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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The most striking feature of respondents' opposition is the length to which it runs away from the Ninth Circuit's actual holding in this case.

As the petition explains, the Ninth Circuit held that when a forward-looking projection is accompanied by an allegedly false or misleading non-forward-looking statement, "no cautionary language—short of an outright admission of the false or misleading nature of the non-forward-looking statement—w[ill] be 'sufficiently meaningful' to qualify the statement for the [PSLRA's] safe harbor." Pet. App. 27a-28a. That holding diverges from every other court to have interpreted the safe harbor; it has no support in the PSLRA's text or history; and it completely undermines Congress's purpose in enacting the safe harbor's first prong. If left on the books, the Ninth Circuit's decision will inflict significant harm on American businesses, as QSI's amici have confirmed. *See* Securities Industry and Financial Markets Association and Chamber of Commerce of the U.S. (SIFMA/Chamber) Amicus Br. 11-19.

Knowing all this, respondents do not even try to defend what the Ninth Circuit actually held. Instead, they characterize the Ninth Circuit's decision as requiring nothing more than a context-dependent, fact-specific inquiry into the circumstances of each particular case. All of their arguments against certiorari depend on fundamentally mischaracterizing the holding in this way. But once that façade is stripped away, it is clear that respondents have offered no reason for this Court to allow the Ninth Circuit's indefensible

(and undefended) misinterpretation of the PSLRA to stand. The petition should be granted.

A. The Ninth Circuit Adopted A Categorical Admission-Of-Falsity Requirement

1. Try as respondents might to disguise it, the Ninth Circuit itself left no mistake as to its holding. That court rested its decision on a new and categorical rule that applies whenever a defendant makes a forward-looking projection accompanied by statements of current or historical fact. Pet. App. 27a. In those circumstances,

> If the non-forward-looking statement is materially false or misleading, it is likely that *no cautionary language—short of an outright admission of the false or misleading nature of the non-forward-looking statement—would be 'sufficiently meaningful'* to qualify the [forward-looking] statement for the safe harbor.

Id. at 27a-28a (emphasis added).

The Ninth Circuit reiterated this admission-of-falsity rule several pages later:

> For cautionary language accompanying a forward-looking portion of a mixed statement to be adequate under the PSLRA, that language must accurately convey appropriate, meaningful information about not only the forward-looking statement but also the non-forward-looking statement. *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.*

Id. at 31a (emphasis added).

Having twice announced a general admission-of-falsity rule, the Ninth Circuit then applied that rule to this case. After noting respondents' allegation that QSI had made false statements about its past and current sales pipeline, it relied on QSI's failure to admit the falsity of those statements as the only reason to deny safe-harbor protection to QSI's forward-looking projections:

> The cautionary language used by [QSI] failed to correct these materially false or misleading non-forward-looking statements. We need not delve into what might, in other cases, constitute adequate cautionary language for mixed statements, for the answer is clear in the case before us. *Because [QSI] made materially false or misleading non-forward-looking statements about the state of QSI's sales pipeline, virtually no cautionary language short of an outright admission that the non-forward-looking statements were materially false or misleading would have been adequate.* No such cautionary language was provided.

Id. at 31a-32a (emphasis added).

2. In response, respondents declare that the Ninth Circuit held that "[t]he adequacy of cautionary

language [under the PSLRA's first prong] is a fact-specific inquiry that will differ from case to case." BIO 14. They likewise assert that the court's decision rested only on the particular circumstances of this case. *See id.* at 14, 27, 32. That is fiction invented to avoid this Court's review.

Respondents ignore or mischaracterize the Ninth Circuit's language—block-quoted and italicized above—announcing and applying a general rule requiring defendants to admit the falsity of any false or misleading non-forward-looking statement in order to obtain protection for their forward-looking statements. Nothing in the Ninth Circuit's opinion describes the relevant test as fact- or case-specific. Nor does the opinion emphasize anything unique or special about QSI's non-forward-looking statements (other than their alleged falsity) when relying on them to deny safe-harbor protection.

And that explains why plaintiffs in the Ninth Circuit have started regularly citing the admission-of-falsity rule adopted below as a reason to deny safe-harbor protection to forward-looking statements—completely belying respondents' attempt to sugarcoat the Ninth Circuit's new rule.[1] No wonder amici representing American businesses are so concerned about the Ninth Circuit's decision.

