No. 18-1010

IN THE

Supreme Court of the United States

JOSEPH P. HAGAN, ET AL.,

Petitioners,

v.

KARIM KHOJA,

Respondent.

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

BRIEF IN OPPOSITION

Lewis S. Kahn
Alexander Burns
Alayne Gobeille
KAHN SWICK &
FOTI, LLC
1100 Poydras Street
Suite 3200
New Orleans, LA 70163

Ramzi Abadou
Counsel of Record
KAHN SWICK &
FOTI, LLP
912 Cole Street, No. 251
San Francisco, CA 94117
(504) 455-1400
ramzi.abadou@ksfcounsel.com

QUESTION PRESENTED

Whether a publicly traded company has a duty to disclose material facts that correct an earlier statement of historical fact when the company learns that the earlier statement was materially false or misleading when made.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

This Court should deny the petition for a writ of certiorari because it asks the Court to decide a question that is not presented in this case. Petitioners contend (Pet. i) that the court of appeals imposed a "duty to update" 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." Every aspect of that contention is wrong.

First, the court of appeals expressly held that the relevant statement of historical fact was *not* accurate when made but was in fact materially false or misleading—and was itself actionable under the securities laws. Petitioners do not seek this Court's review of that holding, instead preferring to ignore it. Second, petitioners contend that the court of appeals imposed a "duty to update"—but the word "update" does not appear anywhere in the court's decision and nothing in the decision even hints at such a duty. Finally, the court of appeals' actual holding does not implicate any circuit conflict. The court held that a company has a duty to disclose material facts correcting a previous statement of historical fact (here, that petitioners' pharmaceutical product had a potential heart benefit) when later information reveals that the earlier statement was materially false or misleading (here, when later study results revealed that the product had *no* potential heart benefit). Every court of appeals to consider the question under similar circumstances has agreed that such a duty to disclose exists. Petitioners may disagree that a duty to disclose arose in this case—but that fact-bound application of settled law does not warrant this Court's review, particularly in an interlocutory posture.

STATEMENT OF THE CASE

1. This case involves allegations of securities violations by Orexigen Therapeutics, Inc. (Orexigen), a now-bankrupt biotechnology company, and its executives, who are petitioners here. Pet. App. 4-5 & n.1.

Orexigen developed a drug called Contrave, which is designed to treat obesity. Pet. App. 5. Because obese patients are at risk of suffering major adverse cardiovascular events (MACE), Orexigen was required to conduct a trial of Contrave to assess whether the drug would further increase the risk of MACE. *Id.* at 6. The so-called "Light Study" was headed by Dr. Steven Nissen of the Cleveland Clinic and was subject to a data-access plan mandating strict confidentiality. *Ibid.*

Under the terms of the Light Study, an "interim analysis" of Contrave's effect on the risk of MACE would be conducted after 25 percent of a pre-determined number of MACE occurred. Pet. App. 6. The interim analysis would assess whether patients on Contrave were more likely to suffer MACE than patients on a placebo. *Ibid.* In November 2013, Orexigen learned that the 25 percent interim analysis indicated that patients on Contrave were 41 percent less likely to suffer MACE compared with patients on a placebo. *Id.* at 6-7.

In the following months, the Light Study administrators learned that Orexigen had violated the requirement that the 25 percent interim results remain strictly confidential by leaking the results to more than 100 people with a financial interest in the results of the study, including investment bankers. Pet. App. 7, 68. The Food and Drug Administration (FDA) sanctioned Orexigen for its unauthorized leaks. *Id.* at 7.

During a June 2014 meeting about Orexigen's leaks, the FDA reminded petitioners that the leaked preliminary results had "a high degree of uncertainty and were likely to change with the accumulation of additional data." *Ibid.*

Less than one month later, petitioners submitted a provisional patent application for Contrave to the United States Patent and Trademark Office (USPTO). Pet. App. 7. Orexigen attached the 25 percent interim results to the patent application, *id.* at 7-8, again breaching the confidentiality agreement. The application purported to cover a cardiovascular benefit, based on the 25 percent interim results, claiming that "the results indicate that treatment with Contrave decreases the occurrence of MACE in overweight and obese subjects with cardiovascular risk factors." *Id.* at 68-69 (brackets and internal quotation marks omitted). Although Orexigen initially filed the patent application as a confidential document, in December 2014, Orexigen requested that the USPTO publish the application—including the confidential 25 percent interim results—and the USPTO did so on March 3, 2015. *Id.* at 7-8.

