No. 15-17282

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINEWORKERS' PENSION SCHEME and BRITISH COAL STAFF SUPERANNUATION SCHEME,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Appeal from an Order of the United States District Court for the District of Arizona
Hon. David G. Campbell (Case No. 12-00555-PHX-DGC)

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amicus curiae* Securities Industry and Financial Markets Association makes the following disclosure:

1. Does *amicus* have a parent company? No.

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Dated: March 26, 2018

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Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amicus curiae* Chamber of Commerce of the United States of America makes the following disclosure:

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. SIFMA is also the United States regional member of the Global Financial Markets Association.

SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005); *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017). This case involves an important issue concerning proof of loss causation in private securities actions, which is directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

The Chamber of Commerce of the United States of America ("Chamber") is the largest business federation in the world. It represents 300,000 members

[1] All parties have consented to the filing of this brief. *See* 9th Cir. R. 29-2(a). Under Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that no party's counsel authored this brief in whole or in part, and that no person or entity other than the *amici*, their members, or their counsel contributed money to fund its preparation or submission.

directly, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before the courts, and the Chamber therefore regularly files *amicus* briefs in cases raising issues concerning the business community. This appeal concerns interests central to the Chamber's mission, as many of the Chamber's members are public companies with exposure to private securities actions.

SUMMARY OF ARGUMENT

In 2017, more federal securities class actions were filed than in any previous year since the enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and one in about 15 S&P 500 companies (6.4 percent) was subject to such a suit. *See* Cornerstone Research, *Securities Class Action Filings* 1 (2017) ("Cornerstone"), available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-YIR; *see also* John Gould, *Federal Class Action Securities Fraud Filings Hit Record Pace in H1 2017* (2017), available at https://corpgov.law.harvard.edu/2017/08/07/federal-class-action-securities-fraud-filings-hit-record-pace-in-h1-2017/. Over the last several years, as the number of filings has increased, this Circuit has been the locus of more securities-fraud class actions than almost any other circuit. Cornerstone at 34.

It is therefore critical that this Circuit define the elements of a securities-fraud claim clearly and correctly. The panel's decision accomplishes neither of those goals. That decision addresses the statutory requirement of loss causation—that is, proof that "the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). A showing of loss causation ensures that a defendant is held responsible only for "economic losses that misrepresentations actually cause," rather than being forced "to provide investors with broad insurance against market losses." *Dura*

Pharm., Inc. v. Broudo, 544 U.S. 336, 345 (2005); *see id.* at 343 (explaining that to prove loss causation a plaintiff must point to a price decrease that was caused by the revelation of the relevant truth, and not by "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events.").

The panel's decision sets forth a broad loss-causation standard under which there is no need to establish that any alleged fraud was ever disclosed to the market. Op. 7-8.[2] That decision directly conflicts with earlier decisions in this Circuit—which rejected that standard in favor of the requirement that a plaintiff show that the market became aware of the existence of fraud—as well as with the law in other circuits. The panel's decision in this case thereby leaves Ninth Circuit law on loss causation in a confusing state of disarray that can be remedied only by the en banc court. The decision also sets the bar for alleging and proving loss causation too low—and does so on the basis of an abbreviated analysis that is untethered from the text and purposes of the relevant statute. If the loss-causation standard in this Circuit is weakened in that way, the result would be the very harms that Congress sought to avoid when it enacted the PSLRA in the first place: a greater number of meritless suits, a decreased opportunity to dispose of

[2] Citations to "Op." refer to the addendum to the petition for panel rehearing or rehearing en banc.

such suits at the pleading stage, increased pressure on defendants to settle, and resulting harm to the economy and the public.

In short, the panel's decision creates a conflict in the law and involves a question of exceptional importance. Rehearing is therefore warranted.

