No. 18-164

In the Supreme Court of the United States

FIRST SOLAR, INC., ET AL., PETITIONERS

v.

MINEWORKERS' PENSION SCHEME, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the plaintiff in a private securities-fraud action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, may establish loss causation based on a decline in the market price of a security where the event or disclosure that triggered the decline did not reveal that an issuer's previous false or misleading statement was fraudulently made.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934, ch. 404, § 10(b), 48 Stat. 891, makes it unlawful for any person "[t]o use or employ[] in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of" rules adopted by the Securities and Exchange Commission (SEC). 15 U.S.C. 78j(b). Rule 10b-5 implements Section 10(b) and states that "[i]t shall be unlawful for any person * * * [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light

of the circumstances under which they were made, not misleading * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b).

This Court has construed Section 10(b) to provide a private right of action against an issuer of securities for violations of Rule 10b-5. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). The elements of such a claim are (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance by the plaintiff on the defendant's misrepresentation or omission (sometimes called transaction causation); (5) economic loss; and (6) loss causation. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 809-810 (2011).

Reliance (or transaction causation) and loss causation address different aspects of causation. Reliance requires a plaintiff to establish that he justifiably relied on the alleged misrepresentation when he entered into the securities transaction and that, if he had "known the truth," he would not have bought or sold the security. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005); see *id.* at 341-343. Loss causation requires a private plaintiff to "prove that the defendant's misrepresentation (or other fraudulent conduct)," rather than some other market factor, "proximately caused the plaintiff's economic loss." *Id.* at 346; *Erica P. John Fund*, 563 U.S. at 812-813.

The loss-causation element reflects the fact that the securities laws are intended "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 455 U.S. at 345. Con-

gress codified the loss-causation requirement in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, by requiring a private plaintiff to establish "that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages." § 101(b), 109 Stat. 747 (15 U.S.C. 78u-4(b)(4)).

2. a. Petitioner First Solar, Inc. is one of the world's largest producers of solar panels, and its stock is traded on the NASDAQ exchange. Pet. App. 10a. Respondents purchased First Solar stock between April 2008 and February 2012. *Id.* at 11a. In this class-action suit, respondents allege that First Solar and several of its executives violated Section 10(b) and Rule 10b-5 by misrepresenting and concealing the full scope of two technical defects in First Solar's products, as well as those defects' financial impact on the company, in an effort to distort the price of First Solar stock. *Id.* at 11a-18a.

Respondents further allege that petitioners' false or misleading public statements succeeded in distorting First Solar's share price until the occurrence between February 2010 and February 2012 of a series of market disclosures, each of which partially corrected the misstatements and was followed by a significant share-price decline. Pet. App. 19a. By February 2012, the share price had plummeted from $300 to $50. *Id.* at 10a-19a. Respondents contend that the initial misstatements proximately caused the drop in share price (and thus the plaintiffs' economic loss) because the disclosures made the market aware of the truth about the solar panels' defects and First Solar's financials. *Id.* at 37a-39a.

b. After denying a motion to dismiss and certifying a class, the district court largely denied petitioners' motion for summary judgment on respondents' Section 10(b) and Rule 10b-5 claims. Pet. App. 9a-79a.

In its analysis of loss causation, the district court perceived a conflict among the Ninth Circuit's precedents. In the court's view, one line of Ninth Circuit decisions required a plaintiff to draw a "causal connection between the *facts* misrepresented and the plaintiff's loss," but not to show "that the fraudulent practices themselves were revealed" to the market. Pet. App. 28a (citing, *e.g.*, *Nuveen Mun. High Income Opportunity Fund* v. *City of Alameda*, 730 F.3d 1111 (9th Cir. 2013); *In re Daou Sys., Inc.*, 411 F.3d 1006 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006)). But the court understood a different line of decisions to take "a more restrictive view," requiring a showing that the market "learned of and reacted to the fraud" itself. Pet. App. 30a-32a (quoting *Metzler Inv. GMBH* v. *Corinthian Colleges, Inc.*, 540 F.3d 1049 (9th Cir. 2008)) (brackets omitted).

