NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENNIS DECIANCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Federal Rule of Evidence 404(b) and this Court's decision in *Michelson v. United States*, 335 U.S. 469 (1948), prohibit admission of unrelated prior convictions evidence in criminal trials. In cases arising under federal securities fraud law, this Court has held silence is not misleading under Rule 10b-5 absent a pre-existing duty to disclose, *Basic Inc. v. Levinson*, 485 U.S. 224, 239 (1988), and that failure to disclose is only fraudulent only upon showing of a specific pre-existing duty to disclose, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 (2011). Notwithstanding this clear precedent, the Second, Sixth, and Eleventh Circuits have held evidence of prior convictions is admissible as "direct proof" in prosecutions alleging securities fraud under Rule 10b-5, so long as an investor would consider the prior convictions "material." The question presented is:

Whether evidence of unrelated prior convictions is admissible in securities fraud cases as direct proof of a fraud under Rule 10b-5, even though there is otherwise no pre-existing duty to disclose, solely upon a showing investors might consider omissions of those unrelated prior convictions material.

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REFERENCE TO OPINIONS AND ORDERS BELOW

The March 1, 2018 opinion of the United States Court of Appeals for the Sixth Circuit is unpublished as *United States v. Donohue et al.*, 726 F. App'x 333 (6th Cir. 2018), *reh'g denied*, 2018 U.S. App. LEXIS 9711 (6th Cir. Apr. 17, 2018). The opinion of the United States District Court for the Northern District of Ohio denying Petitioner Dennis DeCiancio's motion for a new trial, is unpublished, but available as *United States v. Jackson et al.*, No. 15 CR 263, 2016 WL 3627256 (N.D. Ohio July 7, 2016). The opinions and orders are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the March 1, 2018 judgment and opinion of the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit denied *en banc* review on April 17, 2018 and issued a mandate on April 26, 2018. App. 46. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. V:

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

U.S. CONST. AMEND. VI:

The Sixth Amendment to the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

STATEMENT OF THE CASE

This case involves a federal securities-fraud prosecution stemming from alleged misrepresentations made by Petitioner Dennis DeCiancio and his codefendants in the sale of private securities. DeCiancio and his codefendants were associated with Medical Safety Solutions, a corporation involved in the development and sale of a hypodermic-needle destruction device. *See* App. 5–6. The government's case centered on allegations that the defendants made fraudulent representations to investors while selling shares of Medical Safety Solutions. *See* App. 5–7. Specifically, the government alleged defendants made false statements regarding the status of FDA approval of the device, which was necessary to market the needle-destruction device in the United States. App. 6.

In 2015, DeCiancio, Kenneth Jackson, Dane Donohue, and William Schureck were indicted in the Northern District of Ohio on counts arising out of this alleged securities scheme. App. 6. After a jury trial lasting nearly one-month, DeCiancio and his codefendants were found guilty. App. 6. DeCiancio, a seventy-three-year-old Ohioan with no prior criminal convictions, was sentenced to seventy months of incarceration. App. 6.

Before the 2016 trial, Jackson filed a motion *in limine* to exclude evidence of his 1992 state-court criminal convictions for securities fraud, aggravated theft, and perjury. *See* App. 57–59. Jackson's motion, joined by codefendants, sought to bar the convictions pursuant to, *inter alia*, Federal Rule of Evidence 404(b), arguing there was no existing legal duty to disclose such convictions. *See* App. 59–60.

The government opposed the motion and sought to admit the convictions on the theory defendants engaged in fraudulent omissions by not disclosing the unrelated 1992 convictions to investors. *See* App. 68. The district court held the convictions were admissible as "direct proof" of the charged scheme and admitted them without condition. App. 8. As "direct proof," the district court held Rule 404(b) was inapplicable because nondisclosure of the 1992 convictions satisfied the materiality element of a securities fraud claim. App. 8–9.

The government introduced the convictions at trial solely on the basis that investors would consider that information to be relevant prior to investing. App. 8. And aside from that basis, the government offered no other forms of relevancy. App. 73–74 (stating the convictions were "relevant and admissible without regard to Rule 404(b)"). Nor could they, as the decades-old convictions occurred with different investors, with different employees, with a different company, and in a different decade. App. 4.

With the convictions admitted, the government presented them at every turn. The government referenced the convictions in the opening statement, repeatedly through witness direct and cross examination, and again in the closing statement—no less than 100 times in total. *See* App. 16.[1] The impact of these convictions was palpable. When the government questioned investor-witnesses about whether they

[1] The Sixth Circuit described the number of references to Jackson's convictions to be 80. In their respective appellate briefs, each defendant-appellant arrived at varying numbers. While Petitioner does not contend the exact number is dispositive of any issue, Petitioner maintains the record contains over 100—if not over 125—specific references to the convictions throughout the trial.

would have been impacted by knowledge of Jackson's convictions, witnesses typically reacted harshly and emotionally to the convictions.