ARGUMENT

I. The Panel's Decision Conflicts with Decisions of This Court and Other Courts of Appeals

A. The Panel's Decision Leaves Ninth Circuit Law on Loss Causation in a State of Disarray

As the petition explains (Pet. 9-15), the panel's decision in this case on the standard for proving loss causation in securities fraud cases is in stark conflict with earlier panel decisions in this Circuit and leaves the law in a state of disarray. Only the en banc court can remedy the resulting confusion.

In a short discussion, the panel ruled that loss causation does not require any showing of a revelation of fraud and instead may be proven in a wide variety of ways. The panel stated that, "[t]o prove loss causation, plaintiffs need only show a causal connection between the fraud and the loss, . . . by tracing the loss back to the very facts about which the defendant lied . . . . Disclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss." Op. 6 (internal quotation marks omitted). For instance, the panel asserted, "[a] plaintiff may . . . prove loss causation by showing that the stock price fell upon the revelation of an earnings miss, even if the market was unaware at the time that fraud had concealed the miss." *Id.* at 8. The panel concluded that "[r]evelation of fraud in the marketplace is simply one of the infinite variety of causation theories a plaintiff might allege to satisfy proximate cause." *Id.* at 7 (internal quotation marks omitted).

But earlier Ninth Circuit panel decisions definitively rejected that broad view and clearly held that loss causation can be established only if the market learns of, and reacts to, the existence of the alleged fraud. For instance, in *In re Oracle Corp. Securities Litigation*, 627 F.3d 376 (9th Cir. 2010), the court of appeals specifically rejected the argument that plaintiffs "should be able to prove loss causation by showing that the market reacted to the purported 'impact' of the alleged fraud—the earnings miss—rather than to the fraudulent acts themselves." *Id.* at 392. Rather, *Oracle* explained, "more" is required: "[l]oss causation is established if the market learns of a defendant's fraudulent act or practice, the market reacts to the fraudulent act or practice, and a plaintiff suffers a loss as a result of the market's reaction." *Id.*; *see id.* ("[L]oss causation is not adequately pled unless a plaintiff alleges that the market learned of and reacted to the practices the plaintiff contends are fraudulent, as opposed to merely reports of the defendant's poor financial health generally. The market need not know at the time that the practices in question constitute a 'fraud,' nor label them 'fraudulent,' but in order to establish loss causation, the market must learn of and react to those particular practices themselves.") (citation omitted); *see also, e.g.*, *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1063 (9th Cir. 2008) ("[T]he complaint must allege that the practices that the plaintiff contends are fraudulent were revealed to the market and caused the resulting losses."); *Loos v. Immersion Corp.*, 762 F.3d 880, 887-88 (9th Cir. 2014) ("[O]ur precedent requires a securities fraud plaintiff to allege that the market learned of and reacted to th[e] fraud, as opposed to merely reacting to reports of the defendant's poor financial health generally.") (internal quotation marks omitted).

The panel's decision claims that those earlier decisions are simply "fact-specific variants of the basic proximate cause test." Op. 7; *see id.* ("When plaintiffs plead a causation theory based on market revelation of the fraud, this court naturally evaluates whether plaintiffs have pleaded or proved the facts relevant to their theory."). But that attempt to reconcile the deep divisions in the Circuit's law is unavailing. The earlier decisions in this Circuit do not just discuss a particular "variant" of loss causation that happened to be pled in those cases; they pointedly limit the permissible scope of loss causation and reject the approach that the panel here endorsed. *See* Pet. 8-15 (discussing those decisions and explaining why *Lloyd v. CVB Financial Corp.*, 811 F.3d 1200 (9th Cir. 2016), did not overrule them).

Accordingly, if the panel's decision in this case is left in place, confusion will reign. In this Circuit, a later panel is not permitted to overrule an earlier one. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). But the decision in this case purports to recharacterize and override earlier panel decisions, thus confusing the issue considerably. Given the conflict in the law, courts in this Circuit confronting loss causation issues in the future will remain uncertain about the proper standard to apply—and that uncertainty will be burdensome and costly, as parties are forced continually to relitigate the issue of the proper standard and district courts attempt to resolve the issue without sufficient guidance.

