No. 25-977

IN THE

Supreme Court of the United States

JOHNSON & JOHNSON, *et al.*,
Petitioners,

v.

SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION; FRANK HALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED,
Respondents.

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

BRIEF OF *AMICUS CURIAE* MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs opposing government overreach and seeking to lower the excessive costs of litigation.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below opens the floodgates to a slew of meritless securities-fraud class actions that will harm American businesses and consumers. In recent years, event-driven securities litigation has sought to transform every instance of alleged corporate misconduct into securities fraud through class-action suits that

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[1] Per Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in any part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to fund its preparation or submission. Per Rule 37.2, counsel for all parties received timely notice of the intent to file this brief.

rely on the "inflation-maintenance" theory. After a company's stock price falls in the wake of some negative reporting, shareholder plaintiffs—armed with the efficient-market hypothesis and the presumption of classwide reliance endorsed by this Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)—accuse the company of having artificially maintained an inflated stock price by making false or misleading statements before the truth ultimately came out.

The Court installed guardrails on such suits in *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*, 594 U.S. 113 (2021), including by requiring courts to examine the "contents of the misrepresentation and the corrective disclosure" to ensure that the disclosure "actually corrected" the misrepresentation. *Id.* at 123. The decision below, however, turns these critical guardrails into little more than speed bumps on the path to class certification.

Without these safeguards, companies will face a deluge of lawsuits manufactured from litigation setbacks, media coverage, and stock volatility, making it riskier and more expensive for companies to invest, innovate, and build in the United States. This will, in turn, impose a "litigation tax" on productive enterprise. Given sky-high litigation costs, the threat of catastrophic liability, and the gravitational pull toward settlement in even the most dubious inflation-maintenance-theory cases, the Third Circuit's approach will siphon capital away from research, manufacturing, and job creation and toward opportunistic plaintiffs' lawyers. This "tax" will burden American companies with yet another costly layer of regulatory complexity at odds with the United States government's core objectives to strengthen domestic industry, encourage long-term investment, and reduce legal and regulatory barriers that undermine American competitiveness.

ARGUMENT

I. THE THIRD CIRCUIT'S LAX APPROACH TO CLASS CERTIFICATION EFFECTIVELY IMPOSES A LITIGATION TAX.

Class certification is the name of the game in securities-fraud litigation. When a plaintiffs' firm succeeds in certifying a class, the defendant company generally faces the prospect of crushing liability unless it settles. So for risk-averse corporate defendants, the only real chance to fight meritless claims occurs at the class-certification stage. Class-certification guardrails thus are of paramount importance in securities class actions.

The Third Circuit's decision below flattened two important guardrails that serve to prevent hasty, settlement-inducing class certification. First, it failed to apply this Court's careful instruction in *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*, 594 U.S. 113 (2021), to ensure a match "between the contents of the misrepresentation and the corrective disclosure," such that the corrective disclosure "actually corrected" the misrepresentation. *Id.* at 123. Second, the Third Circuit concluded that a disclosure may have price impact even if that disclosure merely repackaged and republished old news—*i.e.*, information already publicly available.

These two missteps threaten to inundate American public companies with even more meritless securities-fraud class actions designed to reach a quick settlement. This flood of settlement-inducing class-action litigation amounts to a substantial tax on public companies—a tax ultimately borne by the American public. See Peter W. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 1–2 (1988) (discussing the "tort tax"); Jim Copland, *The Tort Tax*, Wall St. J.

(June 11, 2003), perma.cc/MZL2-V3K2 (same, with a particular focus on class action litigation).

A. The Decision Below Destroys Key Safeguards Against Permissive Certification in Securities-Fraud Class Actions.

"To recover damages" on a securities-fraud claim, "a private plaintiff must prove, among other things, a material misrepresentation or omission by the defendant and the plaintiff's reliance on that misrepresentation or omission." *Goldman*, 594 U.S. at 118 (citation omitted). And to certify a *class* of securities-fraud plaintiffs, a district court must ensure that issues "common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). As to the ordinarily individualized element of reliance, this Court's precedents give plaintiffs' firms a leg up in securing class certification: Under *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), plaintiffs may invoke a "rebuttable presumption of reliance," applicable *class-wide*, on the assumption that stock prices—upon which all investors rely in trading—"reflect[] all publicly available information," including corporate misrepresentations. *Id.* at 242, 246.

