No. 23-0303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE FIRSTENERGY CORPORATION; STEVEN E. STRAH; K. JON TAYLOR; JASON LISOWSKI; GEORGE SMART; PAUL T. ADDISON; MICHAEL J. ANDERSON; STEVEN J. DEMETRIOU; JULIA JOHNSON; DONALD MISHEFF; THOMAS MITCHELL; JAMES F. O'NEIL, III; CHRISTOPHER D. PAPPAS; SANDRA PIANALTO; LUIS A. REYES; JERRY SUE THORNTON; LESLIE TURNER,

Petitioners.

On Petition for Permission to Appeal from the
U.S. District Court for the Southern District of Illinois,
No. 2:20-cv-03785, Hon. Chief Judge Algenon L. Marbley

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

Amici make the following disclosures under Sixth Circuit Rule 26.1:

1. Is any *amicus* a subsidiary or affiliate of a publicly owned corporation?

No. The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.

The Securities Industry and Financial Markets Association has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Edison Electric Institute has no parent corporation. EEI has no outstanding shares or debt securities in the hands of the public, and no publicly owned company has a 10% or greater ownership interest in EEI.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome?

None known.

Dated: April 20, 2023

/s/ Deanne E. Maynard
Deanne E. Maynard

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members 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 in matters before Congress, the Executive Branch, and the courts.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation and policy affecting business and investment interests. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency.

Edison Electric Institute ("EEI") is the trade association representing all investor-owned electric utilities in the U.S. EEI's members provide electricity for

[1] Pursuant to Rule 29(a)(4)(E), amici affirm that no party's counsel authored this brief in whole or in part and that no party, party's counsel, or person other than amici, their members, and their counsel made any monetary contributions to fund the preparation or submission of this brief. Amici have filed a simultaneous motion for leave to file this brief.

about 235 million Americans, operate in all 50 states and D.C., and represent 70% of the nation's electric power industry, the most capital-intensive industry in the U.S. EEI regularly files amicus briefs in cases raising issues of significant concern for the electric power industry.

Amici have a strong interest in this case. Many of amici's members are subject to federal securities laws and defend against securities class actions. They will be adversely affected by the district court's expansion of *Affiliated Ute*'s presumption of reliance and its erosion of *Comcast*'s requirement to rigorously assess predominance. Amici have long been concerned about the costs securities class actions impose on the American economy. Left uncorrected, the decision below would further increase those costs.

INTRODUCTION

Given the significant costs securities-fraud class actions impose even on innocent companies, courts must rigorously enforce Rule 23(b)(3)'s predominance requirement before certifying a class. Predominance is not satisfied—and no class can be certified—unless plaintiffs establish a class-wide presumption of reliance on defendants' alleged deception and a model for measuring damages across the entire class. The district court here failed to enforce either of these important requirements.

First, the court erroneously absolved plaintiffs of their obligation to prove reliance, an "essential element" of fraud. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). A narrow exception to that obligation allows courts to presume reliance when a plaintiff's claim rests on an omission rather than misstatement. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972). But the district court improperly expanded that narrow exception by presuming reliance even though plaintiffs' claims were premised on defendants' alleged *misstatements*, not omissions. That decision would allow the *Affiliated Ute* presumption to swallow the reliance requirement, effectively writing that essential element out of securities law and eliminating an important component of the predominance analysis.

Second, the district court erred by abdicating its responsibility to conduct a "rigorous analysis" of whether plaintiffs' damages model satisfies the predominance

requirement. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). The court conducted *no* analysis—let alone a "rigorous" one—of plaintiffs' proposed methodology for measuring damages under the Securities Exchange Act of 1934 ("Exchange Act"). As *Comcast* warned, such failure "reduce[s] Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 36.

Securities-fraud class actions have increased significantly in the last decade. Left uncorrected, the district court's erosion of both the reliance element and predominance requirement threatens to exacerbate this trend by making class certification a near certainty in many cases and depriving defendants of otherwise-available defenses. Such lawsuits impose enormous costs on American businesses, with the threat of massive damages pressuring innocent companies to settle even non-meritorious claims. Neither businesses nor the public benefit from such litigation. This Court should grant review and reverse.

