No. _____

In the Supreme Court of the United States

JOSEPH P. HAGAN, *et al.*,
Petitioners,
v.

KARIM KHOJA, on behalf of himself
and all others similarly situated,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Courts of Appeals are currently split on whether the federal securities laws impose a duty on corporate issuers to update a statement that was accurate when made but later became misleading because of subsequent events. The Seventh Circuit rejects any duty to update. Five circuits (First, Second, Third, Fifth, and Eleventh) recognize that a duty to update may exist in certain narrow circumstances, but do not require an issuer to update a statement of historical fact that was accurate when made. In its decision below, the Ninth Circuit creates a duty to update an accurate statement of historical fact when the "value" or "weight" of that statement has been "diminished" by subsequent events. *See* S. Ct. Rule 10(a).

The question presented is:

Whether the Court should resolve the current circuit split regarding a corporate issuer's duty to update under Securities and Exchange Commission Rule 10b-5(b) and find that the Ninth Circuit erred by imposing such a duty to a statement of historical fact that was accurate when made, where the "value" or "weight" of that prior statement was later "diminished" by subsequent events.

PARTIES TO PROCEEDING

Defendants-appellees in the court of appeals, who are petitioners here, are Joseph P. Hagan, Michael A. Narachi, and Preston Klassen. Orexigen Therapeutics, Inc., is not a party to these proceedings. After oral argument at the Ninth Circuit, Orexigen filed a petition for Chapter 11 bankruptcy. Pursuant to the automatic stay provision under 11 U.S.C. § 362(a), the Ninth Circuit's decision was, therefore, limited to the Petitioners here.

Plaintiff-appellant in the court of appeals, who is respondent here, is Karim Khoja, who was appointed lead plaintiff in this securities class action and purportedly represents a class of shareholders of Orexigen.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Hagan, Narachi, and Klassen respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 899 F.3d 988. (App. 1-63.) The district court's opinion is reported at 189 F. Supp. 3d 998. (App. 64-115.)

JURISDICTION

The Ninth Circuit entered its judgment on August 13, 2018. It denied Petitioners' timely filed petition for rehearing and rehearing en banc on November 2, 2018. (App. 118-19.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission ("SEC") Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5(b), which provide in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

INTRODUCTION

To date, this Court has imposed liability under Section 10(b) of the Exchange Act and SEC Rule 10b–5, promulgated thereunder, for a failure to comply with an affirmative duty to disclose information to the investing public in only *two* situations. First, when a corporate insider possesses material nonpublic information, the insider must disclose the information or abstain from trading in the company's shares. *See Dirks v. SEC*, 463 U.S. 646, 654 (1983); *Chiarella v. United States*, 445 U.S. 222, 230 (1980). Second, under the plain terms of Rule 10b-5, when a corporate issuer voluntarily speaks, it has a duty to disclose "material fact[s] necessary in order to make . . . statements made, in the light of the circumstances under which they are made, not misleading." 17 C.F.R. § 240.10b–5(b). This Court has held that there is no "affirmative duty to disclose any and all material information" and that "[e]ven with respect to information that a reasonable investor might consider material, companies can control what they have to disclose . . . by controlling what they say to the market." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44-45 (2011).

But the latter rule begs the question: when, if ever, does an issuer have an affirmative duty to update a statement that was accurate when made, but became misleading as a result of subsequent events. Neither Congress nor this Court has expressly answered this question, which has been described as "the most controversial 'duty' doctrine under Rule 10b-5." Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose* Under Rule 10b-5, 57 Vanderbilt L.R. 1639, 1664 (2004).

Without clarity from Congress or this Court, responsibility for answering this recurring question under the federal securities laws has been left to the Courts of Appeals. But those courts are divided on the question.

The Seventh Circuit has rejected any duty to update. It reasons that a duty to update cannot be reconciled with the plain terms of Rule 10b-5(b) which prohibits statements that are false or misleading "in the light of the circumstances *under which they were made*." Further, the Seventh Circuit has concluded that such a duty would be inconsistent with two core tenets of the federal securities laws: namely, that disclosures should be viewed *ex ante*, not *post hoc*, and that there is no general duty to disclose all material information.

Five circuits (the First, Second, Third, Fifth, and Eleventh), in contrast, have held that a duty to update may exist under two circumstances: first, where the prior statement was forward-looking such that it remained "alive" in the mind of a reasonable investor; and, second, where the prior statement relates to a "fundamental change" to the issuer, such as a merger, liquidation, or takeover attempt. If either situation exists, an issuer *may* have a duty to update a prior statement that was accurate when made. However, there is general agreement among these circuits that an issuer does not owe an affirmative duty to update an accurate statement of historical fact.

The Fourth, Sixth, and Tenth Circuits—along with the Ninth Circuit before its decision below—have, on occasion, considered whether to recognize a duty to

update and expressly refused to either recognize or reject such a duty.

In its decision below, the Ninth Circuit concluded that a corporate issuer has a duty to update an accurate statement of historical fact where the "value" or "weight" of that prior statement was later "diminished" by subsequent events. The Ninth Circuit is now a clear outlier in a deep circuit split.

Compounding its error, the Ninth Circuit provides no guidance on how to comply with its decision. What does it mean for the "value" or "weight" of a prior statement to be "diminished" by subsequent events? How is that determined? Must the diminishment be material? When does the duty attach? With the current periodic reporting regime mandated by the SEC, what information must be disclosed, and when, to satisfy one's duty to update? The Ninth Circuit answers *none* of these questions. Its decision is, thus, bound to (i) create significant confusion and uncertainty for corporate issuers who will be faced potentially daily with the question of whether and when to update previously accurate statements, (ii) encourage opportunistic forum shopping by plaintiffs' lawyers seeking to capitalize on the undefined playing field created by the Ninth Circuit, and (iii) inevitably lead to inconsistent results—both in, and outside, the Ninth Circuit—under what should be *uniform* federal securities laws.