The *Basic* presumption is subject to two important guardrails. First, as this Court clarified in *Goldman*, the "corrective disclosure" must match the "contents of the misrepresentation," such that it "actually correct[s]" the alleged misrepresentation. 594 U.S. at 123. (Call this the "correctiveness" guardrail.) Second, and implicit in the *Basic* presumption itself, the corrective "disclosure" must be an actual disclosure—that is, something *new* and not already priced into what *Basic* assumed to be an efficient market. See 485 U.S. at 247–48. (Call this the "newness" guardrail.) Simply put, a "corrective disclosure" must be both actually *corrective* and actually a *disclosure*. Together,

these guardrails ensure that *Basic* does not become a get-past-class-certification-free card for plaintiffs' firms. In the decision below, however, the Third Circuit eviscerated each guardrail.

1. *Correctiveness.* Contrary to this Court's instructions in *Goldman*, the Third Circuit concluded that it was enough for corrective disclosures to "contain[] information *relating to* [the] alleged misrepresentations," Pet. App. 9a–10a (emphasis added)—instead of matching and "actually correct[ing]" the misrepresentation, *Goldman*, 594 U.S. at 123. This makes it easier for plaintiffs' firms to manufacture lawsuits: Under the Third Circuit's rule, they do not need to *match* a corrective disclosure to a misrepresentation that it "actually corrects"—something merely "related" will do the trick.

2. *Newness.* The Third Circuit also gutted the newness guardrail, reasoning that information that is *already* publicly available "may nevertheless communicate a new signal to the market" when it is repackaged and republished. Pet. App. 8a. But this "new signal" theory is at odds with the efficient-market hypothesis upon which the *Basic* presumption is based: If information is public, it is already priced in. See 485 U.S. at 246–47 ("the market price of shares traded on well-developed markets reflects *all* publicly available information" (emphasis added)); see also *MacPhee* v. *MiMedx Grp., Inc.*, 73 F.4th 1220, 1243 (11th Cir. 2023). In effect, the Third Circuit's rule gives plaintiffs the *benefit* of the strict efficient-market assumption (*i.e.*, the whole class relied on public misrepresentations efficiently absorbed by the market) without reciprocally applying the same strict assumption to their alleged corrective "disclosures" (*i.e.*, public information is not *fully* absorbed by the market until it is repackaged and republished).

B. Abandoning Critical Class Certification Guardrails Imposes an Enormous Tax on American Companies and the Public.

The rules of class certification in securities-fraud class actions may be arcane, but the consequences of ignoring them are not. Liberal class certification is costly: It puts companies to the Hobson's choice of risking catastrophic liability (however unlikely) or else paying a modest toll to make a suit go away. See Marie Gryphon, GREATER JUSTICE, LOWER COST: HOW A "LOSER PAYS" RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM, Manhattan Inst., at 4–5 (2008) (discussing "lottery suits" as one of the two types of abusive litigation). In effect, this amounts to a substantial tax on American business—and ultimately, the American public—levied not by Congress but by the plaintiffs' bar. See Huber, *supra*, at 1–2; Copland, *Tort Tax*, *supra*.

This Court has long recognized that securities-fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 739 (1975). Then-Associate Justice Rehnquist explained that, with "a widely expanded class of plaintiffs" in a securities lawsuit, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff[s]." *Id.* at 740. Given the inordinate risk of liability if the plaintiff class wins, companies almost invariably pay the toll. See Cornerstone Rsch., SECURITIES CLASS ACTION FILINGS—2025 YEAR IN REVIEW 16 (Jan. 2026), tinyurl.com/Cstone2025 (almost half of filed securities class actions settle, and fewer than half a percent go to trial).

The tolls add up. From 2016 to 2024, plaintiffs' firms extracted over *$38 billion* from target companies.

