No. 03-932

In the Supreme Court of the United States

DURA PHARMACEUTICALS, INC., ET AL., PETITIONERS

v.

MICHAEL BROUDO, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a securities fraud plaintiff invoking the fraud-on-the-market theory must demonstrate loss causation by pleading and proving a causal connection between the alleged fraud and the investment's subsequent decline in price.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. Because the court of appeals decided an important question of federal securities law incorrectly and in a manner that conflicts with decisions of other courts of appeals, and because this case is a suitable vehicle for resolving the conflict, the position of the United States is that the petition for a writ of certiorari should be granted.

STATEMENT

1. a. Petitioner Dura Pharmaceuticals, Inc. (Dura) developed and marketed products for the treatment of allergies, asthma, and other respiratory conditions. Pet. App. 2a n.1. In 1995, it began developing a delivery device for asthma drugs called Albuterol Spiros. *Id.* at 19a-20a. The following year, it began selling a respiratory antibiotic called Ceclor CD. *Id.* at 41a. In an April 15, 1997, press release

announcing better-than-expected results for the first quarter of 1997, Dura stated that "strong progress" had been made in selling Ceclor CD, and that "[p]atient dosing" had been completed for the Albuterol Spiros clinical trials that were necessary before a new drug application (NDA) could be submitted to the Food and Drug Administration (FDA). *Id.* at 3a. Dura filed the NDA for Albuterol Spiros in November 1997. *Id.* at 4a.

On February 24, 1998, Dura announced that, for a number of reasons, including slower than expected sales of Ceclor CD, it was anticipating lower revenues and earnings per share in 1998 than had previously been forecast. The next day, the price of Dura stock dropped to $20 3/4 from $39 1/8, a 47% one-day loss. The February 24 announcement did not mention Albuterol Spiros. Pet. App. 5a, 7a, 40a.

Dura's business declined throughout the remainder of 1998. Pet. App. 5a. In November 1998, Dura announced that the FDA had decided not to approve Albuterol Spiros, "due to electro-mechanical reliability issues and chemistry, manufacturing, and control concerns." *Ibid.* Although the complaint in this case does not allege any decline in Dura's stock price after the November 1998 disclosure, it is a fact that, following the announcement, the price of Dura stock dropped from $12 3/8 to $9 3/4. Pet. 3 n.4; Pet. C.A. Supp. E.R. Tab 79, Exh. L. Within twelve trading days, however, the stock was again selling at nearly $12 1/2. *Ibid.*

b. Respondents, shareholders who purchased Dura stock between April 15, 1997, and February 24, 1998, filed several securities-fraud class actions against Dura and a number of its senior officers and/or directors, who are also petitioners here. After the complaints were consolidated and amended, the district court dismissed the resulting complaint without prejudice. Respondents then filed a second consolidated amended complaint (complaint). The complaint alleged that petitioners made false and misleading statements about

Dura's performance during the class period, and thereby violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, as well as Section 20(a) of the Exchange Act, 15 U.S.C. 78t(a), the "controlling person" provision. Pet. App. 2a, 5a-6a, 18a-19a.

According to the complaint, petitioners made misrepresentations concerning a number of different aspects of Dura's business, only two of which are still at issue: sales of Ceclor CD and the development of Albuterol Spiros. Respondents alleged that petitioners deliberately misled the investing public into believing that Ceclor CD was selling better than it in fact was and that the prospects for Albuterol Spiros were better than they in fact were. Pet. App. 2a-3a, 6a-7a, 12a, 27a, 34a-39a, 41a-44a.

2. The district court granted petitioners' motion to dismiss. Pet. App. 18a-51a. It held that the allegations concerning Ceclor CD did not satisfy the pleading requirements for securities-fraud claims, because they did not adequately demonstrate that the challenged statements were made with scienter. *Id.* at 45a-47a. It held that the allegations concerning Albuterol Spiros failed to state a claim under Rule 10b-5, because they did not satisfy the element of loss causation, which means that "the misrepresentations or omissions caused the harm." *Id.* at 39a-40a (quoting *Binder* v. *Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999), cert. denied, 528 U.S. 1154 (2000)). And it ordered that the dismissal be with prejudice, because respondents had already had an opportunity to amend the complaint to satisfy the applicable pleading requirements. *Id.* at 51a.