For instance, during its case-in-chief, the government asked investor Cynthia Cernak whether she would have invested having known about Jackson's convictions. Cernak replied: "I would have run so fast from this company they wouldn't have seen the door shut . . . I want nothing to do with fraud. I want nothing to do with dishonesty." *See* App. 119. Responses inciting this type of propensity reasoning were prevalent throughout the trial. Witnesses similarly described Jackson's convictions as felonies, *see* App. 23–24, and a "ponzi scheme." App. 99–100. Crucially, Jackson's convictions directly implicated DeCiancio and his codefendants when the government portrayed their failure to disclose Jackson's convictions as fraudulent during witness examination. *See* App. 159–60 (describing DeCiancio as having never told a witness-investor "someone involved with the company had prior convictions for securities fraud.").

On appeal, DeCiancio's principal argument was that the court erred in admitting these convictions, and that they had a substantial prejudicial propensity effect when viewed through the lens of the jury. App. 7–24. The Sixth Circuit affirmed, sharing the district court's reasoning that Jackson's convictions were "direct proof" of the charged scheme. App. 10–12. DeCiancio then filed a petition for rehearing *en banc*, and the government was directed to respond. On April 17, the petition for rehearing *en banc* was denied. App. 46.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for two reasons. First, the Sixth Circuit widened an existing circuit split regarding omissions liability under federal securities law. The Sixth Circuit joins the Second and Eleventh circuits in applying a Rule 10b-5 standard in criminal cases that directly deviates from the proper application routinely found in civil 10b-5 actions.

Second, the Sixth Circuit's erroneous holding that defendants' silence—in the absence of a duty to disclose—constituted a material misrepresentation under Rule 10b-5 directly contravenes this Court's holdings in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44–45 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988); and *Chiarella v. United States*, 445 U.S. 222, 235 (1980). This distorted application of federal securities law wrongfully permitted the government to place Jackson's unrelated 1992 securities-fraud convictions front-and-center at DeCiancio's trial—referencing Jackson's prior convictions no less than 100 times.

I. Despite Clear Precedent that "Materiality" under Rule 10b-5 Does Not Create a Duty to Disclose Prior Convictions, the Circuits are Split as to what Governs Duties to Disclose.

The Court should grant this petition because the Courts of Appeal have conflicting rules governing materiality and duties to disclose under 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). *See* SUP. CT. R. 10(a). In civil actions arising out of alleged violations of Rule 10b-5, the majority of circuits have adopted rules that comport with the holdings of *Chiarella*, *Basic*, *and Matrixx Initivities* by requiring a preexisting

duty to disclose before liability may attach to nondisclosure. *See, e.g.*, *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015).

Yet, in criminal cases charging violations of Rule 10b-5, the circuits have established conflicting rules governing fraudulent omissions. There is no genuine legal basis for this criminal-civil divide, as the 1934 Securities Act merely imposes "criminal penalties against any person who willfully violates the Act." *Chiarella*, 445 U.S. at 225 n.3 (citing 15 U.S.C. § 78ff(a) (1934)). The Act otherwise does not bifurcate its applicability between criminal and civil cases. *See id.* Circuits finding criminal defendants possess a duty to disclose unrelated prior convictions have created an ever-growing split in authority deprives criminal defendants of a fair trial as guaranteed by the Constitution.

A. In 10b-5 Prosecutions, a Growing Circuit Split Disregards Binding Securities Law and Allows Prejudicial Propensity Evidence to Permeate Criminal Trials.

In cases charging criminal violations of Rule 10b-5, the Second, Sixth, and Eleventh circuits have held neither *Michelson* and its progeny, nor Rule 404(b), preclude admission of prior convictions in federal securities fraud prosecutions.

This trend among the circuits originated with *United States v. Stitsky*, where the Second Circuit affirmed a case similar to DeCiancio's. *See* 536 F. App'x 98 (2d Cir. 2013) (summary order). There, the Second Circuit affirmed the district court's decision allowing the government to present a criminal defendants' prior convictions to the jury on the basis that nondisclosure was fraudulent—despite any existing duty to disclose his prior, unrelated convictions. *Id.* at 106. The Second Circuit relied solely

on whether investors might have *potentially* considered the prior convictions to have affected their investment decisions. *See id.*

The Eleventh Circuit reached a similar conclusion in *United States v. Bachynsky*, 415 F. App'x 167, 171 (11th Cir. 2011) (per curiam) ("The duty to disclose 'is a general one, and arises whenever a disclosed statement would be "misleading" in the absence of the "disclos[ure] of [additional] material facts" needed to make it *not* misleading.' ") (alterations in original) (quoting *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (emphasis in original)). The *Bachynsky* court went further than the *Stitsky* court in holding general disclosure duties always arise in the case of prior convictions—even when there are no existing judicial, statutory, or regulatory duties to disclose.