The district court relied on "the loss causation test adopted in *Daou*"—a decision within the first line of authority the court had identified—and ruled primarily in favor of respondents, holding that they had "presented sufficient evidence to avoid summary judgment on loss causation with respect to five of the six alleged stock price declines." Pet. App. 33a, 54a; see *id.* at 35a, 37a-54a. The court concluded, however, that, under the second line of decisions, petitioners would be entitled to summary judgment on each of respondents' claims. *Id.* at 35a-36a. The court therefore took "the unusual step of certifying the loss causation issue for immediate interlocutory appeal" under 28 U.S.C. 1292(b). Pet. App. 36a. It certified the following question:

> Can a plaintiff prove loss causation by showing that the very facts misrepresented or omitted by the defendant were a substantial factor in causing the plaintiff's economic loss, even if the fraud itself was not revealed to the market, or must the market actually learn that the defendant engaged in fraud and react to the fraud itself?

Ibid. (citations omitted).

3. The Ninth Circuit accepted the interlocutory appeal and affirmed. Pet. App. 1a-8a. The court explained that the loss-causation inquiry "requires no more than the familiar test for proximate cause," so that a plaintiff must "show a 'causal connection' between the fraud and the loss by tracing the loss back to 'the very facts about which the defendant lied.'" *Id.* at 5a (citations omitted). Under that standard, the court stated, "[d]isclosure of the fraud is not the sine qua non of loss causation." *Ibid.* (citation omitted). Rather, loss causation is necessarily a "'context-dependent' inquiry as there are an 'infinite variety' of ways for a tort to cause a loss." *Id.* at 6a (citation omitted). The court explained that the "ultimate issue is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Ibid.* (citation omitted).

The court of appeals stated that no intracircuit split existed, explaining that the "cases that the district court cite[d] for the proposition of a more restrictive test should be understood as fact specific variants of the basic proximate cause test." Pet. App. 6a. The court of appeals explained that, although revelation of the fraud is "one of the 'infinite variety' of causation theories a plaintiff might allege to satisfy proximate cause," it is not the only viable theory. *Id.* at 6a-7a (citation omitted). The court observed that, although a stock-price

drop that "comes immediately after the revelation of fraud can help rule out alternative causes," such a "sequence is not a condition of loss causation." *Id.* at 7a.

The court of appeals therefore concluded that "the district court applied the correct test in making [the loss-causation] determination." Pet. App. 8a. The court declined to "reach any other issue presented by this case." *Ibid.*

DISCUSSION

To establish the loss-causation element in a private securities-fraud suit, a plaintiff must "prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005); see 15 U.S.C. 78u-4(b)(4). As the court of appeals correctly held, a plaintiff can satisfy that requirement by pleading and proving the existence of a disclosure that reveals to the market the falsity of a prior statement. The plaintiff need not further prove that the market "actually learn[ed] that the defendant engaged in fraud." Pet. App. 5a.

A revelation-of-the-fraud requirement would be inconsistent with this Court's precedents, Congress's codification of the loss-causation requirement, the common-law principles that the loss-causation requirement reflects, and the purposes of the securities laws. The Ninth Circuit's rejection of such a requirement does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

A. The Court Of Appeals Correctly Rejected A Revelation-Of-The-Fraud Requirement For Loss Causation

1. The Court most directly addressed the loss-causation requirement in *Dura Pharmaceuticals, Inc.*

v. *Broudo*, *supra*. In *Dura*, the Court considered whether a plaintiff can prove loss causation simply by establishing that the price of a security was inflated by a misrepresentation at the time of the plaintiff's purchase. 544 U.S. at 342. For several reasons that are instructive here, the Court held that such proof was insufficient.

