No. 08-1021

IN THE

Supreme Court of the United States

GILEAD SCIENCES, INC., JOHN C. MARTIN, JOHN F. MILLIGAN, MARK L. PERRY, NORBERT W. BISCHOFBERGER, ANTHONY CARRACIOLO AND WILLIAM A. LEE,

Petitioners,

v.

TRENT ST. CLARE AND TERRY JOHNSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) – that loss causation be pled by "fair notice of what the plaintiff's claim is and the grounds upon which it rests" – was satisfied by the Ninth Circuit's holding that investors pled "sufficient detail to give defendants ample notice of [Investors'] loss causation theory, and to give us some assurance that the theory has a basis in fact."

PARTIES TO THE PROCEEDING

Petitioners, Defendants-Appellees below, are Gilead Sciences, Inc. and its officers and executives. Respondents, Plaintiffs-Appellants below, are Trent St. Clare and Terry Johnson, on behalf of themselves and a proposed class of investors who purchased publicly traded securities of Gilead between July 14, 2003 and October 28, 2003.

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I. INTRODUCTION

This case arises from the Ninth Circuit's correct application of *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), to the facts alleged in Respondents-Plaintiffs' complaint. There is no reason for this Court to grant certiorari.

In *Dura*, this Court provided a standard for pleading loss causation in securities fraud cases that requires plaintiffs to set forth a theory of causation

accompanied by a showing that it is plausible, noting that this should not create a heavy pleading burden. *Id.* at 346-47. The Court assumed that Federal Rule of Civil Procedure 8(a)(2)'s "short and plain statement" requirement applied. *Id.* at 346.[1]

In the slightly less than four years since *Dura*, six circuits have applied it—six have not yet had the opportunity. As will be demonstrated below, the decisions are harmonious and reflect an understanding of what *Dura* requires. There is no division among the circuits. This case does not present any new statute to be interpreted, any changed circumstances, nor a deviation by the court below from any principle established by this Court. Given the consistent application of *Dura* and the limited experience under it, revisiting its standard is extremely premature.

Petitioners' attempt to create a split in the circuits reflects their dissatisfaction with the Ninth Circuit's fact-bound finding that Respondents alleged a plausible theory of loss causation. Petitioners present no valid basis for certiorari, instead inappropriately asking this Court to act as a court of correction. The Petition should be denied.

Indeed, even if there were some reason for this Court to revisit the question of whether Rule 8 or Rule 9 applies to pleading loss causation in a

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[1] Indeed, defendants in *Dura* suggested that this Court elevate the pleading requirement for loss causation to a Rule 9(b) standard—and this Court declined to do so. Justice Ginsburg emphatically rejected defendants' assertion: "I thought you pointed to the 9(b) pleading rule because fraud must be pleaded with particularity, but causation does not, not under the rules and not under the statute." *Dura Pharms., Inc. v. Broudo*, No. 03-932, 2005 U.S. TRANS LEXIS 4, at *19 (Jan. 12, 2005).

securities fraud complaint, that issue is not properly presented by this case because the Ninth Circuit explicitly held that "under either Rule 8 or Rule 9, the Investors have sufficiently pleaded loss causation." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1056, 1058 (9th Cir. 2008) ("Our review of the Investors' complaint convinces us that the October drop in stock price was plausibly caused by the Warning Letter. . . . Investors' complaint offers sufficient detail to give defendants ample notice of [Investors'] loss causation theory, and to give us some assurance that the theory has a basis in fact.").[2]

II. STATEMENT OF THE CASE

The operative complaint—Plaintiffs' Fourth Amended Complaint, filed on December 2, 2005 ("Complaint")—is the *first* complaint filed in this matter after this Court's decision in *Dura* changed the law in the Ninth Circuit regarding pleading loss causation. As Petitioners concede (Pet. 10),[3] the factual basis for loss causation—that "Gilead misled the investing public by representing that demand for its most popular product was strong without disclosing that unlawful marketing was the cause of that strength" (*Gilead*, 536 F.3d at 1050)—has been alleged since the very first complaint filed after the appointment of lead plaintiffs. Indeed, the district court found that "Plaintiffs have adequately alleged that Defendants engaged in an illegal off-label

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[2] Citations, footnotes, and internal quotations omitted and emphasis added, unless otherwise noted.

[3] "Pet. __" designates a page in the Petition for a Writ of Certiorari.

marketing scheme" (ER 25),[4] holding in its first and second orders that "Plaintiffs have alleged sufficient facts to raise a strong inference that Defendants had knowledge of the company's off-label marketing scheme." ER 12, 25. Petitioners' relentless characterization of a "sue-first-develop-a-story-later approach" (Pet. 30) is simply inaccurate.

The Complaint properly alleges loss causation. On July 14, 2003, Petitioners announced strong financial results for the second quarter of 2003; the market immediately responded by increasing the stock price of Gilead Sciences, Inc. ("Gilead") by 13.4% overnight. ER 78-79 ¶¶174, 180. The Complaint alleges that those results concealed fraud: that demand for Gilead's key drug, Viread, was artificially inflated because 75%-95% of all sales were caused by off-label marketing. ER 34 ¶9, 68-76 ¶¶141-65. Petitioners' practice was publicly exposed on August 7, 2003, when the U.S. Food and Drug Administration ("FDA") published a Warning Letter—Gilead's second on this subject—chastising Gilead for creating "significant public health and safety concerns" and requiring that Gilead immediately cease off-label marketing practices, disseminate correct information, and retrain its employees. ER 65¶125, 82¶191. The market did not respond because Petitioners continued to conceal the extent to which Gilead's business model depended on unlawful off-label marketing. ER 82-83 ¶¶191, 194-95. Prescription rates did respond, however, dropping sharply and modestly recovering to produce slower growth—as compared with earlier quarters—thus impacting Gilead's third quarter sales numbers and revealing

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[4] "ER __" designates a page in the Excerpts of Record filed in the Ninth Circuit.

the true demand for FDA-approved applications of Viread. ER 85¶¶200-01. Wholesalers, observing the decreased demand, drew inventory down well below the industry standard. ER 86¶204. On October 28, 2003, Petitioners announced Gilead's results for the third quarter of 2003, revealing Gilead's true financial condition; the market immediately responded, dropping Gilead's stock price 12% overnight on trading volume that was 1400% above average. ER 86-88¶¶205, 208, 210-11, 99-100¶¶234, 237.

