17 1453

No.

IN THE

Supreme Court of the United States

COMMUNITY HEALTH SYSTEMS, INC.,
WAYNE T. SMITH, AND W. LARRY CASH,

Petitioners,

v.

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN A. RILEY
MILTON S. MCGEE, III
RILEY, WARNOCK & JACOBSON, PLC
1906 West End Avenue
Nashville, TN 37203
(615) 320-3700
sriley@rwjplc.com

GARY A. ORSECK
Counsel of Record
ALAN UNTEREINER
DANIEL N. LERMAN
JACK A. HERMAN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
gorseck@robbinsrussell.com

Counsel for Petitioners

QUESTIONS PRESENTED

To state a claim for federal securities fraud, a private plaintiff must plead "loss causation." *Dura Pharm., Inc.* v. *Bruodo*, 544 U.S. 336 (2005). To do so, most plaintiffs allege that they bought the defendant's securities at prices inflated by fraud, and then those securities lost value when a "corrective disclosure" revealed to the market the truth (*i.e.*, new facts or information), causing an economic loss. The questions presented are:

1. Did the Sixth Circuit correctly hold, in conflict with other circuits, that (a) the legal sufficiency of an alleged "corrective disclosure" is not subject to any fixed rules concerning the permissible sources of corrective "truth" but instead turns on a case-by-case, totality-of-the-circumstances analysis; and (b) mere allegations made in a civil complaint may constitute a corrective disclosure, so long as those allegations are combined with the release of other information (including from other sources), even if those additional materials revealed no new facts to the market?

2. Did the Sixth Circuit correctly hold, in conflict with other circuits, that Federal Rule of Civil Procedure 15(c)(1) authorizes the "relation back" of otherwise time-barred claims asserted in an amended complaint by *new plaintiffs*, so long as the underlying case is a class action and the new plaintiffs' claims satisfy Rule 15(c)(1)(B)'s requirement that they "arose out of the conduct, transaction, or occurrence" set out in the original complaint?

RULE 14.1(B) STATEMENT

Petitioners are Community Health Systems, Inc., Wayne T. Smith, and W. Larry Cash, defendants-appellees below.

Respondents are New York City Employees' Retirement System, Teachers' Retirement System of the City of New York, New York City Fire Department Pension Fund, New York City Police Pension Fund, and Teachers' Retirement System of The City of New York Variable Annuity Program, all of which were plaintiffs-appellants below.

RULE 29.6 STATEMENT

Petitioner Community Health Systems, Inc., is a publicly held corporation. It does not have a corporate parent, and no publicly traded company currently owns 10% or more of its shares.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes, Regulations, and Rules

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-22a) is reported at 877 F.3d 687. The court of appeals' order denying rehearing (App. 79a-80a) is unreported. The district court's opinion granting the motion to dismiss the complaint (App. 23a-78a) is unreported but available at 2016 WL 4098584.

JURISDICTION

The court of appeals' judgment was entered on December 13, 2017. The petition for rehearing was denied on January 18, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AND RULE INVOLVED

Sections 10(b) and 21D of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1985 ("PSLRA"), 15 U.S.C. §§ 78j(b) and 78u-4(b)(4), SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, and Rule 15(c)(1) of the Federal Rules of Civil Procedure are set forth at App. 81a-86a.

STATEMENT

This case involves a securities class action seeking to recover almost $1 billion that was dismissed by the district court, only to have that decision reversed by the Sixth Circuit. It raises two recurring and important issues that significantly

affect federal securities class actions, a large and growing category of cases with great impact on the federal courts and the national economy. On both issues presented, the decision below deepens conflicts in the circuits and compounds doctrinal confusion. And this case, which raises two pure questions of law on a manageable record, is an excellent vehicle for providing much-needed guidance on the proper standards governing (1) the pleading of "loss causation" in securities-fraud cases, and (2) the "relation back" of claims of newly added plaintiffs.

A. Background

This case arises out of an earlier federal lawsuit, filed on April 11, 2011, by Tenet Healthcare Corporation. That lawsuit sought to defeat a hostile takeover attempt by a competitor, petitioner Community Health Systems, Inc. (CHSI). At the time Tenet filed its lawsuit (ultimately dismissed for lack of standing), CHSI had 131 affiliated acute-care hospitals, many acquired though CHSI's longstanding "growth by acquisition strategy." App. 37a; see also App. 4a, 6a, 24a, 26a.

Tenet's complaint alleged that CHSI had committed fraud when it said in its proxy solicitation materials that CHSI's past successes were attributable to "superior operating performance." App. 7a; see App. 119a-203a, 142a-159a (Tenet complaint). Instead, Tenet asserted, CHSI was so profitable because it had overbilled Medicare by causing patients to be improperly admitted to its affiliated hospitals rather than treated (at lower cost) in an outpatient "observation" status. App. 7a-8a, 38a. Medicare reimburses hospitals only for

"reasonable and necessary" treatment. 42 U.S.C. § 1395y(a)(1)(A).

Federal regulations require hospitals to adopt screening criteria for reviewing the appropriateness of physicians' decisions about inpatient admissions. See 42 C.F.R. § 482.30. Tenet's complaint alleged that CHSI employed internally created guidelines (the "Blue Book") for managing patient intake; that the "40-page Blue Book," which "was copyrighted in 2000 and is publicly available at the United States Copyright Office," included unduly permissive admissions criteria; and that CHSI used the Blue Book instead of other guidelines (including the "InterQual Criteria") that some other hospitals pay third parties to license. App. 4a-5a, 26a-27a, 125a-126a (Tenet Cplt. ¶¶ 10, 12).

Tenet's complaint alleged that the Blue Book employed "subjective and liberal" admissions criteria. App. 126a-129a, 142a-159a (Tenet Cplt. ¶¶ 13-18, 50-88). The complaint also relied on "an analysis of publicly available information on hospital observation rates," drawn from public Medicare data, to allege that CHSI admitted an unduly large proportion of patients compared to other hospital companies. App. 122a, 129a-130a, 162a-166a (Tenet Cplt. ¶¶ 4 n.2, 19 & n.5, 97-102).

On the day Tenet filed its lawsuit in an effort to scuttle CHSI's hostile takeover attempt, the price of CHSI shares declined significantly. App. 39a.[1]

---

[1] On that day, trading was halted, and on April 12 CHSI shares opened down 35.8% at $31.48. On December 9, 2010, the day

B. This Litigation

On May 9, 2011, less than a month after Tenet filed its complaint, a CHSI shareholder filed a putative securities-fraud class action against CHSI and petitioners Wayne T. Smith and W. Larry Cash, who at all relevant times were the company's CEO and CFO, respectively. App. 10a-11a. After two other shareholders filed putative class actions, the district court consolidated the cases and appointed the five respondents here (all New York City pension funds) as lead plaintiffs. App. 11a. In July 2012, respondents filed a consolidated complaint. See App. 204a-371a (the "2012 Complaint").