3. To support their reading, respondents point out that the Ninth Circuit mentioned that QSI

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[1] *See, e.g.*, Pl.'s Opp. Mot. Dismiss 15, *Deason v. Super Micro Computer, Inc.*, 2018 WL 1466516 (N.D. Cal. Feb. 16, 2018), ECF No. 58; Pls.' Opp. Mot. Dismiss 15, *In re Sunpower Corp. Sec. Litig.*, 2018 WL 1044146 (N.D. Cal. Jan. 26, 2018), ECF No. 90; Pls.' Mem. Opp. Mot. Dismiss 17, *Rodriguez v. Gigamon Inc.*, 2017 WL 7793156, (N.D. Cal. Dec. 21, 2017), ECF No. 59.

"repeatedly told investors that they could rely on predictions of growth in revenue and earnings" because they were "consistent with, or better than" the state of that pipeline in prior quarters. BIO 12, 27, 32 (emphasis omitted). But the Ninth Circuit noted those statements only in the course of applying its admission-of-falsity rule to the facts of this case. Indeed, the quoted allegation immediately followed a sentence in which the Ninth Circuit expressly reiterated the admission-of-falsity requirement. Pet. App. 31a.

Respondents also emphasize the Ninth Circuit's statement that "[w]e 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 before us." BIO 14, 32 (quoting Pet. App. 31a). But that offers no support for respondents' interpretation: QSI has not argued that the Ninth Circuit's admission-of-falsity rule applies to *all* "mixed statements." Rather, that rule applies only to the subset of mixed statements in which the non-forward-looking statement is false or misleading. And the sentence immediately following respondents' quoted language applied that rule to the facts here. Pet. App. 31a-32a; *see supra* at 3.

Respondents' effort to mischaracterize the Ninth Circuit's opinion—and to ignore its admission-of-falsity requirement—cannot withstand scrutiny. As explained below, that mischaracterization infects every aspect of their response to the petition.[2]

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[2] Respondents also mischaracterize QSI's petition. Respondents' re-formulated question presented (BIO ii) implies that QSI seeks protection for its *non*-forward-looking statements. But QSI only seeks review of the legal standard

B. The Circuit Split Is Real

Respondents do not deny that if QSI's interpretation of the Ninth Circuit's rule is correct, that rule is a complete outlier among the circuits. *See* Pet. 13-24; SIFMA/Chamber Amicus Br. 8-11; Washington Legal Foundation Amicus Br. 10-15. Instead, they claim that no conflict exists by once again pretending that the Ninth Circuit simply applies a fact-specific, case-by-case test.

1. As QSI has explained, the Third, Sixth, Eighth, and Eleventh Circuits follow the PSLRA's text and apply the safe harbor by looking at a defendant's actual cautionary statements and determining whether *those statements* identify "important factors that could cause actual results to differ materially" from the defendant's forward-looking projections. 15 U.S.C. § 78u-5(c)(1)(A)(i); *see* Pet. 14-15, 18-20. Unlike the Ninth Circuit, those circuits do not deny safe harbor protection simply because a defendant has *omitted* a particular warning.

Respondents argue that those courts "consider the context in which the purported cautions are made, and consider whether existing and/or historical facts support or detract from those cautions." BIO 15. In support, they cite a handful of cases purportedly demonstrating that those courts' interpretation of the safe harbor is the same as the Ninth Circuit's. *Id.* at 15-19. But respondents are

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for determining whether—in a "mixed" statement context—the safe harbor protects the *forward*-looking statement. For that reason, respondents' discussion of the Ninth Circuit's holding that *non*-forward-looking statements are unprotected by the safe harbor (BIO i-ii, 10-11) is beside the point.

attacking a straw man: No one denies that the Third, Sixth, Eighth, and Eleventh Circuits all properly consider "context" when assessing whether a defendant's cautionary language is sufficiently meaningful in identifying "important factors" that might cause their forward-looking projections not to come true. *See* Pet. 14-15, 25-26. The three decisions that respondents cite all do so—correctly—by considering the defendant's actual statements and determining whether those statements provide appropriate warnings.[3] Yet none of those decisions states or implies that safe-harbor protection should be denied when the defendant warns about *some* "important factors" yet omits mention of *other* factors that might also qualify as important. And none comes close to embracing the Ninth Circuit's admission-of-falsity requirement.