This Court should intervene to resolve a clear circuit split on an important question of federal securities law and to protect corporate issuers who, as a result of the Ninth Circuit's decision, will be particularly susceptible to the abuses that the Private

Securities Litigation Reform Act of 1995 ("PSLRA") was designed to curb: "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007).

STATEMENT OF THE CASE

I. Factual Background

Orexigen is a now-bankrupt biopharmaceutical company that developed a drug, called Contrave, to treat obesity. (App. 5 & n.1.) Because Contrave was designed to treat severely obese people already at risk for major adverse cardiac events ("MACE"), the Federal Drug Administration ("FDA") required Orexigen to conduct a novel cardiovascular outcomes trial, known as the Light Study, to study the heart-related safety of the drug before it could be marketed to the public. (App. 5-6.) Under the Light Study, once 25 percent of a pre-determined number of MACE occurred, an interim analysis would assess if patients receiving Contrave were more likely to suffer MACE than patients receiving a placebo (the "25% Interim Analysis"). (App. 6.) Pursuant to an agreement reached by Orexigen and the FDA, if the 25% Interim Analysis was successful (*i.e.,* if patients receiving Contrave experienced less than a doubling of MACE compared to patients receiving the placebo), Orexigen could re-submit its previously denied New Drug Application ("NDA") to the FDA for its further consideration.

In November 2013, Orexigen learned the 25% Interim Analysis data. The data satisfied the FDA's

threshold for resubmission of the NDA as it showed that Contrave did not "increase the risk of MACE." (App. 6.) But the data was also (unexpectedly) more positive: 35 of the 4,455 patients on Contrave experienced MACE, compared to 59 of the 4,450 patients on placebo. (App. 67, 122-23 [Compl. ¶¶87-88].)

Eight months later, in July 2014, Orexigen filed a new patent application with the United States Patent and Trademark Office ("PTO") for Contrave based on the potential cardiovascular benefit observed in the 25% Interim Analysis data (the "Patent Application"). (App. 7.) The Patent Application included the 25% Interim Analysis data. (App. 7.) In February 2015, the PTO informed Orexigen that it would issue a patent in response to the Patent Application on March 3, 2015. (App. 8.)

On March 3, 2015, the PTO publicly published the patent, which included the 25% Interim Analysis data. (App. 8.) That same day, Orexigen disclosed, via a Form 8-K, the issuance of the patent which the Company stated "contain[ed] claims related to a positive effect of Contrave on [cardiovascular] outcomes." (App. 122 [Compl. ¶87].) As support, the Form 8-K included the 25% Interim Analysis data (reflected in two tables and a graph) showing that 59 patients receiving the placebo had experienced MACE compared to 35 patients receiving Contrave. (App. 123 [Compl. ¶88].) The Form 8-K further explained that the 25% Interim Analysis was an "early and preliminary assessment" of Contrave's effect on cardiovascular risk, and cautioned that "[a] larger number of [cardiovascular events] are required to

precisely determine the effect of Contrave on [cardiovascular] outcomes." (App. 71-72; App. 123 [Compl. ¶87].)

Approximately three weeks later, the chair of the Light Study's Executive Steering Committee, Dr. Steven Nissen, allegedly informed Orexigen that data at the Light Study's 50% mark showed Contrave had no heart benefit. (App. 9.)

On May 8, 2015, Orexigen issued a press release on Form 8-K reporting its financial results for the first quarter of 2015. (App. 10.) The Form 8-K did not mention either the 25% or 50% interim analyses or their results. (App. 52.)

Four days later, on May 12, 2015, Dr. Nissen publicly disclosed that the 50% interim analysis data did not show a heart benefit for Contrave. (App. 12.)

II. Procedural Background

On August 20, 2015, Plaintiff filed the Complaint primarily asserting claims that Defendants violated Rule 10b-5(b) by allegedly issuing false and/or misleading statements on March 3 and May 8, 2015. (App. 12-13, 121-37 [Compl. ¶¶87–112].)

The Complaint alleges that Orexigen's March 3, 2015 Form 8-K failed to disclose the FDA's alleged concerns about the reliability of the 25% Interim Analysis data upon which the patent was based. (App. 121-23, 125 [Compl. ¶¶87-88, 92].) The Complaint does not (nor could it) allege that it was inaccurate for the Form 8-K to state that the patent "contain[ed] claims related to a positive effect of Contrave on [cardiovascular] outcomes" or that any of the 25%

Interim Analysis data depicted in the two tables and graph in the Form 8-K were false. (*See* App. 39-40; *see also* App. 6-7 ("Rather than increase the risk of MACE, 'Contrave reduced cardiovascular events by 41 [percent] compared with a placebo.'"), 67, 95-96.) The Complaint further alleges that Defendants' May 2015 Form 8-K was misleading, in part, because Defendants failed to disclose that the 50% interim analysis data had allegedly rendered Orexigen's prior, accurate disclosure of the data from the 25% Interim Analysis false and misleading.[1] (App. 130-31 [Compl. ¶¶100–02].)

Defendants moved to dismiss the Complaint, in part, for failure to adequately plead falsity. Defendants cited the Ninth Circuit's decision in *In re FoxHollow Technologies, Inc. Securities Litigation*, 359 F. App'x 802, 804 (9th Cir. 2009), arguing that "[b]efore May 8, [2015] Orexigen had only disclosed the 25% [Interim Analysis] data, which had not changed. Orexigen had no duty to update this accurate statement of historical fact." (App. 139.)

