No. 17-1056

IN THE

Supreme Court of the United States

QUALITY SYSTEMS, INC.; STEVEN T. PLOCHOCKI; PAUL A. HOLT; SHELDON RAZIN,

Petitioners,

v.

CITY OF MIAMI FIRE FIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST; ARKANSAS TEACHER RETIREMENT SYSTEM,

Respondents.

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

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The "safe harbor" provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA") shields from liability forward-looking statements – *i.e.*, projections – that are either (i) "accompanied by *meaningful cautionary statements* identifying *important factors that could cause actual results to differ materially* from those in the forward-looking statement," or (ii) not "made with actual knowledge" that the statement "was false *or* misleading." 15 U.S.C. §78u-5(c)(1)(A), (B) (emphasis added).

Here, several of Petitioners' misstatements were "mixed" statements combining both false and misleading forward-looking statements and false and misleading non-forward-looking statements. *See* App. 28a ("Defendants made a number of forward-looking statements as part of mixed statements."); *see also id.* at 34a (Defendants' "forward-looking statements were premised on th[eir] non-forward-looking statements."). Notably, many of the non-forward-looking statements were independently actionable under the securities-fraud laws, regardless of any purported safe-harbor application: "On eight separate occasions, QSI officers knowingly made materially false or misleading non-forward-looking statements about the state of QSI's sales pipeline." App. 19a. Those non-forward-looking misstatements "were inconsistent with real-time financial information and were materially false or misleading." App. 22a.

The Ninth Circuit held that the "non-forward-looking portions of mixed statements are not eligible for the safe harbor provisions of the PSLRA" (App. 34a), and that "a defendant may not transform non-forward-looking statements into forward-looking statements that are protected by the safe harbor provisions of the

PSLRA by combining non-forward-looking statements about past or current facts with forward-looking statements about projected revenues and earnings." *Id.* at 15a. The Ninth Circuit explained that this holding puts the court in accord with its sister Circuits. *See id.* at 16a ("The First, Second, Third, Fifth, and Seventh Circuits have all concluded that where defendants make mixed statements containing non-forward-looking statements as well as forward-looking statements, the non-forward-looking statements are not protected by the safe harbor of the PSLRA.").

The Ninth Circuit also applied the law to the particularly strong facts of the case, holding that Petitioners did not supply adequate "cautionary language" for the forward-looking portions of their statements to qualify for the safe harbor (*id.* at 31a-32a), and that there were ample allegations that Petitioners knew those statements were false and misleading when they made them. *Id.* at 34a. The court correctly noted that the safe harbor is not "designed to protect [issuers or executives] when they make a materially false or misleading statement about current or past facts, and combine that statement with a forward-looking statement." *Id.* at 17a.

In light of the foregoing, the Question Presented is:

Whether combining false and misleading forward-looking statements with false and misleading *non*-forward-looking statements immunizes both from liability under the PSLRA's limited safe harbor, when Petitioners did not provide adequate cautionary language and knew at the time that their statements were false and misleading.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondents City of Miami Fire Fighters' and Police Officers' Retirement Trust and Arkansas Teacher Retirement System state that neither is a corporation.

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STATEMENT OF THE CASE

A. Factual Background

1. Nature of the Case

Respondents, institutional investors City of Miami Fire Fighters' and Police Officers' Retirement Trust and Arkansas Teacher Retirement System, brought a securities-fraud class action against Quality Systems Inc. ("QSI") and several senior QSI executives and Board members, including CEO Steven Plochocki, Chief Financial Officer Paul Holt, and Chairman of the Board (and QSI founder) Sheldon Razin. QSI and these three Individual Defendants are Petitioners here.

QSI develops and markets practice-management and electronic health records software to medical and dental care providers. Respondents allege that during a 14-month "Class Period" spanning May 2011 through July 2012, Petitioners made a series of misrepresentations and omissions concerning both QSI's current and projected financial performance revolving around its sales "pipeline." Accepting Petitioners' misstatements as truthful, analysts following QSI heralded its growth and QSI's publicly traded stock rose approximately 45%.

In truth, QSI's financial condition was not as Petitioners claimed. QSI's sales and sales pipeline already had begun declining in early 2011. QSI's internal "Salesforce" reporting system showed Petitioners that, as early as April 2011, QSI was *not* meeting sales targets and that the company's pipeline of sales prospects actually was drying up. Unbeknownst to investors, QSI missed its sales targets during the Class Period by as much as 50%. Sales, revenues, and net income all *declined*. Despite this, Petitioners continued to claim publicly that QSI was experiencing "unprecedented" and "continually growing" demand with no "peak" in sight, and that QSI's revenue and earnings would continue to grow 20%-25% by March 2013.

In late February 2012, CEO Plochocki sold nearly 90% of his QSI stock at a price near QSI's all-time high. Only a few weeks thereafter did investors begin to learn the truth about QSI's deteriorating financial condition. On May 10, 2012 – just days after adamantly denying that sales cycles had lengthened "across the board" – QSI admitted that sales were in fact "taking longer to close," and disclosed that fiscal 2012's ("FY2012") results had been far below estimates; consequently QSI missed its earnings projections by material amounts.[1] The May 10, 2012 disclosure caused QSI's stock price to fall more than 16% on heavy trading volume.

Petitioners continued to dissemble after this partial disclosure. Through late July 2012, they claimed that they "were confident in [their] ability to deliver" double-digit revenues and earnings growth for fiscal 2013 ("FY2013"). Their misrepresentations continued until mere days before the truth was revealed. Just three days after Petitioners affirmed 20%-25% revenue and earnings growth projections, QSI admitted on July 26, 2012 that earnings had not only not grown as promised, but had in fact *declined* by 19%. Contrary to their prior statements, Petitioners also admitted that QSI's sales pipeline had declined significantly. They withdrew entirely the FY2013 guidance they had reaffirmed just days previously. Following these revelations, QSI's stock price plummeted another 33%. Altogether, the truthful disclosures caused stock price

[1] QSI's fiscal year runs from April 1 to March 31.

declines that wiped out more than $600 million in QSI shareholder value.

In the wake of these disclosures, analysts questioned Petitioners' credibility. Ahmed Hussein, the company's second-largest shareholder for more than 20 years and QSI's longest-tenured and most-experienced director, filed suit against QSI and Individual Defendants Razin and Plochocki. Hussein's state-court complaint, which was sustained over the defendants' legal challenges, charged that QSI, Razin, and Plochocki had "orchestrated a course of wrongful and fraudulent conduct . . . that culminated in the dissemination" of earnings projections that were "factually baseless when they were made."

