No. 10-649

IN THE

Supreme Court of the United States

APOLLO GROUP, INC., *et al.*,

Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR FORMER SEC COMMISSIONERS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Commissioners of the Securities and Exchange Commission (SEC) and professors of law and finance whose fields of expertise include securities regulation, class-action practice, and law and economics. *Amici* have devoted substantial parts of their professional careers to

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for both parties received timely notice of *amici*'s intent to file this brief. Letters from the parties consenting to the filing of this brief are on file with the Court.

implementing, drafting, and studying the federal securities laws, including how those laws should be interpreted to ensure protection of investors and promotion of efficiency, competition, and capital formation.

This brief reflects the consensus view of the *amici*, all of whom believe that this Court should grant Apollo's petition for certiorari. Each individual *amicus* may not, however, endorse every argument presented herein. The former Commissioners and professors joining this brief as *amici*, listed alphabetically, are:

The Honorable Charles C. Cox, who served as a Commissioner of the SEC from 1983 through 1989, Acting Chairman of the SEC during 1987, and as Chief Economist of the SEC from 1982 through 1983;

The Honorable Joseph A. Grundfest, who served as a Commissioner of the SEC from 1985 through 1990 and who is the William A. Franke Professor of Law and Business at Stanford Law School, Senior Faculty of the Rock Center on Corporate Governance at Stanford University;

The Honorable Roberta S. Karmel, who served as a Commissioner of the SEC from 1977 through 1980, and who is the Centennial Professor of Law at Brooklyn Law School.

Simon M. Lorne, who served as General Counsel of the SEC from 1993 to 1996 and who is an adjunct professor at the NYU School of Law and NYU's Stern School of Business; and

Professor Kenneth E. Scott, who is the Ralph M. Parsons Professor of Law and Business emeritus at Stanford Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unlike traditional fraud lawsuits, modern securities class actions under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder depend on a series of presumptions and methods of proof that substitute for the traditional forms of evidence such as investor testimony. Like the implied § 10(b) right of action itself, these presumptions are mostly judge-made; for example, in almost every § 10(b) class action, investor reliance on the defendant's misrepresentations is presumed rather than proven, on the theory that the impersonal market swiftly assimilates all new material information and incorporates it in securities prices. This presumption was enshrined in § 10(b) by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which formally adopted the "fraud on the market" theory of investor reliance.

The underlying theory of swift market incorporation of new, material information, known as the efficient capital markets hypothesis, is well-established in academic literature, and that literature – along with "common sense and probability," judicial precedent and the history of the Securities Exchange Act – underlay this Court's decision to adopt it as a legal rule of evidence. *Basic*, 485 U.S. at 246-47 & nn. 24-26. Its acceptance gave plaintiffs a powerful weapon: by pleading and proving that a market is efficient, they can recover damages without actual proof that anyone, anywhere actually relied on an alleged misrepresentation, based on the theory that the unsleeping eye of the market took notice and incorporated the misrepresentation into its prices. The Circuits have required plaintiffs, before invoking this weapon, to plead and prove that the market bears the hallmarks of efficiency under the "semi-strong" version of the efficient capital markets hypothesis, meaning proof that the market for a security actually does react to new, material information in the way the theory posits – immediately and consistently.

But while the efficient capital markets hypothesis is the *sine qua non* of investor class actions in establishing that market prices reacted to *false* information, the Circuits have split over how to apply the same theory to market responses to *true* information for purposes of proving two other elements of a § 10(b) claim – loss causation and materiality. Some Circuits hold that when the market fails to react to a subsequent "corrective" disclosure of the truth, that is proof that the market didn't consider those facts material in the first place. Some Circuits hold that if the market fails to react to an initial corrective disclosure of facts, the plaintiffs cannot prove that such disclosures were the cause of their losses, even if those losses followed some later disclosure (a newspaper article, analyst report or other secondary source) repackaging and commenting on the same facts.

The Ninth Circuit, in this case, took the opposite view. The market for the defendant company's stock – whose efficiency was presumed for purposes of reliance – did not show a statistically significant response to initial reports of an adverse report by the Department of Education that undermined the defendants' prior statements, nor to subsequent extensive press reports detailing the troublesome findings of that report – only to two later analyst reports rehashing those facts and opining about them. Yet, the Ninth Circuit found it legally permissible for plaintiffs to establish loss causation from the market's delayed reaction to the analyst reports, *and* to recover damages from the days when the original facts were disclosed. Under the efficient capital markets hypothesis as it is applied to the reliance inquiry, and as it is applied in other Circuits to materiality and loss causation, this is not a permissible result.