Under those circumstances, only the en banc court can alleviate the confusion, avoid a waste of resources, and bring clarity to the law. The issue therefore cries out for en banc review. *See* Fed. R. App. P. 35(a)(1), (b)(1)(A) (need for "uniformity of the court's decisions" justifies en banc review); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc) (in this Circuit, conflict in panel opinions must be resolved by an en banc court).

B. The Panel's Decision Conflicts with Decisions of Other Courts of Appeals

The decision of the panel in this case conflicts not only with prior decisions of this Court but also with the decisions of other courts of appeals. En banc review is warranted on that basis as well. *See* Fed. R. App. P. 35(b)(1)(B); Pet. 15-16.

Most notably, the Fifth Circuit has rejected the argument, accepted by the panel here, that "loss causation may result when the 'true financial condition' of a company becomes known—regardless of whether the disclosure of the company's true financial condition corrects past misstatements." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009). The court held instead that "to establish loss causation th[e] disclosed information must reflect part of the 'relevant truth'—the truth obscured by the fraudulent statements." *Id.*; *see, e.g.*, *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 690 n.68 (5th Cir. 2015) (noting that "[o]ther courts have suggested that materialization of the risk can be an adequate measure of loss causation in appropriate cases" and declining to "decide whether that holding is accurate").[3]

[3] Other circuits have also required some revelation of the alleged fraud. *See* Pet. 16; *see also, e.g.*, *Robbins v. Koger Props. Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997) (requiring "proof of a causal connection between the misrepresentation and the investment's subsequent decline in value" and rejecting claim on loss causation grounds because the alleged misrepresentation had not been disclosed) (cited with approval in *Dura*, 544 U.S. at 344).

II. The Question Presented in This Case Is Exceptionally Important for Additional Reasons

Determining the proper standard for loss causation is exceptionally important not only because of the existing division of authority on the issue but also because of the serious consequences of making the standard too easy to satisfy. If district courts were to follow this panel's guidance, rather than abiding by the earlier, conflicting decisions discussed above, the result would likely be a significant loosening of the loss-causation standard in this Circuit. Such a change in the law is wrong as a matter of statutory interpretation, and it would give rise to the precise harmful effects that Congress intended to avoid when it enacted the loss-causation requirement as part of the PSLRA in 1995.

Congress's purpose in enacting the PSLRA was to stem "the routine filing of lawsuits against issuers of securities . . . whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only a faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, at 31 (1995); *see, e.g.*, *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014) (through the PSLRA, "Congress sought to reduce frivolous suits and mitigate legal costs for firms and investment professionals that participate in the market for nationally traded securities"). In service of that purpose, Congress imposed on securities-fraud plaintiffs the burden of pleading and proving that a defendant's misrepresentations "caused the loss for which the plaintiff seeks to recover." 15 U.S.C. § 78u-4(b)(4); *see id.* § 78u-4(e)(1) (limiting damages to the difference between the stock purchase price and "the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market"). The legislative history describes the loss-causation requirement as a "strong pleading requirement," S. Rep. No. 104-98, at 15 (1995), that was specifically "intended to reduce the cost of raising capital," *id.* at 7.

The standard set forth in the panel's decision, however, can be interpreted to make the loss-causation requirement in this Circuit significantly less "strong." All companies are subject to risks, and an unrevealed fraud does not lurk beneath every disappointing piece of financial news. But any time a company's stock drops in price, a plaintiff can attempt to come up with some allegation that the facts giving rise to the drop in price were insufficiently anticipated and disclosed at some earlier point in time. *Cf. Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) ("No social purpose would be served by encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through offering memoranda with a fine-tooth comb in the hope of uncovering a misrepresentation.").

