No. 24-1409

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION; FRANK HALL, individually and on behalf of all others similarly situated**,**
Plaintiffs-Appellees,

v.

JOHNSON & JOHNSON; ALEX GORSKY; JOAN CASAL VIERI; TARA GLASGOW; CAROL GOODRICH,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey
No. 3:18-cv-01833
Hon. Zahid N. Quraishi

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Pharmaceutical Research and Manufacturers of America ("PhRMA") is a trade association with its headquarters in the District of Columbia. PhRMA has no parent corporation, and no publicly held company owns 10% or more of its stock. PhRMA's member companies are listed on its website at https://phrma.org/en/About.

The National Association of Manufacturers ("NAM") is a nonprofit trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

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INTEREST OF AMICI[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the country's leading innovative biopharmaceutical research companies. PhRMA's members develop innovative medicines that transform lives and create a healthier world. PhRMA advocates in support of public policies to ensure patients can access and afford medicines that prevent, treat, and cure disease. PhRMA member companies have invested more than $850 billion in the search for new treatments and cures over the last decade, supporting nearly five million jobs in the United States. PhRMA members

[1] Defendants-Appellants consent to, and Plaintiffs-Appellees take no position on, the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

produce medicines that are distributed to pharmacies and hospitals throughout the United States.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici have a strong interest in rehearing of this case, as the panel decision, if it were to stand, would expose American businesses to costly securities class-action lawsuits for allegedly defrauding the market, based solely on plaintiffs' lawyers' own republication and advertisement of already-disclosed information that they claim impacted the businesses' stock price.

INTRODUCTION AND SUMMARY OF ARGUMENT

Securities class-action plaintiffs increasingly allege that companies committed fraud on the market by making misrepresentations designed not to

increase their stock's price, but simply to keep it from falling. Such "inflation-maintenance" theories pose particular difficulties in measuring the "price impact" of the alleged misrepresentations, because plaintiffs must show how much the stock price *would have* fallen but for the misrepresentation. *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 123 (2021). Without showing that price impact, plaintiffs cannot take advantage of the "rebuttable presumption" established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that investors relied on the misrepresentation to their detriment when trading the company's stock. *Goldman*, 594 U.S. at 123. Hence, plaintiffs must attempt to show that a later disclosure corrected the misrepresentation and then claim "the back-end price drop" from the disclosure "equals front-end inflation" from the misrepresentation. *Id.* If "there is a mismatch between the contents of the misrepresentation and the corrective disclosure," or if the supposed disclosure otherwise does not actually *correct* anything not already known, then that "inference … starts to break down." *Id.*

The Supreme Court held in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), and reaffirmed in *Goldman*, 594 U.S. at 119, that defendants must "be allowed to defeat the [*Basic*] presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price," *Halliburton*, 573 U.S. at 279. The panel in this case made a series of errors that

deprived Johnson & Johnson ("J&J"), and threatens to deprive other companies, of that right. It did this by allowing Plaintiffs to prove price impact and certify a class based on various "disclosures" that merely amplify already-disclosed information and could not have "corrected" any misrepresentation. The district court made none of the findings necessary to conclude that these disclosures were corrective or new and so could have had any price impact. The panel majority substituted its own hunches—about what evidence the district court *might* have used to reach its conclusion, and about what new signals the disclosures *might* have sent to the market (even though they conveyed only public information).

This reasoning is a recipe for unwarranted class certifications that contravene established Supreme Court precedent. It even allows plaintiffs' lawyers to manufacture their own "corrective" disclosures by filing lawsuits, drafting press releases, and feeding public information to journalists for regurgitation. And because this is only the second appellate panel in the country to have applied the Supreme Court's recent decision in *Goldman*, the majority's errors will have an outsized effect on how other courts analyze price impact in securities cases. This is particularly true for district courts in this Circuit, which will look to the panel's decision for guidance. As inflation-maintenance cases become increasingly popular, the panel's misguided reasoning threatens to saddle many businesses with baseless but costly class-action lawsuits.

This case meets every basic rationale for en banc review. It conflicts with *Halliburton* and *Goldman*, with authoritative cases from other courts of appeals, and with this Court's own cases. Fed. R. App. P. 40(b)(2)(A)-(C). And the question the appeal raises is of exceptional importance to a wide swath of securities cases. Fed. R. App. P. 40(b)(2)(D). Because of the substantial adverse consequences the panel's decision portends for the entire business community, the Court should grant en banc review and reverse.

ARGUMENT

I. The Panel's Decision Conflicts With Supreme Court And Circuit Precedent, And Is Plainly Wrong.

As the Petition explains in greater detail, the panel made numerous legal errors that defy Supreme Court precedent, conflict with other circuit decisions, and undermine evidentiary standards. Put together, these errors deprive defendants of any meaningful opportunity to disprove the price-impact prerequisite to *Basic*'s reliance presumption—an opportunity that *Halliburton* and *Goldman* guarantee.