The split illustrated by the Ninth Circuit's ruling – between Circuits as well as between elements of the same claim – creates an unpredictable landscape for securities class actions and encourages forum shopping in search of courts that will judicially expand the boundaries of recoverable losses. That landscape has led to repeated petitions to this Court to clarify the different ways in which the hypothesis is used, and disregarded, at different stages and to different elements of a § 10(b) case. If the efficient capital markets hypothesis is to form the basis of a lawsuit, it must be applied consistently to all elements of the claim. See *Basic*, 485 U.S. at 231 (noting that this Court has defined a standard of materiality under the securities law). This Court should put an end to the confusion by granting the petition for a writ of certiorari and clarifying that any lawsuit using the efficient capital markets hypothesis to establish the reliance element of the claim must apply the same theory – including its fundamental premise that the stock price immediately reacts to new information – to establish the materiality and loss causation elements as well.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE MULTIPLE ONGOING CIRCUIT SPLITS REGARDING THE EFFICIENT CAPITAL MARKETS HYPOTHESIS

A. The Efficient Capital Markets Hypothesis Underlies All Fraud on the Market Cases

The efficient capital markets hypothesis states that in "an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Basic*, 485 U.S. at 241. "[A]ll publicly available information is embedded in stock prices." Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 5 (1982-83) (cited in *Basic*). New information important to reasonable investors (in effect, the market) is immediately incorporated into stock prices. *Basic*, 485 U.S. at 244. The "semi-strong" version of the hypothesis recognizes that "the collective action of a sufficient number of market participants buying or selling the stock causes a very rapid, if not virtually instantaneous, adjustment in price." Fischel, *supra*, at 10 n.30 (internal quotation marks omitted).[2]

Because the market immediately incorporates new information into stock prices, this Court in *Basic*

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[2] This is in contrast to the "strong" version of the efficient capital markets theory, which posits that the market's reaction is correct, in addition to being immediate, and the "weak" version – inconsistent with *Basic* but effectively the theory adopted here by the Ninth Circuit – which does not presuppose that new information is immediately and fully reflected in market prices.

compared the market to "the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price." *Basic*, 485 U.S. at 244. That goes equally for both true and false information: "the market price of stocks reflects all available public information — and hence necessarily, any material misrepresentations as well." Fischel, *supra*, at 10 n.30. Thus, if there have been material misrepresentations, the market price will be fraudulently inflated, and can be legally presumed as such without further proof: "Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . [a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U.S. at 241-42, 247 (internal quotation marks omitted). This Court concluded that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247.

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court adopted a rule for loss causation in Rule 10b-5 actions that is consistent with the efficient capital markets hypothesis. The Court held that, in order to satisfy the element of loss causation, a plaintiff must allege that the "share price fell significantly after the truth became known." *Id.* at 347. This requirement for loss causation complements the presumption of reliance. In *Basic*, the Court could presume reliance on the theory that all information, even misstatements, will be immediately incorporated in the price of the stock; in *Dura*, the Court required plaintiffs to demonstrate loss causation with a decline in price following a corrective disclosure, because the truth – like the misrepresentation – will be immediately incorporated into the price of the stock.

Unfortunately, not all Circuits have read *Dura* and *Basic* as applying the same rule.

B. The Circuits Are Split

The Circuits are in direct conflict as to what constitutes a corrective disclosure, and whether a subsequent republication of a prior disclosure can be actionable. On the one end of the spectrum, as clearly illustrated by the facts of this case, the Ninth Circuit holds that the market can be deemed to have reacted to a "corrective disclosure" even when reacting to facts that were disclosed days, weeks, or even months earlier. Other circuits, such as the Fifth Circuit, have endorsed a similar approach, albeit only in some procedural settings. On the other end of the spectrum, the Second, Third, and Fourth Circuits have held that there must be an immediate decline in the market price following a disclosure of new facts to establish a market reaction probative of loss causation or materiality. The division cannot be reconciled without this Court's intervention.