If that kind of allegation is understood as one of an "infinite variety" of ways in which loss causation can be established, Op. 7, then the loss-causation requirement will be easier to satisfy, particularly at the pleading stage of the case, than has previously been true in this Circuit. *See, e.g.*, Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10b-5 Causes-of-Action: the Implications of* Dura Pharmaceuticals, Inc. v. Broudo, 63 Bus. Law. 163, 174-75 (2007) (explaining that a theory similar to the one adopted by the panel here "effectively vitiates the loss causation requirement" because "[w]ithout imposing a requirement that there be a corrective disclosure . . . , one runs the risk that the loss causation requirement would have been deemed satisfied even if there would have been the same negative price market reaction to the negative news without the conduct that ran afoul of Rule 10b-5"). Indeed, plaintiffs' lawyers have already described the panel's decision as a "game changer" that "significantly raises the hurdle for defendants to challenge loss causation at the pleading stage." Carol Villegas & James Christie, *9th Circ. Decision Could Be Game-Changer For Investors*, Law360 (Feb. 2, 2018), available at https://www.law360.com/articles/1008644/9th-circ-decision-could-be-game-changer-for-investors.

Such a change in the law cannot be squared with the text of the PSLRA or with pertinent Supreme Court decisions. As the petition points out (Pet. 16), the panel did not engage in any standard statutory interpretation of the loss-causation provision; rather, it relied only on a single law review article written by lawyers at a firm that specializes in filing securities-fraud suits. *See* Op. 8; Jay W. Eisenhofer, Geoffrey C. Jarvis, & James R. Banco, *Securities Fraud, Stock Price Valuation, and Loss Causation: Toward a Corporate Finance-Based Theory of Loss Causation*, 59 Bus. Law. 1419, 1419 n.a1 (2004); GELaw.Com, *U.S. Securities Litigation*, http://www.gelaw.com/practice-areas/securities-litigation/. But permitting plaintiffs to prove loss causation in an "infinite variety" of ways, Op. 7, is inconsistent with the PSLRA's text, which makes clear that no actionable loss occurs unless the market actually learns of the fact that a misstatement or omission was previously made. 15 U.S.C. § 78u-4(e)(1); *see* Pet. 17. In addition, such a standard is inconsistent with the Supreme Court's description of the PSLRA's loss-causation provision as requiring "the revelation of a misrepresentation," not simply the occurrence of some event that could potentially be the result of an undisclosed fraud. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011); *see id.* at 811-12 (stating that "correction to a prior misleading statement" and "subsequent loss [that] could not otherwise be explained by some additional factors revealed then to the market" is "the loss causation requirement as we have described it"); *Dura*, 544 U.S. at 342, 344 (stating that a plaintiff may recover only when a loss is the "result" of the market's reaction to "the truth" about the defendant's misrepresentations); *see also Metzler*, 540 F.3d at 1062-65.[4]

A new, looser standard for loss causation also would have the very consequences that the PSLRA was intended to deter. As the Supreme Court has recognized, securities cases present a "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). A change in the law that makes it more difficult for defendants in such cases to prevail on a motion to dismiss or a summary judgment motion creates enormous pressure to settle—especially if the suit is a class action, in which the amount of damages sought is often very large. *See, e.g.*, S. Rep. No. 104-98, at 7 (1995) ("If a defendant cannot win an early dismissal of the case, the economics of litigation may dictate a settlement even if the defendant is relatively confident that it would prevail at trial.") (internal quotation marks omitted). That pressure

[4] The Supreme Court's description of what loss causation requires is consistent with that Court's acceptance of the "fraud on the market" theory of the reliance element of a securities-fraud claim—that is, the theory that "whenever the investor buys or sells stock at the market price, his 'reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action.'" *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014) (citation omitted). If for purposes of establishing reliance the market price of a stock is considered to be inflated by the existence of a misrepresentation, then the price will be "corrected"—and an investor will suffer a loss that is causally linked to the misrepresentation—only if the market actually learns that a false statement was made.

to settle means that “plaintiffs with weak claims” are able “to extort settlements from innocent companies.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-64 (2008); *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (noting the danger of permitting a securities plaintiff “with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value”).