The district court agreed that Plaintiff failed to adequately plead falsity and dismissed, with prejudice, the claims relating to the March 3, 2015 statements and dismissed with leave to amend claims based on the May 8, 2015 statements. The district court did not address the duty to update argument in Defendants' motion to dismiss. (*See* App. 90-115.) Plaintiff did not

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[1] Plaintiff also alleges that certain statements in the Company's Form 10-Q and on an earnings call on May 8, 2015 were false and/or misleading, but those statements are not directly implicated by this petition. (App. 132-37 [Compl. ¶¶103-12].)

seek reconsideration of the district court's dismissal with prejudice nor did Plaintiff amend the Complaint's allegations regarding the May 8, 2015 statements. Instead, Plaintiff asked the district court to enter judgment, and took an immediate appeal to the Ninth Circuit.

On August 13, 2018, the Ninth Circuit issued its decision. (App. 1.)

III. The Ninth Circuit's Decision

As relevant here, the Ninth Circuit first analyzed whether Orexigen's May 8, 2015 Form 8-K was false and misleading because it "omitted the 50% interim results, which [according to Plaintiff allegedly] 'demonstrated that [Orexigen's] prior representations about Contrave's purported [heart] benefit were false.'" (App. 48 (second and third set of brackets in original).) Because "*the May 2015 Form 8-K did not mention the 50 percent interim results*," the Ninth Circuit concluded "it could not have made a misstatement about them."[2] (App. 52 (emphasis added).) That holding should have ended the Ninth Circuit's inquiry on this particular claim. *See Chiarella*, 445 U.S. at 235 ("a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information."); *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading."); *Matrixx*, 563 U.S. at 45 (under Rule 10b-5 "companies

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[2] Defendants also said nothing about the 25% Interim Analysis data in the May 8, 2015 Form 8-K. Indeed, Plaintiff does not identify a single statement made by Defendants *after* March 3, 2015 that related in any way to the 25% Interim Analysis data. (App. 129-37 [Compl. ¶¶99-112].)

can control what they have to disclose . . . by controlling what they say to the market.").

Instead, *as a matter of first impression in the circuit*, the Ninth Circuit held that Defendants were independently and affirmatively "obligated to share" the 50% interim analysis data because the "value" and "weight" of the Company's prior, accurate disclosure of the data from the 25% Interim Analysis had been "diminished" by information showing that the 50% interim analysis data did not *also* show a heart benefit. The court held:

> Although the 25 percent interim results were still technically accurate, the issue is whether, having learned new information that diminished the weight of those results, Orexigen was obligated to share that information. We conclude that Orexigen was so obligated . . . [I]f subsequent data indicated [the 25 percent] interim results were not so promising after all, their value diminished. Because the 50 percent interim results did precisely that, Orexigen had a duty to disclose them.

(App. 52-53; *see also* App. 56 ("[B]y touting and publishing the 'surprisingly' positive 25 percent interim results, Orexigen created its own obligation to report that those results did not pan out after all.").)

Consequently, and notwithstanding the absence of the magic words "duty to update," the Ninth Circuit imposed an affirmative obligation on Orexigen to update its prior, accurate disclosure of the data from the 25% Interim Analysis.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the current circuit split and answer whether the federal securities laws recognize a duty to update and, if so, whether that duty can ever apply to an accurate statement of historical fact. The Court should also grant certiorari because the Ninth Circuit's decision will (i) create confusion among corporate issuers who will struggle to comply with the ruling, (ii) fuel enterprising plaintiffs' lawyers to strategically file baseless securities fraud suits in that circuit, and (iii) produce inconsistent results among the Courts of Appeals under what should be *uniform* federal securities laws.

I. Certiorari Is Necessary To Resolve A Circuit Split On An Important Issue Of Federal Securities Laws.

Even before the Ninth Circuit's decision, the Courts of Appeals were sharply divided on whether the federal securities laws impose a duty to update. One circuit (Seventh) rejects any duty to update; five circuits (First, Second, Third, Fifth and Eleventh) recognize that a duty to update may exist under certain, limited circumstances but *do not* require an issuer to update a statement of historical fact that was accurate when made; and four others (the Fourth, Sixth, and Tenth, as well as the Ninth, before the decision below) have not answered the question.

Indeed, scholars have lamented this circuit split for decades, noting that "[t]he bewildering case law is in dire need of clarification and consistency, which will come only from further legislative action *or a Supreme*

Court decision that directly addresses whether and when a company has a duty to update. . . ." Jeffrey A. Brill, *Note: The Status of the Duty to Update*, 7 Cornell J.L. & Pub. Policy 605, 677 (1998) (emphasis added); *id.* at 672 ("a substantial reduction in the number of duty to update claims will only occur if Congress clarifies the duty to update or the Supreme Court hears a duty to update case and introduces uniformity to the case law."); *see also* Robert H. Rosenblum, *An Issuer's Duty Under Rule 10b-5 to Correct and Update Materially Misleading Statements*, 40 Catholic Univ. L.R. 289, 292 (1991) ("To date, the United States Supreme Court has not considered the circumstances under which an issuer acquires a duty to disclose . . . updated information.").

The Ninth Circuit's decision—imposing a duty to update an accurate statement of historical fact when the "value" or "weight" of that statement is later "diminished" by subsequent events—directly conflicts with every other circuit that has previously recognized a duty to update. Accordingly, this case presents the perfect opportunity for this Court to introduce a state of uniformity on an issue that has befuddled the circuits for more than three decades.