In the 2012 Complaint, respondents defined the class as all persons or entities that bought and/or sold CHSI shares "between July 27, 2006 (when Smith credited [CHSI's] revenue to its 'operating model' rather than to the Blue Book), and April 8, 2011 (just before the Tenet complaint and the [April 11] drop in [CHSI's] share price)." App. 11a. Petitioners moved to dismiss, and two years passed without any action on the motion.

---

before CHSI announced its proposed acquisition of Tenet, the company's stock had closed at $31.64, and it had risen steadily between then and Friday, April 8, 2011, in anticipation of the merger. Pet. C.A. Br. 5 n.1. The district court therefore observed that "the market reaction" to the Tenet complaint "was just as likely (if not more likely) due to the proposed takeover being thwarted" (and CHSI's longstanding growth-by-acquisition strategy being challenged) than to any disclosure by the complaint of new facts or information. App. 72a.

On October 15, 2015, respondents filed an amended complaint. See App. 372a-546a (the "2015 Complaint"). In it, respondents "expanded the class" to include investors who bought and/or sold shares in a *later* six-month period, between April 11 and October 26, 2011 (the date CHSI announced its third-quarter earnings). App. 10a-11a, 40a.

Petitioners again moved to dismiss. They argued that respondents failed adequately to allege loss causation because (1) mere allegations in a civil complaint (especially one filed by a competitor trying to fend off a hostile takeover) did not, as a matter of law, reveal any new truth to the market as required for a corrective disclosure, and (2) the "disclosures" claimed by respondents (including CHSI's use of the Blue Book) were already known to the public.

In making the second argument, petitioners pointed out that a *qui tam* action raising similar allegations of Medicare fraud and overbilling against CHSI and one of its affiliated hospitals had been unsealed three months *before* Tenet filed its complaint. See *United States ex rel. Reuille* v. *Cmty. Health Sys. Prof'l Servs. Corp.*, No. 1:09-cv-007 (N.D. Ind. 2009) ("*Reuille*"); App. 87a-118a (complaint). The *Reuille* complaint repeatedly referred to and described the Blue Book and its allegedly "liberal" patient admissions guidelines. Indeed, in their 2012 Complaint, respondents acknowledged that *Reuille* raised the "same allegations of improper admissions" (later) made by Tenet. App. 65a-66a (internal quotation marks omitted).

Petitioners also contended that the claims added to the 2015 Complaint on behalf of new class members who purchased shares only after Tenet's

April 11, 2011 lawsuit were time-barred and did not "relate[] back" under Rule 15(c)(1) of the Federal Rules of Civil Procedure.

C. The District Court's Decision

The district court dismissed the 2015 Complaint. It first held that respondents failed adequately to allege loss causation. App. 64a-73a. The complaint, the court explained, "proceeds on a 'fraud on the market theory' and pegs loss causation on the fact that, after the Tenet lawsuit was filed, the value of [CHSI]'s stock dropped dramatically." App. 64a. But to show loss causation through such a corrective disclosure requires identifying the disclosure of *information or facts* (and those facts must also be truly "new to the market"). *Ibid.* Relying on decisions of the Ninth and Eleventh Circuits, the court held that "the filing of a complaint is not a corrective disclosure." App. 64a, 68a; see also App. 72a (explaining that "the Tenet complaint revealed no truths, only allegations").

Next, the court held that the new allegations made in the 2015 Complaint, including claims asserted on behalf of new class members who purchased shares during the post-Tenet time period, were time-barred because they were raised more than two years after respondents had notice of the October 26, 2011, third-quarter earnings call that marked the end of the expanded class period. And those untimely new claims did not relate back to the 2012 Complaint under Rule 15(c), the court held, because they "allege[] a different fraud and alleged corrective disclosure that expands the size of the putative class, extends the class period, and (by

Defendants' calculations) adds hundreds of millions of dollars in potential damages." App. 77a-78a.

D. The Court Of Appeals' Decision

The Sixth Circuit reversed. It first held that the otherwise time-barred claims of new plaintiffs added to the class in the 2015 Complaint "relate[d] back" to the allegations in the 2012 Complaint. App. 12a-14a. Those claims of new plaintiffs satisfy Rule 15(c), the court reasoned, because they meet the standard set out in Rule 15(c)(1)(B): They "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." The court made no mention of Rule 15(c)(1)(C), which authorizes relation back of a pleading that adds a new party "*against whom* a claim is asserted" but only "if Rule 15(c)(1)(B) is satisfied *and*" certain additional requirements are met. Fed. R. Civ. P. 15(c)(1)(C) (emphasis added).

Next, the court held that respondents' complaint adequately pleaded loss causation. Relying on language in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), the Sixth Circuit at the outset suggested that *Dura* established a lenient pleading standard requiring a plaintiff to do nothing more than "plausibly allege[]" at least "'some indication of the loss and the causal connection that the plaintiff has in mind.'" App. 15a-16a (quoting 544 U.S. at 347).

Turning to respondents' corrective-disclosure allegations, the Sixth Circuit rejected the district court's "categorical" rule that a civil complaint (such as the Tenet suit) "could not reveal the truth behind [respondents'] prior alleged misrepresentations

because complaints can reveal only allegations rather than truth." App. 18a. Instead, the court of appeals endorsed a case-by-case, totality-of-the-circumstances approach:

> [E]very representation of fact is in a sense an allegation, whether made in a complaint, newspaper report, press release, or under oath in a courtroom. The difference between those representations is that some are more credible than others[.] * * * Mere allegations in a complaint tend to be less credible * * * [because] they are made in seeking money damages or other relief. But these are *differences of degree, not kind*, and even within each type of representation some are more credible than others. Hence we *must evaluate each putative disclosure individually (and in the context of any other disclosures)* to determine *whether the market could have perceived it as true.*

App. 18a (emphasis added).