When defendants must bear that burden, the economy as a whole suffers. Expending time and resources in litigating and settling securities cases that lack merit increases the cost of capital, discourages beneficial economic activity, and otherwise inflicts economic damage that is ultimately “passed along to the public.” *SEC v. Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010) (Boudin, J., concurring); *see* S. Rep. No. 104-98, at 4, 8, 14 (1995); Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L. J. 945, 948 (1993) (“Unnecessary civil . . . liability diminishes the return to, and increases the cost of, capital.”).

It is for precisely those reasons that the Supreme Court in *Dura* rejected, as inconsistent with the PSLRA, a loss-causation standard adopted by this Circuit that was insufficiently demanding. In *Dura*, the Court held that a plaintiff cannot satisfy the loss-causation requirement “simply by alleging in the complaint and subsequently establishing that the price of the security on the date of purchase was inflated because of [a] misrepresentation." *Dura*, 544 U.S. at 338 (internal quotation marks and emphasis omitted). "Given the tangle of factors affecting price" at the time the security is ultimately sold, the Court explained, an inflated purchase price at most "suggests that the misrepresentation . . . touches upon a later economic loss"—but to "touch upon a loss is not to *cause* a loss, and it is the latter that the law requires." *Id.* at 343 (internal quotation marks omitted). The Court emphasized that a weak loss-causation standard would "bring about harm of the very sort the statutes seek to avoid" by "tend[ing] to transform a private securities action into a partial downside insurance policy." *Id.* at 347-48; *see id.* at 346.

The same considerations apply here. If the panel's decision were broadly interpreted and applied, loss causation could be deemed adequately alleged despite the absence of a direct and causal link between any misrepresentation and a drop in stock price. And that approach would do exactly what the Supreme Court said in *Dura* should not be done with respect to the loss-causation requirement—draining it of so much force that defendants are effectively forced to provide "investors with broad insurance against market losses." *Dura*, 544 U.S. at 345; *see id.* at 347-48.

This Circuit has an especially important role to play in defining the loss-causation standard so as to avoid those negative consequences. As noted above, more securities class actions are filed in this Circuit than almost anywhere else in the country. *See* pp. 2-3, *supra*. In addition, this Circuit is the home of many start-ups and cutting-edge technology companies, which tend to have volatile stock prices and are therefore particularly vulnerable to meritless securities litigation. *See* S. Rep. No. 104-98, at 9 (1995) ("Smaller start-up companies bear the brunt of abusive securities fraud lawsuits. Many of these companies are high-technology companies which, by their very nature, have unpredictable business prospects and, consequently, volatile stock prices."); *see id.* at 5 (stating that "high-tech, bio-tech and other growth companies . . . are sued disproportionately in 10b-5 litigation"). Given that disappointing corporate earnings or prospects are usually the result of ordinary business and market developments rather than fraud, it is imperative to guard against a situation in which such companies might be forced to pay out large settlement amounts simply because there is some after-the-fact claim that they did not adequately disclose an economic risk that is apparent only in hindsight.

For all of those reasons, rehearing is warranted here. Interpretation of the loss-causation standard, which is at issue in every securities-fraud case, has real and serious practical consequences across a vast swath of the economy, and this

Court has a critical role to play in defining that standard clearly and properly. The Court should rehear this case so as to resolve the confusion in this Circuit, more rigorously analyze the statutory provision setting forth the loss-causation requirement, and ensure that loss causation continues to be, consistent with Congress's intent and the Supreme Court's decision in *Dura*, a "strong pleading requirement," S. Rep. No. 104-98, at 15 (1995), that serves a strong gatekeeping function.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing.

Dated: March 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 26, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 26, 2018

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CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 29-2

I certify, pursuant to Ninth Circuit Rule 29-2(c)(2), Ninth Circuit Rule 32-1(e), and Federal Rule of Appellate Procedure 32(g)(1), that the attached brief contains 4,074 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

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