In holding that the Albuterol Spiros allegations did not satisfy the element of loss causation, the district court relied on the facts that Dura's announcement on February 24, 1998, did not "contain[] any negative information about Albuterol Spiros"; that "Dura did not announce that the FDA would not approve Albuterol Spiros until nine months later, in November 1998"; and that the complaint therefore "does not contain any allegations that the FDA's non-approval had any relationship to the February price drop." Pet. App. 40a. Rather than having a connection with "the alleged misrepresentations and omissions regarding Albuterol Spiros," the district court said, "the decline in Dura's stock price" on February 24 "was the result of an expected revenue shortfall." *Ibid.*

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-17a. With respect to the Ceclor CD allegations, the court of appeals held that, although the district court correctly concluded that each allegation of scienter was insufficient standing alone, it failed to determine whether the allegations were sufficient when considered collectively. Pet. App. 11a-14a. The court also held that, contrary to the conclusion of the district court, the Albuterol Spiros allegations did satisfy the element of loss causation. *Id.* at 8a-11a. And the court held that respondents should have been granted leave to amend their complaint. *Id.* at 15a-16a & n.6. The court declined petitioners' invitation to affirm on alternative grounds not addressed by the district court. *Id.* at 16a.

In holding that respondents had adequately alleged loss causation, the court of appeals noted that that element is satisfied if the plaintiff shows that "the misrepresentation touches upon the reasons for the investment's decline in value." Pet. App. 8a (quoting *Binder*, 184 F.3d at 1066). While acknowledging the ambiguity of the phrase "touches upon," the court followed prior decisions of the Ninth Circuit holding that a plaintiff in a fraud-on-the-market case[1]

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[1] Under the fraud-on-the-market theory, an investor's reliance on a "public material misrepresentation[]" is presumed, because "most publicly

establishes loss causation if he shows that "the price on the date of purchase was inflated because of the misrepresentation." *Id.* at 9a (quoting *Knapp* v. *Ernst & Whinney*, 90 F.3d 1431, 1438 (9th Cir. 1996), cert. denied, 519 U.S. 1112 (1997)). "[I]t is not necessary," the court said, "that a disclosure and subsequent drop in the market price of the stock have actually occurred," because "the injury occurs at the time of the transaction," which is the time at which "damages are to be measured." *Ibid.* The court thus held that, to satisfy the element of loss causation, a plaintiff need not plead "a stock price drop following a corrective disclosure or otherwise"; he need only plead "that the price at the time of purchase was overstated and sufficient identification of the cause." *Ibid.* The court concluded that the complaint satisfied this requirement, because it alleged that "the price of the stock was overvalued in part due to the misrepresentations * * * that the development and testing of the Albuterol Spiros device were proceeding satisfactorily and that FDA approval of the device was imminent." *Id.* at 10a-11a.

The court acknowledged that the Third and Eleventh Circuits apply a different standard of loss causation. Those circuits, the court said, "do require demonstration of a corrective disclosure followed by a stock price drop." Pet. App. 9a-10a n.4 (citing *Semerenko* v. *Cendant Corp.*, 223 F.3d 165, 185 (3d Cir. 2000), cert. denied, 531 U.S. 1149 (2001), and *Robbins* v. *Koger Props., Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997)).

DISCUSSION

The petition for a writ of certiorari should be granted. There is an acknowledged circuit conflict regarding the

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available information is reflected in market price." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988).

nature and scope of the plaintiff's burden to plead and prove loss causation in a fraud-on-the-market case under Rule 10b-5; the court of appeals decided that question incorrectly; the question is one of recurring importance; and this case is a suitable vehicle for resolving it.

A. The Court Of Appeals' Decision Conflicts With Decisions Of Other Courts Of Appeals

1. Quoting its decision in *Knapp* v. *Ernst & Whinney*, 90 F.3d 1431, 1438 (9th Cir. 1996), cert. denied, 519 U.S. 1112 (1997), the court of appeals held that, "[i]n a fraud-on-the-market case, plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of the misrepresentation." Pet. App. 9a. The court also held that "it is not necessary that a disclosure and subsequent drop in the market price of the stock have actually occurred." *Ibid.* Acknowledging that its decision conflicts with decisions of the Third and Eleventh Circuits, however, the court stated that those courts "do require demonstration of a corrective disclosure followed by a stock price drop to be alleged in the complaint." *Id.* at 9a-10a n.4.