First and foremost, the panel decision enables class-action plaintiffs to prove price impact from "corrective" disclosures that do not actually provide any new facts. *See* Panel Op. 10 & n.11. In doing so, the panel split with other circuits, which rightly have rejected the idea that sources like journalistic reports or press releases characterizing existing information can constitute corrective disclosures of that information in an efficient market. *See, e.g.*, *Meyer v. Greene*, 710 F.3d 1189,

1199 (11th Cir. 2013); *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 512 (2d Cir. 2010). And it created significant tension with the Supreme Court's decision in *Goldman*, which clarified that "there is less reason to infer front-end price inflation" from a "back-end price drop" in an inflation-maintenance case if a supposedly corrective disclosure did not "actually correct[]" a still-existing misrepresentation. 594 U.S. at 123.

The panel's willingness to credit media republications of already-public information also conflicts with this Court's decision in *In re Merck & Co., Inc. Securities Litigation*, 432 F.3d 261 (3d Cir. 2005), where the Court rejected an attempt to pass off a *Wall Street Journal* analysis of previously-disclosed data as a corrective disclosure, *id.* at 270-71. The plaintiffs there asserted, as Plaintiffs did here, that the analysis brought to light or highlighted details not previously appreciated by the market. *Id.* But this Court rejected the argument in *In re Merck*, explaining that once the underlying facts were disclosed, the market incorporated those facts without the need for further analysis by others. *Id.* The panel concluded the opposite here. Panel Op. 8-9.

The panel decision also violates the Supreme Court's admonition that, "if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be *proved* before class certification." *Halliburton*, 573 U.S. at 283 (emphasis added). The panel majority affirmed the district court's

class certification because "[e]ach disclosure *could have* communicated new, value-relevant information to investors," and because each "was followed by a stock price decline" that the majority thought must have been because of the disclosures. Panel Op. 10-11.

Both rationales are wrong. The first allows plaintiffs to defeat defendants' showing of no price impact based solely on judges' intuitions about what *might* be sufficient to give the market additional signals—not based on the actual evidence put forward. *See* Panel Op. 10-11 n.11 (speculating about signals each disclosure may have communicated). But it is the "district court's task" to "assess all the evidence," to weigh the likelihood "that the alleged misrepresentations had a price impact." *Goldman*, 594 U.S. at 126-27. Judicial speculation cannot substitute for the evidence the parties present.

As to the second rationale, the panel erroneously treated the fact that the stock price moved *after* a disclosure as proof that the price moved *because* the disclosure corrected a misrepresentation. Only the latter constitutes price impact. *See In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 611-12 (7th Cir. 2020). A new *event*, such as a trial verdict, may trigger a stock-price drop even if the event is based on already-public information, like evidence of malfeasance, whose initial disclosure had already dispelled a prior misrepresentation. *See* Dissenting Op. 12-14. The panel confused such events, which can lower stock prices by creating bad

publicity, with the earlier revelation of the underlying information, which in an efficient market will already have corrected any misrepresentation. *See* Panel Op. 12 n.12.

II. The Standard For Rebutting The *Basic* Presumption Is Of Great Importance.

The question raised by this case—what must be proven to defeat a rebuttal of the *Basic* presumption in corrective-disclosure cases—is of exceptional importance. As shown below, corrective-disclosure theories, and inflation-maintenance theories in particular, have become common in securities class-action lawsuits. The panel decision invites highly dubious class actions predicated on stale disclosures. As one academic observer noted, "this opinion is a gift to plaintiffs." Ann Lipton, *The Third Circuit Says Markets are Efficient but Not Too Efficient*, Bus. Law Prof Blog (Aug. 1, 2025), https://perma.cc/L9YX-ASU8. And this "gift" will keep on giving—not just at class certification, "but also [on] motions to dismiss, where arguments similar to J&J's" have, before now, often "succeed[ed] in getting complaints dismissed." *Id.*

Even worse, the panel's reasoning allows plaintiffs and their counsel to manufacture their own "corrective" disclosures and the evidence needed for class certification. Consider the supposed corrective disclosures Plaintiffs put forward here: two press releases from products-liability plaintiffs' law firms teasing new lawsuits or documents; several news articles and a blog post, which relied on

already-public information provided by those same plaintiffs' attorneys and expert witnesses; and a jury verdict in a trial against J&J brought by those same plaintiffs' attorneys. *See* Panel Op. 3-4 n.3; Defs.'-Appellants' Opening Panel Br. 14-15, 35-37, 41-42. All these "disclosures" repeated already-available information. Yet the panel declared that each could constitute valid corrective disclosures. Panel Op. 10-11 & n.11. Thus, under the panel's reasoning, nothing would prevent even securities plaintiffs' attorneys from simply creating their own press releases, filing lawsuits, or feeding stories to journalists, and then turning around and pointing to their own regurgitations of already-public information as "corrective" disclosures.