Applying that approach, but evidently without taking into account that the Tenet complaint was worthy of special skepticism because it was filed by a competitor attempting to fend off a hostile takeover, the Sixth Circuit reasoned that "two aspects of the Tenet complaint set it apart from most complaints." App. 19a. The first, which was "separate from the complaint itself," was that petitioner Cash, in response to the filing of the Tenet lawsuit, "promptly admitted the truth of one of the complaint's core allegations, namely that [CHSI] had used the Blue Book to guide inpatient admissions." *Ibid.*

Second, the Tenet complaint's allegations included "expert analyses" based on publicly available Medicare data, including allegations that CHSI "admitted more inpatients than other hospitals, but did so in a manner that was clinically improper"—something the court regarded as "beyond the ken of most investors." App. 19a-20a. Taken together, these two "aspects" made it at least "plausible," the court reasoned, that the Tenet complaint "revealed a truth that [CHSI] had until then fraudulently concealed: that the Blue Book had improperly inflated [CHSI's] inpatient admissions and thus its profits." *Ibid.*

To reach that conclusion, the Sixth Circuit also rejected petitioners' argument that there was nothing "new" about these alleged disclosures because (as the Tenet complaint itself acknowledged) the Blue Book was "available for inspection at the Library of Congress"; its adoption, standards, and role in guiding patient admissions and boosting profits had been detailed in the publicly available *Reuille* complaint; and the expert "analyses" alleged in the Tenet complaint involved nothing more than the application of a simple mathematical formula to publicly available Medicare data. App. 20a-21a.[2]

---

[2] The Sixth Circuit also mentioned, but did not discuss, a second disclosure alleged by respondents: petitioners' "October 2011 admissions that earnings were down and that [CHSI's] phase-out of the Blue Book played a role in that fall." App. 17a.

REASONS FOR GRANTING THE PETITION

This case raises two important and recurring issues of federal law that have produced sharp divisions and serious confusion in the circuits: (1) the requirements for pleading loss causation through a corrective disclosure, and (2) the standards governing the "relation back" of otherwise time-barred claims added in amended pleadings on behalf of new plaintiffs. Given the huge stakes involved in this case and other securities class actions in which these issues regularly arise, as well as the serious errors made by the Sixth Circuit, further review is needed.

I. Review Is Warranted To Resolve Conflict And Confusion In The Lower Courts Over The Requirements For Pleading Loss Causation

Thirteen years ago, this Court held that private securities-fraud plaintiffs must adequately plead "loss causation" because that is an element of any claim brought 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. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-47 (2005); see also 15 U.S.C. § 78u-4(b)(4). It is not enough, the Court explained, for a plaintiff merely to claim that she had purchased a security at a price that was inflated because of a misrepresentation. Instead, she must *also* allege both (1) that the price decline for which damages are sought occurred *after* "the truth became known" (when the alleged fraud was revealed to the market); and (2) that the losses claimed are attributable *only* to that fraud, and not to other

confounding factors unrelated to the fraud (such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts," or "other events"). *Dura*, 544 U.S. at 342-43, 347.

In *Dura*, this Court faced a situation where the plaintiff's complaint failed to articulate any theory of loss causation at all. The Court therefore had no occasion to provide guidance on how such allegations, if made, should be assessed for legal sufficiency. This case presents a valuable opportunity to provide such further guidance.

Most plaintiffs (like respondents here) seek to plead loss causation by alleging that they bought securities at prices inflated by fraud, and that those securities later lost value after a "corrective disclosure" revealed the truth to the market. As both lower courts correctly recognized, to plead loss causation through a corrective disclosure, the plaintiff must point to the disclosure of some truth or fact(s) that are truly "new" to the market. App. 16a, 64a. In this case, however, the Sixth Circuit endorsed a legally flawed approach to evaluating whether respondents had alleged a corrective disclosure that both qualified as a "truth" and revealed facts that were "new." And it deepened existing confusion about a plaintiff's burden at the pleading stage by misreading *Dura* as having effectively adopted a Rule 8 pleading standard.

A. The Lower Courts Are Divided And Confused Over How To Assess The Legal Sufficiency Of An Alleged Corrective Disclosure

1. *Whether An Alleged Corrective Disclosure Reveals Facts Or The Truth, As Opposed To Mere Allegations.* The district court dismissed the 2015 Complaint for failure to plead loss causation based on the principle, adopted by "many courts," that "the filing of a civil complaint"—in this case, the Tenet complaint—"is not a corrective disclosure." App. 64a, 67-68a (citing cases); see also App. 72a (because "the Tenet complaint revealed no truths, only allegations," it was a legally insufficient basis for pleading loss causation).[3] In reversing, the Sixth Circuit flatly rejected that "categorical" rule. Instead, it suggested that *every* alleged putative disclosure of new information—regardless of its source or origin—must be evaluated in order to determine whether it was plausible that "the market could have perceived it as true." App. 18a-19a.

The Sixth Circuit's case-by-case approach sharply conflicts with decisions of the Ninth and

---

[3] With regard to loss causation, the 2012 Complaint alleged only that "when Defendants' material misrepresentations and omissions because apparent to the market subsequent to *the revelations made by Tenet*, the price of [CHSI] stock fell precipitously." App. 365a (¶ 359) (emphasis added). The 2015 Complaint was even less specific: It alleged only that "[t]he market price of [CHSI] common stock declined sharply *upon public disclosure of the facts alleged herein* to the injury of Lead Plaintiff and Class members." App. 541a (¶ 499) (emphasis added).

Eleventh Circuits, including *Sapssov* v. *Health Management Associates, Inc.*, 608 F. App'x 855 (11th Cir. 2015) (per curiam), a case that is nearly identical to this one. In *Sapssov*, as here, the plaintiffs alleged that a hospital company had a "corporate policy mandating unnecessary admission of Medicare patients." *Id.* at 857. To allege loss causation, the plaintiffs pointed to stock price drops that followed (1) a whistleblower's civil complaint, later summarized by a securities analyst, and (2) the announcement of a government investigation, including the issuance of two subpoenas to the company. *Id.* at 861, 863-64.

The *Sapssov* district court held that the plaintiffs failed to plead loss causation because the whistleblower complaint did not, as a matter of law, "reveal the falsity of a prior statement." 22 F. Supp. 3d 1210, 1231 (M.D. Fla. 2014). "The filing of a civil complaint," the court explained, "certainly does not establish that the defendant committed or is liable for the conduct alleged" in the complaint and therefore does not qualify as a corrective disclosure. *Ibid.*

The Eleventh Circuit affirmed that categorical rule: "[A] civil suit is not proof of liability," and thus cannot constitute a corrective disclosure for purposes of alleging loss causation. 608 F. App'x at 863. The Eleventh Circuit took a similar categorical approach concerning the initiation of a government investigation: "Revelation of the [government] investigation, including issuance of subpoenas, does not show any actual wrongdoing and *cannot qualify* as a corrective disclosure." *Ibid.* (emphasis added).