First, the Court explained that an inflated purchase price alone would not prove that the defendants' misstatement caused any loss at all. *Dura*, 544 U.S. at 342-343. The Court noted that, if "the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." *Id.* at 342. And if the purchaser "sells later after the truth makes its way into the marketplace, an initially inflated purchase price *might* mean a later loss," but not "inevitably so." *Ibid.* Rather, a lower resale price "may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Id.* at 343.

Second, the Court held that equating price inflation with loss causation lacked support in the common-law principles that underlie private securities-fraud claims. *Dura*, 544 U.S. at 343-344. The Court analogized private securities-fraud suits to common-law actions alleging deceit or misrepresentation, in which a plaintiff must show not only "justifiabl[e] reli[ance]"—"had he known the truth he would not have acted"—but also that the defendant's misrepresentation proximately caused "actual economic loss." *Ibid.* The Court explained that, under those principles, an individual who "'misrepresents the financial condition of a corporation

in order to sell its stock'" is liable to the "relying purchaser 'for the loss' the purchaser sustains 'when the facts ... become generally known' and 'as a result' share value 'depreciate[s].'" *Id.* at 344 (quoting Restatement (Second) of Torts § 548A cmt. b at 107 (1977) (Restatement)) (brackets in original). But the individual is not liable for losses "brought about by business conditions or other factors." *Id.* at 344-345 (citation omitted). The Court explained that an inflated-price approach, which eliminated the need for proof that any economic loss was actually caused by the defendant's misstatement, could not be reconciled with those principles. *Id*. at 345.

Finally, the Court held that the inflated-price approach was inconsistent with an "important securities law objective." *Dura*, 544 U.S. at 345-346. The Court explained that the securities laws "seek to maintain public confidence in the marketplace." *Id.* at 345. Private securities-fraud actions serve that purpose by deterring fraud and protecting investors "against those economic losses that misrepresentations actually cause." *Ibid.* But, as the PSLRA confirms, such actions are not intended "to provide investors with broad insurance against market losses." *Ibid.*; see 15 U.S.C. 78u-4(b)(4). The Court concluded that the PSLRA "makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Dura*, 544 U.S. at 346.

The Court reiterated this understanding of loss causation in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804 (2011). In that case, the Court declined to require a private securities-fraud plaintiff to prove "loss causation" before invoking the fraud-on-the-market

theory of reliance adopted in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). *Erica P. John Fund*, 563 U.S. at 809-813. The Court explained that *Basic*'s fraud-on-the-market doctrine establishes a presumption of reliance where a defendant's misrepresentation "'is reflected in [the] market price' of the stock at the time of the relevant transaction." *Id.* at 812 (quoting *Basic*, 485 U.S. at 247) (brackets in original). The separate loss-causation element of the private cause of action "addresses a matter different from whether an investor relied on a misrepresentation," by "requir[ing] a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Ibid.* That requirement ensures that a plaintiff may recover losses based on a stock price's decline only to the extent that the loss was caused by the defendant's misrepresentation, rather than by "other intervening causes, such as 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events.'" *Id.* at 812-813 (quoting *Dura*, 544 U.S. at 342-343).

2. The decision below is consistent with these principles. Applying the "familiar test for proximate cause," the Ninth Circuit held that, to prove loss causation, a plaintiff must establish "a 'causal connection' between the fraud and the loss by tracing the loss back to 'the very facts about which the defendant lied.'" Pet. App. 5a (citations omitted). The court correctly recognized that, like proximate cause generally, "loss causation is a 'context-dependent' inquiry." *Id.* at 6a (citation omitted). And it explained that, although a stock price drop immediately following a revelation of fraud (*i.e.*, a revelation that the issuer knowingly concealed the truth)

"can help to rule out alternative causes," such a revelation is not a necessary "condition of loss causation." *Id.* at 7a. Rather, "[t]he ultimate issue * * * is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Id.* at 7a-8a (citation and internal quotation marks omitted).