A. Summary of Complaint's Factual Allegations by the Ninth Circuit

In an opinion authored by Judge Hawkins and joined by Chief Judge Kozinski and Third Circuit Judge Cowen, the Ninth Circuit thoroughly detailed the Complaint allegations it found relevant to support Respondents' loss causation theory, often citing to particular Complaint paragraphs. *Gilead*, 536 F.3d at 1050-54. Because Petitioners challenge the "basis in fact" for the opinion, Respondents' fact summary here tracks the facts as articulated by the Ninth Circuit, supplementing them with additional Complaint citations where helpful because, as the court noted, the Complaint "offers much greater detail." *Id.* at 1050 n.1.

1. *Gilead Artificially Inflated Its Stock Price by Misrepresenting Its True Financial Condition with Concealed Reliance on Off-Label Marketing and Related Wholesaler Stockpiling*

The "fortunes" of Gilead, a biopharmaceutical company, "depended heavily on [the] commercial success" of its key drug, Viread, an antiretroviral agent used to treat patients with HIV. *Id.* at 1050.

"Sales of Viread amounted to about 65% of Gilead's total revenues at all relevant times of this action." *Id.*; *see also* ER 32¶2. "'Wall Street analysts looked to sales of Viread, Gilead's most important and most promoted drug, to gauge whether the Company's business was on track and growing.'" *Gilead*, 536 F.3d at 1050 (quoting ER 32¶4).

Gilead was "required to comply with federal law, including [FDA] marketing regulations," which "prohibit the marketing of drugs for non-FDA-approved uses, commonly referred to as 'off-label' uses." *Id.* at 1050-51. "While physicians are free to prescribe drugs for off-label uses . . . they rely on the FDA-approved prescribing information to determine which drugs can be used safely and effectively by patients with specific health problems." *Id.* at 1051.

"In an October 27, 2003 *Forbes* article, Defendant [Chief Executive Officer John C.] Martin acknowledged that in order for Gilead to reach its goal of increasing new and total prescriptions, it had to convince physicians to switch patients from a competitor's drugs to Gilead's Viread drug regimen." ER 33¶6. Consistent with that goal, "'[i]n order to gain market share, artificially increase perceived demand, and increase sales, Gilead officers, executives, and clinical personnel, with the express knowledge and approval of the [Officers], routinely and consistently provided Gilead's sales and marketing team with off-label information and encouraged, expected, and directed them to use it to sell Viread. . . .'" *Gilead*, 536 F.3d at 1051 (quoting ER 47¶58); *see also* ER 49-56¶¶68-90 (detailing witness reports about Gilead officers arming sales people with off-label studies and non-FDA-reviewed clinical

trials for sole purpose of off-label marketing), ER 68¶139 (explaining that Gilead gave its salespeople off-label slides, posters, and presentation materials to support the illegal, off-label marketing data).

"Viread 'off-label marketing took three forms: (1) marketing to HIV patients co-infected with Hepatitis B; (2) marketing Viread as a first-line or initial therapy for HIV infection; and (3) marketing against Viread's safety profile.'" *Gilead*, 536 F.3d at 1051 (quoting ER 69¶144). "Ultimately, 75%-95% of Viread sales resulted from off-label marketing efforts." *Id.*; *see also* ER 34¶9. The Ninth Circuit found that the Complaint alleges "Gilead misled the investing public by representing that demand for its most popular product was strong without disclosing that unlawful marketing was the cause of that strength." *Gilead*, 536 F.3d at 1050.

On March 14, 2002, Gilead privately received the first of two Warning Letters from the FDA, ordering Gilead to "immediately cease" off-label marketing practices. *Id.* at 1051; *see also* ER 56-57¶¶91-93. "On March 21, 2002, per the FDA's request, Gilead sent a reply that acknowledged receipt of the FDA's letter and agreed to immediately stop off-label marketing." *Gilead*, 536 F.3d at 1051; *see also* ER 57¶94. "This was not done. In fact, Gilead's off-label marketing increased, either at the Officers' direction or with their knowledge and tacit encouragement." *Gilead*, 536 F.3d at 1051; *see also* ER 65¶¶125-27.[5]

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[5] Indeed, Gilead continues to unlawfully rely on off-label marketing to promote its drugs. On February 27, 2009, the FDA again publicly issued a Warning Letter, chastising Gilead for "false or misleading" statements that "minimize[d] the serious risks [potential liver injury and the risk of birth defects] associated with [another Gilead drug]" contrary to

"By June 2003, Gilead's off-label marketing put it in the position to raise Viread's price." *Gilead*, 536 F.3d at 1051. "Consistent with standard industry practice," Gilead pre-announced the price increase to wholesalers who "typically stockpile drugs in advance of price increases so that they can resell at a higher price to retailers after the increase takes effect." *Id.* at 1051-52; *see also* ER 76-77¶¶166-71. "Because Gilead had 'illegally inflated sales and artificially inflated demand for Viread'" through its off-label marketing, wholesalers—who use current sales numbers to predict future demand when stockpiling in anticipation of a price increase—bought "mass quantities of Viread[,] . . . confirming 'the impression that Viread was in high demand and that Gilead's financial and operational results were strong.'" *Gilead*, 536 F.3d at 1052 (quoting ER 77¶¶171-72); *see also* ER 77-78¶173.

On July 14, 2003, the first day of the Class Period,[6] Gilead announced that "its second quarter financial results would exceed analysts' expectations," explaining that "'[t]he main reason for the jump in Viread sales is an increase in prescriptions, not inventory stocking.'" *Gilead*, 536 F.3d at 1052 (quoting ER 79 ¶179); *see also* ER 78-79 ¶¶174-79. "This statement was misleading. It created the impression that demand for Viread was strong, which it was, but for reasons that were not well-understood by the public." *Gilead*, 536 F.3d at 1052.

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the FDA warning label and risk management plan. *See* http://www.fda.gov/cder/warn/2009/Letairis_Letter.pdf.

[6] The class period alleged is July 14, 2003 through October 28, 2003 ("Class Period").