Sapssov is consistent with other court-of-appeals decisions holding that mere *allegations* of fraud do not qualify as corrective disclosures. In *Meyer* v. *Greene*, the Eleventh Circuit held that the announcement of an SEC investigation could not, as a matter of law, qualify as a corrective disclosure. 710 F.3d 1189, 1201-02 (2013). That is because "[t]he announcement of an investigation reveals just that—an investigation—and nothing more." *Id.* at 1201. Although such an announcement can "portend an added *risk* of future corrective action," the court explained, it does not itself "reveal to the market that a company's previous statements were false or fraudulent." *Ibid.*

The Ninth Circuit reached the same conclusion in *Loos* v. *Immersion Corp.*, 762 F.3d 880, 887-90 (2014). The plaintiffs there attempted to plead loss causation based on a 23% stock price drop that followed a company's announcement of its internal investigation into allegations of improper revenue recognition. Relying on *Meyer*, the Ninth Circuit held that "[t]he announcement of an investigation" could not qualify as a corrective disclosure because it "does not 'reveal' fraudulent practices to the market." *Id.* at 890. "Indeed, at the moment an investigation is announced, the market cannot possibly know what the investigation will ultimately reveal." *Ibid.* The Sixth Circuit's decision departs sharply from this well-reasoned line of cases.

2. *Whether An Alleged Corrective Disclosure Reveals Anything "New" To The Market.* A "corrective disclosure" that reveals nothing *new* is incapable of correcting anything. In concluding that the Tenet complaint's allegations qualified, the Sixth

Circuit relied on two additional considerations: the fact that the Tenet complaint contained "expert" analysis, and that Cash acknowledged on April 11, 2011 (supposedly for the first time) that CHSI used the Blue Book for patient admissions. Neither of those things, however, revealed anything "new" to the market. The Sixth Circuit's contrary conclusion is inconsistent with decisions in other circuits and independently warrants review.

In the typical securities class action (as in this case), plaintiffs seek to establish the element of reliance by invoking the "fraud on the market" theory recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). That theory, and the rebuttable presumption it creates, rests on the premise that an efficient market exists that allows all publicly available information to be assimilated quickly and reflected in the share price. As the Eleventh Circuit explained in *Meyer* v. *Greene*, however, the "efficient market theory * * * cuts both ways": "Investors cannot contend that the market is efficient for purposes of reliance and then cast the theory aside when it no longer suits their needs for purposes of loss causation." 710 F.3d at 1198-99.

In this case, however, the Sixth Circuit allowed respondents to do just that. Indeed, the court went further: It expressly declined *even to consider* the fact that the Blue Book was copyrighted and "thus presumably available for inspection at the Library of Congress" in evaluating whether (1) it was "news" to the market that CHSI used the Blue Book in determining patient admissions, or (2) "the market * * * kn[ew] about its contents." App. 20a-21a. That failure was all the more egregious,

moreover, for three reasons (which also demonstrate why this is an especially good vehicle for addressing the "newness" issue). First, the Tenet complaint *specifically admitted* that it was based on publicly available information (including not only Medicare data but also the "publicly available" copy of the Blue Book that anyone could access "at the United States Copyright Office"). See page 3, *supra*. Indeed the Tenet complaint admitted that its expert's "analysis" relied "only" on "publicly available data." App. 129a (Tenet Cplt. ¶ 19 n.5).

Second, the *Reuille qui tam* complaint—which was unsealed and placed on the public court docket three months *before* Tenet filed its complaint—clearly stated that CHSI used the Blue Book in its admissions practices and described in detail the Blue Book's admissions criteria (which it said were more lenient than InterQual). App. 102a-107a (*Reuille* Cplt. ¶¶ 21-24, 27).[4]

Third, as the district court correctly recognized (App. 65a), *respondents themselves* admitted in their 2012 and 2015 Complaints, respectively, that the *Reuille* complaint raised the "same allegations of

---

[4] See App. 104a-105a (*Reuille* Cplt. ¶ 24) (discussing differences between Blue Book and InterQual criteria for patients with chest pain); App. 107a-108a (*Reuille* Cplt. ¶ 28) (alleging that CHSI "set[] internal guidelines that mandate the use of the more lucrative 'inpatient' status"); App. 109a (*Reuille* Cplt. ¶ 29(d)) (alleging that CHSI "justified" its higher inpatient admissions "by the use of questionable medical criteria [it] devised and different than that established by Medicare, *i.e.*[,] Blue Book v. InterQual criteria"); App. 113a (*Reuille* Cplt. ¶ 41) (referring to CHSI's "unique 'Blue Book' methodology").

improper admissions practices" as the Tenet complaint, and that the Tenet complaint was based on publicly available Medicare data. App. 65a (internal quotation marks omitted). Had the Sixth Circuit required plaintiffs to live with the efficient-market hypothesis in all its implications, it could not have concluded that the Tenet complaint (or Cash's statement that CHSI used the Blue Book for patient admissions) disclosed anything new. Under *Meyer*, the Eleventh Circuit would have dismissed this case.

According to the Sixth Circuit, the Tenet complaint was unusual because it included expert analysis that "set it apart from most complaints." App. 19a. But *Meyer* simply cannot be distinguished on that basis. After all, *Meyer* also involved "in-depth analysis" (in that case, by a noted short seller and sophisticated professional investor). See 710 F.3d at 1197-1200. Because that analysis was based entirely on information obtained from publicly available sources, however, the Eleventh Circuit held that—by virtue of the efficient-market hypothesis elsewhere invoked by plaintiffs—it could not qualify as "new" information as required for a corrective disclosure.

That was true even though the short seller's report included expert analysis *and* his bearish opinion concerning the stock. *Id.* at 1199-1200. The Eleventh Circuit cited multiple cases recognizing that negative characterizations or *opinions* concerning previously disclosed facts are not corrective disclosures. *Ibid.* Those cases are inconsistent with the Sixth Circuit's suggestion that the expert allegations included in the Tenet complaint are qualitatively different because they

include an opinion about "the propriety of [CHSI's] inpatient admissions" (App. 20a)—a disclosure that, in any event, respondents admitted below was not new to the market because it had been included in the *Reuille* complaint.[5] See App. 65a.

Finally, the Sixth Circuit's evaluation of whether the alleged corrective disclosures involved any new information was tainted by its mistaken assumption that *Dura* adopted the plausibility standard of Fed. R. Civ. P. 8.[6] Thus, rather than

---

[5] In *Sapssov*, the allegedly revelatory complaint was filed by the hospital company's own Director of Compliance, who described his conclusion that there was fraudulent billing for "patients improperly admitted as inpatients." *Sapssov*, 608 F. App'x at 858. There is no principled basis for the Sixth Circuit's distinction between the credibility of Tenet's hired-gun experts and a company's Director of Compliance.