A. The Circuits Are Split Over Whether The Federal Securities Laws Impose A Duty To Update.

1. Seventh Circuit

The Seventh Circuit has rejected a duty to update. Its rationale is based both on the plain text of Rule 10b-5 and on core principles of the federal securities laws.

In *Stransky v. Cummings Engine Corp. Inc.*, plaintiff alleged that defendants committed securities fraud by issuing press releases, which contained both historical statements and predictions, that were allegedly false or misleading because they failed to disclose that the corporation at issue was experiencing a significant cost increase in the warranties that it issued with its flagship engines. *See* 51 F.3d 1329, 1331, 1334 (7th Cir. 1995).[3] The Seventh Circuit distinguished the duty to correct (which "applies when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not," which "[t]he company then must correct . . . within a reasonable time") from the duty to update (which "[s]ome have argued . . . arises when a company makes a forward-looking statement—a projection—that because of subsequent events becomes untrue"). *Id.* at 1331-32. While the court embraced the former, *see id.* at 1332 n.2, 1336, it rejected the latter, noting that it "ha[d] never embraced such a theory, and we decline to do so now."[4] *Id.* at 1332.

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[3] The challenged historical statements were that: the engines "were coming down on their cost curves," *id.* at 1334; the engines "were making progress toward their targets," *id.*; and "costs of the engines are now declining," *id.* at 1335. The challenged predictions were that: "profit margins should improve" and "the costs of the engines should decline from current levels." *Id.*

[4] In dicta, the Seventh Circuit qualified the breadth of its holding: "As [plaintiff] contests only statements that were predictions or projections . . . we limit our analysis to whether a duty to update such predictions exists. We express no opinion on whether the outcome would be the same if a plaintiff contested statements of intent to take a certain action." *Id.* at 1332 n.4.

The court explained:

> No duty to update an historical statement can logically exist. By definition an historical statement is addressing only matters at the time of the statement. Thus, that circumstances subsequently change cannot render an historical statement false or misleading. Absent a duty to speak, a company cannot commit fraud by failing to disclose changed circumstances, with respect to an historical statement.

Id. at 1332 n.3. Because Rule 10b-5(b) includes the language "in the light of the circumstances under which they were made," 17 C.F.R. § 240.10b–5(b), the rule "implicitly precludes basing liability on circumstances that arise after the speaker makes the statement." *Stransky*, 51 F.3d at 1332. That interpretation, according to the court, necessarily followed given that "[t]he securities laws typically do not act as a Monday Morning Quarterback." *Id.* "'The securities laws approach matters from an *ex ante* perspective: just as a statement true when made does not become fraudulent because things unexpectedly go wrong, so a statement materially false when made does not become acceptable because it happens to come true.'" *Id.* (quoting *Pommer v. Medtest Corp.*, 961 F.2d 620, 623 (7th Cir. 1992)).

Applying this framework, the Seventh Circuit held that defendants may have been under a duty to correct the challenged historical statements to the extent that they subsequently learned that their initial statements were inaccurate when made. *Stransky*, 51 F.3d at 1336. As for the forward-looking statements, the court held that the plaintiff could plead on remand that they

"were unreasonable when made or were not made in good faith." *Id.*; *see also id.* at 1333 (noting that "a projection can lead to liability under Rule 10b–5 only if it was not made in good faith or was made without a reasonable basis."). However, there is no duty to update either historical or forward-looking statements. *See id.* at 1332, n.3, n.4, & 1335.

Courts deciding duty to update cases in the Seventh Circuit after *Stransky* have generally held that no duty to update exists in that circuit. *See, e.g.*, *Gallagher v. Abbott Labs.*, 269 F.3d 806, 810 (7th Cir. 2001) ("In order to maintain the difference between periodic-disclosure and continuous-disclosure systems, it is essential to draw a sharp line between duties to correct and duties to update. We drew just this line in *Stranksy* and adhere to it now."); *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) ("*Gallagher* distinguishes between a duty to update disclosures by adding the latest information and a duty to correct disclosures false when made. The Securities Exchange Act of 1934 may require the latter, though not the former, *Gallagher* holds."); *Grassi v. Info. Res., Inc.*, 63 F.3d 596, 599 (7th Cir. 1995) ("'a company has no duty to update forward-looking statements merely because changing circumstances have proven them wrong.'") (quoting *Stransky*); *Fry v. UAL Corp.*, 895 F. Supp. 1018, 1052 (N.D. Ill. 1995) ("the Seventh Circuit recently refused to adopt the position that forward-looking statements give rise to a duty to update when subsequent events make them no longer true."), *aff'd*, 84 F.3d 936 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (7th Cir.), *cert. denied*, 117 S. Ct. 447 (1996); *but cf. In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 282 (7th Cir. 1996) ("declin[ing] to

hold that *Stransky* adopted a bright-line rule that no duty to [update] exists in any case").

2. First, Second, Third, Fifth, and Eleventh Circuits

Five circuits (First, Second, Third, Fifth, and Eleventh) have recognized some formulation of a duty to update. "[T]he key considerations," when recognizing the duty to update in these circuits, "are whether the original statement is still 'alive' in the sense of being relied on by reasonable investors and whether the statement relates to a 'fundamental change' to the issuer." Bruce Mendelsohn & Jesse Brush, *The Duties to Correct and Update: A Web of Conflicting Case Law and Principles*, 43 Sec. Reg. L.J. 67, 74 (2015).