Echoing Fifth Circuit Judge Jones' recognition that "a half-truth is sometimes more misleading than an outright lie" (*Plotkin v. IP Axess Inc.*, 407 F.3d 690, 702 (5th Cir. 2005)), the Ninth Circuit held "[o]mitting the role of off-label marketing in a press release highlighting the drug's success made a true statement (that demand was strong) also a misleading one." *Gilead*, 536 F.3d at 1052. The financial news "had a marked effect on [Gilead's] stock price," causing an overnight 13.4% increase to a "near-record high." *Id.*

2. *Although the FDA Publicly Warned Gilead to Stop Off-Label Marketing, the Public—Unaware of Gilead's Economic Reliance on the Unlawful Practice—Attached Little Significance and the Stock Price Remained Artificially Inflated*

On July 29, 2003, the FDA issued a second warning letter to Gilead, chastising Gilead for off-label marketing at a national HIV/AIDS conference. *Id.* The FDA letter stated that Gilead's illegal acts were "particularly troubling because the more than 1,500 attendees of [the 15th National HIV/AIDS Update Conference] included social workers, AIDS educators, and patients with HIV/AIDS, and you had previously been warned not to engage in such activities." ER 65¶127, ER 106. The FDA letter "expressed the 'significant public health and safety concerns raised by these repetitive promotional activities.'" *Gilead*, 536 F.3d at 1053 (quoting ER 109). The FDA made the letter public on August 7, 2003. *Id.*

"Gilead's shareholders and the investing public did not find [the FDA letter] very significant, though, because they failed to appreciate the extent of Gilead's off-label marketing, and thus could not foresee the letter's impact on Viread's sales." *Id.*; *see also* ER 82-83¶¶191-95. The public's lack of understanding of the significance of the letter was reflected in the fact that "shares closed at higher prices than they opened on both August 7 and August 8." *Gilead*, 536 F.3d at 1053.

"Yet, '[u]nbeknownst to investors, the disclosure of the FDA Warning Letter had a detrimental effect on Viread sales. . . .'" *Id.* (quoting ER 85¶200). "'Physicians, now alerted to Gilead's illegal marketing efforts and to the safety problems with Viread, were less eager to prescribe it to their patients.'" *Id.* "Competitors invoked the letter in efforts to persuade physicians to switch from Viread to their products." *Id.* Thus, the FDA letter caused a "'marked drop in prescriptions and sales'" of Viread. *Id.* (quoting ER 85¶201). "Although the Investors lack precise sales figures, a Morgan Stanley analyst report [issued October 29, 2003] shows that Viread prescriptions experienced a 'sharp drop' in August 2003, followed by 'flattened growth' for the remainder of the third quarter." *Id.*

Indeed, the Ninth Circuit agreed that "[i]t is not unreasonable that physicians—the targets of the off-label marketing—would respond to the Warning Letter while the public failed to appreciate its significance." *Id.* at 1058. "The prescriptions would have suffered further decline were it not for certain side-effects that made it dangerous for some patients to discontinue using the drug." *Id.* at 1053; *see also* ER 58-59¶100, 86¶202.

Wholesalers "observed the initial drop in sales and prescriptions of Viread, and the ensuing slow growth." *Gilead*, 536 F.3d at 1053; *see also* ER 86 ¶204. They drew down their "supply of Viread . . . to the lowest level in four quarters, and well below the industry average for other drugs." *Id.*

The market, however, "continued to misunderstand the significance of the Warning Letter." *Gilead*, 536 F.3d at 1053; *see also* ER 83¶195. Gilead continued to conceal "the activities that gave rise to that letter, or the impact the letter would have on sales of Viread." *Gilead*, 536 F.3d at 1053. The Ninth Circuit agreed that "[t]he Warning Letter, which discussed only two instances of off-label marketing, would not necessarily trigger a market reaction because it did not contain enough information to significantly undermine Gilead's July 2003 pronouncements concerning demand for Viread." *Id.* at 1058.

"The Officers exploited the public's ignorance." *Id.* at 1053. Between the date the FDA letter was issued to Gilead and the date that it was made public, two Gilead officers each sold over $3 million in Gilead stock—with a third officer selling nearly $700,000 worth of shares on the day the letter was publicly disclosed. *Id.* "Throughout August, while the market misapprehended Gilead's impending troubles, the Officers continued to sell off substantial numbers of shares" in a manner that was "unusual and suspicious." *Id.* at 1053-54.

3. *When Gilead Admitted Decreased Quarterly Earnings on October 28, 2003, Investors Learned the Economic Impact of the Off-Label Marketing and Related Wholesaler Overstocking—and Gilead's Stock Price Immediately Declined 12%*

"Not until October 28, 2003, did the public finally realize the impact of the off-label marketing and the Warning Letter." *Id.* at 1054; *see also* ER 86-87¶205. After the market closed, Gilead revealed that its third quarter financial results "fell significantly below expectations." *Gilead*, 536 F.3d at 1054; *see also* ER 85-87 ¶¶200-05. Gilead blamed wholesaler overstocking. *Id.* "Market analysts attributed the disappointing sales to 'lower end-user demand.'" *Id.* "That lower end-user demand, as noted, was a direct result of the Warning Letter, which had exposed Gilead's unlawful off-label marketing efforts to physicians." *Id.* In short, Gilead's disclosure of its third-quarter financial results "made the effect of [Gilead's off-label marketing] inescapably clear." *Id.*

The following day, trading volume for Gilead was "up 1,400% from its average daily level." *Gilead*, 536 F.3d at 1054; *see also* ER 87-88 ¶208. The stock price dropped 12% in one day. *Id.* "Importantly, the drop occurred immediately after Gilead disclosed less-than-expected revenues resulting from the reduction in wholesalers' Viread inventories, which analysts ascribed to lower end-user demand. That lower end-user demand, in turn, is expressly alleged to have been caused by the Warning Letter." *Gilead*, 536 F.3d at 1058. Thus, "the market did react immediately to the corrective disclosure—the October 28 press release." *Id.*

B. Prior Rulings by District Court

The district court held "Plaintiffs have adequately alleged that Defendants engaged in an illegal off-label marketing scheme." ER 25. In fact, the court twice held "Plaintiffs have alleged sufficient facts to raise a strong inference that Defendants had knowledge of the company's off-label marketing scheme." ER 12, 25.