[6] In *Dura*, this Court expressly left open the question whether loss-causation allegations are governed by the "plausibility" standard of Rule 8 or by Rule 9(b)'s heightened-pleading requirement. See 544 U.S. at 346 ("[W]e assume, at least for argument's sake, that" the PSLRA and FRCP do not "impose any special further requirement" concerning "the pleading of [loss causation]" beyond what is required by Rule 8). That issue has divided the circuits, and the Sixth Circuit's decision only deepens that split. See, *e.g.*, *Or. Pub. Emps. Ret. Fund* v. *Apollo Grp.*, 774 F.3d 598, 604-05 (9th Cir. 2014) (describing conflict and adopting Rule 9(b) standard); Pet. for Certiorari at 3-5, 16-32, *Gilead Sciences* v. *Trent St. Clare*, No. 08-1021 (2009) (discussing circuit conflict and confusion over *Dura*); H. BLOOMENTHAL & S. WOLFF, 3C SEC. & FED. CORP. L. § 16:108 (2ND ED. MARCH 2018) (discussing competing arguments and efforts to parse *Dura* oral argument transcript for clues). In contrast to the Sixth Circuit, the Second Circuit not only requires a plaintiff to allege loss causation with specificity but

treat the "newness" inquiry as a pure question of law that it could resolve by taking judicial notice of the Tenet and *Reuille* complaints, the Sixth Circuit repeatedly asked whether the alleged disclosures "plausibly" came as news to the market. See App. 21a ("The reality (*at least plausibly*) * * * is that the disclosure that [CHSI] used the Blue Book to guide inpatient admissions was news to the market.") (emphasis added); *ibid.* (expert's allegation that use of Blue Book was "clinically improper * * * *quite plausibly* came as news to investors") (emphasis added); *ibid.* (because *Reuille* complaint was focused on one hospital, it "*remains plausible* that the market first learned the full extent of Community's alleged fraud from Tenet complaint") (emphasis added).

The district court declined to resolve the newness issue (despite its view that petitioners' arguments had "some facial appeal") for a related reason: It concluded that whether the information was "new" was a question of *fact* that could not be resolved on a motion to dismiss. App. 64a-67a.[7] As

---

also to "allege[] facts that would allow a factfinder to ascribe some rough proportion of the whole loss to [defendant]'s misstatements." *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007).

[7] In contrast to *Meyer*, the district court did not consider the efficiency of the market for CHSI stock to be a given in light of respondents' invocation of the fraud-on-the-market presumption. Instead, the district court opined that it "is unclear whether" the information in the *Reuille* complaint "should be considered publicly available" (App. 67a), relying on this Court's summary of the defendants' *rejected* arguments in

these divergent judicial approaches suggest, this question would benefit from clarification by this Court.

B. The Sixth Circuit's Analysis Is Wrong

1. The Sixth Circuit's endorsement of a case-by-case, totality-of-the-circumstances approach to determine how "truth-like" allegations in a civil complaint are is deeply flawed. Allegations are just that: They reveal nothing more than the *potential* for a *future* corrective disclosure of truth. See *Meyer*, 710 F.3d at 1201; *Loos*, 762 F.3d at 890. Some allegations may be more robust than others, but meatier allegations are no more revealing of any truth. They present nothing more than an interested party's *claim*, as yet untested by the adversary process, that may well turn out to be unfounded or false. Even if such an allegation pointed to an elevated *risk* of fraud (and it does not), as *Sapssov*, *Meyer*, and *Loos* all make clear, the mere existence of a risk of fraud simply does not reveal that a fraud actually occurred. Many risks go unrealized.

If left uncorrected, the Sixth Circuit's decision will require district courts, at the pleading stage, to engage in a case-by-case determination of the credibility of the specific allegations made in any given civil complaint. In contrast, the Eleventh and Ninth Circuits' approach provides a clear and

---

Halliburton Co. v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2410 (2014), and on this Court's observation that market efficiency can be "a matter of degree and * * * proof" at the class certification stage and later.

sensible rule and prevents such ad hoc determinations. Contrary to the Sixth Circuit's suggestion, there *is* a legally significant distinction between, on the one hand, sworn "statement[s]" made "under penalty of perjury" pursuant to 18 U.S.C. § 1621 and a defendant's "own admissions of wrongdoing" as a statement against interest under Fed. R. Evid. 804(b)(3), and, on the other hand, "[m]ere allegations" in a civil complaint seeking money or other relief and governmental or corporate decisions to open an investigation. App. 18a. The former fall into a category that is sufficiently reliable to qualify as "truth"; the latter do not.

Nor is "every representation of fact * * * in a sense an allegation" (App. 18a). A true admission of wrongdoing by the defendant can be taken to the bank, for example, and facts reported in publications like the *Wall Street Journal* or *New York Times* are the product of independent journalists and editors operating according to professional norms and newsgathering practices, including reliance on multiple sources and factchecking.[8]

---

[8] The Sixth Circuit's suggestion that petitioner Cash's acknowledgement that CHSI *used* the Blue Book was somehow an "admission" that CHSI's prior public statements were false is grossly mistaken. As noted above (at page 3), Medicare requires hospitals to use written criteria to review inpatient admissions, but does not require them to use any *specific* criteria. CHSI's decision to use criteria that it developed internally—instead of incurring the expense of licensing another set of guidelines from some other company—complied with Medicare rules and was not uncommon. Indeed, the Sixth Circuit acknowledged that 25% of hospitals use guidelines other than InterQual or Milliman. App. 4a-5a. In any event,

2. Equally mistaken is the Sixth Circuit's conclusion that respondents pleaded corrective disclosures that revealed "new" facts to the market. As explained above, the court was wrong to apply the Rule 8 "plausibility" standard to this inquiry, wrong not to assume that the market was efficient for this purpose, and wrong to ignore the Blue Book's availability at the Copyright Office. It also erred in ignoring statements made in the Tenet complaint, the *Reuille* complaint, and even respondents' own 2012 and 2015 Complaints showing that no new information was disclosed by either the Tenet complaint or Cash's acknowledgment that CHSI used the Blue Book. See page 16-17, *supra*.

As noted above (at 5), the Sixth Circuit also failed to grasp the actual contents of the *Reuille* complaint, which (like Tenet) alleged both that CHSI was using the Blue Book *and* that its guidelines for admissions (which *Reuille* described in detail) were more lenient than InterQual and had led to a dramatic boost in admissions—the core allegations allegedly "disclosed" to the market by the Tenet complaint. The Sixth Circuit was likewise incorrect in suggesting that the *Reuille* complaint "alleged fraudulent billing only at the specific [CHSI-affiliated] hospital where that employee worked."