2. Relevant Facts[2]

a. QSI's Sales and Earnings Growth Depended on Its Ability to Continually Book New-System Sales

QSI develops and markets practice-management and electronic health records ("EHR") software to medical and dental care providers. ER43:¶23. The company and its subsidiaries operate as four business divisions. ER45:¶28.

Of the four, QSI's "NextGen" Division is particularly important; it was QSI's most-significant source of revenue and most-profitable division during the Class Period, contributing over 75% of the company's FY2012 consolidated revenue. ER45:¶29. NextGen develops and markets practice-management software

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[2] These facts are drawn from the opinion in Petitioners' Appendix ("App. __a") and from the Ninth Circuit Excerpts of Record ("ER__").

used in automated medical office functions like scheduling and billing, and develops and markets EHR software mainly used to automate patient records. *Id*.

QSI explained that the EHR systems market was largely untapped "greenfield," so QSI's financial performance was particularly dependent on its ability to continuously book "new system sales."[3] ER47:¶34; ER48:¶38. New-system sales (including software, hardware, supplies, *et cetera*) were also the most-profitable type of sales (ER48:¶37), yielding high-margin "maintenance" revenue (including post-contract services and software license renewals). *Id*. In contrast to the EHR systems market, the practice-management market was a highly competitive "replacement market" of customers with PM systems already in place. ER48:¶38.

b. Petitioners Closely Monitored QSI's Sales and Prospects Via Daily Updates

Petitioners monitored QSI's sales and sales pipeline via Salesforce, a sales tracking and forecasting database that was updated daily. ER36:¶2; ER55:¶53. QSI's sales "pipeline" was divided into four categories. ER49-ER50:¶41. Category 1 deals were expected to close in three to four months, while category 2 deals were expected to close in six to eight months. *Id*. The remaining categories contained deals that were not expected to close within eight months. *Id*. QSI publicly reported only its category 1 and 2 sales pipeline (*id*.); *see also id*. at n.4.

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[3] "Greenfield" sales were system sales to customers who previously had no EHR system in place. ER48:¶38.

c. Numerous QSI Personnel – Including a 14-Year Veteran Director, and Its Former Chief of Operations – Confirm that QSI's Core Business Had Slowed by April 2011

By April 2011, shortly before the Class Period began, QSI was experiencing a marked slowdown in new client bookings and sales-pipeline additions. ER58:¶63(a). Thus, QSI's most-profitable segment, and the key driver of its growth, already was in decline by April 2011. ER61:¶72(a).

That segment suffered further deterioration throughout 2011 (ER64:¶81(a)), and QSI's overall sales pipeline was in decline by the fourth quarter of FY2012 – the quarter beginning January 1, 2012. ER74:¶104(c). Real-time internal forecasting data and sales reports reflecting those facts were circulated to, and made available to, the Individual Defendants and QSI's management. ER59:¶63(c). These reports were emailed to the Individual Defendants on a weekly basis. *Id.*; ER37:¶5.

Numerous former company employees and ex-QSI Board members confirm that sales-pipeline decline. Hussein, who served as a QSI director for 14 years (ER51:¶45), states that QSI's new bookings had begun declining by April 1, 2011. ER51-ER52:¶46. Hussein also notes that QSI's sales pipeline had begun declining in the fourth quarter of FY2012. *Id.* Consequently, QSI's revenues and net income decreased. *Id.*[4]

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[4] In a state-court suit, Hussein accused Petitioners QSI, Razin, and Plochocki of, *inter alia*, fraud and constructive fraud in connection with the same conduct alleged here. ER35:¶1. *See Hussein v. Razin, et al.*, No. 30-2013-00679600-CU-NP-CJC (Cal. Sup. Ct. Orange Cty.). The state court overruled their

Hussein's account is corroborated by numerous former QSI personnel, including additional company directors, sales executives, and QSI's former Chief of Operations. ER52:¶48; *see also* App. 9a (the "complaint includes information about Defendants' knowledge provided by three high-level officers of QSI"); App. 10a (the "complaint also contains information about Defendants' knowledge provided by five lower-level QSI employees"). Each corroborates former director Hussein's assertion that QSI's senior officers accessed "real-time information concerning QSI's revenue and income." ER35:¶1. They also are consistent with QSI's own admission, made in proxy materials, that it utilized "*a continuous reforecasting process*, which incorporates inputs from all operating entities to determine short[-]term and long[-]term expectations." ER89-ER90:¶142 (emphasis added).

d. Despite the Ongoing, Material Slowdown in QSI's Core Business, Petitioners Make False and Misleading Statements About Both Current Conditions and Projected Financial Performance

On numerous occasions during the Class Period, QSI executives "knowingly made materially false or misleading non-forward-looking statements about the state of QSI's sales pipeline." App. 19a. Each of them supported, and thus formed an integral part of, *forward*-looking misstatements made either contemporaneously with them, or soon after:

- At the June 9, 2011 Goldman Sachs Healthcare Conference, CFO Holt falsely stated that

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demurrer to claims for fraud, constructive fraud, and negligent misrepresentation.

the market for QSI's products in ambulatory health care facilities was "greenfield for the most part." ER57:¶60. (Recall, "greenfield" sales were system sales to customers who previously had no EHR system in place. ER48:¶38.) Within three weeks, on an analyst conference call Plochocki publicly raised earnings-per-share ("EPS") guidance for FY2012, claiming QSI would achieve EPS of $2.79 for that fiscal year. ER57:¶61.

- On October 27, 2011, Plochocki again increased QSI's guidance for the fiscal year, projecting EPS growth ranging from 29% to 33%: "This is an upgrade from our previous views of . . . 28% to 32% EPS growth." ER59:¶64. When an analyst asked Plochocki if the raised guidance was "conservative," he replied that it was "quite conservative" given that QSI's pipeline of future business was purportedly so "large." ER59-ER60:¶65. When asked if that pipeline was flattening out, NextGen division president Scott Decker said it was flat, "but I wouldn't read too much into that" because "*it's unprecedented with the amount of demand we see coming*." ER60:¶66 (emphasis added). Again, Plochocki rebuffed any suggestion that QSI's "greenfield" was stagnating: he "set the record straight" and reassured investors that "greenfield opportunities are plentiful." ER60:¶67.

- On November 7, 2011, Plochocki again denied that QSI's business was slowing. In an *Investor's Business Daily* interview, Plochocki "said worries about flattening and saturation *were baseless*," and insisted that "[t]here is nothing drying up and there is nothing slowing down." ER60:¶69 (emphasis added).