Also in March 2015, Orexigen filed a Form 8-K with the Securities and Exchange Commission (SEC)—and again improperly revealed the 25 percent interim results of the Light Study. Pet. App. 8. The market responded immediately and positively; one analyst referred to the 25 percent interim results as the "'holy grail' for cardiometabolic disease treatment." *Ibid.* The price of Orexigen's stock soared. *Ibid.* Contemporaneous articles in *Forbes* quoted FDA officials' condemnation of Orexigen's disclosure of the 25 percent interim results in the SEC filing. *Id.* at 9. The

officials warned that the results should not be misinterpreted and "condemn[ed] Orexigen's SEC filing as 'unreliable,' 'misleading,' and 'likely false.'" *Ibid.* In the days following the publication of those articles, the price of Orexigen's stock fell. *Ibid.*

Within a few weeks, on March 26, 2015, the director of the Light Study informed Orexigen that the 50 percent interim results (*i.e.*, results from the study's half-way point) no longer indicated any potential heart benefit from Contrave. Pet. App. 9. In light of Orexigen's unauthorized disclosures of the earlier interim results in the March 2015 Form 8-K, members of the study's executive steering committee voted unanimously to halt the study. *Ibid.* Orexigen refused to authorize a press release informing the public about the 50 percent interim results and the termination of the Light Study. *Ibid.*

On May 8, 2015, Orexigen filed with the SEC a press release on Form 8-K and a quarterly report on Form 10-Q. Neither filing disclosed either the 50 percent interim results or the steering committee's plans to terminate the Light Study. Pet. App. 10. In particular, the Form 10-Q stated that "additional analysis of the interim results or new data from the continuing Light Study . . . may produce negative or inconclusive results, or may be inconsistent with the conclusion that the interim analysis was successful." *Ibid.* (alternation in original). The same day, Orexigen hosted a conference call with investors and analysts. *Ibid.* When petitioners were asked on the call about the "fate of the Light Study," they did not reveal that the committee had unanimously voted to halt it. *Ibid.* Instead, they stated that the study "is continuing" and that "if the decision is made to terminate the trial

early," petitioners would release additional information. *Id.* at 10-11 (emphasis omitted). When asked whether they would release the 50 percent interim results, petitioners did not reveal that they knew what those results were. *Id.* at 10. Instead, they suggested that, "for regulatory purposes," the 25 percent interim results have more weight and misrepresented that "if any of that status changes, then we would of course announce that." *Id.* at 11.

Four days later, the head of the Light Study (Dr. Nissen) announced that the study had been halted "[f]ollowing premature disclosure of interim study results." Pet. App. 12. He further stated that the most recent results from the study did not suggest any heart benefit from Contrave. *Ibid.* In two articles published on May 12, 2015, Dr. Nissen further stated that Orexigen had refused for six weeks to reveal the 50 percent interim results and explained his view that "[p]atients were misled, investors were misled." *Id.* at 79 (alteration in original). He also explained that the committee had chosen to take the "unprecedented step" of releasing the 50 percent interim data because they "couldn't allow unreliable data to be used in clinical decision making" and because they "had a duty to the public and also to the investment community, to tell the truth." *Id.* at 79-80. In the wake of those revelations, Orexigen's share price fell sharply. *Id.* at 80.

2. a. Respondent Karim Khoja is an investor in Orexigen. On August 20, 2015, he filed the operative complaint on behalf of a putative investor class, asserting three claims. Pet. App. 12. Count I alleges that petitioners misrepresented and/or omitted material facts "to conceal the truth and/or adverse material information" about the Light Study, in violation of 15

U.S.C. § 78j(b), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Pet. App. 12. Count II alleges a fraud scheme in violation of Rule 10b-5. *Ibid.* Count III alleges "controlling" liability against petitioners, pursuant to Section 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a). Pet. App. 13.

Petitioners filed a motion to dismiss for failure to state a claim. Pet. App. 13. The district court granted the motion in part, dismissing with prejudice two claims under Count I and granting respondent leave to amend the remaining claims. *Ibid.*; *id.* at 64-115. Respondent requested entry of judgment and filed a notice of appeal. *Id.* at 13.

b. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 59-60. With respect to Count I, the court affirmed in part and reversed in part the district court's dismissal—and granted leave to amend the complaint with respect to the portion of the dismissal affirmed on appeal. *Id.* at 59. With respect to Count II, the court affirmed the dismissal, but granted leave to amend the complaint. *Ibid.* And with respect to Count III, the court of appeals reversed the dismissal "so the district court may reconsider those claims in light of [the court's] reversal of the district court's dismissal of claims in Count I and in light of any amendments to the Complaint." *Id.* at 60.