---

respondents *never alleged* that CHSI lied about using the Blue Book (and the Tenet complaint indicated that it was no secret that CHSI used it because it was publicly available in the Copyright Office). Thus, Cash's statement, even if it *was* an "admission," is irrelevant.

App. 21a. In fact, the *Reuille* complaint includes many allegations against all of *CHSI*.[9]

Finally, the Sixth Circuit was wrong to conclude that the expert-based allegations included in the Tenet complaint set that document apart from other civil complaints. See pages 17-18 & note 5, *supra*. The Tenet complaint stated that the company had retained two consulting firms to analyze "publicly available data"—and, in particular, to calculate CHSI's "observation rate" for patients as well as how that rate had changed at a group of hospitals after they were acquired by CHSI. App. 129a-130a (Tenet Cplt. ¶¶ 19-21 nn.5-6). But that analysis was based on simple arithmetic and thus hardly beyond the ken of ordinary investors.[10]

---

[9] For example, the *Reuille* complaint alleged that "*CHS* does not encourage 23 Hour Observation"; that the "head of [the] *parent company CHS* Case Management," had visited the hospital in December 2008 shortly after its acquisition and had made clear not only that "'inpatient' status is justified by the *CHS criteria* set" forth in the Blue Book but also that it was "*CHS policy* to appeal denials by Medicare of 'one day stays' as inappropriate 'inpatient' hospitalizations," rather than place patients in observation; and that, when case managers complained about improper admissions, they were told that "'that is how *CHS* insists it be done.'" App. 104a-107a (*Reuille* Cplt. ¶¶ 23, 25, 27 (emphasis added)).

[10] See App. 129a (Tenet Cplt. ¶ 19n.5-6) (stating that calculation of "observation rate[]" involved determining "the number of Medicare outpatient observation claims divided by the sum of Medicare outpatient observation claims plus Medicare inpatient claims").

II. Review Is Warranted To Resolve Conflicts Over Rule 15(c)'s Relation-Back Requirements For Newly Added Plaintiffs

Rule 15(c)(1) "sets forth an exclusive list of requirements for relation back" and "mandates relation back once the Rule's requirements are satisfied." *Krupski* v. *Costa Crociere S.p.A.*, 560 U.S. 538, 553 (2010). It provides that:

> [a]n amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> (C) the amendment *changes the party or the naming of the party against whom a claim is asserted*, if Rule 15(c)(1)(B) is satisfied *and* if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received *such notice* of the action that it *will not be prejudiced* in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for *a mistake concerning the proper party's identity*.

Fed. R. Civ. P. 15(c)(1) (emphasis added).

Respondents' 2012 Complaint alleged a securities fraud on behalf of a putative class of investors who purchased and/or sold CHSI stock between July 27, 2006 and April 8, 2011 (just before the Tenet complaint was filed). App. 210a-211a (Cplt. ¶ 2). The 2015 Complaint sought to expand the putative class to include investors who had purchased and/or sold the stock between April 11 and October 26, 2011. Both lower courts agreed that the new allegations in the 2015 Complaint were time-barred unless they "relate[d] back" under Rule 15(c).

The district court ruled that the new allegations in the 2015 Complaint do not "relate back" under Rule 15(c)(1) because they "allege[] a different fraud and alleged corrective disclosure that expands the size of the putative class, extends the class period, and (by Defendants' calculations) adds hundreds of millions of dollars in potential damages." App. 74a, 77a-78a. The 2012 Complaint, the court added, "hardly gave Defendants notice of the potential scope of Plaintiff's expanded claim, although it certainly could have and should have." App. 78a.

The Sixth Circuit disagreed. Although it acknowledged that the "amended complaint did expand the class definition," the court held that the untimely claims of the new plaintiff investors "relate back" to the claims asserted in the 2012 Complaint, so long as those new claims satisfy Rule 15(c)(1)(B) —*i.e.*, if they "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). See App. 14a. The Sixth Circuit's flawed approach

deepens a conflict in the circuits and warrants further review.

A. The Decision Below Exacerbates A Circuit Conflict Over The Relation-Back Requirements For Newly Added Plaintiffs

1. The Sixth Circuit has long interpreted Rule 15(c)(1) narrowly when applied to the claims of newly added parties (on either side of the v.), except in cases involving class actions. The court addressed the Rule's applicability to new plaintiffs in *Asher* v. *Unarco Material Handling, Inc.*, 596 F.3d 313 (6th Cir. 2010), a non-class action involving tort claims brought by individual employees exposed to a carbon monoxide gas leak (and by their spouses). The court held that Rule 15(c)(1) could not be used to add new plaintiffs in an amended complaint that was otherwise time-barred. "[A]n amendment which adds a new party," the court explained, "creates a new cause of action and there is no relation back to the original filing." *Id.* at 318 (internal quotation marks omitted). The Sixth Circuit noted that some other circuits had either permitted a new plaintiff who was the real party in interest to be *substituted in* for an original plaintiff, or had allowed *corrections* to an original plaintiff's mistaken name, but neither of those situations involved an increase in the number of plaintiffs in the case. Accord Fed. R. Civ. P. 15(c)(1)(C) (authorizing "*changes*" to *"the party* or the naming of *the party* against whom a claim is asserted") (emphasis added). Nor, the Sixth Circuit observed in dicta suggesting an exception, were the plaintiffs seeking "'to add additional plaintiffs where the action, as originally brought, was a class action.'"

Asher, 596 F.3d at 319 (quoting *Hill* v. *Shelander*, 924 F.2d 1370, 1376 (7th Cir. 1991)).[11]

In the decision below, the Sixth Circuit turned that dicta into a holding. It acknowledged, at the outset, that the 2015 Complaint "did expand the class definition." App. 14a.[12] "[T]hat change," however, was permissible, the court explained, because it "only conformed the class definition to the scope of the same fraud 'set out' in the original complaint," which in turn "should have come as no surprise." *Ibid.* (citing and quoting Fed. R. Civ. P. 15(c)(1)(B)). Thus, the Sixth Circuit held that Rule 15(c)(1)(B) makes the addition of new plaintiffs in a class action acceptable, notwithstanding the untimeliness of their claims, if doing so "conformed"

---

[11] The language in *Hill* can be traced back, through dicta in other cases, to a misreading of a Ninth Circuit decision from 1944. See *Hill*, 924 F.2d at 1376 (citing *Aarhus Oliefabrik A/S* v. *A.O Smith Corp.*, 22 F.R.D. 33, 36 n.9 (E.D. Wisc. 1958) (citing *Culver* v. *Bell & Loffland*, 146 F.2d 29, 30-31 (9th Cir. 1944))). But *Culver* merely held that unnamed persons on whose behalf an FLSA collective action *had already been brought* may be made named plaintiffs in that action by amendment. That hardly supports an exception or special rule for *newly added* plaintiffs in class actions, nor does it bear on this case.