ARGUMENT

I. THE DISTRICT COURT'S ERRONEOUS EXPANSION OF *AFFILIATED UTE* UNDERMINES THE RELIANCE REQUIREMENT

A. The *Affiliated Ute* Presumption Applies Only To Claims Based On Omissions, Not Misstatements Or Half-Truths

Plaintiffs alleging securities fraud must prove, among other things, "reliance upon the misrepresentation or omission" of the defendant. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460-41 (2013). Requiring "proof of reliance

ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'" *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011). "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation." *Id.*

That method of proof, however, is nearly impossible if there was no misrepresentation on which the plaintiff could have relied. In *Affiliated Ute*, the Supreme Court addressed this difficulty by creating a narrow exception to plaintiffs' obligation to prove reliance. 406 U.S. at 152. *Affiliated Ute* allowed courts to presume reliance where (1) the plaintiff's claim turned on the defendant's nondisclosure, not its misstatements, and (2) the defendant had a duty to disclose. *Id.* The Court's purpose was to address "the difficulty of proving 'a speculative negative'—that the plaintiff relied on what was not said." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999). The presumption thus applies only where "reliance as a practical matter is impossible to prove" because "no positive statements exist." *Waggoner v. Barclays PLC*, 875 F.3d 79, 95 (2d Cir. 2017).

The same reasoning has no force when a plaintiff alleges affirmative misstatements made by the defendant are misleading because they omit material information (sometimes called "half-truths"). *Id.* at 95-96. If a plaintiff alleges

statements were false or rendered misleading by other undisclosed facts, nothing prevents the plaintiff from proving it in fact relied on those statements. For that reason, multiple courts of appeals have restricted the *Affiliated Ute* presumption to fraud claims based primarily on omissions. *Id.* at 96; *Vervaecke v. Chiles, Heider & Co.*, 578 F.2d 713, 717 n.2 (8th Cir. 1978); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2 F.4th 1199, 1208-09 (9th Cir. 2021); *Joseph v. Wiles*, 223 F.3d 1155, 1162-63 (10th Cir. 2000); *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 220 (D.C. Cir. 2010).

B. The District Court Erroneously Applied The *Affiliated Ute* Presumption To Defendants' Alleged Misstatements

The district court here erred in two ways: by suggesting that *Affiliated Ute* applies beyond omission-based claims, and by holding alternatively that plaintiffs' claims were primarily omissions-based.

First, the district court disregarded as nonbinding the well-reasoned opinions of multiple courts of appeals. R. 435 (Certification Op.) at 9820. Instead, it concluded the *Affiliated Ute* presumption applies even in "mixed cases of affirmative misstatements and omissions." *Id*. at 9821. In doing so, the court did not attempt to explain how such an expansion accords with the language or reasoning of *Affiliated Ute*—which, again, is premised on the impossibility of proving reliance on statements never made. *Waggoner*, 875 F.3d at 95.

Second, the district court compounded its error by deeming plaintiffs' claims "primarily omission-based." R. 435 at 9821. In fact, plaintiffs accused defendants of nearly 50 alleged *misstatements*. R. 72 (Consolidated Complaint) at 1576-92. While acknowledging these affirmative "communications" and "statements," the court treated them as "omissions" because "they painted an incomplete picture of the alleged truth" by "omitting information necessary to qualify or to place into doubt those contentions." R. 435 at 9822. Using that logic, any misstatement could be recast as an omission: all false statements involve a corresponding "omission" in the "failure to disclose which facts in the representation are not true." *Volkswagen*, 2 F.4th at 1208. The court's approach would thus "permit the *Affiliated Ute* presumption to swallow the reliance requirement almost completely." *Desai v. Deutsche Bank Secs. Ltd.*, 573 F.3d 931, 941 (9th Cir. 2009) (quotation omitted).