First Circuit. In *Backman v. Polaroid Corp.*, the First Circuit, sitting en banc, overruled a prior panel decision imposing a duty to update on Polaroid Corporation. *See* 1990 U.S. App. LEXIS 787 (1st Cir. Jan. 23, 1990), *withdrawn and substituted opinion*, 910 F.2d 10 (1st Cir. 1990) (en banc). In November 1978, Polaroid disclosed glowing earnings in its third quarter report, which displayed Polavision, a new instant movie camera, on its cover. 1990 U.S. App. LEXIS 787 at *3. The quarterly report acknowledged that Polaroid's costs of sales had increased due, in part, to substantial expenses associated with the camera. *Id.* at *3-4. Later that month, the company was forced to reduce and then halt production of Polavision in light of disappointing financial results for the camera. *Id.* at *4-6, *26-28. The First Circuit panel held that, although the statements about Polavision in the third quarter report were not false or misleading when made,

the Company was nonetheless required to update those statements once it became apparent that Polavision had more serious problems. *Id.* at *26-29. The en banc court reversed, holding that the challenged statements were solely statements of historical fact which were accurate at the time they were made. Thus, Polaroid had no duty to update the earlier statements regardless of a subsequent change of circumstances. *Backman*, 910 F.2d at 16-17. In dicta and without further elaboration, the en banc court espoused that "special circumstances" may give rise to a duty to update:

> a statement, correct at the time, may have *a forward intent and connotation upon which parties may be expected to rely*. If this is a clear meaning, and there is a change, correction, more exactly, further disclosure, may be called for.

Id. at 17 (emphasis added). Since *Backman*, the First Circuit has not expounded upon what the "special circumstances" entail, but it has rejected a duty to update pre-class period statements of historical fact that were accurate when made. *See Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1219 n.33 (1st Cir. 1996) ("The alleged statement regarding 'service revenues' constitutes a statement of historical fact not alleged to be false, and as such, does not provide the basis for a duty to update.").

Second Circuit. In *In re Time Warner Securities Litigation*, plaintiffs alleged that Time Warner made numerous false and misleading statements about its strategy—"a highly publicized campaign to find international 'strategic partners'"—to resolve the $10 billion-plus in debt incurred as a result of the

company's merger with Paramount Communications. 9 F.3d 259, 262 (2nd Cir. 1993).[5] Although the statements about pursuing strategic partnerships were accurate when made, plaintiffs alleged that later events (problems in the strategic alliance negotiations as well as the company's active consideration of a dilutive stock offering) gave rise to a duty to update. *Id.* at 262-63, 266. Although the Second Circuit agreed with plaintiffs that a "duty to update opinions and projections may arise if the original opinions or projections have become misleading as [a] result of intervening events," it rejected the argument that Time Warner had a "duty to disclose problems in the alliance negotiations as those problems developed" because the "attributed public statements lack the sort of definite positive projections that might require later correction." *Id.* at 267. Nevertheless, at the pleading stage, the Second Circuit held that Time Warner had a duty to disclose the possibility of the equity offering as a proposed solution to the company's debt problem:

> A duty to disclose arises whenever secret information renders *prior* public statements materially misleading. . . . [W]hen a corporation is pursuing a specific business goal and announces that goal as well as an intended

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[5] The allegedly false and misleading statements included, for example, that Time Warner "continues to have serious talks that could lead to the sale of five or six separate minority stakes in its entertainment subsidiaries next year," "received and continue[s] to receive many expressions of interest in forming joint ventures of all of its businesses from all over the world," and "was continuing talks with potential foreign partners . . . We're not selling or buying . . . . We're partnering." *Id.* at 266 (listing eleven allegedly false and misleading statements).

> approach for reaching it, it may come under an obligation to disclose other approaches to reaching the goal when those approaches are under active and serious consideration.

Id. at 268 (emphasis added).

Later cases in the Second Circuit make clear that the key consideration under *Time Warner*'s duty to update "opinions and projections" holding is whether the statement conveys a forward-looking representation. *See In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998) ("There is no duty [ ] to update when the original statement was not forward looking and does not contain some factual representation that remains 'alive' in the minds of investors as a continuing representation."); *Ill. State Bd. of Inv. v. Authentidate Holding Corp.*, 369 F. App'x 260, 263 n.2 (2d Cir. 2010) ("the statement that 'an agreement amending the original metrics will be completed shortly' was clearly forward-looking and was likely to remain 'alive' in the minds of reasonable investors" and, thus, was "'the sort of definite positive projection[ ]' that this Court has found 'require[s] later correction' when intervening events render it misleading") (quoting *Time Warner*, 9 F.3d at 267); *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 390 (2d Cir. 2015) ("Because the statements . . . did not imply anything about future circumstances, there was no duty to update.").

Third Circuit. In *In re Burlington Coat Factory Securities Litigation*, the Third Circuit gave considerable attention to the issue, acknowledging that a duty to update "might exist under certain

circumstances," but "we have not clarified when such circumstances might exist." 114 F.3d 1410, 1431 (3d Cir. 1997). At issue was whether Burlington Coat Factory had a duty to update an earnings-per-share estimate given to the market in November 1993 when the company subsequently learned information that materially changed the projection. *See id.* at 1432. The Third Circuit limited its holding to "ordinary, run-of-the-mill forecasts, such as the earnings projection in this case," declining "to hold that [such] disclosure[s] . . . can produce" "a continuous duty to update the public with either forecasts or hard information." *Id.* at 1432-33.

It nonetheless outlined the contours of an actionable duty to update theory:

> For a plaintiff to allege that a duty to update a forward-looking statement arose on account of an earlier-made projection, the argument has to be that the projection contained an implicit factual representation that remained 'alive' in the minds of investors as a continuing representation.