In reviewing the district court's dismissal of the claims under Count I, the court of appeals noted that, in order to properly plead a violation of Section 10(b) and Rule 10b-5, a plaintiff must establish (as relevant here) a material misrepresentation or omission by the defendant. Pet. App. 37. The court explained that "'[d]isclosure is required . . . only when necessary 'to

make . . . statements made, in the light of the circumstances in which they were made, not misleading.'" *Id.* at 38 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011)) (ellipses in original). In other words, a "compan[y] can control what [it] ha[s] to disclose" in order to comply with Section 10(b) and Rule 10b-5. *Ibid.* (quoting *Matrixx*, 563 U.S. at 45). The court went on to explain, however, that "once [a] defendant[] [chooses] to tout positive information to the market, [it is] bound to do so in a manner that wouldn't mislead investors, including disclosing adverse information that cuts against the positive information." *Ibid.* (quoting *Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 705-706 (9th Cir. 2016)).

The court of appeals considered five distinct statements that respondent contended were false or misleading: (1) the March 2015 Form 8-K, (2) the March 2015 press release, (3) the May 2015 Form 8-K, (4) the May 2015 Form 10-Q, and (5) the May 2015 earnings conference call. Pet. App. 39-57.

The court of appeals first concluded that the March 2015 Form 8-K was materially misleading because it disclosed the 25 percent interim results but failed to disclose that the FDA had informed petitioners that those results were unreliable, had a high degree of uncertainty, and were likely to change with the accumulation of data. Pet. App. 40-41. The court explained that, "once Orexigen chose to tout the apparently positive 25 percent interim results, Orexigen had the obligation also to disclose that they were likely unreliable." *Id.* at 41. Emphasizing that the appeal arose from a motion to dismiss, the court noted that "a jury might find that Orexigen's hedging about the preliminary nature of the results was enough to satisfy [its]

duty," but emphasized that, "[f]or pleading purposes," the allegations in the complaint are sufficient. *Id.* at 42. Petitioners do not seek this Court's review of that holding.

The court of appeals then considered whether the March 2015 press release gave the misleading impression that the USPTO published the patent application on its own initiative rather than at Orexigen's request. Pet. App. 43-48. The court again emphasized that Orexigen "did not have a duty" to disclose particular clarifying information, "absent a statement suggesting" something false or misleading. *Id.* at 46. The court of appeals reversed the district court's dismissal of that claim, finding that respondent should be granted an opportunity to amend the claim. *Id.* at 47-48. Petitioners do not seek this Court's review of that holding.

Turning to the May 2015 Form 8-K, the court of appeals considered whether respondent plausibly alleged a violation of Rule 10b-5 by alleging that petitioners (1) misrepresented that the Light Study was ongoing at that point, (2) omitted that the executive committee had already terminated the study, and (3) omitted the 50 percent interim results. Pet. App. 48. With respect to the first two theories of violation, the court of appeals reversed the district court's dismissal because the district court had resolved a disputed factual question (when the study was terminated) in favor of petitioners, rather than crediting the plausible allegations in the complaint that the study had been terminated before May 2015. *Id.* at 49-51. Petitioners do not seek this Court's review of that holding. With respect to the third theory of violation—that Orexigen had a duty to disclose the 50 percent interim

results—the court of appeals held that the district court erred in dismissing that claim. *Id.* at 52-53. The court of appeals explained that Orexigen's earlier disclosure that the 25 percent interim results indicated that Contrave had a potential heart benefit was "a boon to Orexigen," causing its stocks to soar and that, "even if investors understood more results were necessary to confirm Contrave's potential heart benefit, the 25 percent interim results clearly suggested a promising venture." *Id.* at 53. Because "subsequent data indicated those earlier interim results were not so promising after all," "Orexigen had a duty to disclose th[e]" later results. *Ibid.* That holding is the only aspect of the court of appeals' decision that petitioners ask this Court to review.