The court understood and acknowledged Respondents' claim regarding the impact of that fraud: "According to Plaintiffs, Defendants' off-label marketing enabled the company to create the appearance of increased prescriptions and demand for Viread." ER 11. The court understood that "[a]s a result, wholesalers [who estimate future demand by reviewing past sales] were encouraged to stock up on Viread ahead of Gilead's announced price increase." *Id.* The court stated "Plaintiffs further allege that Gilead's second quarter sales estimates, including wholesaler stocking, were tainted by the off-label marketing scheme because the marketing 'created an artificial and illusory demand for Viread.'" *Id.*

The court also understood and articulated Respondents' theory of loss causation. ER 136-37. Summarizing, the court explained that "it was [a] foreseeable, very significant risk, that if they engage in off label[] marketing techniques to the degree that's alleged, it was foreseeable at some point that this house built on quick sand would fall and the numbers would be what they assert." *Id.* The court concluded: "that is the theory, if I am right." *Id.*

The district court erred, however, by disbelieving Respondents' theory at the pleading stage. The court picked evidentiary holes in Respondents' loss cau-

sation theory and rejected it on the purported strength of those holes:

> There are too many logical and factual gaps in Plaintiffs' allegations to support the conclusion that Defendants' alleged misconduct proximately caused Gilead's stock decrease in October. . . . The [Complaint] does not connect the following chain of events, which it must for Plaintiffs to adequately plead loss causation: 1) that Defendants' alleged failure to disclose the off-label marketing scheme caused a material increase in sales; 2) that practitioners materially decreased their demand for Viread due to the publication of the FDA Warning Letter; and most importantly; 3) that the alleged decrease in sales due to the FDA letter proximately caused Gilead's stock to decrease three months later.

ER 183 n.12.

C. Ninth Circuit Decision, Applying this Court's Pleading Standard

Correctly applying *Dura*, the Ninth Circuit reversed the district court's order of dismissal. "Our review of the Investors' complaint convinces us that the October drop in stock price was plausibly caused by the Warning Letter." *Gilead*, 536 F.3d at 1058.

Initially, the Ninth Circuit recognized that "[a] plaintiff bears the burden of proving that a defendant's alleged unlawful act 'caused the loss for which the plaintiff seeks to recover damages.'" *Id.* at 1055 (quoting 15 U.S.C. §78u-4(b)(4)). "To establish loss causation, the plaintiff must demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the plaintiff." *Id.*

"The misrepresentation need not be the sole reason for the decline in value of the securities, but it must be a 'substantial cause.'" *Id.* (quoting *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 n.5 (11th Cir. 1997)).

Acknowledging the parties' dispute about the relevant pleading standard, the Ninth Circuit held it "need not resolve" whether loss causation must be pled to satisfy Rule 8 or Rule 9 because this Complaint satisfied both standards. *Id.* at 1056. The Ninth Circuit more than met *Dura*'s demand for "some indication of the loss and the causal connection that the plaintiff has in mind" (544 U.S. at 347), requiring "some assurance that the theory has a basis in fact." *Gilead*, 536 F.3d at 1056. "Therefore, under either Rule 8 or Rule 9, the Investors have sufficiently pleaded loss causation." *Id.*

The Ninth Circuit thoroughly analyzed *Dura*, concluding the facts alleged here are "meaningfully different." *Id.* "The Investors here identify a specific economic loss: the drop in value on October 29, 2003, that followed the October 28 press release." *Id.* "They also allege that this loss was caused by Gilead's misrepresentations." *Id.* "They provide abundant details of Gilead's off-label marketing, and they assert that this led to higher demand for Viread, which in turn inflated Gilead's stock price." *Id.*

Further, the Ninth Circuit held that, in pleading the facts that caused that inflation to come out of the stock price, the "complaint *specifically* alleges that physicians were less eager to prescribe Viread, and competitors used the Warning Letter to lure Viread customers to other drugs." *Id.* at 1058. The Ninth Circuit concluded "[i]t is not unreasonable that physicians—the targets of the off-label marketing—

would respond to the Warning Letter while the public failed to appreciate its significance." *Id.*

"[W]e find the complaint sufficiently alleges a causal relationship between (1) the increase in sales resulting from the off-label marketing, (2) the Warning Letter's effect on Viread orders, and (3) the Warning Letter's effect on Gilead's stock price." *Id.* at 1057. The specific allegations are "enough fact to raise a reasonable expectation that discovery will reveal evidence – or the lack thereof – of the Warning Letter's effect on demand." *Id.* at 1058.

III. REASONS FOR DENYING THE PETITION

A. Certiorari Is Unwarranted Because the "2-3-1 Split" Among the Circuits Asserted by Petitioners Does Not Exist; There Is No Split Among the Circuits

There is no split among the circuits regarding the standard for pleading loss causation. Indeed, all circuits addressing the issue—including the Ninth Circuit here—use remarkably similar language in describing the pleading standard. Faithfully following this Court's clear guidance in *Dura*, circuit courts around the country require a theory of loss causation with enough facts to assure its plausibility. There is no need for this Court to revisit this issue.

In *Dura*, this Court held that to plead loss causation, a plaintiff "must provide the defendant with fair notice of what the plaintiff's claim is and the grounds upon which it rests." 544 U.S. at 346. Striking a balance between preventing "abusive practices including the routine filing of lawsuits . . . with only a faint hope that the discovery process might lead eventually to some plausible cause of action" and honoring long-standing principles of

federal pleading which are "not meant to impose a great burden upon a plaintiff," this Court expressly identified the level of assurance necessary for loss causation allegations in a securities fraud claim to survive the pleading stage: allegations that provide "a reasonably founded hope that the [discovery] process will reveal relevant evidence." *Id.* at 347.

The Ninth Circuit required exactly that: "Investors' complaint offers sufficient detail to give defendants ample notice of [Investors'] loss causation theory [mirroring "fair notice of what the plaintiff's claim is"], and to give us some assurance that the theory has a basis in fact [mirroring "the grounds upon which it rests"]." *Compare Gilead*, 536 F.3d at 1056 *with Dura*, 544 U.S. at 347. Mirroring this Court's "reasonably founded" language, the Ninth Circuit concluded that Respondents' Complaint provided "enough fact to raise a reasonable expectation that discovery will reveal evidence—or the lack thereof—of the Warning Letter's effect on demand." *Compare Gilead*, 536 F.3d at 1058 *with Dura*, 544 U.S. at 347.

Moreover, the Ninth Circuit's upholding of complaint allegations that "plausibly establish loss causation" follows this Court's proscription of the opposite: claims "with only a faint hope that the discovery process might lead eventually to some plausible cause of action." *Compare Gilead*, 536 F.3d at 1057 *with Dura*, 544 U.S. at 347. In this case, the Ninth Circuit found the loss causation allegations "plausible" and held that there was a "reasonable expectation" that discovery would reveal evidence to support the allegations. That is precisely the standard for pleading loss causation outlined by this Court in *Dura*.