- Those optimistic reassurances continued into the next month. On December 14, 2011, at an Oppenheimer Healthcare Conference, Plochocki responded to a comment that mid- and large-practice markets may have become totally penetrated by claiming "[y]ou wouldn't know that by our pipeline." ER61:¶71. He also projected continuing growth: "greenfield opportunities" "are going to continue to grow." ER60-ER61:¶70. "So the bottom line is that our pipeline current and our pipeline future are very robust." *Id*.

- On a January 26, 2012 conference call with analysts, Plochocki insisted that "[o]ur pipeline continues to build to record levels." ER62:¶74. When an analyst asked for updates on the current fiscal year, Plochocki repeated that QSI was on track for 29%-34% growth, and raised investors' expectations even higher by remarking: "we probably have a pretty good shot at 35% on that bottom one." ER62:¶75. At the same time, executive Decker claimed that "there's nothing out of character in the pipeline that we're reporting today versus . . . the past couple of years." ER62-ER63:¶76. Plochocki ended that call by emphasizing QSI's purportedly robust growth. He reminded analysts that QSI had exceeded their revenue growth and EPS expectations for "five straight quarters," and that things were only improving: QSI's pipeline was "growing," and "we truly are embarking upon" four-to-eight quarters "of the most robust growth in EHR adoption." ER63:¶77.

- On February 7, 2012 – just two weeks before dumping nearly 90% of his personal QSI shares at near all-time-high prices for approximately $3.9 million – Plochocki repeated his bullish "pipeline" comments at a UBS Healthcare Conference: "Th[e] sales pipeline has grown every quarter since the announcement of the stimulus bill back in February of 2009 . . . ." ER63:¶79.
- On May 9, 2012, responding to concerns that QSI's sales cycle might be lengthening, NextGen division president Decker stated "[I]t absolutely is not a macro trend we're seeing. In fact, I went back through the data over the last few days and objectively looked at it. Sales cycle has not lengthened for us across the board, and in fact, over the last year, you've seen a compression of it." ER65-ER66:¶84.
- On a May 17, 2012, conference call, Plochocki stated, "Our pipeline is deep. . . . [O]ur fundamentals haven't changed. Our pipeline keeps growing . . . . We haven't seen any fundamental change to any of the dynamics that have been feeding into our system for the last two or three years." ER71-ER72:¶¶96-97. On that same call, Plochocki insisted that QSI "remain[ed] confident" about growth, with revenues growing 20%-24% and EPS growing 20%-25%. ER69:¶93. Holt echoed those reassurances, telling call participants that "[w]e are confident in our ability to deliver on this guidance." ER70-ER71:¶95.

The first quarter of QSI's FY2013 ended on June 30, 2012. ER76:¶108. Although by that date QSI's EPS had already *declined* by 19%, Petitioners continued to affirm overall EPS growth of 20%-25% for the full fiscal year then underway. *Id*. On July 9 and again on July 10, QSI filed preliminary proxy materials with the SEC reiterating the company's "plan[] to grow revenues by 20-24% and earnings by 20-25% in FY2013." *Id*. On July 13 and again on July 23 – nearly one month after the first quarter had ended with its (undisclosed) 19% EPS decline – Petitioners filed "Additional Definitive Proxy Materials" with the SEC, again misleadingly claiming EPS growth of 20%-25% for the year. *Id*.

B. The Ninth Circuit's Decision

In a well-reasoned decision, the Ninth Circuit reversed the district court's dismissal. App. 1a-35a.[5]

The Ninth Circuit joined five sister Circuits in holding that non-forward-looking statements of past or current facts are not protected by the safe harbor when they are "mixed" with forward-looking projections: "The First, Second, Third, Fifth, and Seventh Circuits have all concluded that where defendants make mixed statements containing non-forward-looking statements as well as forward-looking statements, the non-forward-looking statements are not protected

[5] This case will proceed regardless of whether this Court grants or denies the Petition. Petitioners concede that each of the eight *non*-forward-looking statements deemed actionable by the Ninth Circuit are, as the court held, unprotected by the PSLRA's safe harbor. Petition for a Writ of Certiorari ("Pet.") at 2 ("Non-forward-looking statements thus remain subject to liability under the standards set forth elsewhere in the securities laws."); *id*. at 32-33 (noting a certiorari grant "will resolve" only "seven forward-looking" mixed statements in the case).

by the safe harbor of the PSLRA." App. 16a.[6] That is because "the safe harbor is not designed to protect companies and their officials when they knowingly make a materially false or misleading statement *about current or past facts*." App. 17a (emphasis added).

Here, the court found "[on] eight separate occasions, QSI officers knowingly made materially false or misleading non-forward-looking statements about the state of QSI's sales pipeline." App. 19a; *see also* App. 22a ("The non-forward-looking statements of Plochocki and other QSI officers were inconsistent with real-time financial information and were materially false or misleading.").

Additionally, the Petitioners' statements were material, for they "provided a concrete description of the past and present state of [QSI's] pipeline" (*id*. at 21a) while affirmatively creating "'an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed].'" *Id*. at 22a (quoting *Brody v. Transitional Hosps. Corp*., 280 F.3d 997, 1006 (9th Cir. 2002)).

In addition, the Ninth Circuit held, Respondents had adequately alleged that the non-forward-looking misstatements had been made with *scienter*. The overwhelming allegations included detailed accounts from former QSI employees who explained that company executives, "including individual defendants, had

[6] *See, e.g.*, *In re Stone & Webster, Inc., Sec. Litig*., 414 F.3d 187, 211-13 (1st Cir. 2005); *In re Vivendi, S.A., Sec. Litig*., 838 F.3d 223, 246 (2d Cir. 2016); *Inst'l Inv'rs Grp. v. Avaya, Inc*., 564 F.3d 242, 255 (3d Cir. 2009); *Spitzberg v. Houston Am. Energy Corp*., 758 F.3d 676, 691-92 (5th Cir. 2014); *Makor Issues & Rights, Ltd. v. Tellabs Inc*. ("*Tellabs II*"), 513 F.3d 702, 705 (7th Cir. 2008). App. 16a-17a.

access to and used reports documenting in real time the decline in sales during the Class Period." App. 24a. In addition, "QSI's executives themselves told investors they had real-time access to, and knowledge of, sales information." *Id*. at 25a. Plochocki's scienter was reinforced by his insider selling of *87%* of his QSI stock on one day in late-February 2012, near the stock price's peak. *Id*. at 25a-26a. "That Plochocki chose to sell the vast majority of his shares in QSI shortly after boasting to investors that QSI anticipated record levels of sales in the next six to eight months gives rise to a 'strong inference' that Plochocki knew adverse information about the state of QSI's sales he was not sharing with the general public." *Id*. at 26a (citation omitted).