The Eleventh Circuit case cited by the court of appeals, *Robbins* v. *Koger Props., Inc.*, 116 F.3d 1441 (1997), held that "proof that a plaintiff purchased securities at an artificially inflated price, without more," does not "satisf[y] the loss causation requirement," and it explicitly rejected the Ninth Circuit's contrary decision in *Knapp*. *Id.* at 1448. The Eleventh Circuit instead concluded that there must be "proof of a causal connection between the misrepresentation and the investment's subsequent decline in value." *Ibid.* Applying that principle, it reversed a jury verdict for the plaintiffs, because, while there may have been sufficient evidence that the defendant's misrepresentations artificially inflated the price of the stock, there was no evidence of any connection between the misrepresentations and a decline in the stock's price. *Ibid.*

The Third Circuit case cited by the court below, *Semerenko* v. *Cendant Corp.*, 223 F.3d 165 (2000), cert. denied, 531 U.S. 1149 (2001), followed the Eleventh Circuit's decision in *Robbins*. *Id.* at 185. Applying the principle that loss causation requires "the value of the security * * * [to] actually decline as a result of an alleged misrepresentation," the Third Circuit reversed the dismissal of a complaint because the plaintiffs alleged that they had purchased stock "at a price that was inflated due to the alleged misrepresentations" and had "suffered a loss when the truth was made known and the price of [the] stock returned to its true value." *Ibid.*

2. The court of appeals' decision is also inconsistent with decisions of the Second and Seventh Circuits. As support for its holding that loss causation requires only that the misrepresentations inflated the purchase price, the Ninth Circuit cited (Pet. App. 9a) the Second Circuit's decision in *Suez Equity Investors, L.P.* v. *Toronto-Dominion Bank*, 250 F.3d 87 (2001). But in a case decided about a month after the decision in this case, the Second Circuit made clear that it rejects the Ninth Circuit's standard. Clarifying its decision in *Suez Equity Investors*, the Second Circuit held in *Emergent Capital Investment Management, LLC* v. *Stonepath Group, Inc.*, 343 F.3d 189 (2003), that a mere allegation that fraudulent omissions "'induced a disparity between the price plaintiff paid for the * * * shares and their true investment quality'" at the time of purchase "cannot satisfy the loss causation pleading requirement." *Id.* at 198. Instead, the court said, loss causation "require[s] that securities fraud plaintiffs demonstrate a causal connection between the content of the alleged misstatements or omissions and 'the harm actually suffered.'" *Id.* at 199 (quoting *Suez Equity*, 250 F.3d at 96). The court concluded that that standard was

satisfied in the case before it, because the complaint adequately alleged a causal connection between the omissions and "the decline in [the] stock value." *Id.* at 197.

Insofar as it rejects the view that loss causation requires a connection between the fraud and a decline in the investment's value, the Ninth Circuit's decision is also inconsistent with the Seventh Circuit's decision in *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680 (Posner, J.), cert. denied, 496 U.S. 906 (1990). That case held that loss causation requires an allegation that, "if the facts had been as represented by the defendants[,] the value of the [investment] * * * would not have declined," *id.* at 682, or, put differently, that "but for the circumstances that the fraud concealed, the investment that [the plaintiffs] were induced by the fraud to make would not have lost its value," *id.* at 683. In *Bastian*, the Seventh Circuit affirmed the dismissal of a complaint alleging that the defendants' fraudulent statements had induced the plaintiffs to invest in oil and gas limited partnerships that ultimately became worthless, because the complaint did not allege that "the plaintiffs' loss was due to the defendants' fraud" rather than (for example) "the unexpected drop in oil prices." *Id.* at 684. While *Bastian*, like *Emergent Capital*, was not a fraud-on-the-market case, the Seventh Circuit has since made clear that the loss-causation standard applied in that case "applies equally to fraud-on-the-market cases [and] to direct reliance cases." *Roots P'ship* v. *Lands' End, Inc.*, 965 F.2d 1411, 1419 (1992).