Id. The court was careful to note that "there is no general duty on the part of a company to provide the public with all material information," *id.* at 1432 (citing *Time Warner* and *Shaw*), and that "an accurate report of past successes does not contain an implicit representation that the trend is going to continue, and hence does not, in and of itself, obligate the company to update the public as to the state of the quarter in progress." *Id.* (citing *Shaw*). However, the court, like the Second Circuit in *Time Warner*, acknowledged that an issuer may have a duty to update "the public as to

extreme changes in the company's originally expressed expectation of an event such as a takeover, merger or liquidation." *Id.* at 1434 n.20 (emphasis in original).

This framework has repeatedly been affirmed by later Third Circuit decisions. *See, e.g., U.S. v. Schiff*, 602 F.3d 152, 170 (3d Cir. 2010) (rejecting duty to update because "Bristol's ongoing sales volume of pharmaceutical products to wholesalers in its distribution chain, do not come close to fitting within the narrow range of [*Burlington Coat Factory*'s articulation of the] duty [to update]."); *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 176 (3rd Cir. 2014) (rejecting argument that "defendants had an ongoing duty to disclose [ ] that the interim results were not supportive of the move to Phase 3" where defendants "previously told the market the interim results would need to be 'spectacular' to justify early initiation of Phase 3") (relying on *Burlington Coat Factory* and *Schiff*).

Fifth Circuit. In *Rubinstein v. Collins*, the Fifth Circuit recognized in dicta—despite mistakenly phrasing its analysis in terms of a duty to correct, *see Brill*, 7 Cornell J.L. & Pub. Policy at 642—a duty to update, stating: "We note that, at least facially, it appears that defendants have a duty under Rule l0b-5 to [update] statements if those statements have become materially misleading in light of subsequent events." 20 F.3d 160, 170 n.41 (5th Cir. 1994) (citing *Backman*).

Eleventh Circuit. In *Finnerty v. Stiefel Laboratories, Inc.*, the Eleventh Circuit upheld a jury verdict finding that Stiefel had a duty to update the statement that the company "will continue to be privately held," which was made to investors as part of

a stock buyback, when the company later became actively engaged in merger discussions with Sanofi-Aventis. 756 F.3d 1310, 1317-19 (11th Cir. 2014). In recognizing the duty to update, the Eleventh Circuit held that:

> [A] duty exists to update prior statements if the statements were true when made, but misleading or deceptive if left unrevised . . . There is, of course, no obligation to update a prior statement about a historical fact . . . The duty attaches only to forward-looking statements—statements that contain "an implicit factual representation that remain[s] 'alive' in the minds of investors as a continuing representation."

Id. at 1317 (citing *Stransky,* 51 F.3d at 1332 n.3, and quoting *Burlington Coat Factory*, 114 F.3d at 1432).

3. Other Circuits

The Fourth, Sixth, and Tenth Circuits—as well as the Ninth Circuit before the decision below—have considered the question but neither recognized nor declined to recognize a duty to update. These circuits have found that, even if such a duty were to exist, it would not be implicated by the facts presented before them. *See Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 219 (4th Cir. 1994) ("Assuming that there can ever be a 'duty to update,' there was no such duty here."); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 561 (6th Cir. 2001) ("[T]he Reform Act does not impose a 'duty to update,' *see* 15 U.S.C. § 78u-5(d), and we do not decide today whether such an obligation exists. . . ."), *overruled on other grounds by Tellabs*, 551 U.S. at 314;

Emps.' Ret. Sys. of Rhode Island v. Williams Cos., Inc., 889 F.3d 1153, 1166 (10th Cir. 2018) (noting that "[w]hether there is ever [ ] a duty to update is uncertain" and the "circuits are divided" but declining to "decide this issue today," because "[e]ven if there is a duty to update in some circumstances, there was no duty here."); *In re FoxHollow*, 359 F. App'x at 804 ("Because we conclude that FoxHollow's statements would not be false or misleading even under a duty to update, we do not decide that novel question of law.").

B. The Ninth Circuit's Decision Only Deepens The Circuit Split.

Notwithstanding this circuit split, each of the circuits that have expressly recognized a duty to update (First, Second, Third, and Eleventh) or rejected it (Seventh) agreed on one thing: an issuer owes no duty to update a statement of historical fact that was accurate when made.[6] *See Shaw*, 82 F.3d at 1219 n.33 ("The alleged statement . . . constitutes a statement of historical fact not alleged to be false [at the time made], and as such, does not provide the basis for a duty to update."); *IBEW*, 783 F.3d at 390 ("Because the statements referred only to past events or conditions . . . there was no duty to update."); *Burlington Coat Factory*, 114 F.3d at 1432 ("[A]n accurate report of past successes does not contain an implicit representation

[6] While the Fifth Circuit's decision in *Rubinstein* was silent on this particular point, in recognizing the viability of a duty to update, *see* 292 F.3d at 170 n.41, it cites to *Backman v. Polaroid*, where the en banc First Circuit reversed a panel decision imposing a duty to update on statements of historical fact which were accurate at the time they were made. *See Backman*, 910 F.2d at 16-17.

that the trend is going to continue, and hence does not, in and of itself, obligate the company to update the public as to the state of the quarter in progress."); *Stransky*, 51 F.3d at 1332 n.3 ("No duty to update an historical statement can logically exist. By definition an historical statement is addressing only matters at the time of the statement . . . [T]hat circumstances subsequently change cannot render an historical statement false or misleading."); *Finnerty*, 756 F.3d at 1317 ("There is, of course, no obligation to update a prior statement about a historical fact.").

Because the Ninth Circuit imposed a duty to update Orexigen's prior, accurate disclosure of the data from the 25% Interim Analysis (App. 52-53, 56), its decision directly conflicts with the decisions of the First, Second, Third, Seventh, and Eleventh Circuits. The decision below thus adds a third branch to the already-existing circuit split.