The court explained how Petitioners utilized false and misleading non-forward-looking statements in publicly made "mixed" statements comprising seven forward-looking statements. *Id*. at 28a-32a. (The "mixed" statements are detailed *supra* at pp.6-9.) As the court noted, "Defendants repeatedly told investors *that they could rely on predictions of growth* in revenue and earnings *because the current state of QSI's sales pipeline was consistent with, or better than*, the state of the pipeline in previous quarters." *Id*. at 31a (emphasis added). As already noted, those latter representations were held to be materially false and misleading, and made with scienter. Because of that, and their unique "mixed" nature, the Ninth Circuit held, the safe harbor could only protect the forward-looking statements if accompanying cautions conveyed "appropriate, meaningful information about not only the forward-looking statement but also the non-forward-looking statement." *Id*.

There was no such protection in this case, for at least two reasons.

First, as the Ninth Circuit pointed out, nothing in record showed "what, if any, cautionary language accompanied the January 26, 2012, conference call." *Id*. at 29a. Without any cautionary language even at issue for the alleged misrepresentations and omissions on January 26, 2012, this case will proceed as to that call's statements and omissions regardless of any decision by this Court regarding the sufficiency of purported cautionary language for the other alleged forward-looking misrepresentations.

Second, the cautions associated with the remaining "mixed" forward-looking statements fell well short of the mark. Quoting the PSLRA, the court explained that adequate cautionary language "must identify 'important factors that could cause actual results to differ materially from those in the forward-looking statement.'" App. 31a (quoting 15 U.S.C. §78u-5(c)(1)(A)(i)). For the "mixed" statements, the "important factors" needed to avoid perpetuating Petitioners' false and misleading forward-looking misrepresentations would have been truthful current and past facts on those same topics:

> Where, as here, forward-looking statements are accompanied by non-forward-looking statements about current or past facts, that the non-forward-looking statements are, or may be, untrue is clearly an "important factor" of which investors should be made aware.

App. 31a. Petitioners failed to do that: "The cautionary language used by Defendants failed to correct these materially false or misleading non-forward-looking statements." *Id*.

Notably, the Ninth Circuit was careful to explain the limited extent of its holding. The adequacy of cautionary language is a fact-specific inquiry that will differ from case to case, and here the cautionary language was clearly inadequate: "We need not delve deeply into what might, in other cases, constitute adequate cautionary language for mixed statements, for the answer is clear in the case now before us." App. 31a. Despite the Petitioners' suggestion, the Ninth Circuit did not announce a blanket, chiseled-in-stone rule that "mixed" statements containing false and misleading non-forward-looking ones can *never* be adequately insulated with meaningful cautions. Rather the court held that in this case, given the obvious falsity of Petitioners' statements in light of existing, internally known facts, "virtually no cautionary language short of an outright admission that the non-forward-looking statements were materially false or misleading would have been adequate." App. 32a.

Following the appellate court's decision, Petitioners petitioned for rehearing en banc. After the "full court [was] advised of the petition," the Ninth Circuit denied it. App. 62a.

REASONS FOR DENYING THE PETITION

A. The Circuits Agree on How to Properly Analyze "Meaningful" Cautionary Statements Accompanying Forward-Looking Statements

The Petition's central theme is that the circuits have separated into two main camps over the interpretation and application of the PSLRA safe harbor's "meaningful cautionary language" criterion. "In particular," Petitioners claim, "the circuits are divided over whether they should (1) focus only on the factors identified by the cautionary language itself, or (2) instead also consider whether that language omits other important factors with the potential to undermine the projection." Pet. at 13.

Petitioners place into the former camp "at least" four circuits that they assert focus *only* on the precise cautionary language to the exclusion of all else: the Third, Sixth, Eighth, and Eleventh circuits. Pet. at 14-15. As to the latter supposed camp, Petitioners contend that the Seventh and D.C. Circuits "take a different approach" by "also consider[ing] whether those statements *omitted* important considerations" facing defendants at the time of the forward-looking statements. Pet. at 16 (emphasis in original). Petitioners then lump the Ninth Circuit in with the second camp, albeit with an additional, purportedly "new extreme" approach requiring a defendant's outright *admission* that its accompanying non-forward-looking statements are false or misleading. Pet. at 14.

Petitioners' central theme is a fiction. In truth, the circuits highlighted by Petitioners are aligned in their treatment of the safe harbor's "meaningful" cautions requirement, and Petitioners' purported circuit "split" is illusory. Like the Ninth Circuit, they consider the context in which the purported cautions are made, and consider whether existing and/or historical facts support or detract from those cautions. (And, as pp.27-31 *infra* explain, that the Ninth Circuit's holding in this case represents a "new extreme" is an additional fabrication by Petitioners.)

Illustrative of the nonexistent schism is the Third Circuit's decision in *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481 (3d Cir. 2016). Petitioners place *OFI* in their focus-only-on-the-cautionary-language camp (Pet. at 14-15), but that placement is wrong.

OFI involved the aftermath of a failed merger between two tire companies, Cooper Tire & Rubber Company and Apollo Tyres Ltd. *OFI*, 834 F.3d at 485-86. Prior to the attempted merger, Cooper's international operations included Cooper Chengshan Tire Company, Ltd. ("CCT") in China, 65% of which Cooper owned. *Id*. at 486. Cooper's existing Chinese presence "was a key motivation behind" Apollo's merger efforts (*id*.), but it also complicated things: CCT workers reacted negatively to the merger announcement, went out on strike, and even after returning to work barred Cooper officials from the facility and stopped producing Cooper-branded tires. *Id*. at 487.

Despite that labor unrest, Cooper's Proxy Statement soliciting votes for the merger said that "'[n]either the [CCT] strike nor the plant slowdown are expected to have an effect on the consummation of the merger.'" *Id*. at 488. The Proxy Statement also included projections that Cooper had shared with Apollo, other potential purchasers, and its bankers. *Id*. But the Proxy Statement cautioned that those projections were merely "'aspirational'" and based upon assumptions that "'may now be outdated,'" and instructed shareholders that they should not regard them as "'necessarily predictive of actual future events.'" *Id*.

The district court dismissed the action for a failure to state a claim, including among its holdings that certain statements were forward-looking ones protected by the PSLRA's safe harbor. *Id*. at 489. The Third Circuit affirmed. *Id*. at 505.