3. In addition to citing its own decision in *Knapp* and the Second Circuit's decision in *Suez Equity Investors* as support for its loss-causation standard, the court of appeals cited (Pet. App. 9a) the Eighth Circuit's decision in *Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824 (2003). Petitioners and their amicus (SIA Br. 3) agree that the Eighth Circuit is aligned with the Ninth Circuit, in that it "appears to accept the artificial price inflation theory in interpreting loss causa-

tion." Pet. 13. But the Eighth Circuit's position on this issue is less than clear. It is true that both of the Eighth Circuit decisions cited by petitioners (*ibid.*), including *Gebhardt*, can be read to say that loss causation, like reliance, see *Basic Inc.* v. *Levinson*, 485 U.S. 224, 241-249 (1988), should be presumed in a fraud-on-the-market case. See *Gebhardt*, 335 F.3d at 831; *In re Control Data Corp. Secs. Lit.*, 933 F.2d 616, 618-621 (8th Cir.), cert. denied, 502 U.S. 967 (1991). But each of those decisions also includes language suggesting agreement with the majority view. See *Gebhardt*, 335 F.3d at 831 (plaintiffs "demonstrated loss causation" by pleading that "a decline in the value of their stock" was caused by "the company's misbehavior"); *In re Control Data Secs. Lit.*, 933 F.2d at 621 ("The class presented evidence of a sufficient 'causal nexus' between [the defendant's] improper accounting and the drop in [its] stock price, so that a reasonable jury could find causation.").

4. Respondents correctly identify Ninth Circuit decisions that are consistent with the majority view. Br. in Opp. 8-10. All of those decisions, however, predate the decision in this case. Moreover, there are other Ninth Circuit decisions, followed by the court of appeals here (Pet. App. 9a), that disagree with the majority view on loss causation, and the Ninth Circuit denied, without dissent, a petition for rehearing en banc (*id.* at 52a-53a) in which petitioners asked the court to resolve what they characterized as an intra-circuit conflict (Pet. for Panel Reh'g and Reh'g En Banc 6-9). Under these circumstances, it is reasonable to conclude that the decision below will be viewed as the law of the Ninth Circuit on loss causation both by future panels and by district courts.

B. The Court Of Appeals' Decision Is Incorrect

1. In a Rule 10b-5 action brought by a private party, the plaintiff must prove that he suffered an injury that was

caused by the defendant's misrepresentations. As the court of appeals correctly recognized, the causation requirement encompasses both transaction causation—"that the violations in question caused the plaintiff to engage in the transaction"—and loss causation—"that the misrepresentations or omissions caused the harm." Pet. App. 8a (quoting *Binder* v. *Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999), cert. denied, 528 U.S. 1154 (2000)). Loss causation had long been a judicially inferred element of a Rule 10b-5 claim, see *Bastian*, 892 F.2d at 683-685, and for nearly a decade it has been a statutory element by virtue of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. As amended by the PSLRA, the Exchange Act, in a provision titled "Loss causation," requires a plaintiff in a private action to prove that "the [challenged] act or omission of the defendant * * * caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. 78u-4(b)(4). Under the court of appeals' view of loss causation, an investor's loss in a fraud-on-the-market case "occurs at the time of the transaction," when he is harmed by paying too much for the security, and a causal link exists because the defendant's misrepresentation inflated the price. Pet. App. 9a. That holding is incorrect.

A material misrepresentation that reflects an unduly favorable view of a company, when disseminated to the investing public, will typically raise the price of the company's stock, because the price of a security traded in an efficient market ordinarily reflects all publicly available information. See *Basic Inc.* v. *Levinson*, 485 U.S. at 241-249. The artificial inflation will not be reduced or eliminated until the market price reflects the true facts that had been concealed by the fraud. This will most commonly occur when the truth is revealed in whole or in part through a corrective disclosure. That, however, is not the only way the fraud may be revealed. Events may also effectively disclose the truth. See, *e.g.*, *Suez Equity*, 250 F.3d at 93-94.