Other circuits require similar allegations. Shortly before this Court's decision in *Dura*, the Second Circuit held that "[t]o plead loss causation, the complaint must allege facts that support an inference that [the company's] misstatements and omissions concealed the circumstances that bear upon the loss . . . ." *Lentell v. Merrill Lynch & Co. Inc.*, 396 F.3d 161, 174 (2d Cir. 2005). The court required a theory and some supporting facts.

Importantly, the Second Circuit makes absolutely clear that the revelation of negative economic news need not precisely match the alleged prior misstatement or omission for loss causation allegations to survive the pleading (or proof) stage. *Id.* at 173. Rather, loss causation allegations are sufficient if they allege that the loss was "foreseeable" and "caused by the materialization of the concealed risk." *Id.* (referencing *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001)). By way of example, the Second Circuit cites allegations that an executive's "concealed lack of skill would cause the company's eventual liquidity problems" as sufficient to plead the "causal precursor" to the loss. *Id.* at 174. Thus, revelation of the liquidity problems would trigger the loss caused by the concealment of the executive's lack of skill—loss need not necessarily be triggered by an admission or direct revelation of the previously concealed lack of skill of the executive. *Id.*

The Second Circuit's analysis follows this Court's guidance that there is "more than one way to demonstrate the causal connection . . . between the plaintiffs' injury and the defendant's wrongful conduct" in a Rule 10b-5 cause of action. *Basic Inc. v. Levinson*,

485 U.S. 224, 243 (1988). Loss causation allegations need not be limited to defendants' public confessions.

Since *Dura*, the Second Circuit (with Justice O'Connor sitting) has continued to follow *Lentell*, focusing on tort law concepts of foreseeability, a plausible theory and some related factual support, holding that "[a] misstatement is the proximate cause of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations . . . alleged. . . ." *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 157 (2d Cir. 2007). Thus, the Second Circuit requires securities fraud plaintiffs to articulate a theory of loss causation—in *Lattanzio*, "that Deloitte's misstatements concealed the risk of Warnaco's bankruptcy." *Id.* *Lattanzio* simply concluded plaintiffs did not plausibly articulate that theory because the complaint alleged the risk of bankruptcy had already been disclosed. *Id.* at 158. In other words, plaintiffs' loss causation theory was not plausible.

The Fourth Circuit follows suit. Like the Ninth Circuit here, the Fourth Circuit refrained from choosing between Rule 8 and Rule 9 pleading standards, simply holding a securities fraud plaintiff must plead loss causation "with sufficient specificity to enable the court to evaluate whether the necessary causal link exists." *Compare Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 186 (4th Cir. 2007) *with Gilead*, 536 F.3d at 1056 ("sufficient detail . . . to give us some assurance that the theory has a basis in fact"). The Fourth Circuit acknowledged that "[l]oss causation is not one of the elements with respect to which the PSLRA imposes a more stringent pleading requirement" and the dissent explicitly stated that loss causation "is not subject to any heightened pleading

requirement under the PSLRA." *Teachers' Ret.*, 477 F.3d at 185, 194. Moreover, in analyzing loss causation, the Fourth Circuit referenced *Lentell*, underscoring the uniformity among the circuits. *Id.* at 186. Like *Lattanzio*, *Teachers' Ret.* simply held "[t]he problem with plaintiffs' theory . . . is that these facts had already been disclosed in public filings . . . ." *Id.* at 187. No "new facts" were disclosed "that revealed [the company's] previous representations to have been fraudulent." *Id.* The loss causation theory was not plausible.

As noted above, the Ninth Circuit applied the same standard, concluding plaintiffs' theory *was* plausible. *Gilead*, 536 F.3d at 1058 ("It is not unreasonable that physicians—the targets of the off-label marketing—would respond to the Warning Letter while the public failed to appreciate its significance."). Thus, although certain information—the Warning Letter—was publicly revealed, the economic impact of off-label marketing on Viread's sales remained concealed until October 28, 2003. *Id.* ("Importantly, the drop occurred immediately after Gilead disclosed less-than-expected revenues resulting from the reduction in wholesalers' Viread inventories, which analysts ascribed to lower end-user demand. That lower end-user demand, in turn, is expressly alleged to have been caused by the Warning Letter."). The court found a plausible theory with a factual basis.

Similarly, the Eighth Circuit requires a loss causation theory with some facts to assure its plausibility. *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 550 (D. Minn.), *cert. denied*, 129 S. Ct. 222 (2008) (citing *Lentell*, 396 F.3d at 173). Again, *Schaaf* affirmed dismissal because the complaint allegations showed plaintiffs' loss causation theory was

not plausible. *Id.* at 553. As this Court recently held in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), even under Rule 8 pleading standards, a complaint must allege "enough factual matter (taken as true) to suggest . . . plausible grounds" for plaintiffs' claim. Noting the parallels to *Dura*, *Bell Atlantic* "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the claim. *Bell Atl.*, 550 U.S. at 556, 563 n.8.

Thus, the circuits are in harmony. Struggling to create a "split," Petitioners cite to one word in an unpublished decision by the Fifth Circuit which can hardly be said to articulate that circuit's application of *Dura*. *Catogas v. Cyberonics, Inc.*, 292 F. App'x 311 (5th Cir. 2008). The Fifth Circuit applied the same plausible theory test applied by every other circuit, concluding the loss causation theory was not plausible because the alleged corrective revelation "did not reveal anything regarding the accounting of options that had not already been disclosed to the investing public." *Id.* at 315. The Fifth Circuit did not hold that Rule 9 applies to loss causation—nor did the court undertake any analysis on that issue. *Id.* at 314-15. Indeed, Judge Higginbotham, on the *Catogas* panel, previously authored an opinion for the Fifth Circuit, holding the Private Securities Litigation Reform Act ("PSLRA") requires particularity only as to "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177-78 (5th Cir. 1997). The later unpublished decision in *Catogas* simply follows this Court's direction for "sufficient allegations that the misrepresentations caused plaintiffs' loss." 292 F. App'x at 314 (citing *Dura*, 544 U.S. at 343). Petitioners' assertion of a

"split" in the circuits hinges on the word "particularity" in the introductory paragraph of an unpublished decision, overlooking the Fifth Circuit's published decision in *Williams*. *Id.* at 312.