[12] The Sixth Circuit inaccurately described the nature of the expanded class. It said that the 2015 Complaint "expand[ed] the class definition to include investors that held their stock until October 2011, rather than until only April 2011." App. 14a. In fact, it expanded the putative class to include additional investors who *bought and/or sold* CHSI stock during the additional six-month period. See page 5, *supra*.

the class membership to the scope of the fraud originally alleged.

The Seventh Circuit has also interpreted Rule 15(c) as permitting the otherwise time-barred claims of new, putative class members to "relate back" to an earlier pleading—even where the original lawsuit was *not* fashioned as a class action. In *Arreola* v. *Godinez*, 546 F.3d 788 (7th Cir. 2008), the court held that an inmate who had brought an individual Section 1983 lawsuit challenging a county jail's policy of denying inmates crutches could use Rule 15(c) to add otherwise time-barred allegations on behalf of a class of similarly situated inmates. It was enough, the Seventh Circuit reasoned, that the class complaint challenged the same prison policy as the original, non-class pleading. "Under Rule 15(c)(1)(B)," the court declared, "nothing more is required." *Id.* at 796. Moreover, the Seventh Circuit explained, because the amendment "changed the potential group of *plaintiffs*," it did not change "the party or the naming of the party *against whom* the claim was asserted, and thus there is no problem under Rule 15(c)(1)(C)." *Id.* at 796 (emphasis added). See also *Paskuly* v. *Marshall Field & Co.*, 646 F.2d 1210, 1211 (7th Cir. 1981) (per curiam).

2. The rule in the Sixth and Seventh Circuits conflicts with decisions of the Ninth and Eleventh Circuits. The Ninth and Eleventh Circuits do not exempt class actions from the normal principles that govern relation back of the claims of newly added plaintiffs. And, again contrary to the decision below, those circuits require that an amendment adding claims of new class members do more, in order to relate back, than simply arise "out of the conduct,

transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B).

The Ninth Circuit's decision in *In re Syntex Corp. Securities Litigation*, 95 F.3d 922 (1996), also involved a securities class action. The plaintiffs there sought in an amended complaint to expand the class period to include the otherwise time-barred claims of new investors who had purchased shares in a later time period. *Id.* at 934-35. Although the new plaintiffs' fraud claims were "substantively the same as the allegations" in the original complaint (*id.* at 935), the Ninth Circuit held that they did not "relate back" under Rule 15(c).

"An amendment adding a party plaintiff," the court explained, "relates back * * * only when: 1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and 3) there is *an identity of interests* between the original and newly proposed plaintiff." *Ibid.* (emphasis added). Without addressing notice or fairness, the court held that the third requirement was not satisfied. The "two groups of plaintiffs" lacked an "identity of interests," the Ninth Circuit explained, because the "newly proposed class members bought stock at different values and after different disclosures and statements were made by Defendants and analysts." *Ibid.* Accordingly, Rule 15(c) did not permit relation back.

The Eleventh Circuit reached the same conclusion in *Cliff* v. *Payco General American Credits, Inc.*, 363 F.3d 1113 (2004), rejecting relation back where a plaintiff sought to expand the

geographic scope of his proposed class. The Eleventh Circuit observed that some courts (such as the Ninth Circuit in *Syntex*) had applied judicially created tests for determining whether amendments involving newly added plaintiffs "relate back." 363 F.3d at 1131-32.[13] On the other hand, other courts including the Second, Third, and Fifth Circuits have "extended" what is now Rule 15(c)(1)(C)—which by its terms "does not expressly contemplate an amendment that adds or changes plaintiffs"—to "address this type of amendment." *Ibid.*[14] Because the plaintiff could not meet either the judicially created or rule-based test, the Eleventh Circuit concluded, the untimely claims of the newly proposed class members did *not* relate back. *Id.* at 1132 n.15.

---

[13] See also *Young* v. *Lepone*, 305 F.3d 1, 14 (1st Cir. 2002) ("[T]here must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent." (internal quotation marks omitted)); *Leachman* v. *Beech Aircraft Corp.*, 694 F.2d 1301, 1310 (D.C. Cir. 1982) (same); *Brauer* v. *Republic Steel Corp.*, 460 F.2d 801, 804 (10th Cir. 1972).

[14] Those circuits have examined "whether the defendant would be unfairly prejudiced in maintaining a defense against the newly-added plaintiff and whether the defendant knew or should have known that it would be called upon to defend against claims asserted by the newly-added plaintiff." *Cliff*, 363 F.3d at 1132-33 (citing *SMS Fin., LLC* v. *ABCO Homes, Inc.*, 167 F.3d 235, 244-45 (5th Cir. 1999); *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2d Cir. 1997); and *Nelson* v. *Cty. of Allegheny*, 60 F.3d 1010, 1014-15 (3d Cir. 1995)).

3. Courts and commentators have recognized that the circuits are divided over the proper test for determining whether an amendment adding new plaintiffs "relates back" under Rule 15(c). See, *e.g.*, *Cliff*, 363 F.3d at 1131-32 (discussing divergent approaches taken by circuits); Michelle Nabors, *Relation Back of Amendments Adding Plaintiffs Under Rule 15(c)*, 66 Okla. L. Rev. 113, 113, 126-42 (2013) (identifying and discussing in detail "three different approaches courts have taken"). Most circuits agree, however, that—contrary to the Sixth Circuit's conclusion below—it is *not* enough for a newly added plaintiff merely to satisfy Rule 15(c)(1)(B). See page 29-30 & notes 13-14, *supra*.

Review would allow the Court to resolve not only the 2-2 circuit split over how Rule 15(c) should be applied to newly added class action plaintiffs, but also dispel widespread confusion over the proper "relation back" principles that apply to newly added plaintiffs of any kind.

B. The Decision Below Is Wrong

Rule 15(c)(1)(C) governs relation back as it applies to an amendment that "changes the party or the naming of the party against whom a claim is asserted." Although it does not by it terms address changes to plaintiffs, the advisory committee's notes expressly contemplate such amendments. Fed. R. Civ. P. 15 advisory committee's notes ("The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier."). The advisory committee's notes further explain that "[t]he chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule

15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." *Ibid.*

By its plain terms, Rule 15(c)(1)(C) requires *more than* mere compliance with Rule 15(c)(1)(B). See Fed. R. Civ. P. 15(c)(1)(C). It also demands that a new defendant: (1) "received such notice of the action that it will not be prejudiced in defending on the merits," Rule 15(c)(1)(C)(i); and (2) "knew or should have known that the action would have been brought against it, *but for a mistake concerning the proper party's identity*," Rule 15(c)(1)(C)(ii) (emphasis added). As this Court has recognized, the latter element concerns "what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant." See *Krupski*, 560 U.S. at 554.