Because "the cost of the alleged misrepresentation" will be "incorporated into the value of the security" until that time, the investor who purchased the security will be able to recoup part or all of his overpayment "by reselling the security at the inflated price." *Semerenko*, 223 F.3d at 185. For that reason, it cannot be said that an investor in a fraud-on-the-market case who purchases a security at an inflated price has suffered *any* loss at the time of purchase, much less one caused by the defendant's misrepresentation. See *Robbins*, 116 F.3d at 1448. Measuring the loss in such a case as of the time of purchase, and not requiring any allegation of a subsequent loss of value attributable to the fraud, would grant a windfall to investors who sold before the reduction or elimination of the artificial inflation, because they would recover the portion of the purchase price attributable to the fraud on resale, and then would be entitled to recover that same amount again in damages.

The court of appeals' decision is also erroneous because it renders loss causation effectively indistinguishable from transaction causation, as both the Second Circuit and the Eleventh Circuit have observed. See *Emergent Capital*, 343 F.3d at 198; *Robbins*, 116 F.3d at 1448. Under the Ninth Circuit's approach, transaction causation requires a showing that a material misrepresentation caused the plaintiff to purchase the stock, while loss causation requires a showing that the misrepresentation caused the stock to be purchased at an inflated price. Pet. App. 8a-9a. But since a fundamental premise of the fraud-on-the-market theory is that the dissemination of a material misrepresentation "typically affects the price of the stock," *Peil* v. *Speiser*, 806 F.2d 1154, 1161 (3d Cir. 1986), quoted in *Basic Inc.* v. *Levinson*, 485 U.S. at 244, proof that the plaintiff purchased stock in an efficient market after the defendant made a material misrepresentation will, in the Ninth Circuit, establish transaction causation and loss causation simultaneously. Such a result is difficult to reconcile with the well-established principle that transaction causation and loss causation are distinct elements of a Rule 10b-5 cause of action.

Though it was not relied upon by the court below, there is arguably some support for the Ninth Circuit's standard in the legislative history of the PSLRA. The section of the Conference Report that discusses the applicable loss-causation provision states that a plaintiff must plead and prove that the misrepresentation "actually caused the loss incurred by the plaintiff," and then says the following: "For example, the plaintiff would have to prove that the price at which the plaintiff bought the stock was artificially inflated as the result of the misstatement or omission." H.R. Conf. Rep. No. 369, 104th Cong., 2d Sess. 41 (1995). That "example," if construed to be an exhaustive description of the plaintiff's burden, would be essentially identical to the Ninth Circuit's standard. But the entire discussion of the loss-causation provision in the Conference Report is only two sentences long, and the Report does not elaborate on the "example" it provides or explain whether additional items of proof would also be required. For those reasons, and because of the flaws in the Ninth Circuit's standard identified above, it is not likely that this lone sentence in the PSLRA's legislative history reflects a considered congressional judgment regarding how loss causation is to be established in a Rule 10b-5 case. A contrary conclusion would be particularly unwarranted in view of the PSLRA's purpose, which was to impose stricter requirements on plaintiffs in private securities-fraud actions.

2. As formulated by petitioners, and by the courts in the cases on which petitioners rely, the loss-causation standard requires a decline in the stock's price. That formulation may simply reflect the fact that, as in most securities-fraud cases,

there was in fact a decline in price in this case and the others that petitioners cite. A decline in price may not be a necessary condition for loss causation, however, because the inflation attributable to fraud could be reduced or eliminated even if there were a net increase in price. That could happen, for example, if the company corrected the false information and at the same time issued unrelated positive information. Thus, while it is ordinarily a decline in the price of stock that harms investors, they can also be harmed "[i]f a stock does not appreciate as it would have absent the fraudulent conduct," *Gebhardt*, 335 F.3d at 831-832, so that their profit is smaller than it would otherwise have been. As Judge Easterbrook has observed, "a firm that lies about some assets cannot defeat liability by showing that other parts of its business did better than expected, counterbalancing the loss." *Goldberg* v. *Household Bank, F.S.B.*, 890 F.2d 965, 966 (7th Cir. 1989).

C. The Question Presented Is One Of Recurring Importance

The question presented in the petition does not directly affect the government's ability to enforce the federal securities laws, because loss causation is not an element of a securities-fraud case in a criminal prosecution or civil enforcement action brought, respectively, by the Department of Justice or the Securities and Exchange Commission. The issue is nevertheless one of recurring importance.