Apollo initially disclosed the existence of the DOE report and its settlement with the DOE on September 7, 2004. On September 14-15, the media extensively covered the contents of the DOE report and Apollo's practices. Apollo's stock price did not react: there was no statistically significant reaction.[3] Two weeks

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[3] In a typical § 10(b) action, expert econometric testimony premised upon the efficient capital markets hypothesis is used to establish the timing and duration of price inflation for purposes of establishing reliance loss causation and damages. Courts have generally recognized the standard applied by

after Apollo's initial disclosures, however, a securities analyst, Kelly Flynn, issued two reports republishing the facts in the DOE report, offering her opinions about the DOE reported facts and other unrelated negative information and downgrading the stock. Immediately following the issuance of the Flynn reports, Apollo's stock price suffered a statistically significant decline. Notwithstanding the fact that the Flynn reports merely incorporated and synthesized the information that had been disclosed by Apollo two weeks earlier, the Ninth Circuit treated the Flynn reports as permissible corrective disclosures. This

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econometric experts under which a stock price reaction is only legally significant if it is statistically significant after excluding the movement of market-wide indices. *See, e.g.*, *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 505 (2d Cir. 2010); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (per curiam). Such standards are necessary to exclude the possibility that prices moved due to random chance. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (pegging level of statistical significance at "greater than two or three standard deviations"); *Ottaviani v. State Univ. of N.Y. at New Paltz,* 875 F.2d 365, 371 (2d Cir. 1989) ("two standard deviations corresponds approximately to a one in twenty, or five percent, chance that a disparity is merely a random deviation from the norm, and most social scientists accept two standard deviations as a threshold level of 'statistical significance'"); *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (excluding expert testimony that failed to meet standards of statistical significance); *EEOC v. Ethan Allen, Inc.*, 259 F. Supp. 2d 625, 635 (N.D. Ohio 2003) (excluding expert testimony that used a 68% confidence level, "only slightly higher than the predicted results of tossing a coin."). Despite this consensus, the Ninth Circuit in this case permitted damages to be recovered even for days on which no statistically significant price reaction could be proven.

view is irreconcilable with the efficient capital markets hypothesis.[4]

The Third Circuit, in a line of cases beginning with *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1416, 1425 (3d Cir. 1997) (Alito, J.), has taken a more orthodox view of how efficient markets operate. The defendant company in *Burlington* disclosed the poor sales figures that had been claimed to constitute a disclosure of the fraud on July 29, 1994, to no market reaction; the stock did not plunge sharply until the company's year-end revenues and earnings were released in a press release on September 20, 1994. The court explained that, "[b]ecause the market for BCF stock was 'efficient' and because the July 29 disclosure had no effect on BCF's price, it follows that the information disclosed on September 20 was immaterial as a matter of law." *Id.* at 1425. In a later case, then-Judge Alito elaborated that "when a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock." *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.).[5]

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[4] The Fifth Circuit, while taking a more stringent position at later stages of the litigation, likewise permits a delayed-reaction theory of loss causation at the pleading stage. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 266 n.33 (5th Cir. 2009).

[5] Other circuits that follow this approach include the Second Circuit, *see, e.g., In re Omnicom Grp, Inc. Sec. Litig.*, 597 F.3d 501 (2d Cir. 2010) (noting that plaintiff must prove that the corrective disclosure was "promptly digested" by the market); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 207 (2d Cir. 2008) (noting that "[e]vidence that unexpected corporate events or financial releases cause an immediate response in the price of a security" is the most important factor in determining whether the stock trades in an

In this case, the Ninth Circuit concluded that the Flynn reports were "corrective disclosures" because they could have provided "additional or more authoritative fraud-related information," even though, notably, they did not contain any new facts not previously disclosed but only offered the third party analyst's opinions. In so doing, the Ninth Circuit rejected the district court's conclusion that the Flynn reports could not be treated as a corrective disclosure because, in an efficient market, the market is presumed to have already incorporated the facts contained in the initial disclosure.

In contrast, in other Circuits, this type of republication or amplification of previously disclosed facts cannot constitute a corrective disclosure. For example, in *Teachers' Retirement System of Louisiana v. Hunter*, the Fourth Circuit found that the republication of previously disclosed facts in a complaint (which was followed by a stock price decline) could not have caused the stock price to decline. 477 F.3d 162, 187 (4th Cir. 2007); see also *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 512 (2d Cir. 2010) (finding that a subsequent negative characterization of previously known facts cannot constitute a corrective disclosure).

As these cases demonstrate, the Circuits have adopted diametric positions on what constitutes a

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efficient market), and the First Circuit. *See In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 14 (1st Cir. 2005) (a "market price 'fully reflects' all publicly available information when prices respond so quickly to new information that it is impossible for traders to make trading profits on the basis of that information. . . . Where the market reacts slowly to new information, it is less likely that misinformation was reflected in market price and therefore relied upon.") (internal quotation marks omitted); *see also* Petition at 15-18.

corrective disclosure and how quickly the market must react to bad news to satisfy loss causation under *Dura*, and in so doing have failed to apply a consistent theory of market behavior. This conflict warrants further clarity from this Court. Absent further guidance, the circuits are left to create a body of diverging case law that offends the notions of justice and fundamental fairness.