That split—on a question of federal law with enormous consequences to corporate issuers and, thus, the Nation's economy—demands this Court's review so a *uniform* standard under the federal securities laws can be declared for fair and consistent application across *all* circuits.

C. No Duty to Update An Accurate Statement of Historical Fact Can Logically Exist.

In resolving the circuit split, the Court should adopt the reasoning of the Seventh Circuit in rejecting a duty to update.

First, assessing the truth or falsity of a historical statement of fact *at the time it was made* is the only

approach faithful to the plain text of Rule 10b-5. *See Stransky*, 51 F.3d at 1332 (Rule 10b-5(b) "implicitly precludes basing liability on circumstances that arise after the speaker makes the statement."). "[A] strong argument exists that the language of Rule 10b-5 does not permit examining events that occur after a statement is made. The language of Rule 10b-5 implies that the determination of whether a misleading statement is actionable must be made as of the time the statement was made." Gregory S. Porter, *What Did You Know and When Did You Know It?: Public Company Disclosure and the Mythical Duties To Correct and Update*, 68 Fordham L.R. 2199, 2230 (2000).

Indeed, as this Court has repeatedly emphasized, when asked to interpret a federal statute, the analysis must start with the language passed by Congress and signed by the President. *See, e.g., Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund,* 138 S. Ct. 1061, 1069, 583 U.S. ___ (2018) ("The statute says what it says—or perhaps better put here, does not say what it does not say."); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). "When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete." *Id.* at 254 (citation and internal quotations omitted).

Rule 10b-5(b) states, in relevant part:

> It shall be unlawful for any person . . . (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in

> order to make the statements made, *in the light of the circumstances under which they were made*, not misleading.

17 C.F.R. § 240.10b–5(b) (emphasis added). There is nothing ambiguous about the words chosen by Congress. The statute, on its face, makes no mention of events arising *after* a challenged statement is made. Had Congress intended Rule 10b-5(b) to impose liability under such circumstances, it could have done so. But it did not. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725, 582 U.S. __ (2017) ("it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."); *Magwood v. Patterson*, 561 U.S. 320, 334, (2010) ("We cannot replace the actual text [of a statute] with speculation as to Congress' intent"). Accordingly, the use of the phrase "in the light of the circumstances under which [the statements] were made" in Rule 10b-5(b) can mean only one thing: to be actionable, a statement that omits a material fact must have been misleading *when made*. *See, e.g., In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012) (plaintiff must "identify[ ] . . . why the statements were false or misleading at the time they were made."); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 105 (2d Cir. 2007) ("The complaint fails to sufficiently allege that this representation was false when made."); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1330 (3d Cir. 2002) ("To be actionable, a statement or omission must have been misleading at the time it was made; liability cannot be imposed on the basis of subsequent events.").

Any other conclusion would impose a continuous disclosure obligation. However, this Court has rejected such a construct on at least three separate occasions. *See Chiarella*, 445 U.S. at 235; *Basic*, 485 U.S. at 239 n.17; *Matrixx*, 563 U.S. at 45.[7] Thus, "[i]n order to maintain the difference between periodic-disclosure and continuous-disclosure systems, it is essential to draw a sharp line between duties to correct and duties to update." *Gallagher*, 269 F.3d at 810; Brill, 7 Cornell J.L. & Pub. Policy at 634 (noting that a duty to update historical statements "would necessitate sweeping changes to the periodic reporting rules and regulations that the Exchange Act prescribes."). The Third Circuit appropriately drew just that line in *Stransky*. *See* 51 F.3d at 1331-32 & n.3; *Gallagher*, 269 F.3d at 808 ("Much of plaintiffs' argument reads as if firms have an absolute duty to disclose all information material to stock prices as soon as news comes into their possession. Yet that is not the way the securities laws work. We do not have a system of continuous disclosure. Instead firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose.") (citing *Chiarella, Basic,* and *Stransky*).

Finally, a duty to update cannot be squared with the federal securities laws' *ex ante* approach: "just as a statement true when made does not become fraudulent because things unexpectedly go wrong, so a statement

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[7] *See also* Porter, 68 Fordham L.R. at 2233 ("[I]f firms were required to update historical factual statements, such a duty to update would be indistinguishable from a requirement to disclose all material information, in essence creating a continuous disclosure requirement.").

materially false when made does not become acceptable because it happens to come true." *Stransky*, 51 F.3d at 1332; *Eckstein v. Balcor Film Inv'rs*, 58 F.3d 1162, 1169 (7th Cir. 1995) ("The securities laws ask whether the disclosures were proper at the time; they use an *ex ante* perspective, and how things turn out *ex post* does not matter to liability. . . .") (emphasis added); *Burlington Coat Factory*, 114 F.3d at 1429 n.16 ("Securities laws approach matters from an *ex ante* perspective.").

Applying that reasoning to a hypothetical set of facts exposes the flaw in the Ninth Circuit's decision below. Suppose that rather than indicate a "positive effect of Contrave on [cardiovascular] outcomes," the 25% Interim Analysis data *did not* indicate a heart benefit for Contrave, yet Petitioners nonetheless disclosed in the March 3, 2015 Form 8-K that a recently issued patent contained claims that it did. That disclosure would not subsequently become true, for example, if the 50% interim analysis data later indicated a heart benefit for the drug. The original disclosure would remain false when made. Logically then, the accurate disclosures in the March 3, 2015 Form 8-K (that the patent "contain[ed] claims related to a positive effect of Contrave on [cardiovascular] outcomes" and of the 25% Interim Analysis data, which showed that 59 patients receiving the placebo had experienced MACE compared to 35 patients receiving Contrave) would not become false or misleading simply because the later 50% interim analysis data did not indicate a heart benefit for the drug. The original disclosures would remain accurate when made.