Petitioners contend (Pet. 3) that the Ninth Circuit should have required respondents to show "that the market learned of and reacted to information that revealed the fraudulent nature of the defendant's conduct." That argument is incorrect. In a typical private securities-fraud case, it is the release to the market of false information about a company that artificially distorts the purchase price of the company's stock. When "the relevant truth begins to leak out," a subsequent decrease in share price can occur and can cause a plaintiff harm, regardless of whether or when the market becomes aware that the prior misstatement was fraudulent. *Dura*, 544 U.S. at 342; see *Basic*, 485 U.S. at 246 ("[T]he market price of shares traded on well-developed markets reflects all publicly available information."). To be sure, the plaintiff must *also* prove, as a distinct element of a private securities-fraud claim, that the defendant acted with scienter. See p. 2, *supra*. But a revelation *to the market* that the prior misstatements were fraudulently made is not required to establish that the fraud proximately caused the purchaser harm.

The PSLRA's damages-limitation provision, 15 U.S.C. 78u-4(e), reinforces this conclusion. With an exception that is not relevant here, Section 78u-4(e) provides that, in a private securities-fraud suit in which "the plaintiff seeks to establish damages by reference to the market price of a security," the award of damages to the plaintiff may not exceed the difference between the purchase

price and the "mean trading price" during a 90-day period that begins when "information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. 78u-4(e)(1). Congress thus recognized that the revelation of information "correcting the misstatement," *ibid.*, is the critical prerequisite for attributing harm caused by a drop in share price to a defendant's misstatement. Such a correction may occur even if the new information does not reveal that the prior misstatement was fraudulently made.

A revelation-of-the-fraud standard also lacks a basis in the common-law principles in which private securities-fraud actions are "root[ed]." *Dura*, 544 U.S. at 345. The Restatement explains that "one who misrepresents the financial condition of a corporation in order to sell its stock" becomes "liable to a purchaser who relies upon the misinformation for the loss that he sustains when the facts as to the finances of the corporation become generally known and as a result the value of the shares is depreciated on the market." Restatement § 548A cmt. b at 107. Causation in a common-law action for deceit or misrepresentation thus depends not on the market learning that the issuer fraudulently concealed the truth, but on the true "facts as to the finances of the corporation becom[ing] generally known." *Ibid.*

Finally, a revelation-of-the-fraud standard would not further the purpose of the loss-causation requirement. The loss-causation element reflects the fact that private securities-fraud actions are intended to protect investors against losses caused by a defendant's misrepresentations, rather than to "provide investors with broad insurance against market losses." *Dura*, 544 U.S. at 345. The element thus limits an issuer's liability—even

for knowing misstatements—when its stock price drops because of "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Id.* at 342-343; see S. Rep. No. 98, 104th Cong., 1st Sess. 15 (1995) (requiring proof "that the misstatement or loss alleged in the complaint caused the loss incurred by the plaintiff," as opposed to "factors unrelated to the fraud").

Requiring proof that the defendant's scienter was made known to the market would not advance this purpose. Consider an issuer that misstates the number of products it has sold, distorting its share price. The correct sales figures are later revealed, and the share price drops accordingly, but it is unknown at the time whether fraud or a good-faith error produced the misstatement. If evidence adduced during subsequent litigation reveals that the issuer acted with scienter, the defendant can rightly be held liable for the price drop caused by the disclosure of the actual quantity of merchandise sold. Under any reasonable understanding of causation, the fraudulent "misrepresentation that affected the integrity of the market price also caused a subsequent economic loss." *Erica P. John Fund*, 563 U.S. at 812 (emphasis omitted). Yet a revelation-of-the-fraud requirement would bar that action simply because the disclosure to which the market reacted did not reveal that the truth had been fraudulently concealed. Such an approach would undermine Congress's purpose to protect investors "against those economic losses that misrepresentations actually cause." *Dura*, 544 U.S. at 345.