Beyond the fundamental conflict discussed above, this Court should also provide clear guidance to the lower courts on the application of *Dura* to efficient markets because it is an issue that is often raised at various stages of a litigation, and consistent application at the different stages of the litigation is equally important. In the case at hand, the issue arose at the proof stage, following the completion of a trial. However, loss causation is often addressed also at the pleading and class certification stage. See, *e.g.*, *Dura*, 544 U.S. at 348 (finding that plaintiffs' complaint allegations insufficient to plead loss causation); *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 344 (5th Cir. 2010) (affirming district court's denial of class certification on the ground that plaintiff failed to meet the requirements for proving loss causation at the class certification stage).

Amici believe that the efficient capital markets hypothesis should be consistently applied to federal securities fraud claims. Courts that allow such claims to proceed despite a delay of days, weeks or months between the revelation of the truth and the (allegedly) corresponding stock price adjustment, even if that later adjustment corresponds to release of an analyst report that repackages the information, fundamentally ignore the efficient capital markets hypothesis as applied in *Basic* and *Dura*. When truth is introduced into the market, the inflation in the stock price will be immediately removed. Deflation resulting from the truth is immediate just as the inflation resulting from the misstatement is immediate. Fischel, *supra*, at 10 n.30. An investor who purchased stock after the truth correcting a prior misrepresentation was revealed would not be able to claim that he was defrauded by the prior misrepresentation. Rather, once the truth has been revealed, the truth necessarily is incorporated into the stock price. At that point, the stock is no longer artificially inflated as a result of the prior misrepresentation. Thus, even if the stock price declines after a later analyst report repackages the information, that stock price decline cannot be due to artificial inflation being removed from the stock's price. Otherwise persons purchasing stocks after the truth has come out would have a claim for fraud.

II. THIS CASE PRESENTS A GOOD VEHICLE FOR THIS COURT TO ADDRESS THE LEGAL PRESUMPTIONS DRAWN FROM THE EFFICIENT CAPITAL MARKETS HYPOTHESIS

This is at least the second Petition on an aspect of loss causation to reach the Court just this Term, and one in a series of such Petitions in recent years.[6] The Court has already asked the Solicitor General to weigh in on the petition in *Erica P. John Fund, Inc. v. Halliburton Co.*, which seeks review of the Fifth Circuit's standard for loss causation at the class

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[6] *See, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403; *Gilead Scis., Inc. v. Trent St. Clare*, No. 08-1021; *Laborers Dist. Council Constr. Ind. Pension Fund v. Omnicare*, No. 09-1400; *Holmes v. Grubman*, No. 10-409; *Thane Int'l, Inc. v. Milkowski*, No. 07-1577.

certification stage, and the Solicitor General has responded by urging the Court to grant that Petition. Brief for the United States as Amicus Curiae, No. 09-1403 (U.S. Dec. 3, 2010).

Amici express no view on the *Halliburton* petition, but agree that the Court should take this opportunity to resolve the confusion among the Circuits regarding the substantive standards for applying the efficient capital markets hypothesis to fraud-on-the-market lawsuits, and submit that this case is a superior vehicle for doing so. Accordingly, whether or not this Court takes the *Halliburton* Petition, it should grant this Petition, and if appropriate consolidate it with *Halliburton.*[7]

The instant Petition presents two advantages over *Halliburton.* First, *Halliburton* presents the threshold issue – a significant question in itself – of the proper procedural standard to apply at the class certification stage, an issue related to the one the Court has already agreed to hear in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277. If the Court determines that the Fifth Circuit applied the wrong standard under Rule 23, it might not reach the question of the substantive methods of proving loss causation, and indeed the Solicitor General has not even asked the Court to address that question. Here, by contrast, the case comes to the Court on a full trial record, and

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[7] In the October 2010 term, the Court consolidated the following cases in order to resolve a shared issue: *Ariz. Christian Sch. Tuition Org., v. Winn*, Docket No. 09-987 and *Garriott v. Winn*, Docket No. 09-991; *Ariz. Free Enter. v. Bennett*, Docket No. 10-238 and *McComish v. Bennett*, Docket No. 10-239; *Boeing Co. v. United States*, Docket No. 09-1302 and *Gen. Dynamics Corp. v. United States*, Docket No. 09-1298; and *Camreta v. Greene*, Docket No. 09-1454 and *Alford v. Greene*, Docket No. 09-1478.

the sole question presented is what constitutes a corrective disclosure in the context of a § 10(b) claim brought under the fraud-on-the- market theory.