In denying the circuit conflict, respondents completely ignore the Third Circuit's decision in *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242 (3d Cir. 2009), which QSI highlighted in the petition (at 19-20). In *Avaya*, the court granted safe-harbor protection to the defendant's forward-looking statements even though the plaintiff had sufficiently alleged that those statements were accompanied by false or misleading *non*-forward-looking statements. *Id.* at 258, 266-67. This case presents the exact same scenario as *Avaya*, yet the Ninth Circuit reached

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[3] *See OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 501-02 (3d Cir. 2016); *Rand-Heart of N.Y., Inc. v. Dolan*, 812 F.3d 1172, 1179 (8th Cir. 2016); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 558-59 (6th Cir. 2001), *cert. dismissed*, 536 U.S. 935 (2002).

precisely the opposite result. Respondents do not even try to explain how these results are consistent.

2. Respondents also implausibly deny that the Ninth Circuit's decision departs from the approach taken by the Seventh and D.C. Circuits. BIO 22-27. Like the Ninth Circuit, the Seventh and D.C. Circuits misapply the PSLRA by looking to whether the defendant has *omitted* certain "important factors" undermining its projections, instead of following the text and addressing whether the company has affirmatively *identified* such factors. *See* Pet. 16-17, 20-21. But neither embraces the Ninth Circuit's extreme approach of requiring a defendant to admit the falsity of any allegedly false or misleading non-forward-looking statement.

Respondents' attempt to deny that the Seventh Circuit's approach creates a conflict is especially bizarre. The Second Circuit has expressly acknowledged that conflict, as have various commentators. *See Slayton v. American Express Co.*, 604 F.3d 758, 771 & nn.7-8 (2d Cir. 2010); Pet. 22 (citing law review articles). Respondents argue that the conflict actually turns on a different issue—whether discovery is necessary to properly resolve the safe-harbor issue at the pleading stage. But they fail to recognize that the *reason* the Seventh Circuit believes discovery is necessary is to enable the court to evaluate whether the defendant's cautionary language "omit[s] important variables from the cautionary language." *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 734 (7th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005). That implicates QSI's core point, which is that the Seventh and Ninth Circuits are wrong in focusing on what the cautionary language *omits*, instead of on what it *contains*. *See* Pet. 16, 20-21.

3. Given respondents' failure to meaningfully address the conflict, it is little surprise that respondents just ignore QSI's defense-contractor hypothetical showing how the circuit split produces different results as applied to the same facts. Pet. 22-24. If QSI's alleged split were illusory (as respondents assert), they could surely explain how the courts of appeals would agree on how the contractor's projections would be treated under the safe harbor. Respondents' failure to even attempt such an explanation speaks volumes.

C. The Ninth Circuit's Interpretation Of The Safe Harbor Is Flagrantly Wrong

Respondents' failure to account for the Ninth Circuit's actual holding is especially glaring in the merits section of their opposition. BIO 27-31. That section does not mention—let alone defend—the Ninth Circuit's actual reasoning. Instead, it manufactures a series of unpersuasive rationales for the court's bottom-line result—each of which the Ninth Circuit itself rejected below.

1. Respondents' principal alternative argument is that "purported cautions cannot be meaningful if the risks they warn of have already materialized." BIO 28, 30-31 (emphasis omitted). But that argument is totally disconnected from the Ninth Circuit's reasoning, which rested entirely on its admission-of-falsity rule.

If applicable here, respondents' argument would mean that *none* of QSI's forward-looking statements are protected by the safe harbor. But even the Ninth Circuit rejected that result when it granted such protection to the projections QSI made on January 9 and May 14, 2012. Pet. App. 32a-33a. It did so

because those projections—unlike all of the other forward-looking statements at issue in this case—were *not* accompanied by allegedly false or misleading *non*-forward-looking statements. Pet. App. 31a-32a, 33a.

Respondents' risks-had-already-materialized argument is also unpersuasive on the facts. This reply brief is not the place to comprehensively rebut that argument, but three points bear mention. First, respondents' brief contains no citation to (or analysis of) QSI's actual cautionary language. Even a cursory look at that language confirms that it warned about risks that had *not* materialized. *See id.* at 47a-48a, 63a-65a. Second, respondents' argument hinges on its assertion that "QSI's business slowdown had definitively commenced by April 2011," when in fact the record shows QSI achieved record results for the first three quarters of the 2012 fiscal year. *See* BIO 29; C.A. SER070, SER113, SER156. And third, respondents made the exact same argument to the Ninth Circuit, but that court rejected it. Pet. App. 32a-33a (granting safe-harbor protection to QSI's January 9 and May 14, 2012 projections); Resp'ts C.A. Br. 57-58. It was entirely right to do so.