The court of appeals also reversed the dismissal of Count I with respect to the May 2015 Form 10-Q because the complaint plausibly alleged that petitioners misrepresented that the Light Study was continuing when they knew it would be terminated—and because they misleadingly suggested that additional results "'*may* be inconsistent with the conclusion that the interim analysis was successful'" when they already knew that additional results "revealed exactly that." Pet. App. 54 (citation omitted). Petitioners do not seek this Court's review of that holding.

The court of appeals reached a similar conclusion with respect to the May 2015 earnings conference call, during which petitioners misrepresented that the Light Study was continuing and emphasized the importance of the 25 percent interim results, promising to "announce" any related changes in status. Pet. App. 54-56. Petitioners also do not seek this Court's review of that holding.

In addition to reversing and remanding for additional proceedings on Count I, the court of appeals affirmed the district court's dismissal of Count II but granted leave to amend. And it reversed the district court's dismissal of Count III—because that dismissal was premised on the district court's now-reversed holdings with respect to Count I—and remanded for reconsideration. Pet. App. 57-59. Petitioners do not seek this Court's review of those holdings.

THE PETITION SHOULD BE DENIED

Petitioners seek this Court's interlocutory review of the court of appeals' determination that respondent adequately alleged (at the motion-to-dismiss stage) that petitioners violated 15 U.S.C. § 78j(b), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and Rule 10b-5, 17 C.F.R. § 240.10b-5, by failing to correct their previous statement that Contrave had potential heart benefits. This Court's review of that fact-bound issue is unwarranted because it does not implicate any conflict among the courts of appeals. Review of the court of appeals' interlocutory decision would also be a waste of time. Because petitioners do not seek review of the lion's share of the Ninth Circuit's decision, they will face further proceedings in the district court with respect to *all* of respondent's claims—including his claims that petitioners' May 2015 Form 8-K was materially false or misleading—regardless of this Court's disposition of the petition for a writ of certiorari. The petition should be denied.

I. The Decision Below Does Not Implicate Any Split In The Circuits.

Petitioners' primary contention (Pet. 12-22) is that the challenged aspect of the decision below deepens an existing circuit conflict about whether companies have a "duty to update" forward-looking statements that were accurate when made but that become misleading as a result of subsequent events. Petitioners are simply incorrect about what the court of appeals decided in this case. Far from inventing or applying a duty-to-update standard, the court straightforwardly applied the same duty-to-correct standard that is recognized throughout the country. Review of that fact-bound application of settled law is unwarranted.

A. Petitioners argue (Pet. 12-23) that the courts of appeals are intractably divided about whether Section 10(b) and Rule 10b-5 impose on companies a duty to update a statement that, although correct at the time, may have a forward-looking connotation that investors would reasonably rely on. As petitioners explain, the Seventh Circuit has declined to recognize such a duty, *see Stransky v. Cummings Engine Co.*, 51 F.3d 1329, 1332 (7th Cir. 1995)—although it has also expressly "decline[d]" to "adopt[] a bright-line rule that no duty to correct exists in any case," *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 282 (7th Cir. 1996). Other courts of appeals have acknowledged the possibility that a duty to update might exist with respect to certain types of forward-looking factual statements. Thus, for example, the en banc First Circuit has noted—in what petitioners concede is dicta, *see* Pet. 17—that when a clear "statement, correct at the time, [has] a forward intent and

connotation upon which parties may be expected to rely" and "there is a change, correction, more exactly, further disclosure, may be called for." *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc). The Second Circuit has similarly stated that a duty to update may arise in some circumstances, but does not arise "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." *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998). Other courts of appeals have made similar statements. *See*, *e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1431 (3d Cir. 1997) (noting that a duty to update "might exist under certain circumstances" and that the court has "not clarified when such circumstances might exist"); *Rubinstein v. Collins*, 20 F.3d 160, 170 n.41 (5th Cir. 1994) (dicta); *Finnerty v. Stiefel Labs., Inc.*, 756 F.3d 1310, 1317 (11th Cir. 2014).