B. No Circuit Conflict Exists On The Question Presented

Petitioners contend (Pet. 9) that the circuits are divided "over whether loss causation requires proof that the market actually learned of and reacted to the defendant's fraudulent misconduct, or whether some lesser showing may suffice." But no court of appeals requires a private securities-fraud plaintiff "to establish that the market learned that the defendant's challenged statements were knowingly false when made." Pet. 13. Nor have petitioners identified any conflict over any other legal standard that should apply. To the contrary, the courts of appeals have applied consistent legal standards, and petitioners identify no sound reason to believe that any other circuit would have decided this case differently.

1. Contrary to petitioners' contention (Pet. 9), neither the First, Fourth, Seventh, or Eleventh Circuit has adopted a revelation-of-the-fraud standard for loss causation.

a. In *Massachusetts Retirement Systems* v. *CVS Caremark Corp.*, 716 F.3d 229 (1st Cir. 2013), the plaintiffs alleged that the defendants had misrepresented the success of a merger between CVS Corp. and Caremark Rx Inc., including the integration of the companies' computer systems and the maintenance of a high level of service for existing customers. *Id.* at 231-232. The plaintiffs claimed that the market had learned the truth about the issues with the merger when the CEO of the combined entity, CVS Caremark, acknowledged that it had "suffered 'some big client losses'" for "varying reasons[:] some price, one service," and that "'one of the chief architects'" of the integration model for the companies had "unexpected[ly] retire[d]." *Id.* at 234-235 (first set of brackets in original); see *id.* at 234-236. The First Circuit held that the plaintiffs had adequately

alleged loss causation because the CEO's statements "plausibly revealed to the market that CVS Caremark had problems with service and the integration of its systems." *Id.* at 240. Relying on the Ninth Circuit's decision in *Daou*, the court found it sufficient that the allegations "indicate[d] that the drop in CVS Caremark's share price was causally related to its misstatements regarding the integration of CVS and Caremark." *Id.* at 242; see *ibid.* ("We agree with the Ninth Circuit's approach, and we believe that the result here is the same."). In requiring the plaintiffs to allege (and ultimately prove) a causal link between their economic loss and the defendants' prior "misstatements," the court did not suggest that a loss-causing disclosure must inform the market that the misstatements were fraudulently made.

b. In *Meyer* v. *Greene*, 710 F.3d 1189 (11th Cir. 2013), the plaintiffs alleged that a publicly traded company had materially overstated the value of its real estate holdings in quarterly and annual reports to the SEC, and that the "truth * * * c[a]me to light" when a prominent hedge fund investor gave a presentation at a conference, questioning the company's valuation, and when the SEC subsequently opened an investigation into the company's "'policies and practices concerning impairment of investment in real estate assets.'" *Id.* at 1192-1193. The Eleventh Circuit held that the plaintiffs had not established loss causation because they had failed to offer "proof of a causal connection between the misrepresentation and the investment's subsequent decline in value." *Id.* at 1195 (citation omitted).

The court in *Meyer* explained that, in a fraud-on-the-market case, plaintiffs typically establish loss causation

by (1) "identifying a 'corrective disclosure,'" *i.e.*, "a release of information that reveals to the market the pertinent truth that was previously concealed or obscured by the company's fraud"; (2) "showing that the stock price dropped" shortly thereafter; and (3) "eliminating other possible explanations." 710 F.3d at 1196-1197 (quoting *FindWhat Investor Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1311-1312 (11th Cir. 2011), cert. denied, 568 U.S. 814 (2012)). The court concluded that the investor presentation did not qualify as a corrective disclosure because it did not reveal any new information at all. See *id.* at 1198 ("Because a corrective disclosure 'obviously must disclose *new* information,' the fact that the sources used in the [investor presentation] were already public is fatal to the [plaintiffs'] claim of loss causation.") (citation omitted). The court held that the SEC investigation could not constitute a corrective disclosure for similar reasons, explaining that "[t]he announcement of an investigation reveals just that—an investigation —and nothing more." *Id.* at 1201. That analysis has no logical implications for a case (like this one) where the market receives new information that shows the defendants' prior representations to be false, but that does not reveal whether the defendants acted with scienter.