Petitioners' contrary assertion notwithstanding, the Seventh Circuit also follows this Court's guidance, requiring "a causal connection between the material misrepresentation and the loss . . . when the facts . . . become *generally known*." *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 843 (7th Cir.) ("In the present case, therefore, Tricontinental had to allege that PwC's 1997 audit contained a material misrepresentation which caused Tricontinental to suffer a loss when that material misrepresentation 'became *generally known*.'"), *cert. denied*, 128 S. Ct. 357 (2007).

The Seventh Circuit did not hold Rule 9 applies to loss causation. Indeed, the court held to the contrary—that Rule 9 applies to "the circumstances constituting fraud . . . the who, what, when, where, and how . . . ." *Id.* at 833. The Seventh Circuit recognized "[t]his heightened pleading requirement does not extend to states of mind" and the court did not even deem it necessary to mention loss causation in this context. *Id.* Consistently, Judge Posner has previously written for the Seventh Circuit, holding Rule 9 requires particularity only as to "the who, what, where, and when of the alleged fraud." *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999). Nothing in *Tricontinental* states the dismissal was affirmed because of a lack of particularity in pleading loss causation. Rather, the Seventh Circuit held the loss causation theory *implausible* in light of the complaint allegations: "Tricontinental, however, has not

identified any statements by Anicom or PwC that made '*generally known*' any problems or irregularities in the 1997 audited financial statement." 475 F.3d at 843. The complaint linked plaintiffs' loss to statements in 1998 and 1999 financial statements—not the 1997 financial statements which plaintiffs alleged were fraudulent. *Id.* at 843-44.

As in *Catogas*, the substantive Rule 10b-5 loss causation analysis in *Tricontinental* does not discuss Rule 9. *Id.* Indeed, by repeatedly requiring that the truth become "generally known," the Seventh Circuit follows this Court's guidance and falls in line with every other circuit that has addressed the issue, requiring a plausible theory and some facts to support it. Petitioners rely on peripheral language in a footnote in a separate section of the opinion which states only that the state law "negligent misrepresentation claim must be evaluated according to the pleading requirements of Rule 8, not the heightened pleading requirements of Rule 9" and that the negligent misrepresentation claim does allege loss causation. *Id.* at 839 n.10. In the context of *Tricontinental*'s earlier Rule 9 discussion—limited to "the circumstances constituting fraud" (*id.* at 833)—and the court's prior decision in *Ackerman*, this footnote is ambiguous. In any event, it is hardly a developed analysis—and certainly not a basis for suggesting a split among the circuits.

The Tenth Circuit recently confirmed the logic followed by all the above circuits: loss causation must be pled with a plausible theory and some factual support. "Any reliable theory of loss causation that uses corrective disclosures will have to show both that corrective information was revealed and that this revelation caused the resulting decline in price."

In re Williams Sec. Litig.-WCG Subclass, ___ F.3d ___, No. 07-5119, 2009 WL 388048, at *8 (10th Cir. Feb. 18, 2009). Even at summary judgment, the Tenth Circuit held "[t]o be corrective, the disclosure need not precisely mirror the earlier misrepresentation." *Id.* Instead, "it must at least relate back to the misrepresentation and not to some other negative information about the company." *Id.* Importantly, the Tenth Circuit emphasized "if we are too exacting in our demands for a connection between the initial misrepresentation and the subsequent revelation—for instance, by imposing a mirror image requirement . . . then we would eliminate the possibility of 10b-5 claims altogether." *Id.*

This Court's guidance is clear. There is no split in the circuits. The Petition should be denied.

B. Certiorari Is Unwarranted Because the Test Articulated by This Court in *Dura*—"Fair Notice of What the Plaintiff's Claim Is and the Grounds Upon Which It Rests"—Is Precisely the Standard Applied by the Ninth Circuit—"Sufficient Detail to Give Defendants Ample Notice of [Investors'] Loss Causation Theory, and to Give Us Some Assurance that the Theory Has a Basis in Fact"

The Ninth Circuit applied the pleading standard for loss causation articulated in *Dura* and followed by every circuit in the country that has addressed the issue: a theory of loss causation with some facts to assure its plausibility. Petitioners seek to expand *Dura* to require evidentiary specifics well beyond

what *Dura* contemplates. Certiorari should be denied.

1. *The Ninth Circuit Explicitly Held Investors Alleged Loss Causation Sufficiently to Satisfy "Either Rule 8 or Rule 9" and Demanded More than Rule 8 Notice by Requiring a "Basis in Fact" Under Rule 9*

The Ninth Circuit held that "under either Rule 8 or Rule 9, the Investors have sufficiently pleaded loss causation." *Gilead*, 536 F.3d at 1056. Despite Petitioners' insistence that the Ninth Circuit either does not understand Rule 9 or was disingenuous in applying it, the opinion scrupulously marshals the "basis in fact" supporting Respondents' loss causation theory. *Id.* at 1050-54. Taking almost five full pages to recount the factual basis for Respondents' loss causation theory, the Ninth Circuit concluded "Investors did in fact explicate the causal logic underlying their theory." *Id.* at 1050 n.1. The court noted the Complaint contains "much greater detail" than contained in the five pages (*id.*) and held there was "sufficient detail" to provide "some assurance that the [loss causation] theory has a basis in fact." *Id.* at 1056. In particular, the Ninth Circuit held the Complaint "specifically alleges that physicians were less eager to prescribe Viread, and competitors used the Warning Letter to lure Viread customers to other drugs." *Id.* at 1058.

The Petition mischaracterizes the Ninth Circuit's opinion. Overlooking the Ninth Circuit's holding that it found "sufficient detail" in the Complaint to be assured Respondents' loss causation theory has a "basis in fact" (*id.* at 1056), Petitioners (incorrectly)

assert the "Ninth Circuit has required no factual basis." Pet. 20. Summarizing other circuits' decisions which also required some assurance of a factual basis for a loss causation theory, the Petition (inaccurately) declares "the Ninth Circuit permits a complaint devoid of such factual allegations to survive." Pet. 24. Despite the Ninth Circuit's clear language to the contrary and its copious citation to "specific[]" factual allegations (*e.g.*, *Gilead*, 536 F.3d at 1058), the Petition states the Ninth Circuit "holds that factual specificity is not required." Pet. 17.