Petitioners ask this Court to intervene in this case to resolve that shallow and largely theoretical circuit conflict. But it would be impossible to resolve any such conflict in this case because this case does not involve an alleged duty to update. In the portion of the decision below that petitioners now challenge, the court of appeals instead applied the settled legal principle that a company has a duty to disclose material facts correcting a previous statement of historical fact when subsequently revealed facts make clear that the previous statement was false or misleading. Courts of appeals (including the Seventh Circuit) generally agree that a duty to disclose exists in such circumstances. *See*, *e.g.*, *In re Cabletron Sys., Inc.*, 311 F.3d 11, 36 (1st Cir. 2002); *In re IBM Corp. Sec. Litig.*, 163 F.3d at 109

(2d Cir.); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1430-1431 (3d Cir.); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009); *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 471 (6th Cir. 2014); *Gallagher v. Abbott Labs.*, 269 F.3d 806, 810 (7th Cir. 2001); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1125 (10th Cir. 1997); *Fried v. Stiefel Labs., Inc.*, 814 F.3d 1288, 1294 (11th Cir. 2016). The Ninth Circuit's application of that settled legal rule to the facts of this case does not warrant further review.

B. Seeking to gain traction with their alleged circuit conflict, petitioners portray (Pet. 12, 23-24) the decision below as holding that companies have a duty to update previous *accurate* statements of historical fact when the value or weight of such statements is later diminished. But that is not what the Ninth Circuit held; not by a long shot.

Initially, the premise of petitioners' assertions is incorrect. The court of appeals did *not* hold that petitioners' March 2015 disclosure of the 25 percent interim results was "accurate" (Pet. 24). To the contrary, the court held that respondent adequately alleged that petitioners' disclosure of the 25 percent interim results in March 2015 was materially misleading because it failed to disclose that the results were unreliable, had a high degree of uncertainty, and were likely to change with the accumulation of data. Pet. App. 40-41. Although petitioners had no duty to disclose the 25 percent interim results, the court explained, once they chose to do so, they were obligated "also to disclose that they were likely unreliable." *Id.* at 41. Instead of seeking this Court's review of that holding, petitioners simply ignore it, suggesting instead that the court of appeals held the opposite.

In analyzing whether respondent adequately alleged that petitioners had a duty to disclose the 50 percent interim results in the May 2015 Form 8-K, the court of appeals explained that the previous disclosure of the 25 percent interim results conveyed that Contrave had a "potential heart benefit"—a message that appeared to materially affect the price of Orexigen's stock. Pet. App. 53. When petitioners conveyed in March 2015 that Contrave had a potential heart benefit, they made a statement of historical fact; under the law of every circuit that has decided the question, when information later came to light that revealed the original statement of fact to be incorrect or misleading, petitioners had a duty to correct the earlier statement. That is exactly what should have happened here. The court of appeals concluded that the 50 percent interim results indicated that Contrave did not in fact have a potential heart benefit. *Ibid.* In other words, the 50 percent interim results indicated that petitioners' earlier statements about Contrave's potential heart benefit were not accurate when made.

Petitioners contend (Pet. 24) that the duty to correct does not apply here because the court of appeals characterized their March 2015 disclosure of the 25 percent interim results as "accurate" when made. Not so. Petitioners improperly conflate two different historical facts they disclosed in March 2015: (1) the 25 percent interim results themselves and (2) the potential heart benefit of Contrave. *See* Pet. App. 39-40 (March 2015 Form 8-K both included graphic representation of the 25 percent interim results *and* stated that the patent claims "related to a positive effect of Contrave on [cardiovascular] outcomes" that "appear

to be unrelated to weight change"). The court of appeals held that "the 25 percent interim results" were themselves "technically accurate" when revealed and thereafter. *Id.* at 52. But petitioners' disclosure that Contrave had "a positive effect" on cardiovascular outcomes was not. As noted, petitioners do not challenge the court of appeals' holding that petitioners' March 2015 disclosure of Contrave's potential heart benefit was misleading when made. In considering the May 2015 Form 8-K, the court of appeals correctly held that respondent had adequately alleged that petitioners had a duty to disclose information that would correct their earlier (mis)statements about Contrave's potential heart benefit when the 50 percent interim results revealed that Contrave had *no* potential heart benefit. *Id.* at 52-53. That is a paradigmatic application of the duty to correct, and petitioners cannot identify any other court of appeals that would have applied a different legal rule in these circumstances.