Relevant here, the Third Circuit's reasoning tracked the PSLRA's safe harbor: the Proxy Statement projections were accompanied by "a lengthy and specific disclaimer" that had warned investors not to consider them as predictive of actual future results, and also called the documents "'outdated financial projections.'" *Id*. at 501. The Proxy Statement also identified "a number of relevant factors" that could cause actual results and events to differ materially "'from those expressed or implied by forward-looking statements.'" *Id*. at 502.

Importantly, however, the Third Circuit went beyond Cooper's cautions – just like the Ninth Circuit here – to consider the *additional context comprising historical and present-tense facts* supplementing Cooper's safe-harbor warnings:

> While those warnings could have been more direct, *Cooper included considerable detail regarding the CCT strike, and in so doing supplied sufficient context* to constitute cautionary language with respect to its forecast regarding the strike's outcome. Indeed, immediately before the statement about which OFI complains, the Proxy explained, in detail, that the strike was underway, that CCT's employees were "demanding termination of the merger," that the strike had started and stopped before, and that CCT was then denying Cooper access to the facility and withholding financial information.

Id. (emphasis added). The Third Circuit made it clear that those additional facts were valuable supplements to Cooper's cautionary safe-harbor language: "*Paired with those significant disclosures*, Cooper's warnings cleared the bar for providing the 'meaningful cautionary statements' required by the PSLRA safe harbor provision." *Id*. (emphasis added).

Other circuits in Petitioners' first camp go beyond the plain cautionary words, too, in deciding whether they are truly "'meaningful.'"

For example, the Sixth Circuit explored at length the context in which healthcare provider Vencor attempted to insulate its forward-looking statements about the anticipated effects of the Balanced Budget Act on its fortunes with cautionary language. *See Helwig v. Vencor, Inc.*, 251 F.3d 540 (6th Cir. 2001) (en banc). Although Vencor had already undertaken an internal analysis of the proposed legislation and created an internal memorandum detailing its potential impact (*id.* at 545), it nonetheless publicly claimed it was "'unable to assess the effect on any such legislation on its business.'" *Id.* at 546 (citation omitted). The Sixth Circuit ruled the cautions inadequate – especially as the Budget Act neared enactment: "Vencor's blanket statements concerning pending legislation offered investors no guidance about the consequences of health care reform upon the company's business. These statements were not meaningful and were hardly even cautionary." *Id*. at 559. Additional cautions that disclaimed knowledge about "'whether such proposals will be adopted or if adopted, what effect, if any, such proposals would have on its business'" were deemed by the Sixth Circuit to be "generic disclaimer[s]." *Id*. at 558.

Similarly, the Eighth Circuit in *Rand-Heart of N.Y., Inc. v. Dolan*, 812 F.3d 1172 (8th Cir. 2016) recognized that even admittedly "cautionary" language will not always satisfy the safe harbor: "Even if cautionary, these excerpts are not *meaningfully* cautionary." *Id*. at 1179 (court's emphasis). That was because "they are not 'company-specific warnings based on a realistic description of the risks applicable to the particular circumstances.'" *Id*. (quoting *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 922 (8th Cir. 2015)). Like the Sixth Circuit – and the Ninth Circuit in this case – the Eighth Circuit engaged in a more-searching inquiry of the context in which the cautions were made.

Petitioners compound their circuit-split error by using cherry-picked language from the PSLRA's Conference Report to bolster their premise that, in contrast to other circuits, the Ninth Circuit impermissibly went beyond a caution's plain text in deciding whether it was truly meaningful. Petitioners say that the Third and Eleventh Circuits "have explicitly embraced the PSLRA legislative history stating that '[t]he first prong of the safe harbor'" – *i.e.*, the meaningful-cautions prong – "'requires courts to examine *only the cautionary statement* accompanying the forward-looking statement.'" Pet. at 14-15 (quoting H.R. Conf. Rep. No. 104-369, at 44 (1995), *as reprinted in* 1995 U.S.S.C.A.N. 730) (Petitioners' emphasis).[7] They also round out their first group's membership on the point by insisting that "[t]he Sixth and Eighth Circuits have followed the same basic approach."[8]

Petitioners have an intractable problem in using that quote and those circuits to bolster their supposed circuit split, however: even a cursory glance at *OFI* and the other cases shows that Petitioners have

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[7] Petitioners cite *OFI*, 834 F.3d at 503, as well as *Edward J. Goodman Life Income Tr. v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010) and *Harris v. Ivax Corp.*, 182 F.3d 799, 803 (11th Cir. 1999).

[8] Pet. at 15 (citing *Miller v. Champion Enters. Inc.*, 346 F.3d 660 (6th Cir. 2003); *Julianello*, 791 F.3d 915; *Rand-Heart*, 812 F.3d 1172).

twisted the circuits' citation to the Conference Report's language.

OFI was *not* saying that the Conference Report requires ignoring any surrounding context or additional stated facts accompanying purported cautions; rather, it was stating the truism that the safe harbor's plain text is set up in the disjunctive, and that a speaker's *state of mind* at the time is irrelevant to whether the cautions were meaningful. *See OFI*, 834 F.3d at 503 ("whether Cooper [and its executives] believed that statement to be true at the time is irrelevant, as long as there was sufficient 'meaningful cautionary language'"). *OFI* recognizes that the Sixth Circuit states the same truism (in *Miller*, 346 F.3d at 672), as does the Eleventh Circuit (in *Goodman*, 594 F.3d at 795) – and that the Ninth Circuit does, too (in *In re Cutera Sec. Litig.*, 610 F.3d 1112 (9th Cir. 2010)). *OFI*, 834 F.3d at 502-03. In other words, the decisions simply point out the safe harbor's knowledge-inquiry prong is separate from its meaningful-cautions prong, which deals "only" with the sufficiency of the cautions themselves without regard to state of mind. Petitioners' use of Conference Report language concerning that discrete point to support their *different* premise is, at best, disingenuous.[9]

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[9] Equally questionable is Petitioners' repeated insistence that securities-litigation plaintiffs are required to plead (and later prove) defendants' knowledge that a forward-looking statement was *false* at the time. *See, e.g.*, Pet. at 6 (a projection is shielded from liability if "the defendant has not made the projection 'with actual knowledge" that it is false"); *id*. at 7 (safe harbor's second prong requires showing forward-looking statement was made with actual knowledge "that it was false"). That recital of the safe harbor is only half-accurate, and it misleadingly raises the bar for plaintiffs' pleadings and ultimate proof. The text actually specifies a defendant's actual knowledge "that the statement"