There is no good reason why these same requirements (perhaps slightly adapted) should not also apply to cases involving newly added plaintiffs—assuming they can be added at all. Thus, courts extending Rule 15(c)(1)(C) to new plaintiffs have typically limited relation back "to corrections of misnomers or misdescriptions," or amendments that add or substitute the real party in interest. *Asher*, 596 F.3d at 319. The reason is straightforward:

> [w]ithout some limit, total strangers with claims arising out of a multi-victim incident might join pending actions long after the statute of limitations had lapsed. That would allow the tardy plaintiffs to benefit from the diligence of the other victims, and, more importantly, could cause defendants' liability to increase geometrically and their defensive strategy to

> become far more complex long after the statute of limitations has run. Even if, as here, there were no showing of specific prejudice in the sense of lost or destroyed evidence, defendants would still be deprived of their interest in repose.

Leachman v. *Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1982). The decision below ignores these concerns.

III. The Issues Presented Are Important And Recurring

1. The proper standard for pleading loss causation (including corrective disclosures) is an important question of federal law that arises with regularity. Loss causation is an essential element of a plaintiff's securities-fraud claims. See 15 U.S.C. § 78u-4(b)(4); *Dura*, 544 U.S. at 341-47. In addition, loss causation is a critical issue in the large and growing number of federal securities class actions filed each year. According to one study, an average of 180 such cases were filed annually between 1997 and 2016—and 214 new cases were filed in 2017. See Cornerstone Research, *Securities Class Action Filings—2017 Year in Review* 1, https://stanford.io/2H8vNgu.[15] Virtually all of these class actions are

---

[15] There is every reason to think this category of cases will grow even more quickly given the proliferation of "event-driven" securities class actions that are tied to adverse events (*e.g.*, mass torts) as opposed to financial misrepresentations. *Cf.* John C. Coffee, Jr., The CLS Blue Sky Blog, *Securities Litigation in 2017: "It Was the Best of Times, It Was the Worst of Times"* (March 19, 2018), http://clsbluesky.law.columbia.edu/

fraud-on-the-market cases. See *id.* at 9. These cases have an enormous impact on the federal courts and the national economy.

Moreover, as one commentator has correctly noted, "loss causation" is "the key gatekeeping mechanism for private securities fraud litigation" and is often "litigated in response to a motion to dismiss." Jill Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811, 825 (2009). Thirteen years have passed since this Court, in *Dura*, made clear the requirement that a private securities fraud complaint articulate at least *some* theory of "loss causation" (but without providing further guidance to lower courts on specific pleading requirements). For the reasons set forth above, the need for that clarification has only grown since.

2. The second question presented is equally important and recurring. The importance of the proper application of "relation back" principles under Rule 15(c)(1) to newly added *plaintiffs*, including in class actions, obviously extends beyond the securities class-action context to all amended complaints filed in federal courts. It is also underscored by this Court's recognition that Rule 15(c)(1) "*mandates* relation back" once its "exclusive list of requirements" is satisfied. *Krupski*, 560 U.S. at 553 (emphasis added). And, of course, Rule 15(c)(1)'s

---

2018/03/19/securities-litigation-in-2017-it-was-the-best-of-times-it-was-the-worst-of-times/.

meaning is especially significant in the class-action setting.

The meaning of Rule 15(c)(1) has important real-world consequences. As the advisory committee's notes to Rule 15 make clear, "[r]elation back is intimately connected with the policy of the statute of limitations." Notes of Advisory Committee on Rules—1966 Amendment. The flawed approach taken by the Sixth and Seventh Circuit opens the door for plaintiffs to unfairly expand the size and scope of their class membership to include untimely claims many years after the filing of the original complaint. A lack of uniformity in the way courts interpret Rule 15(c)(1) also necessarily results in a lack of uniformity in how the implicated federal statutes of limitations are applied.

This concern is particularly acute in securities class actions. First, "very few securities class actions are litigated to conclusion," *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002). Permitting the improper use of relation back to expand the size of a class can "place unwarranted or hydraulic pressure to settle on defendants." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001), as amended (Oct. 16, 2001). Second, because securities class actions such as this are authorized under a statute that allows for nationwide service of process, see 15 U.S.C. § 78aa, the more lenient approach taken by the Sixth Circuit toward expanded plaintiff classes under Rule 15(c)(1) —and to pleading loss causation—raises the very real prospect of forum-shopping.

This Court in recent years has repeatedly granted certiorari in cases involving the interplay

between statutory time limitations and class actions. See *China Agritech, Inc.* v. *Resh*, 138 S. Ct. 543 (2017) (granting certiorari); *Cal. Pub. Emps. Ret. Sys.* v. *ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) (*American Pipe* tolling does not apply to statute of repose); *Menominee Indian Tribe of Wis.* v. *United States*, 136 S. Ct. 750 (2016) ("mistaken reliance" on putative class action did not justify equitable tolling). And it has not hesitated to intervene to restore national uniformity concerning the proper interpretation of Rule 15(c)(1)'s "relation back" provisions even where the confusion in the lower courts was less extensive than it is here. See *Krupski* v. *Costa Crociere S.p.A.*, 560 U.S. 538 (2010).

The Rule 15(c)(1) issue is also recurring, as reflected by the many cases cited above. In addition to the circuit splits described above, district courts continue to wrestle with how to apply Rule 15(c)(1) to newly added plaintiffs, including in class actions. See, *e.g.*, *Merryman* v. *J.P. Morgan Chase Bank, N.A.*, 319 F.R.D. 468, 473 (S.D.N.Y. 2017) (collecting cases); Nabors, *supra*, 66 Okla. L. Rev. at 113-54 (discussing numerous cases). Review is needed to ensure that the "relation back" provisions of Rule 15(c)(1)—and the federal statutes of limitations they affect—have the same meaning in federal courts across the nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN A. RILEY
MILTON S. MCGEE, III
RILEY, WARNOCK &
JACOBSON, PLC
1906 West End Avenue
Nashville, TN 37203
(615) 320-3700
sriley@rwjplc.com

April 2018

GARY A. ORSECK
Counsel of Record
ALAN UNTEREINER
DANIEL N. LERMAN
JACK A. HERMAN
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER &
SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
gorseck@robbinsrussell.com