation will be relevant in a large number of cases, about a quarter of which arise in the Ninth Circuit." *Dura* CVSG Br. 14. The case for review here is at least as strong. The Ninth Circuit's outsize role in securities-fraud cases has only grown. *See* Pet. 22-24; Br. of SIFMA et al. 20-21. And, contrary to the Government's suggestion here, it makes no difference that the courts have not explicitly identified a conflict. Not even the Ninth Circuit's express *denial* of a split stopped the Government in *Dura* from urging review. *Dura* CVSG Br. 7-9.

Review is also warranted because, as the Government explained in *Dura*, "there might not be [another] case suitable for certiorari review for some time." *Id.* at 18. Now that the Ninth Circuit has settled on a rule, future defendants will have no basis to seek certification on the loss-causation standard. And "[s]ince the denial of a motion to dismiss is ordinarily not appealable, and since most securities-fraud class actions settle before trial, the Ninth Circuit might not have an opportunity to address this question again for some time." *Id.* For their part, "many class-action counsel would be reluctant to seek certiorari" from dismissals rendered by courts that apply stricter standards "because of the risk of affirmance, which would make that standard applicable nationwide." *Id.* at 19.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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