II. The Ninth Circuit's Decision Will Have Important And Unfortunate Consequences If Left To Stand.

The current circuit split—only deepened by the Ninth Circuit—makes it a matter of the plaintiff's chosen forum whether a corporate issuer is subject to a duty to update and, if so, what types of statements give rise to that duty.

Put differently, if this case had been filed in the First, Second, Third, Fifth, Seventh, or Eleventh circuits, the district court's decision finding that Orexigen had no duty to disclose the 50% interim analysis data in the Company's May 2015 Form 8-K would have been affirmed. (App. 103-04.) Here, despite the Ninth Circuit's concession that the 25% Interim Analysis data was "still technically accurate" in May 2015 (*see* App. 52), Petitioners must continue litigating the allegedly misleading nature of the May 2015 Form 8-K.

That divergence will only fuel untoward forum-shopping making the Ninth Circuit the home province for duty to update claims and produce (additional) inconsistent results under what should be uniform federal securities laws. This is no small risk. Venue under the Exchange Act is available in any district "wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a). There are more than 1,000 publicly traded companies located within the Ninth Circuit[8] and, even if not based in the

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[8] *See* https://www.nasdaq.com/screening/companies-by-state.aspx (compiling totals from Alaska (29), Arizona (56), California (781),

Ninth Circuit, scores of publicly traded companies transact business there. Indeed, the Ninth Circuit has emerged as the fast growing forum for securities class actions and trailed only the Second Circuit for the most filings in such cases in 2018.[9]

Remarkably, the Ninth Circuit's decision provides no guidance on how to comply with its decision. The Ninth Circuit does not explain (1) what it means for the "value" or "weight" of a prior statement to be "diminished" by subsequent events, (2) whether the "value" or "weight" and/or the "diminish[ment]" must be material, (3) how that is determined, or (4) what must be disclosed, and when, to satisfy one's duty to update under the Ninth Circuit's rule.[10] The failure to

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Hawaii (15), Idaho (8), Montana (5), Nevada (36), Oregon (23), and Washington (72)).

[9] *See* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review*, available at http://www.nera.com/publications/archive/2019/recent-trends-in-securities-class-action-litigation--2018-full-y.html (January 29, 2019).

[10] The Ninth Circuit's concern with the "diminished" "value" and "weight" of a prior, accurate statement of historical fact makes no sense from a rational investor's standpoint. "Important subsequent events . . . will always render" prior, accurate statements of historical fact "out-of-date." Brill, 7 Cornell J.L. & Pub. Policy at 634. Accordingly, "it is fair to conclude that most investors recognize that these statements *will not remain accurate indefinitely*." *Id.* at 635 (emphasis added) (noting that *Backman v. Polariod*'s "refusal to impose on companies a duty to update statements of historical fact should not harm the public" because such statements "cannot become false or misleading as a result of subsequent events."). Indeed, that is why "earnings projections,"

answer *any* of these important questions will only fuel "uncertainty and excessive litigation [that] can have [damaging] ripple effects" on capital formation and market performance. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994); *see also* Hon. Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) ("Overbreadth and uncertainty deter beneficial conduct and breed costly litigation.").

At bottom, the Ninth Circuit's rogue and undefined standard makes it nearly impossible for corporate issuers to determine in real time what disclosures to make, and when. The standard makes such corporate issuers particularly susceptible to hind-sight second guessing. *See, e.g.*, *Shaw*, 82 F.3d at 1202-03 (noting that the "task of deciding whether particular information is subject to mandatory disclosure is not easily separable from normative judgments about the kinds of information that the securities laws *should* require to be disclosed, which depend, in essence, on conceptions of materiality.") (emphasis in original); Porter, 68 Fordham L.R. at 2235 ("In a continuous disclosure system, the number of difficult disclosure decisions is multiplied exponentially, with each decision subject to being second guessed in subsequent litigation."). If left undisturbed, rather than face the prospect of potentially limitless second-guessing under the Ninth Circuit's decision below, the most likely result is that corporate issuers will make fewer, rather

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and not statements of historical fact, "are the most useful to investors in deciding whether to invest in a firm's securities." *Burlington Coat Factory*, 114 F.3d at 1433.

than more, disclosures regarding historical events. *See* Brill, 7 Cornell J.L. & Pub. Policy at 607 ("the duty to update increases the number of statements that companies must monitor to ensure that they remain accurate"); *Backman*, 910 F.2d at 17 (recognizing concerns of *amici curiae* that the imposition of a duty to update statements of "historical fact . . . could inhibit disclosures altogether.").

And, particularly in the absence of guidance from the Ninth Circuit, how can district courts possibly decide (and do so consistently) that the "value" or "weight" of a prior statement of historical fact was *not* "diminished" by subsequent events at the pleading stage?[11] On this point, that would effectively make it impossible for corporate issuers in the Ninth Circuit to defeat duty to update claims before being exposed to the heavy (and, many times, settlement-mandating) costs of discovery, contrary to one of the "PSLRA's twin goals: to curb frivolous, lawyer-driven litigation." *Tellabs*, 551 U.S. at 322.

Only this Court's intervention can prevent the inevitable forum-shopping, abuse and costly uncertainty that will result from the Ninth Circuit's decision.

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[11] The same is true for the nebulous "remain[s] 'alive' in the minds of investor[]" standard articulated by the Third Circuit in *Burlington Coat Factory*, 114 F.3d at 1432, (and later adopted by the Second Circuit). *See* Mendelsohn & Brush, 43 Sec. Reg. L.J. at 74 (noting that the "alive" requirement "is a somewhat nebulous concept").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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