Cornerstone Rsch., SECURITIES CLASS ACTION SETTLEMENTS—2025 REVIEW AND ANALYSIS 1 (Feb. 2026), tinyurl.com/Cstne2025. And just last year alone, securities class-action settlements totaled more than $3 billion, with a median settlement of $16 million—a paltry 6.5% of plaintiffs' estimated damages, representing the very low probability of the plaintiffs' success on the merits. *Id.* at 1, 6–7.

Troublingly, plaintiffs' firms often target America's most innovative companies for securities-fraud strike suits—imposing, in effect, a tax on innovation. See generally Elisabeth Kempf & Oliver Spalt, *Litigating Innovation: Evidence from Securities Class Action Lawsuits*, ECGI Fin. Working Paper No. 614/2019 (June 2019), tinyurl.com/ImplicitTax; *id.* at 32 ("Our core finding is that meritless class action lawsuits constitute an economically meaningful 'tax' on innovation output …."); *id.* ("[T]here is a strong empirical link between innovation and subsequent low-quality class action litigation."). This "tax"—empirically estimated to be about 2.7%, *id.* at 25—disincentivizes companies from innovating and drains resources from companies that do, slowing their growth and hampering the broader American economy.

More still, "litigation against innovative firms may create disincentives for these firms to list on public stock markets" in the first place, *id.* at 30, thereby contributing to America's noted "listing gap"—the troubling decline in publicly listed companies in recent years relative to other developed nations. See Craig Doidge, G. Andrew Karolyi & René M. Stulz, *The U.S. Listing Gap*, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 21181 (May 2015); cf. Jason M. Thomas, *Where Have All the Public Companies Gone?*, Wall St. J. (Nov. 16, 2017), perma.cc/SV9U-G5PG (noting the "steady decline" in public markets since the 1990s,

attributable in part to "shareholder lawsuits," and explaining how this trend "has benefited private market players at the expense of everyday investors").

The securities-litigation tax does not affect only American companies—ultimately, the tax comes out of the pockets of innocent shareholders and American consumers. See Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1080 (2019) (explaining how securities-fraud class actions "effect[] the arbitrary transfer of money from one innocent group of shareholders to another."); *id.* ("The wealth transfer … is quite frequently … circular, because many shareholders purchase stock in a given corporation both during and outside the class period," so "all that they have done at the end of the day is shift money from one pocket to another, minus the high transaction costs of securities litigation." (cleaned up)); cf. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (noting that "excessive litigation can have ripple effects").

The costs imposed on American companies, their shareholders, and the American public illustrate the importance of ensuring sensible checks on the certification of securities-fraud class actions. This case presents the opportunity to revitalize those checks by reinforcing the *Basic* presumption's "correctiveness" and "newness" guardrails. *Supra* § I.A.

II. AN EXPANSIVE SECURITIES CLASS ACTION REGIME UNDERMINES THE UNITED STATES' ABILITY TO ATTRACT INVESTMENT AND GROW THE ECONOMY.

The United States has long made economic growth a priority. The reason is obvious: All Americans benefit when markets run efficiently and when the conditions

for investment are favorable. Job growth, low prices, and business expansion are key indicators of a healthy economy, so it is unsurprising that politicians of all stripes have vigorously pursued these goals. The Third Circuit's approach to securities-fraud class actions undermines these core aims.

The current chairman of the Securities and Exchange Commission has remarked on the dire need for securities litigation reform. See Paul S. Atkins, Chairman, Sec. & Exch. Comm'n, Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala (Oct. 9, 2025). In a recent speech, Chairman Atkins noted that "taking a company public is no longer so 'cool' as it once was." *Id.* That statement has clear empirical support: "There are approximately 4,700 exchange-listed companies today, compared to a high point of approximately 7,800 in 1997." *Id.* One of the SEC's top priorities is "to reverse this trend" and "make being a public company an attractive proposition for more firms." *Id.* But that goal is all but unattainable when companies are plagued by "meritless, vexatious, or frivolous litigation." *Id.* All that does is "driv[e] capital away from the U.S. public markets." *Id.* Yet that is exactly what the Third Circuit's misreading of *Goldman* and *Basic* does: It makes it easier for vexatious litigants to shake companies down for an easy payout.