Second, this case presents comparatively simple facts. The trial record involves no factual ambiguities regarding what the market was told, and when. The jury was instructed that it could base liability only on a single day's corrective disclosures: the two September 20, 2004 Flynn reports, which the plaintiff contended revealed a single alleged fraud.[8] Supplemental Excerpts of Record at 118, *In re Apollo Group Sec. Litig.*, No. 08-16971 (9th Cir. June 23, 2010). By contrast, *Halliburton* involves ten corrective disclosures covering three separate subjects, none of which presents the question of whether a disclosure is corrective if it repackages facts that had been previously disclosed to no reaction. Thus, this case is a much more straightforward vehicle for addressing the recurring questions of law surrounding application of the efficient capital markets hypothesis.

Alternatively, taking this case in tandem with *Halliburton* would enable this Court to resolve the Circuit splits regarding the law of loss causation at the various stages of a case's life cycle in a comprehensive manner, and to avoid having to revisit the issue repeatedly in the years to come.

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[8] The availability of damages for four additional trading days – permitted by the Ninth Circuit here – is likewise a straightforward question of law tied to the same narrow set of facts.

III. THE NINTH CIRCUIT'S APPROACH DISREGARDS THIS COURT'S CONSISTENT DIRECTIVE TO AVOID NEW NON-STATUTORY EXPANSIONS OF THE IMPLIED PRIVATE RIGHT OF ACTION UNDER § 10(b)

As set forth above, the Ninth Circuit's approach to loss causation amounts to a judicial expansion of the implied § 10(b) cause of action, enabling plaintiffs to selectively use the efficient capital markets hypothesis to sustain a legal presumption of reliance while disregarding precisely the same theory for purposes of proving loss causation and materiality. This Court's precedents have consistently rejected such expansions. This Court should take this opportunity to rein in unreasonable extensions of the efficient capital markets hypothesis as an evidentiary presumption.

The § 10(b) cause of action was a judicial creation, and while its existence has been effectively ratified by Congress, this Court has repeatedly held that Congress, not the courts, must take the lead if § 10(b) is to be extended beyond its present boundaries. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S. 148, 165 (2008) ("The decision to extend the cause of action is for Congress, not for us."); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994). This is consistent with this Court's general approach to implied causes of action. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (explaining that this Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one") (internal quotation marks omitted).

This Court's hesitance to expand the implied right of action without Congressional direction to do so has long been informed by "[t]he practical consequences" of interpreting the statute expansively. *Stoneridge*, 522 U.S. at 158-65. Judicial improvisation creates uncertainty in "an area that demands certainty and predictability." *Cent. Bank*, 511 U.S. at 188 (internal quotation marks omitted); see also *Pinter v. Dahl*, 486 U.S. 622, 652–54 & n. 29 (1988). For the same reasons, this Court has likewise rejected tests that are "complex in formulation and unpredictable in application." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). As the Court noted in *Central Bank*, the lack of clear and predictable liability rules "leads to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." 511 U.S. at 188. "[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5 is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Id.* (internal quotation marks omitted). Here, the more predictable and administrable rule is one that subjects the reliance, materiality and loss causation inquiries to the same empirical standards for showing that an efficient market has reacted in a statistically significant way to new information.

Moreover, judicial expansion of statutes for which there is an implied cause of action, such as § 10(b), upsets the careful balance the securities laws strike between compensating fraud victims and protecting capital markets from the damaging effects of frivolous litigation. The securities laws – and specifically the rules governing market efficiency and loss causation – were not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 544 U.S. at 345 (citing *Basic*, 485 U.S. at 252 (White, J., concurring in part and dissenting in part)). Congress has not been silent in striking this balance, but has actively and repeatedly legislated in this area, as illustrated by the fact that the securities laws were amended in 1995, 1996, 1998, 2000, 2002, and 2010. The loss causation provisions applicable to § 10(b) claims were enacted in 1995, in the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995), as part of an "effort to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006). Congress drafted those provisions against the backdrop of the efficient-market presumption in *Basic*; if it had wanted to provide a more expansive method of proving damages, it could have done so. Indeed, in §§ 11 and 12 claims under the 1933 Act, which do not rest on the fraud-on-the-market theory, Congress maintained the statutory damages formulas and placed the burden of disproving loss causation on the defendants – but not in § 10(b) cases.

In sum, the Ninth Circuit's rule leaves the determination of recoverable losses under § 10(b) uncertain from case to case and Circuit to Circuit, and untethered from the efficient capital markets hypothesis that gives the claim life in the first instance. This Court should grant the petition to resolve these uncertainties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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