The text of the opinion speaks for itself. The Ninth Circuit recounted the Complaint's factual allegations. *Gilead*, 536 F.3d 1050-54. Moreover, the Ninth Circuit did indeed analyze Respondents' loss causation allegations under both Rule 8 and Rule 9, concluding the factual allegations are sufficient under either standard. *Id.* at 1056. Carefully following *Dura*, the Ninth Circuit found "enough fact to raise a reasonable expectation that discovery will reveal evidence – or the lack thereof – of the Warning Letter's effect on demand." *Id.* at 1058.

2. *Petitioners Now Seek to Broaden Dura to Require Evidentiary Specifics Not Contemplated by This Court*

Strikingly, the Petition articulates Respondents' theory of loss causation: Gilead's October 28, 2003 announcement that third-quarter Viread revenues had declined "was perceived by the market as negative news, as it meant that the true demand for Viread (reflecting the number of patients actually using the drug) going into the third quarter had been less than previously believed." Pet. 8-9.

Petitioners further acknowledge the factual basis for Respondents' theory by disputing the facts. Thus, while the Ninth Circuit held a "slowing increase in demand"—demonstrated by an analyst report attached to the Complaint—was sufficient to "proceed to the evidentiary stages to determine the extent of the Warning Letter's impact on the growth of demand for Viread" (*Gilead*, 536 F.3d at 1058), Petitioners reprise the arguments they made in the district court and to the Ninth Circuit that slower growth is still growth. Pet. 13-14. Petitioners' assertion must await trial.

Petitioners want evidentiary proof—even beyond the analyst report attached to the Complaint here. In making this assertion, Petitioners push well past what this Court required in *Dura*, where this Court held that plaintiffs need only provide a short, plain statement that "provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation" alleged in the complaint. 544 U.S. at 347. This Court held that complying with this standard is "not meant to impose a great burden upon a plaintiff." *Id.* Rather, plaintiff need only allege that the "relevant truth" concealed by the alleged fraud was disclosed to the market, causing a decline in the price of publicly traded securities that damaged investors, including the plaintiff. *Id.*

As referenced above, the issue of the applicable pleading standard arose at oral argument in *Dura*. 2005 U.S. TRANS LEXIS 4, at *19-*27. Justice Ginsburg explicitly rejected defendants' assertion that Rule 9(b) pleading standards should apply to loss causation: "I thought you pointed to the 9(b)

pleading rule because fraud must be pleaded with particularity, but causation does not, not under the rules and not under the statute." *Id.* at *19. When defendants insisted that heightened pleading standards should apply because loss causation is an element of fraud, Justice Ginsburg again rejected the assertion: "[N]o. It said fraud must be pleaded with particularity, not all the elements of a fraud claim." *Id.* Indeed, Rule 9 requires only that "the circumstances constituting fraud or mistake" be stated with particularity. Justice Breyer explicitly articulated that pleading loss causation was a simple matter of alleging "what your theory is." *Id.* at *26. "Nobody is asking for some facts. . . . All they're asking is not for evidence, but a simple, clear explanation of the theory . . . ." *Id.* at *26-*27.

While Petitioners assert – without support – that Rule 9 should also apply to pleading loss causation, the plain text of the PSLRA defeats their assertion. The PSLRA requires particularized pleading of falsity and allegations that sum to a "strong inference" of scienter. 15 U.S.C. §78u-4(b)(1)-(2). But, the PSLRA imposes no heightened pleading requirement for loss causation. *Id.*; *see Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 830 n.3 (8th Cir. 2003) (PSLRA "does not change traditional pleading rules with respect to . . . materiality and loss causation"); *accord Williams*, 112 F.3d at 177-78 (PSLRA requires particularity only as to "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby"); *In re Lord Abbett Mut. Funds Fee Litig.*, 553 F.3d 248, 250 n.2 (3d Cir. 2009) (PSLRA's heightened pleading requirement applies only to falsity and scienter).

Because the PSLRA explicitly heightens the pleading requirement for falsity and scienter—but is silent as to pleading loss causation—this Court presumes Congress acted intentionally. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Had Congress meant to increase the pleading requirements for loss causation, it surely would have said so: "*Expressio unius est exclusio alterius.*" *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

Petitioners themselves reference this very principle of statutory construction. Pet. 18 n.5. But, Petitioners rely on the absence of discussion about loss causation in Rule 9—ignoring the *subsequent* PSLRA's discussion of heightened pleading requirements for certain elements, other than loss causation.

"In this era of corporate scandal, when insiders manipulate the market with the complicity of lawyers and accountants, we are cautious not to raise the bar of the PSLRA any higher than that which is required under its mandates." *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 946 (9th Cir. 2003). The PSLRA "was not enacted to raise the pleading burdens under Rule 9(b) and section 78u-4(b)(1) to such a level that facially valid claims, which are not brought for nuisance value or as leverage to obtain a favorable or inflated settlement, must be routinely dismissed on Rule 9(b) and 12(b)(6) motions." *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336,

354 (5th Cir. 2002) (Higginbotham, J.). "Nothing in the Act . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses' – a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2508 n.4 (2007).

Thus, as this Court assumed in *Dura*, "neither the Rules [of Civil Procedure] nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss." 544 U.S. at 346. Rather, the fact that all circuits addressing the issue require a theory with some factual basis simply acknowledges the overlap of pleading standards under Rules 8 and 9. *See United States ex rel. v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004). Even under a Rule 8 standard – which applies to loss causation—this Court holds that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.*, 550 U.S. at 555. There must be "enough factual matter (taken as true) to suggest" a claim. *Id.* at 556. Following this Court's guidance, the Ninth Circuit held "[s]o long as the complaint alleges facts that, if taken as true, plausibly establish loss causation, a Rule 12(b)(6) dismissal is inappropriate." *Gilead*, 536 F.3d at 1057.

Importantly, however, "[t]his is not 'a probability requirement.'" *Id.* (quoting *Bell Atl.*, 550 U.S. at 556). "'[I]t simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' loss causation." *Id.* The Ninth Circuit concluded that Respondents' Complaint alleges "enough fact to raise

a reasonable expectation that discovery will reveal evidence—or the lack thereof—of the Warning Letter's effect on demand." *Gilead*, 536 F.3d at 1058 (quoting *Bell Atl.*, 550 U.S. at 556).

Petitioners' demand for more than a plausible theory with a factual basis has no support. The Petition should be denied.