As petitioners emphasize (Pet. 12), the *Meyer* court also "note[d]" that the hedge fund investor's opinions about public facts "were not necessarily revelatory of any past fraud." 710 F.3d at 1200. But the court was not commenting on whether the investor had expressed an opinion about the company's state of mind. Rather, it was pointing out that the investor's statements were "about potential future actions," not *past* misstatements. *Ibid.*

c. The Fourth and Seventh Circuit decisions that petitioners cite are similar. In *Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, cert. denied, 552 U.S. 824 (2007), the Seventh Circuit explained that "[t]o plead loss causation, the plaintiff must allege that it was *the very facts* about which the defendant lied which caused its injuries." *Id.* at 842 (emphasis added; citation omitted). It held that the plaintiff had not adequately alleged that misstatements in a 1997 audit had caused the plaintiff's injuries, because the only public disclosures that the plaintiff identified concerned accounting irregularities in financial statements from 1998 and 1999. *Id.* at 842-844. Because the plaintiff had failed to "identif[y] any statements * * * that made 'generally known' any problems or irregularities in the 1997 audited financial statement," its allegations were not sufficient to state a claim "for losses suffered as a result of alleged misrepresentations in the 1997 audited financial statement." *Id.* at 843-844.

In *Teachers' Retirement System of Louisiana* v. *Hunter*, 477 F.3d 162 (2007), the Fourth Circuit likewise explained that, in order to show loss causation, a plaintiff must prove that "the defendant's misrepresentations proximately caused the plaintiff's economic loss." *Id.* at 185. The plaintiffs there alleged that the defendant had misrepresented a series of transactions "in an effort to artificially inflate the price of its stock," and that the plaintiffs had been harmed when the complaint in an earlier lawsuit against the company revealed "the true nature of the transactions" and the defendant company's stock price dropped as a result. *Id.* at 168-169. The court rejected the plaintiffs' theory of loss causation, not on the ground that the prior lawsuit had not

revealed the defendant's state of mind about the company's alleged misrepresentations, but because the only facts contained in the earlier complaint concerning those transactions "had already been disclosed in public filings." *Id.* at 187. Indeed, the court found it immaterial to the loss-causation analysis that the earlier complaint had "attribute[d] an improper purpose to th[os]e previously disclosed facts." *Ibid.*

As petitioners note (Pet. 10), a subsequent Fourth Circuit decision did focus on whether the alleged disclosures had revealed the defendant's state of mind at the time the alleged misstatements were made. See *Katyle* v. *Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 478 (concluding that a decline in share price following a series of alleged corrective disclosures could not be attributed to the defendant's alleged misstatements because the purported disclosures "did not, gradually or otherwise, reveal to the market any undisclosed truth about [the defendant's] undisclosed knowledge and resulting fraudulent omissions"), cert. denied, 565 U.S. 825 (2011). The court's focus on the defendant's state of mind, however, appears to reflect its understanding that the alleged misstatements were false because they concealed the company's *knowledge* about whether a planned leveraged buy-out would actually occur. See, *e.g.*, *id.* at 475 (referring to the "undisclosed knowledge behind" the company's fraudulent statements); *id.* at 477 (stating that the "falsity of the [defendant's allegedly fraudulent] press releases necessarily depends on the fact [the defendant] knew the deal was off"). In a more recent decision, the Fourth Circuit stated more precisely that the "ultimate loss causation inquiry" is "whether a 'misstatement or omission concealed something from the market that, when disclosed, negatively affected the

value of the security.'" *Singer* v. *Reali*, 883 F.3d 425, 446 (2018) (quoting *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 261-262 (2d Cir. 2016)).