The district court is not alone in its error: other courts in this Circuit have similarly extended the *Affiliated Ute* presumption beyond its intended scope. R. 435 at 9821 (citing *Cosby v. KPMG, LLP*, No. 3:16-cv-121, 2021 WL 1828114, at *6 (E.D. Tenn. May 7, 2021); *Burges v. Bancorpsouth, Inc.*, No. 3:14-cv-1564, 2017 WL 2772122, at *10 (M.D. Tenn. June 26, 2017)). Without this Court's intervention, this Circuit will become an outlier in its failure to require proof of reliance for affirmative misstatements.

The consequences will be significant. Following the decision below, plaintiffs could easily plead fraud claims as omissions rather than misstatements to avoid the requirement to prove actual reliance, or the additional conditions for invoking the presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). This shortcut fatally undermines the reliance requirement's critical and purposeful role as a gatekeeper to class certification and a bulwark against abusive securities litigation. *See Desai*, 573 F.3d at 940 (whether "putative class can meet the requirements of Rule 23(b)(3)" often turns on whether each plaintiff "would have to prove reliance"). Erosion of the reliance requirement will make class certification a near certainty in many cases, reshape post-certification litigation, and lower the barrier to speculative securities-fraud class actions that use the threat of massive class-wide damages to extract settlements.

II. THE DISTRICT COURT ABDICATED ITS RESPONSIBILITY UNDER *COMCAST* TO CONDUCT A RIGOROUS ANALYSIS OF PLAINTIFFS' DAMAGES MODEL

In *Comcast*, the Supreme Court held courts must undertake a "rigorous analysis" to ensure satisfaction of "Rule 23(b)(3)'s predominance criterion" before certifying a class. 569 U.S. at 33-34. Specifically, courts must scrutinize whether a plaintiff's damages model "establish[es] that damages are capable of measurement on a classwide basis" in a manner "consistent with [plaintiff's] liability case." *Id.* at 34-35. This "rigorous analysis" is particularly important in securities-fraud class

actions, where a presumption of reliance may already obscure individual differences by removing an element of the plaintiff's proof.

The district court abdicated its responsibility under *Comcast*. It did not analyze plaintiffs' methodology for measuring damages under the Exchange Act at all, let alone "rigorously." It merely stated "predominance exists with respect to damages for the same reasons" that it did for damages under the Securities Act of 1933 ("Securities Act"). R. 435 at 9819. But the court's analysis of plaintiffs' Securities Act damages model relied almost entirely on the existence of a statutory formula for those claims. Unlike the Securities Act, the Exchange Act provides no statutory formula. As defendants explain, the Securities Act model makes no sense for the Exchange Act, which requires different proof and compensates a different harm. Pet. 18-21. The district court never engaged with these arguments. If such cursory treatment were permissible, *Comcast*'s protections would be meaningless for an entire class of claims—and there is no guarantee such flawed logic would remain confined to the Exchange Act.

This case is part of a concerning trend in this Circuit of district courts taking their *Comcast* responsibility too lightly and granting certification even where individual damages inquiries may predominate. *See, e.g., In re Big Lots, Inc.*, No. 17-0303, 2017 WL 4404634 (6th Cir. Aug. 23, 2017) (granting Rule 23(f) appeal where defendant argued district court accepted plaintiffs' damages model

without rigorous analysis, but appeal ultimately dismissed by stipulation). In contrast, courts elsewhere have properly denied certification when plaintiffs failed to satisfy *Comcast*'s rigorous analysis. *See, e.g, In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 151-52 (N.D. Tex. 2014) (refusing to presume *Comcast* satisfied based merely on Securities Act provisions); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 141-42 (S.D.N.Y. 2014) (denying class certification for insufficient "specificity as to the methodology that will be used").

Comcast warned that failure to scrutinize a damages model "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." 569 U.S. at 36. This Court should remind district courts of their important obligation to prevent this warning from becoming reality.