What a plaintiff must plead and prove to establish loss causation in a fraud-on-the-market case is a recurring question because of the large number of securities-fraud class actions that are filed in federal court. According to one study, an average of approximately 190 such cases were filed annually between 1996 and 2003. See Cornerstone Research, *Securities Class Action Case Filings—2003: A Year in Review* 3 Exh. 2 (2004), *available at* http:

//securities.stanford.edu/clearinghouse_research/2003_YIR/2003051104.pdf. A large plurality of those cases—an average of 51 per year—were filed in the Ninth Circuit. *Id.* at 13 Exh. 12. Because loss causation is an essential element of a private plaintiff's Rule 10b-5 claim, see 15 U.S.C. 78u-4(b)(4), and because the overwhelming majority of securities-fraud class actions allege a violation of Rule 10b-5, see Cornerstone Research, *supra*, at 15, 16 Exh. 14, the pleading requirements for loss causation will be relevant in a large number of cases, about a quarter of which arise in the Ninth Circuit. The court of appeals' decision could affect the outcome of any one of those cases in which the plaintiffs' sole allegation of loss causation is that the price of the stock they purchased was inflated by the defendants' fraud.

The question presented in the petition is also an important one. As this Court "repeatedly ha[s] emphasized," private securities-fraud actions are a "necessary supplement" to criminal and civil enforcement actions. *Bateman, Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964)). The principal reason the government brings such enforcement cases is to ensure the integrity of the securities markets, and thereby protect the investing public. Those objects, however, are likely to be hindered rather than furthered by permitting private securities-fraud suits to proceed past the pleading stage without any allegation that the plaintiffs suffered a loss attributable to the fraud. By requiring issuers of securities to expend time and resources litigating, and in most cases settling, such lawsuits, the Ninth Circuit's decision is more likely to harm than to aid "the intended beneficiaries" of Rule 10b-5. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

D. This Case Is A Suitable Vehicle For Resolving The Circuit Conflict

1. Because the court of appeals reversed the district court's dismissal of the complaint and remanded for further proceedings, its decision is interlocutory. While this Court ordinarily does not grant certiorari to review interlocutory decisions, that is not an invariable rule. Indeed, in many of this Court's leading decisions on Rule 10b-5, certiorari was granted after the court of appeals had reversed either the dismissal of the complaint or a grant of summary judgment for the defendants.[2] In those cases, the interlocutory posture of the case may have been thought to be no obstacle to review because the court of appeals had "decided an important issue, otherwise worthy of review, and Supreme Court intervention [could] serve to hasten or finally resolve the litigation." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002). That is equally true here.

A related reason for not applying the general rule against review of interlocutory decisions in a case of this type is that a large proportion of securities-fraud class actions are effectively decided at the pleading stage. If a motion to dismiss is granted and affirmed on appeal, the defendants will prevail. But if a motion to dismiss is denied, or if it is granted but reversed on appeal, the costs of pre-trial litigation, combined with the risks of a substantial damages award, will in most cases lead the defendants to settle. According to a recent study, "[f]ully 80 percent of federal securities class action

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[2] See *Central Bank of Denver*, 511 U.S. at 168-169 (aiding and abetting); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 353-354 (1991) (statute of limitations); *Basic Inc.* v. *Levinson*, 485 U.S. at 228-229 (materiality and reliance); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 468-470 (1977) (breach of fiduciary duty); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 191-193 (1976) (scienter); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975) (purchase or sale).

lawsuits end in settlement." Elaine Buckberg et al., *Recent Trends in Securities Class Action Litigation: 2003 Update*, 5 Class Action Litig. Rep. 304, 305 (2004). Because of the probability of settlement, this is not likely to be a case in which petitioners could "rais[e] the same issue[] in a later petition, after final judgment has been rendered." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari).