To be sure, certain decisions on which petitioners rely do consider a market reaction to the disclosure of a company's fraudulent conduct. In *Singer*, for example, the Fourth Circuit held that the plaintiffs had adequately alleged loss causation based on a disclosure to the market that the issuer had made false or misleading statements about engaging in Medicare fraud. 883 F.3d at 447. In *FindWhat.com*, an Internet advertising company disclosed that it had engaged in "click fraud" that had artificially inflated its revenues. 658 F.3d at 1312-1316. In such "double fraud" cases, a corrective disclosure may reveal a type of non-securities fraud. But the existence of such cases does not mean that loss causation can be established *only* when the defendant's *securities* fraud is revealed to the market.

2. Petitioners are also wrong in suggesting (Pet. 12-16) that the Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits are divided on which less demanding alternative legal standard applies. All of those circuits recognize that "[l]oss causation requires proof of a causal connection between a misstatement and a subsequent decline in a stock's price." *Alaska Elec. Pension Fund* v. *Flowserve Corp.*, 572 F.3d 221, 229 (5th Cir. 2009) (per curiam); see, *e.g.*, *In re Daou Sys., Inc.*, 411 F.3d 1006, 1025 (9th Cir. 2005) (requiring "a causal connection between the deceptive acts * * * and the injury suffered"), cert. denied, 546 U.S. 1172 (2006). And they agree that, in the context of a fraud-on-the-market claim, loss causation generally requires proof that a "misstatement or omission concealed *something* from the market that, *when disclosed*, negatively affected the

value of the security." *In re Vivendi*, 838 F.3d at 261-262 (quoting *Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir.), cert. denied, 546 U.S. 935 (2005)); see, *e.g.*, *EP Medsystems, Inc.* v. *EchoCath, Inc.*, 235 F.3d 865, 884 (3d Cir. 2000) (noting that in a typical case, plaintiffs allege that "they purchased the securities at a price that was artificially inflated, only to suffer a loss when the true situation was made known"); *Flowserve*, 572 F.3d at 230 (stating that "th[e] disclosed information must reflect part of the 'relevant truth'—the truth obscured by the fraudulent statements"); *Norfolk Cnty. Ret. Sys.* v. *Community Health Sys., Inc.*, 877 F.3d 687, 695 (6th Cir. 2017), cert. denied, 139 S. Ct. 310 (2018) (describing a corrective disclosure as "a statement that reveals what the defendants * * * previously concealed"); *Lloyd* v. *CVB Fin. Corp.*, 811 F.3d 1200, 1209 (9th Cir. 2016) ("The burden of pleading loss causation is typically satisfied by allegations that the defendant revealed the truth through 'corrective disclosures' which 'caused the company's stock price to drop and investors to lose money.'") (citation omitted); *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1130, 1138 (10th Cir. 2009) ("Plaintiff must establish that his losses were attributable to some form of revelation to the market of the wrongfully concealed information.") (brackets, citation, and emphasis omitted).[*]

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[*] Several circuits have identified, as an alternative to the "corrective disclosure" theory of loss causation, a "materialization of the risk" theory "whereby a plaintiff may allege 'proximate cause on the ground that negative investor inferences,' drawn from a particular event or disclosure, 'caused the loss and were a foreseeable materialization of the risk concealed by the fraudulent statement.'" *Ohio Pub. Emps. Ret. Sys.* v. *Federal Home Loan Mortg. Corp.*, 830 F.3d 376, 384-385 (6th Cir. 2016) (collecting cases) (citation omitted). Other courts have questioned whether those labels "add[] [any]-

Petitioners contend (Pet. 15) that the Third Circuit applied an unduly lenient standard in *McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418 (2007). But the court in *McCabe* held that the plaintiffs had *not* adequately alleged loss causation. *Id*. at 438. The court's discussion of what allegations might be sufficient in a future case therefore was dictum. And even if the *McCabe* court had issued a holding that conflicted with decisions of other circuits, this case would be an unsuitable vehicle to resolve the conflict, since petitioners do not suggest that the Third Circuit would have decided this case differently than did the court below.