III. LEFT UNCORRECTED, THE DISTRICT COURT'S DECISION WILL EXPAND SECURITIES-FRAUD CLASS ACTIONS AND IMPOSE SIGNIFICANT COSTS ON AMERICAN BUSINESSES

Both Congress and the Supreme Court have recognized that securities lawsuits pose "a danger of vexatiousness different in degree and in kind" from other litigation. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975); *see* H.R. Conf. Rep. No. 104-369, at 31 (1995) (discussing securities-fraud plaintiffs' "abusive practices"). Because, as here, securities lawsuits are often brought as class actions, high defense costs and the potential for massive liability create strong

pressure on defendants to settle regardless of merit. *See* Stanford Clearinghouse, *Securities Class Action Filings: 2019 Year in Review* 16 (2020) (less than 1% of securities class filings from 1997 to 2018 reached trial verdict and nearly half settled).[2] Aware of these dynamics, "plaintiffs with weak claims" can "extort settlements from innocent companies." *Stoneridge*, 552 U.S. at 163.

These dangers are particularly present in "event-driven" lawsuits like this one, where plaintiffs sue after unfavorable news coverage causes a company's stock price to fall. U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System* 9 (Feb. 2019).[3] Such plaintiffs routinely allege that vague, innocuous statements—like defendants' commitment to "good corporate governance" (R. 72 at 1580)—are misleading given whatever undisclosed facts precipitated the price drop. Requiring plaintiffs to prove reliance on such banal statements may defeat baseless lawsuits (or at least preclude class certification). But the district court's expansion of the *Affiliated Ute* presumption removes this important check on runaway event-driven litigation. While other circuits have corrected this error, event-driven lawsuits will proliferate in this Circuit without reversal of the class-certification order below.

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[2] http://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-YIR.pdf.

[3] https://instituteforlegalreform.com/wp-content/uploads/2020/10/Securities-Class-Action-Reform-Proposals.pdf.

The growth of these securities class actions inflicts considerable costs on American businesses and investors. According to one study, as many as one in eleven S&P 500 companies will be sued annually in a securities class action. *Containing the Contagion*, *supra*, at 11. The costs of such litigation are spread to all U.S. companies, who must pay higher premiums for liability insurance and hold more cash on hand to prepare for future settlements instead of using that money for capital expenditures. C. Metzger & B. Mukherjee, *Challenging Times: The Hardening D&O Insurance Market*, Harv. L. Sch. Forum on Corporate Governance (2020)[4]; M. Arena & B. Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. Fin. & Quantitative Analysis 251, 251 (2015). Some companies may avoid going public altogether, depriving the public of valuable investment opportunities.

These costs are not offset by any purported benefits. Most securities class settlements merely transfer wealth between two innocent (and often overlapping) groups of shareholders: those who currently own the company's stock and those who purchased it during the class period. U.S. Chamber Institute for Legal Reform, *Risk and Reward: The Securities-Fraud Class Action Lottery* 4 & n.16 (Feb. 2019).[5]

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[4] https://corpgov.law.harvard.edu/2020/01/29/challenging-times-the-hardening-do-insurance-market.

[5] https://www.instituteforlegalreform.com/uploads/sites/1/Risk_and_Reward_WEB_FINAL.pdf.

And because the price of high insurance premiums is passed on to shareholders, it is an "open question" whether such settlements "actually produce[] any net recovery" at all. John C. Coffee, Jr., *Reforming the Sec. Class Action: An Essay on Deterrence & Its Implementation*, 106 COLUM. L. REV. 1534, 1547 (2006).

The district court's erosion of important protections for class-action defendants will further increase these costs without any countervailing benefits.

CONCLUSION

This Court should grant defendants' petition for leave to appeal.

Dated: April 20, 2023

Respectfully submitted,

/s/Deanne E. Maynard

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,595 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b), as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft Word 2022 in Times New Roman 14-point font.

Dated: April 20, 2023

/s/ Deanne E. Maynard
Deanne E. Maynard

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 Sixth Circuit by using the CM/ECF system on April 20, 2023.

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

Dated: April 20, 2023

/s/ Deanne E. Maynard
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