The reforms needed in securities litigation are connected to the United States' broader economic priorities. In manifold ways, the current Administration has expressed its commitment to strengthening domestic industry, encouraging long-term investment, and reducing legal and regulatory barriers that undermine American competitiveness. For example, in one of his first executive orders, President Trump directed administrative agencies to "identify at least 10

existing regulations to be repealed" for every new one that is proposed. Exec. Order No. 14,192, § 3 (Jan. 31, 2025). This executive order's intent is to "alleviate unnecessary regulatory burdens placed on the American people." *Id.* § 2. It is a response to the "ever-expanding morass of complicated Federal regulation," which "imposes massive costs on the lives of millions of Americans, creates a substantial restraint on our economic growth and ability to build and innovate, and hampers our global competitiveness." *Id.* § 1.

In another executive order, the president established an "Investment Accelerator"—a new office in the Department of Commerce that seeks to expedite and facilitate domestic and foreign investments in the United States exceeding $1 billion. See Exec. Order No. 14,255, § 3 (Mar. 31, 2025). The president explained that this was meant to serve America's economic policy of "attract[ing] substantial domestic and foreign investment in the United States." *Id.* § 2. And it further recognized that "slow, complex, and burdensome American regulatory processes at every stage of a company's development and operation make significant domestic and foreign investment harder than necessary." *Id.* § 1.

Politicians are not the only ones concerned with the growing thicket of laws that overburden Americans and their businesses. As one member of this Court has lamented: "Law is multiplying, and its demands are growing increasingly complex. So much so that ordinary people are often caught by surprise, and even seasoned lawyers, lawmakers, and (yes) judges sometimes struggle to make sense of it all." See Neil Gorsuch & Janie Nitze, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024). That sentiment is understandable. In addition to mountains of legislation, agencies have written so many new rules and regulations that, by

2021, "the Code of Federal Regulations spanned about 200 volumes and over 188,000 pages." *Id.* A company's need to navigate this regulatory morass makes economic growth more difficult.

Allowing a regime that invites meritless securities-fraud class actions to proliferate only exacerbates these problems and stifles the nation's attempts at reform. See James R. Copland, THE UNELECTED: HOW AN UNACCOUNTABLE ELITE IS GOVERNING AMERICA 125–38 (2020) (discussing how class action litigation operates as regulation). The Third Circuit's approach effectively adds another layer of regulatory complexity to an already tangled system. Now, with the fear of incurring even greater liability from overzealous plaintiffs' lawyers, companies will be incentivized to "overinvest in precautionary measures," thereby stifling innovation. Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. Pa. L. Rev. 2173, 2184 (2010). So too, companies will be incentivized to "reduce disclosure of truthful information or … disclose too much trivial information." *Id.* Having to weigh these tradeoffs is not something companies would have to do if courts properly applied the guardrails erected in *Goldman* and *Basic*. Companies should not have to fear being sued for making aspirational commitments to broad values or putting on a robust defense in litigation.

Importantly, the need for reform of securities litigation is not a partisan issue. A report issued by former Republican New York City Mayor Michael Bloomberg and Democratic Senator Chuck Schumer described "the legal environments in other nations" as "far more effectively discourag[ing] frivolous litigation." Michael R. Bloomberg & Charles E. Schumer, SUSTAINING NEW YORK'S & THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP, at ii (Jan. 22, 2007),

tinyurl.com/SchumBloomRep. They specifically identified "the prevalence of meritless securities lawsuits and settlements" as having "driven up the apparent and actual cost of business—and driven away potential investors." *Id.* This hurts the United States' global standing by "diminish[ing] our attractiveness to international companies." *Id.* Accordingly, legal reforms to "reduce spurious and meritless litigation and eliminate the perception of arbitrary justice" are necessary. *Id.*; see also Kempf & Spalt, *supra*, at 32 ("'[T]he current securities class action system in the U.S. may be an impediment to economic growth and competitiveness.").

As this Court has noted, "[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008); *Blue Chip*, 421 U.S. at 737 ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn."). This Court thus should ensure that the appropriate guardrails for securities litigation remain in place. Cf. *Stoneridge*, 552 U.S. at 165 ("Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries."); see also *id.* at 165–66 (noting that Congress "ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action," but that Congress "chose to extend it no further").

CONCLUSION

For the foregoing reasons, and those stated in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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