2. If the Court does grant certiorari and resolves the loss-causation issue, it is possible that the case will ultimately be decided on some other ground, because there are issues unrelated to loss causation that the court of appeals directed the district court to address on remand. One of those issues is whether the totality of respondents' allegations are adequate to show that petitioners made knowingly false statements concerning Ceclor CD. Pet. App. 14a. The other is whether any of the allegations concerning either Ceclor CD or Albuterol Spiros are subject to dismissal for reasons the district court has not yet considered. *Id.* at 16a. Thus, even if this Court reversed the judgment of the court of appeals, the case would still proceed, albeit in a more limited form, if, on remand, the district court found that the allegations concerning Ceclor CD are sufficient and rejected respondents' alternative arguments for dismissal. And even if this Court *affirmed* the judgment of the court of appeals, the complaint would still be dismissed if, on remand, the district court found that the Ceclor CD allegations are *not* sufficient and found merit in respondents' alternative arguments for dismissal of the Albuterol Spiros allegations. But the mere possibility that the parties that won in this Court would lose on some other ground in the lower courts should not be an obstacle to certiorari, particularly since the court of appeals has given no indication of how any of the pending issues should be resolved. See *id.* at 14a n.5 (expressing "no opinion" on whether allegations concerning Ceclor CD "in

totum rise to the level necessary for scienter"); *id.* at 16a (stating that "it would be improper" for court of appeals to decide issues not addressed by district court).

3. Respondents contend that the facts of this case satisfy not only the loss-causation standard applied by the court of appeals but also the one that petitioners advocate, and that the choice of standards will thus have no effect on the outcome. Br. in Opp. 4-6. They argue that, even if there must be "a drop in a security's price upon disclosure of the truth," that is what happened here, because Dura announced in November 1998 that the FDA would not approve Albuterol Spiros and the price of its stock declined the next day. *Id.* at 5. That, however, is not the allegation of loss causation in the complaint. Consistent with the standard ultimately endorsed by the court of appeals, the complaint alleges simply that respondents "were damaged" because, "[i]n reliance on the integrity of the market, they paid artificially inflated prices for Dura securities." Resp. C.A. E.R. Tab 72, at 85 (¶ 179). See Resp. C.A. Br. 18 (arguing that this allegation satisfies element of loss causation); Mem. of Points & Authorities in Opp. to Mot. to Dismiss 40 (same). Insofar as there are any allegations of a corrective disclosure followed by a decline in the stock price, moreover, those allegations relate to the February 1998 announcement concerning Ceclor CD. Resp. C.A. E.R. Tab 72, at 17 (¶ 32), 61-62 (¶ 134). Thus, if respondents wish to rely upon the November 1998 corrective disclosure and price decline, they will have to amend their complaint, as they implicitly acknowledged in the court of appeals. See Pet. C.A. Br. 21 ("[I]f plaintiffs were required to plead a stock drop upon a corrective disclosure, the district court should have permitted them to do so in an amended complaint.").

If the Court granted certiorari and reversed the court of appeals' judgment, it is possible that respondents would request, and that the courts below would grant, leave to amend the complaint to include an allegation of loss causation based on the November 1998 disclosure concerning Albuterol Spiros and the subsequent decline in price. But it is also possible that leave to amend on that ground would not be sought, or that, if it were, it would be denied, because amending the complaint to satisfy the majority view on loss causation might require more fundamental amendments. For example, alleging one loss in February 1998 and a second loss in November 1998 would create two categories of class members: those who sold their stock between February and November (and could recover only for the first loss), and those who held it through November (and could recover for both). That, in turn, might require the creation of subclasses, see Fed. R. Civ. P. 23(c)(4)(B), and might raise questions about the standing of some or all of the proposed class representatives. While these considerations might not in the end foreclose an amendment of the complaint that would satisfy the loss-causation standard advocated by the United States, there is sufficient doubt about that issue that the possibility of amendment should not be a ground for denying certiorari.

4. A final reason to grant certiorari, rather than await another case that presents the same question, is that there might not be such a case suitable for certiorari review for some time. If certiorari were denied here, defendants in future Rule 10b-5 cases in the Ninth Circuit would be unable to seek dismissal of a complaint that alleged loss causation on the sole basis of an artificially inflated purchase price, and if there were such a motion it would be denied. Since the denial of a motion to dismiss is ordinarily not appealable, and since most securities-fraud class actions settle before trial, the Ninth Circuit might not have an opportunity to address this question again for some time. And while review by this Court could be sought in a case in which some other court of appeals affirmed the dismissal of a complaint that did not

satisfy the loss-causation standard followed by the majority of the courts of appeals, petitioners' amicus may well be correct that many class-action counsel would be reluctant to seek certiorari in such a case because of the risk of affirmance, which would make that standard applicable nationwide. See SIA Br. 6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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