2. Next, respondents purport to defend the Ninth Circuit's result by arguing that "cautions cannot be 'meaningful' if they merely repeat themselves" over time. BIO 29. But that argument is also completely disconnected from anything in the Ninth Circuit's actual decision or rationale, and respondents do not even try to pretend otherwise. Indeed, the Ninth Circuit itself rejected this argument as a basis for denying safe-harbor protection to all of QSI's projections. Pet. App. 33a; *see* Resp'ts C.A. Br. 58-60.

3. Respondents ultimately fall back on a generalized assertion that "Congress never intended for misstated historical facts to receive safe harbor protection; to the contrary, it specifically singled them out as *un*protected." BIO 31. But once again, that assertion is irrelevant to the actual question presented. As QSI has made clear—and as respondents themselves elsewhere acknowledge—QSI is seeking safe harbor protection *only* for its forward-looking statements. Pet. 2, 32-33; BIO 10 n.5; *see supra* at note 2.

4. Of course, there is a reason respondents do not even try to defend the Ninth Circuit's admission-of-falsity rule in their 34-page opposition. That rule finds no support in the PSLRA's text and, quite the opposite, squarely conflicts with its express statement that safe-harbor protection is warranted whenever the defendant's cautionary language identifies "important factors" that could undermine its projections. 15 U.S.C. § 78u-5(c)(1)(A)(i). The admission-of-falsity rule also contradicts the unambiguous Conference Report clarifying that the statutory text does *not* require the defendant to identify "all" important factors, as well as its direction that courts should consider "*only* the cautionary statement accompanying the [projection]." H.R. Rep. No. 104-369, at 44 (1995) (Conf. Rep.).[4]

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[4] Respondents challenge QSI's reliance on this legislative history (BIO 19-20), but the relevant language of the Conference Report speaks for itself, and the petition (at 14-15, 26) straightforwardly presented the context in which that language appeared.

D. The Question Presented Is Important And Should Be Resolved In This Case

There can be no serious doubt that the question presented is extraordinarily important for American businesses and markets. Corporations almost always pair their forward-looking projections with discussions of current or historical fact, and plaintiffs will therefore virtually always be able to assert that safe-harbor protection is unwarranted because (1) some aspect of the non-forward-looking statements was false or misleading, and (2) the company failed to expressly admit as much.

The Ninth Circuit's admission-of-falsity rule threatens to make it impossible for defendants to rely on the safe harbor in practice. The result will be more frivolous lawsuits, more unjust settlements, and fewer public disclosures by companies who decide the risks just aren't worth it—just what Congress wanted the PSLRA to *prevent*. Pet. 30-32; SIFMA/Chamber Amicus Br. 4, 11-18. Moreover, the Ninth Circuit's decision deepens the existing circuit split and thus injects additional confusion into an already-muddled area of law. As QSI's amici and the Second Circuit have all emphasized, further clarification of how the safe harbor applies is essential. *See Slayton*, 604 F.3d at 772; SIFMA/Chamber Amicus Br. 3-4, 14, 17-19; WLF Amicus Br. 5-6, 13-15.

In response, respondents suggest that this case is not especially significant because plaintiffs are unlikely to forum shop their way into the Ninth Circuit. BIO 32-34. That argument is almost laughable. It ignores not only the persistence of the plaintiffs' bar, but also the generous venue provisions governing securities cases. *See* 15 U.S.C.

§ 78aa(a) (allowing suit to be filed in any district "wherein the defendant is found or is an inhabitant or transacts business"). In any event, respondents' own cited authority shows that more than 25% of all securities class actions filed between 1993 and 2006 were brought within the Ninth Circuit. James D. Cox et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 Wis. L. Rev. 421, 441 (2009). Of course, the plaintiffs' bar will head there.

Finally, respondents do not dispute that this case is an ideal vehicle for resolving the question presented. Pet. 32-33. The Court should seize this opportunity to overturn the Ninth Circuit's misguided admission-of-falsity rule and provide needed guidance on the safe harbor, here and now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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