The panel's errors will have impact far beyond this case. This is only the second appellate decision to have applied *Goldman*, after the Second Circuit's remand opinion in *Goldman* itself. *See* Jessica Corso, *Securities Class Actions Had A Late Summer Appellate Bloom*, Law360 (Sept. 8, 2025), https://perma.cc/BPZ8-BH3Z. The opinion inevitably will have an outsized effect on securities class actions as other courts begin to grapple with *Goldman*.

Indeed, the panel's ruling already has figured into what likely will be the third circuit-level case applying *Goldman*—*Jaeger v. Zillow Group, Inc.*, No. 24-6605 (9th Cir. argued Aug. 14, 2025). The *Jaeger* plaintiffs quickly filed a Rule 28(j) letter to alert the Ninth Circuit to the panel's decision, and leaned on that decision as support for their position at oral argument. *See* Citation of

Supplemental Authorities, *Jaeger*, *supra*, ECF No. 36 (Aug. 5, 2025); Tr. of Oral Arg. 32:52-33:41, *Jaeger*, *supra*, https://www.ca9.uscourts.gov/media/video/?20250814/24-6605. The prominence that the *Jaeger* plaintiffs' counsel gave to the panel's decision here further illustrates the importance of the decision, and the strong likelihood that its consequences will reverberate beyond this case and this Circuit.

It does not matter that the opinion is unpublished. Though unpublished decisions are not binding authority, "parties remain free to argue" even before this Court "that such opinions set forth persuasive reasoning." *Wallace v. Mahanoy*, 2 F.4th 133, 144 n.16 (3d Cir. 2021). More crucially, "district courts may rely on non-precedential opinions as strongly persuasive authority," *United States v. Barney*, 792 F. Supp. 2d 725, 729 (D.N.J. 2011), *aff'd*, 672 F.3d 228 (3d Cir. 2012), and often do. As one of only two circuit-level decisions applying *Goldman*, and the only such decision from this Court, district courts in this Circuit (and beyond) inevitably will rely on the panel decision. *See, e.g.*, *In re Celgene Corp. Sec. Litig.*, 2020 WL 8870665, at *10 (D.N.J. Nov. 29, 2020) (turning to other circuits' decisions because "[t]he Third Circuit has not addressed if a plaintiff that invokes the *Basic* presumption can rely on a price maintenance theory").

The panel opinion will have significant adverse consequences for *amici*'s members. Securities cases generally allege that misrepresentations artificially

inflated stock prices until corrective disclosures burst the inflationary bubble. Of these, a growing number allege the same "inflation-maintenance" theory alleged in *Goldman* and by Plaintiffs here—despite the Supreme Court's refusal to bless its validity. *Goldman*, 594 U.S. at 120 n.1; *see, e.g.*, *Allstate Corp.*, 966 F.3d at 612 & n.5; *IBEW Loc. 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782-83 (8th Cir. 2016); *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 257-58 (2d Cir. 2016); *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 680, 687 (5th Cir. 2015); *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1314-15 (11th Cir. 2011).

Indeed, the inflation-maintenance theory has become securities plaintiffs' go-to method of alleging price impact. One study found that, in the four years after *Halliburton*, the inflation-maintenance theory was raised in ***71%*** of district-court cases involving attempts to rebut the *Basic* presumption. *See* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077 (2019). "District courts within the Third Circuit have also recognized that a plaintiff can proceed on a price maintenance theory," and often adjudicate class-certification motions in such cases. *Celgene Corp.*, 2020 WL 8870665, at *11 (citing cases); *see, e.g.*, *Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.*, 2023 WL 7285167, at *3 (E.D. Pa. Nov. 3, 2023); *Allegheny Cnty. Emps.' Ret. Sys. v. Energy Transfer LP*, 623 F. Supp. 3d 470, 490-91 (E.D. Pa. 2022).

Goldman promised to tighten the too-loose standards courts had used to certify classes under the inflation-maintenance theory. But the panel's decision neutralizes *Goldman* and lets plaintiffs manufacture their own corrective disclosures. It is thus vital to *amici* and their members that this Court grant rehearing en banc and correct the panel's egregious errors before they spread.

CONCLUSION

For these reasons, this Court should grant rehearing en banc.

Dated: September 19, 2025
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,550 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft 365 in Times New Roman font, type 14 point.

Dated: September 19, 2025

/s/ Anton Metlitsky
Anton Metlitsky

CERTIFICATION AS TO E-BRIEF AND VIRUS SCAN

In accordance with Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies that will be filed should the Court request paper copies. I further certify that the electronic submission was subjected to a virus scan using Windows Defender, version 1.343.445.0, and that no virus was detected.

Dated: September 19, 2025

/s/ Anton Metlitsky
Anton Metlitsky

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the Court of Appeals for the Third Circuit.

Dated: September 19, 2025

/s/ Anton Metlitsky
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