3. *Petitioners Inappropriately Request that This Court Revisit the Fact-Bound Arguments Which the Ninth Circuit Properly Rejected Under* Dura

Careful reading of the Petition exposes Petitioners' true goal: factual rehearing of the Ninth Circuit's conclusion that Respondents' theory is plausible. They raise the same fact-bound assertions they raised below—all of which were carefully considered and rejected by the Ninth Circuit. Petitioners' request for rehearing is not a proper basis for certiorari.

For example, Petitioners assert—as they did below—that the decline in Viread prescriptions in the third quarter was "attributed . . . to wholesaler inventory stocking," representing that the conclusion is found in a "Morgan Stanley analyst report." Pet. 13, citing ER 114-15. But, the Morgan Stanley analyst report referenced states that—even after accounting for inventory stocking—demand for Viread was down. "[N]ormalized for inventory build/ drawdown, currency, and price increases," the "underlying demand growth" in the third quarter was 10% as compared with 21% in the second quarter and 22% in the first. ER 117. Thus, according to Morgan Stanley, Viread's demand growth curve took a serious dip in the third quarter of 2003. ER 115 ("The only

lingering fundamental factor among the aforementioned is the fact that end-user demand run rates were actually lower than previously believed."). As the Ninth Circuit held, there is "no reason why the court cannot proceed to the evidentiary stages to determine the extent of the Warning Letter's impact on the growth of demand for Viread." *Gilead*, 536 F.3d at 1058.

Similarly reiterating a factual assertion made—and rejected—below, the Petition attempts to defeat loss causation allegations at the pleading stage because Gilead's "stock recovered nearly half that loss within one day and recovered fully within a month." Pet. 9. But, Petitioners' pleas that the eventual stock price recovery somehow negates the loss caused by the stock price drop were anticipated and rejected by the PSLRA which provides a method for calculating the stock price "bounce back." Under the PSLRA's established 90-day "bounce back" provision, an award of damages is limited to the difference between an investor's purchase price and "the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. §78u-4(e)(1). Applying that provision, Petitioners are liable for substantial damages—at least tens of millions of dollars—to the Class. No other analysis is necessary. Respondents are not required to *prove* the amount of their damages at the pleading stage. *Gebhardt*, 335 F.3d at 832 (In ruling on a motion to dismiss, "we decline to attach dispositive significance to the stock's price movements absent sufficient facts and expert testimony, which cannot be considered at this procedural juncture, to put this information in its proper context.").

The essence of Respondents' Complaint is that Petitioners concealed known safety concerns and promoted their drug for unapproved uses, exploiting an incredibly vulnerable, life-threatened population to increase sales, boost Gilead's stock price, and cash in on insider sales—and did so in flagrant violation of FDA rules. ER 31-36 ¶¶1-16. Loss causation is amply alleged in "sufficient detail to give defendants ample notice of [Respondents'] loss causation theory, and to give [the Ninth Circuit] some assurance that the theory has a basis in fact." *Gilead*, 536 F.3d at 1056. The Petition should be denied.

4. *Circuits Uniformly Agree that an Alleged Misrepresentation Need Not Be the Sole Reason for the Decline in Value of a Security—as Long as It Is Alleged to Have Been a "Substantial Cause" of the Loss*

Apparently recognizing certiorari is not necessary on the issue of the loss causation pleading standard, Petitioners also request that this Court revisit the settled law that causation is not appropriately apportioned at the pleading stage, representing it as the "second part of *Dura*'s loss causation test." Pet. 24. As a preliminary matter, this issue is not properly considered as it is not subsumed in the Petition's Question Presented. Supreme Court Rule 14. Moreover, it is surprising that Petitioners would raise this as an issue worthy of this Court's attention since their brief advised the Ninth Circuit that the district court's analysis of causation apportionment was "not necessary to its decision." Petitioners' Ninth Circuit Answering Brief at 52 n.14. In any event, this Court has already held that proximate cause means substantial cause—not exclusive cause—

and all circuits that have faced the issue agree district courts should not apportion causation at the pleading stage. Thus, there is no need for this Court's further guidance.

This Court holds "[p]roximate cause is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). "'[I]n the ordinary case there may be *several* points along the chain of causality' pertinent to the enquiry." *Id.* (quoting *Beattie v. United States*, 756 F.2d 91, 121 (D.C. Cir. 1984) (Scalia, J., dissenting) (emphasis in original)).

Accordingly, consistent with circuits throughout the country, the Ninth Circuit held here that "[t]he misrepresentation need not be the sole reason for the decline in value of the securities, but it must be a 'substantial cause.'" *Gilead*, 536 F.3d at 1055 (quoting *Robbins*, 116 F.3d at 1447 n.5).

The Third Circuit concurs: "[s]o long as the alleged misrepresentations were a substantial cause of the inflation in the price of a security and in its subsequent decline in value, other contributing forces will not bar recovery. . . ." *Semerenko v. Cendant Corp.*, 223 F.3d 165, 186-87 (3d Cir. 2000). That court noted "defendants may *disprove* that the Class suffered a loss as a result of the alleged misrepresentations by showing that the misrepresentations were not a substantial factor in setting the price of ABI common stock during the Class period," but held that "we disagree that the defendants may do so at this stage of the proceedings." *Id.* at 187; *accord Miller v. Asensio & Co.*, 364 F.3d 223, 229 (4th Cir. 2004).

The Seventh Circuit also finds loss causation amply pled even when a plaintiff's "alleged injuries equally could have been caused by [other] factors." *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997). Where the plaintiff "alleged a plausible theory connecting [the claimed] omission to its loss," the court held "it is possible for more than one cause to affect the price of a security and, should the case survive to that point, a trier of fact can determine the damages attributable to the fraudulent conduct." *Id.* (citing *Ackerman v. Schwartz*, 947 F.2d 841, 849 (7th Cir. 1991)).

The Second Circuit agrees. "Of course, if the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation will not have been established. But such is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003).

Even at the proof stage, the Fifth Circuit holds plaintiffs need only prove the fraud "caused a significant amount of the decline," explicitly declining "to quantify what fraction of a decline is 'significant.'" *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 270 (5th Cir. 2007) (Higginbotham, J.).

Because circuits around the country follow the clear guidance from this Court that it is not proper for a district court to apportion causation at the pleading stage, this tacked-on issue is not an appropriate basis for granting certiorari.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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