Nothing in the safe harbor's statutory text or legislative history forbids courts from inquiring into the *context* into which the cautions fit; to the contrary, the same Conference Report that Petitioners embrace observes, repeatedly, that meaningful cautions will identify important factors that "could cause" actual results to differ from those projected – including, "for example, information about the issuer's business." H.R. Conf. Rep. No. 104-369, at 43. At the same time, the Conference Report emphasizes both that (i) "boilerplate warnings will not suffice as meaningful cautionary statements," and (ii) a "cautionary statement that misstates historical facts is not covered by the [s]afe harbor." H.R. Conf. Rep. No. 104-369, at 43-44. Plainly, to undertake an analysis of information relating to an issuer's business, or to explore whether a caution is mere "boilerplate," or even comprises a misstatement *itself*, requires courts to venture beyond the stingy, warning-words-only ground urged by Petitioners. *See, e.g.*, *Helwig*, 251 F.3d at 558-59; *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 734-35 (7th Cir. 2004); *OFI*, 834 F.3d at 502.

Petitioners' second grouping of circuit-level decisions – the two they say allow judicial inquiry into

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either "was false *or misleading*." 15 U.S.C. §78u-5(c)(1)(B)(i) (emphasis added). The two terms are different, with Congress expressly separating them by the disjunctive "or"; thus, courts "must interpret the statutory phrase as a whole, giving effect to each word and not interpreting the provision so as to make other provisions meaningless or superfluous." *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005). With that correct reading of the statutory text, it is enough that Petitioners knew at the time that their projections were *either* false or misleading. The Ninth Circuit held as much here: Petitioners "had actual knowledge that their forward-looking statements were false or misleading." App. 34a.

what was *omitted* from a safe-harbor warning – are also congruent with the circuit decisions discussed *supra* (including the Ninth Circuit).

The D.C. Circuit in *Harman* recognized that cautions are not sufficiently meaningful when "they were misleading in light of historical fact" and events that "had already materialized." *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104 (D.C. Cir. 2015); *see id*. at 103 ("The question, then, is whether the Company's statements during the two conference calls were accompanied by warnings specific to the Company and tailored to the specific forward-looking statements, not mere boilerplate, and *consistent with the historical facts* when the statements were made . . . .") (emphasis added). The D.C. Circuit explained that, given certain boilerplate warnings:

> To the extent other statements were tailored to the Company's PND business operations, the purportedly cautionary statements were not meaningful because they *were misleading in light of historical fact*. References to amassed inventory did not convey that inventory was obsolete, as opposed to stocked with the latest, cutting-edge models. Even if viewed as implicitly raising the specter of obsolescence, the statements were insufficient for at least the reason that *they did not warn of actual obsolescence that had already manifested itself*.

Id. at 104 (emphasis added).

The D.C. Circuit's analysis is on all fours with that applied by the Sixth Circuit in *Helwig*, the Third Circuit in *OFI*, and by the Ninth Circuit here. They all sensibly hold that it is important whether the supposed cautions were adequate, or instead omitted or misrepresented material historical facts.

The D.C. Circuit's holding is consistent with Congress's directive that the warnings "must convey substantive information about factors that realistically could cause results to differ materially from those projected in the forward-looking statement . . . such as, for example, information about the issuer's business," and that a warning "that misstates historical facts is not covered by the [s]afe harbor." H.R. Conf. Rep. No. 104-369, at 43-44. And the Circuit's analysis is also consistent with reams of precedents holding that warning of the "possible" effects of an undisclosed event that has already occurred is not cautionary, but *deceitful*. *See, e.g.*, *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981) ("To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit."), *aff'd in relevant part and rev'd in part on other grounds*, 459 U.S. 375 (1983).

The Seventh Circuit's *Asher* opinion, dealing with a medical-products manufacturer, rounds out the universe of circuits that, contrary to Petitioners' suggestion, apply similar reasoning to whether stated cautions are "meaningful." *See Asher*, 377 F.3d 727. Like the other circuit decisions, *Asher* recognizes that "boilerplate" warnings are insufficient; to come within the safe harbor the "cautions must be tailored to the risks that accompany the particular projections." *Id*. at 732. Whether they are in fact "tailored" or "boilerplate" requires the same inquiry and analysis of surrounding facts that the Seventh's sister circuits engage in; the *Asher* court rejected argument that the warnings there *were* boilerplate precisely because the statements, "by contrast, at least included Baxter-specific information and highlighted some parts of the business that might cause problems." *Id.* at 733.

But defendant Baxter was not home-free. The Seventh Circuit observed that Baxter's cautionary language "may fall short" because its warnings did not flag existing risks, or change despite evolving internal risks:

> the problem is that there is no reason (on this record) to conclude that Baxter mentioned those sources of variance that (at the time of the projection) were the principal or important risks. For all we can tell, *the major risks Baxter objectively faced when it made its forecasts were exactly those that, according to the complaint, came to pass, yet the cautionary statement mentioned none of them*. Moreover, *the cautionary language remained fixed even as the risks changed*.

Id. at 734 (emphasis added). When a manufacturing sterility failure occurred prior to some of Baxter's forward-looking statements, "Baxter left both its forecasts and cautions as is." *Id.* Similarly, when Baxter closed two plants that had been "its principal source of low-cost dialysis products" (*id.* at 728-29), its "forecasts and cautions continued without amendment." *Id.* at 734. "This raises the possibility – no greater confidence is possible before discovery – that Baxter omitted important variables from the cautionary language and so made projections more certain than its internal estimates at the time warranted." *Id.* at 734-35.

Petitioners' suggestion that *Asher* is emblematic of the supposed "circuit split [that] pre-dates the Ninth Circuit's decision in this case" (Pet. at 22) is also wrong. Petitioners cite two law review articles for the proposition while quoting *Asher*-critical text from both – insinuating that the commentary evidences the circuit split that they say warrants certiorari here, and that "has been widely acknowledged by courts and commentators alike":

> *See*, *e.g*., . . . Joseph De Simone *et al*., Asher *to* Asher *and Dust to Dust: The Demise of the PSLRA Safe Harbor?*, 1 N.Y.U. J.L. & Bus. 799, 800 (2005) ("It is beyond cavil that the Seventh Circuit's decision in *Asher* diverges from the other recent circuit court cases . . . "); Alfred Wang, Comment, *The Problem of Meaningful Language: Safe Harbor Protection in Securities Class Action Suits after* Asher v. Baxter, 100 Nw. U. L. Rev. 1907, 1928-32, 1936-37 (2006) (noting that Seventh Circuit's approach "is at odds . . . with the precedents in the other circuits").