Petitioners contend (Pet. 29-30) that the court of appeals' holding requires a company to update previous statements that were accurate when made whenever the value or weight of the earlier statement is diminished by subsequent events. But that is not what the Ninth Circuit held. Aside from mischaracterizing their previous statements as accurate when made, petitioners misunderstand the court's reference to the "weight" of the earlier disclosures. Although the 25 percent interim results were themselves still accurate, the operative question before the court was whether the accompanying representations about Contrave's positive cardiovascular effects remained accurate in light of the 50 percent interim results. Pet. App. 52. Because the 50 percent interim results diminished the

weight of the earlier results, they rendered the earlier representation about the cardiovascular benefits inaccurate—and therefore had to be disclosed in order to correct the previous inaccurate statements. *Id.* at 52-53. As the court explained, because "subsequent data indicated that those earlier interim results were not so promising after all," petitioners had a duty to disclose the subsequent data to correct their earlier representations about "Contrave's potential heart benefit." *Id.* at 53. Although the Ninth Circuit could have been clearer in explaining its reasoning, its holding is a straightforward application of the rule that a company has a duty to disclose information to correct an earlier statement when later information reveals that the earlier statement was inaccurate or misleading. That holding does not conflict with any decision of any other court of appeals.

C. The court of appeals' decision is also consistent with this Court's precedent.

This Court emphasized in *Matrixx Initiatives, Inc. v. Siracusano*, that Section "10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information" and that "companies can control what they have to disclose under these provisions by controlling what they say to the market." 563 U.S. 27, 44-45 (2011). But once a company chooses to share material information, it cannot "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." *Id.* at 37 (quoting 17 C.F.R. § 240.10b-5(b)). The court of appeals applied those precise principles, Pet. App. 38, first finding that petitioners' disclosure that the 25 percent interim results suggested that Contrave had a potential heart

benefit was material ("a boon to Orexigen"), and then concluding that petitioners were required to disclose later-acquired information indicating that Contrave had no such potential heart benefit, *id.* at 53.

Petitioners' passing suggestion that the court of appeals' decision is tantamount to "impos[ing] a continuous disclosure obligation" of the sort this Court has rejected is baseless. Pet. 27 (citing *Matrixx*, 563 U.S. at 45; *Basic Inc. v. Levinson*, 485 U.S. 224, 239 (1988); *Chiarella v. United States*, 445 U.S. 222, 235 (1980)). Petitioners notably do not cite to the court of appeals' decision in making that argument—and for good reason as nothing in that decision even hints at a continuous disclosure obligation. Respondent did not allege that petitioners had a duty to disclose the 50 percent interim results the minute they became aware of them. Instead, respondent alleged that petitioners had a duty to disclose those results to correct earlier misstatements that were materially misleading or false when petitioners filed their required Form 8-K.

II. This Case Is An Exceedingly Poor Vehicle To Review The Question Presented.

Even if petitioners were correct (they are not) that this case implicates whether companies have a duty to update earlier statements of historical fact, the interlocutory posture of this case would make it the worst kind of vehicle for considering that question.

Regardless of the disposition of the petition for a writ of certiorari, petitioners will face further proceedings in the district court about their false and misleading disclosures with respect to the 25 percent interim results and with respect to the Light Study more gen-

erally. Indeed, regardless of the disposition of the petition, petitioners will face further proceedings about the May 2015 Form 8-K—because they do not seek review of the court of appeals' holding that respondent adequately alleged that the form was materially misleading in its failure to disclose that the Light Study had been terminated.

As explained, the premise of petitioners' question presented—that the March 2015 disclosure of the 25 percent interim results was accurate when made—was squarely rejected by the court of appeals in a portion of the opinion petitioners do not now challenge. But even if there were ambiguity about whether petitioners' original statements about the 25 percent interim results were false or misleading when made, further proceedings on remand would clarify that antecedent factual question. Petitioners are wrong that the court of appeals held them to a duty-to-update standard—without ever using the word "update"—but if the district court and/or court of appeals ultimately does impose such a duty as the case progresses, petitioners can seek this Court's review at that time. If the Court were to grant the petition now, the only question it could answer would be whether a company has a duty to disclose information that would correct an earlier statement when later information reveals that the statement was materially false or misleading at the time it was made. There is no circuit conflict on that question, and even petitioners do not argue that no such duty exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Lewis S. Kahn
Alexander Burns
Alayne Gobeille
KAHN SWICK & FOTI, LLC
1100 Poydras Street
Suite 3200
New Orleans, LA 70163

Ramzi Abadou
Counsel of Record
KAHN SWICK & FOTI, LLP
912 Cole Street, No. 251
San Francisco, CA 94117
(504) 455-1400
ramzi.abadou@ksfcounsel.com

April 5, 2019