Petitioners also contend that the court of appeals "broke with this Court's guidance and congressional intent" when it held "that a plaintiff may prove loss causation by 'tracing the loss back to the very facts about which the defendant lied.'" Pet. 19 (quoting Pet. App. 5a). That criticism is misconceived. The Ninth Circuit's reference (Pet. App. 5a) to "tracing the loss" is simply another way of stating that corrective disclosures must "'relate back to the misrepresentation and not to some other negative information about the company,'" *Katyle*, 637 F.3d at 473 (citation and emphasis omitted). In this case, the district court held that there were triable issues of loss causation for five of the disclosure events, but no triable issue as to the announcement that First

thing to the analysis." *Schleicher* v. *Wendt*, 618 F.3d 679, 684 (7th Cir. 2010); see *ibid.* (noting that, regardless of which terminology is used, "the fraud lies in an intentionally false or misleading statement, and the loss is realized when the truth turns out to be worse than the statement implied"). Petitioners make clear (Pet. 9 n.2; Reply Br. 7 n.1) that their argument does not turn on any such semantic distinction.

Solar's CEO would leave the company. The court explained that, although the stock price had declined after that announcement was made, the disclosure could not support a finding of loss causation because it did not relate back to earlier misstatements about product quality and financial performance. Pet. App. 45a-48a.

Petitioners also argue (Pet. 16) that the Ninth Circuit split with other circuits when it "affirmed the district court's decision with respect to losses following the December 2011 press release," because the release simply revised the company's earnings and revenue guidance and "did not mention the hot-climate defect" that allegedly drove the revisions. But the district court understood the complaint to allege misrepresentations concerning not only the technical defects themselves, but the financial impacts of those defects. See Pet. App. 17a-18a. Other courts of appeals have recognized that "a plaintiff need not rely on a single, complete corrective disclosure," but instead may "show that the truth gradually leaked out into the marketplace 'through a series of partial disclosures.'" *Meyer*, 710 F.3d at 1197 (quoting *Lormand* v. *US Unwired, Inc.*, 565 F.3d 228, 261 (5th Cir. 2009)); *Katyle*, 637 F.3d at 472 (stating that a "single complete disclosure" is not a "prerequisite to establishing loss causation").

Even if the district court had erred in applying the governing legal standard to the facts of this case, that error would not warrant this Court's review. In conducting interlocutory review, the court of appeals addressed only the certified question concerning the "correct test" for alleging loss causation, not the district court's application of that test. Pet. App. 8a. In any event, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

3. Although petitioners assert that the courts of appeals are "irreconcilably divided" on the question presented, the various circuits' standards for establishing loss causation in private securities-fraud suits actually reflect a striking degree of jurisprudential harmony. Indeed, there is a recognizable pattern of cross-circuit citations across all three of petitioners' judicial groupings. Reply Br. 3 (capitalization omitted). In *Katyle*, for instance, the Fourth Circuit relied on Second, Fifth, and Tenth Circuit precedents. 637 F.3d at 471-473 (citing *Lentell*, *Flowserve*, and *Williams*). Similarly in *CVS Caremark*, the First Circuit relied on the Second, Third, Fifth, Ninth, and Tenth Circuit decisions that petitioners describe as taking different positions on corrective disclosures. 716 F.3d at 238-241 (citing *Lentell*, *McCabe*, *Flowserve*, *Daou*, and *Williams*). And petitioners identify no court that has expressed the view that a circuit conflict exists on this issue. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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