Pet. at 22.

The fatal error with Petitioners' premise is that the quoted text in both law review articles was not criticizing *Asher*'s consideration of omitted historical facts, but rather *Asher*'s holding *allowing discovery at the pleading stage* in order to conduct a safe-harbor inquiry.[10]

[10] Such discovery, allowed prior to any denial of a motion to dismiss, would appear to run afoul of the PSLRA's automatic discovery stay. 15 U.S.C. §78u-4(b)(3)(B) ("In any private action arising under this title [15 U.S.C. §78a *et seq*.], all discovery and other proceedings shall be stayed during the pendency of any

The New York University piece's authors described *Asher*'s controversial holding thusly – "In Asher, the Seventh Circuit rejected defendants' attempt to rely on the protection of the PSLRA's safe harbor provision on a motion to dismiss prior to discovery" – and summed up the controversy's battling sides:

> Proponents of the Asher opinion contend that the Seventh Circuit properly held that in certain situations, like the one sub judice, discovery is necessary to determine whether courts should invoke the safe harbor provision to dismiss a federal securities claim. Opponents argue that the Asher opinion is a radical shift in safe harbor jurisprudence wherein the court ruled that it is virtually impossible to dismiss a federal securities action prior to discovery.

Joseph De Simone, Matthew D. Ingber & Evan A. Creutz, *Practitioner Note: Asher to Asher and Dust to Dust: The Demise of the PSLRA Safe Harbor?*, 1 N.Y.U. J.L. & Bus. 799, 800 (Summer 2005). That battle is not the one that Petitioners seek to wage against Respondents here via certiorari.

Similarly, just before the "at odds" text in the Northwestern University comment that Petitioners quote, its author specified just what about the *Asher* decision *was* "at odds . . . with the precedents in the other circuits" – namely, that "[b]y *lowering the standard under which plaintiffs can open the door to expensive discovery*, the decision makes it easier for plaintiffs to survive the pleadings stage." Alfred Wang,

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motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

Comment: The Problem of Meaningful Language: Safe Harbor Protection in Securities Class Suits After Asher v. Baxter, 100 Nw. U. L. Rev. 1907, 1936 (Summer 2006) (emphasis added). That may be so, but it is a far cry from the point for which Petitioners cite the text, and for which they seek certiorari.[11]

In sum, Petitioners' attempt to manufacture a circuit "split" collapses under the actual holdings and facts of the various decisions. Certiorari is unwarranted.

B. The Ninth Circuit's Decision Was Correct

Faced with "mixed" misstatements comprising both forward-looking and non-forward-looking reassurances discussing QSI's sales pipeline and financial health – *all* of them false or misleading, material, and made with scienter – the Ninth Circuit zeroed in on the unique amalgam of historical and present-tense statements that Petitioners used to burnish their earnings and revenue-growth projections:

> In both the conference calls and at the [in-person healthcare] conferences, Defendants *repeatedly told investors that they could rely on predictions* of growth in revenue and earnings *because the current state* of QSI's sales pipeline was consistent with, or better than, the state of the pipeline in previous quarters. The cautionary language used by Defendants *failed to correct* these materially false or misleading non-forward-looking statements.

App. 31a (emphasis added). Simply put, that cautionary language was inadequate; it failed to identify

[11] Petitioners also omit that, despite *Asher*'s supposed outlier status, this Court denied defendants' certiorari petition. *Baxter Int'l Inc. v. Asher*, 544 U.S. 920 (2005).

"'important factors that could cause actual results to differ materially from those in the forward-looking statement[s].'" *Id.* (quoting 15 U.S.C. §78u-5(c)(1)(A)(i)). It failed to "accurately convey appropriate, meaningful information about not only the forward-looking statement[s] but also the non-forward-looking statement[s]" supporting them. App. 31a.

The court's conclusion was correct, for at least three reasons.

First, it is beyond cavil that purported cautions cannot be meaningful if the risks they warn of *have already materialized*. *Harman*, 791 F.3d at 103 ("[T]here is an important difference between warning that something '*might*' occur and that something '*actually* had' occurred.") (emphasis in original) (citation omitted); *see id.* at 102 ("cautionary language cannot be 'meaningful' if it is 'misleading in light of historical fact[s]'") (quoting *Slayton v. Am. Express Co.*, 604 F.3d 758, 770 (2d Cir. 2010)); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 986 (9th Cir. 2008) ("[n]othing alerts the reader that some of these risks may already have come to fruition"); *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004) ("Cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired."); *Huddleston*, 640 F.2d at 544 ("To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.").[12]

[12] Congress recognized this well-settled rule, explaining that a cautionary statement "that misstates historical facts is not covered by the [s]afe harbor." H.R. Conf. Rep. No. 104-369, at 44.

Here, Petitioners failed to acknowledge: (i) the *existing*, pronounced saturation in the market for QSI's products that had begun back in early 2011, forcing QSI to compete for lower-cost deals; (ii) that QSI's business slowdown had definitively commenced by April 2011; (iii) there already existed a severe decline in new "greenfield" sales, with QSI primarily making less-lucrative "replacement" sales; and (iv) QSI already was missing sales targets by up to 50%.[13]

Second, cautions cannot be "meaningful" if they merely repeat themselves, reporting period after reporting period, without taking into account material changes to the business that belie the executives' false and misleading positive promotions. *Slayton*, 604 F.3d at 772-73 (that cautions were actually non-protective boilerplate "is bolstered by the fact that the defendants' cautionary language remained the same even while the problem changed"); *Helwig*, 251 F.3d at 559 (Sixth Circuit notes that "[s]ubstantially similar" cautions repeated in company's SEC filings over period of time "were not meaningful and were hardly even cautionary"); *Asher*, 377 F.3d at 734-35 (decrying fact that "cautionary language remained fixed even as the risks changed").

[13] Alleging that the "warned"-of future risks already existed is not the same as emphasizing that the QSI Defendants *knew* of that undisclosed existence; that would be a separate allegation going to scienter. The Ninth Circuit holds that the PSLRA's safe harbor contains separate "cautions" and "knowledge" prongs, and that even successful allegations of a defendant's mental state are not enough to block safe-harbor access if the accompanying cautions suffice. *See Cutera*, 610 F.3d at 1112-13. The Ninth Circuit panel here reaffirmed that dual-prong awareness while citing *Cutera*. App. 15a.

Here, Petitioners repeated the *same* warnings, quarter over quarter, in attempting to broadly insulate their public statements. For instance, in a document affixed to their motion to dismiss, Petitioners explained that they cautioned investors that individual sales of their "large and expensive" systems could represent a significant portion of QSI's revenue, and that the loss/deferral of even one such sale could adversely affect their quarterly revenue and profitability. CD29-1/Appdx. B:794.[14] Yet by Petitioners' admission, that same warning reappeared verbatim in *10 different SEC filings* from May 27, 2011 through July 23, 2012 (*see id.*) – even though a slew of former QSI employees and executives corroborates that the company's sales had begun deteriorating prior to that time. Moreover, even as they repeated those cautions to investors in June-July 2012, other SEC filings later showed that in the fiscal quarter ending June 30, 2012, QSI's earnings *had already declined by 19%*. ER76:¶108. And yet Petitioners continued to claim through July that QSI still expected to grow earnings-per-share 20%-25% for the fiscal year! *Id*. "[M]ere boilerplate . . . does not meet the [safe harbor] statutory standard." *Harman*, 791 F.3d at 102.

Third, one cannot turn a blind eye to what is already happening inside a company when deciding if its published warnings are sufficiently "meaningful." *Harman*, 791 F.3d at 102-03 ("If a company were to warn of the potential deterioration of one line of its business, when in fact it was established that that line of business had already deteriorated, then . . . its cautionary language would be inadequate to meet the safe harbor standard."); *Slayton*, 604 F.3d at 770 ("We

[14] Citations to "CD__" denote the district court's Clerk's Docket.

agree with the SEC and the parties that cautionary language that is misleading in light of historical fact cannot be meaningful . . . ."). Congress agrees: the safe harbor's "cautionary statements must convey substantive information about factors that realistically could cause results to differ materially from those projected in the forward-looking statement, such as, for example, information about the issuer's business." H.R. Conf. Rep. No. 104-369, at 43.

At bottom, Congress never intended for misstated historical facts to receive safe harbor protection; to the contrary, it specifically singled them out as *un*protected. H.R. Conf. Rep. No. 104-369, at 44 (a cautionary statement "that misstates historical facts is not covered by the [s]afe harbor"). The Ninth Circuit's ruling on Petitioners' misleading cautions is perfectly congruent with Congress's stated intent.

C. Petitioners' Baseless Fears Do Not Justify Certiorari

Beyond Petitioners' baseless suggestion that the Ninth Circuit's decision demarcates a circuit split, and the fact that the court's conclusion was a routine and correct application of statutory law, Petitioners distort the Ninth Circuit's ruling to conjure a parade of purported horribles for future litigants.

Petitioners cast the ruling in rigid, unbending terms, asserting that the Ninth Circuit now requires securities-fraud defendants to "categorically . . . admit the alleged falsity of *non*-forward-looking statements." Pet. at 3 (emphasis in original); *see also id*. at 18 (arguing that Ninth Circuit holds that the safe harbor protects mixed forward-looking statements "only if the defendant's cautionary language *specifically admits* that the non-forward-looking statement is false or misleading”) (emphasis added); *id*. at 21 (criticizing court’s purportedly “rigid and categorical rule”); *id*. at 3 (insisting that “[s]pecifically, the court held that” safe harbor not satisfied in mixed-statement context “unless the company *actually admits the falsity* of the non-forward-looking statement”) (emphasis added).

But those assertions misstate the Ninth Circuit’s ruling, and are belied by the opinion’s straightforward language. Rather than requiring defendants to “specifically admit[]” or “actually admit[]” to a non-forward-looking statement’s outright falsity in order to shelter in the safe harbor in all cases (Pet. at 3, 18), the court based its ruling on the particularly tight link in this case between Petitioners’ misrepresentations of present fact and forward-looking misrepresentations. App. 31a (“Defendants repeatedly told investors that they could rely on predictions of growth in revenue and earnings because the current state of QSI’s sales pipeline was consistent with, or better than, the state of the pipeline in previous quarters.”). Indeed, the Ninth Circuit specifically disclaimed making a ruling as broad as Petitioners contend, emphasizing that the particular alleged facts compelled one conclusion *in this case*: “We need not delve deeply into what might, in other cases, constitute adequate cautionary language for mixed statements, *for the answer is clear in the case now before us*.” *Id*. (emphasis added).

Likewise, Petitioners’ fears of forum shopping by future litigants wielding the Ninth Circuit’s holding (Pet. at 24) are misguided. While a securities-fraud suit may be brought in any federal district court where “the defendant is found or is an inhabitant or transacts business” (15 U.S.C. §78aa(a)), there are obvious reasons why plaintiffs have not flocked to purportedly “friendlier” venues despite arguable pleading differences.

First, the "well-established doctrine" of *forum non conveniens*, subsumed in the statutory change-of-venue provision in 28 U.S.C. §1404, "is available to defendants who believe the plaintiff's initial choice of forum poses substantial burdens on them." James D. Cox, Randall S. Thomas, Lynn Bai, *The Continuing Evolution of Securities Class Actions Symposium: Do Differences In Pleading Standards Causes Forum Shopping in Securities Class Actions?: Doctrinal & Empirical Analyses*, 2009 Wis. L. Rev. 421, 428 (2009). A motion to transfer is a tool well-known to defendants in securities actions, and securities plaintiffs understand this. Second, when multiple class-action securities complaints are filed both within and without a corporate defendant's home district, "the multi-district-litigation (MDL) panel can address opportunism via its authority to transfer" the cases to "'any district for coordinated or consolidated pretrial proceedings.'" *Id.* at 429 (quoting 28 U.S.C. §1407(a)).

Given these considerations, plaintiffs file suit where defendant corporations have their principal place of business. One empirical study conducted by three respected legal scholars found that, despite variations in the circuits relating to the PSLRA's strong-inference-of-scienter standard some 14 years after that statute's passage, fully 85% of the securities-fraud class actions in their sample nonetheless were "filed in the home circuit of the defendant corporation." *Id.*[15]

[15] In the remaining cases filed outside the defendants' home jurisdiction, "our analysis shows that differences in pleading standards do not explain a statistically significant amount of the reason for that decision." *Id*.

Thus, whatever the potential attractions of filing securities lawsuits in (reputedly) friendly venues, observers conclude there is a "consistent[]" view among plaintiffs' counsel: "it is impractical for them to engage in forum shopping due to the strong likelihood that their choice of venue" removed from a defendant's principal place of business "will be immediately followed by a successful (not to mention expensive and time consuming) defendant's motion to relocate the suit." *Id*. at 428-29. In sum, the "data supports the conclusion that differences across pleading requirements do not support significant forum shopping." *Id*. at 451.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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