DeCiancio's case marks the latest stop in this dangerous trend. The Sixth Circuit embraced the same aberrant rationale: omissions regarding decades-old unrelated criminal convictions are material and misleading under Rule 10b-5, even in the absence of any articulated duty to disclose affording any notice that the convictions should have been disclosed to investors. *See* App. 12–14. These circuits have not even attempted to engage with this Court's established securities fraud rules, and have carved out a dangerous and unfairly prejudicial exception in criminal 10b-5 prosecutions.

B. Civil Cases Arising Under Rule 10b-5 Have Adopted Consistent Rules Governing Duties to Disclose that Create a Sharp Divide with Criminal Cases.

Contrary to the results reached by the Second, Eleventh, and now Sixth Circuit, civil cases generally treat duties to disclose as separate elements of a 10b-5 securities fraud claim. Rather than hold disclosure duties relating to prior convictions are universal, civil cases properly recognize a pre-existing duty to disclose as a separate element of a securities fraud claim. For instance, the Second Circuit in *Stratte-McClure v. Morgan Stanley* explained "we have consistently held that 'an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts.'" 776 F.3d 94, 101 (2d Cir. 2015) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)). Similarly, the Sixth Circuit's civil cases have held "[i]n order to be actionable, a misrepresentation or omission must pertain to material information that the defendant had a duty to disclose, two significant limitations to the general policy of disclosure." *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 669 (6th Cir. 2005) (citing *Basic*, 485 U.S. at 238); *see also In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (citing *Basic*, 485 U.S. at 239 n.17).

The Fifth Circuit has taken an analogous position regarding material omissions, holding "'deception' within the meaning of § 10(b) requires that a defendant fail to satisfy a duty to disclose material information to a plaintiff." *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 384 (5th Cir. 2007). The Eleventh Circuit has also adopted a similar rule. *See Finnerty v. Stiefel*

Labs., Inc., 756 F.3d 1310, 1316 (11th Cir. 2014) ("[A] defendant's omission to state a material fact is proscribed only when the defendant has a duty to disclose.") (quoting *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986) (alteration in original)).

The Third Circuit has recognized the same rule, holding "[s]uch a duty to disclose must be separately shown." *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (internal quotations omitted) (quoting *Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 608 (N.D. Cal. 1991)). Similarly, the Ninth Circuit has held "[s]uch a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* and *Matrixx Initiatives*." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014). Likewise, the First Circuit has held "[e]ven if information is material, there is no liability under Rule 10b-5 unless there is a duty to disclose it." *See Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir. 1990) (en banc) (quoting *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 26 (1st Cir. 1987)). The alignment of the circuits is particularly strong, highlighting the magnitude of the error committed by the Second, Sixth, and Eleventh Circuits in their criminal 10b-5 jurisprudence.

1. *Consistent with* Basic *and* Matrixx Initiatives*, Civil Cases Hold Disclosure Duties Arise out of Specific and Defined Circumstances.*

In accordance with the principles adopted by this Court in *Matrixx Initiatives*, the Courts of Appeal have generally held disclosure duties only arise in defined circumstances. For instance, the Sixth Circuit has held disclosure duties "may arise when there is insider trading, a statute requiring disclosure, or, as relevant to this case, an inaccurate, incomplete or misleading prior disclosure." *City of Monroe*, 399

F.3d at 669 (quoting *In re Digital Island Sec. Litig.*, 357 F.3d 322, 329 n.10 (3d Cir. 2004) (internal quotations omitted)). The Second Circuit has adopted nearly identical language, holding "[s]uch a duty may arise when there is 'a corporate insider trad[ing] on confidential information,' a 'statute or regulation requiring disclosure,' or a corporate statement that would otherwise be 'inaccurate, incomplete, or misleading.'" *Stratte-McClure*, 776 F.3d at 101 (alterations in original) (quoting *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992)). Criminal cases charging 10b-5 violations have simply ignored any such analysis and thus materially divided what constitutes a 10b-5 action. This Court should grant certiorari to settle this conflict.

II. The Sixth Circuit's Opinion Directly Conflicts with this Court's Decisions in *Chiarella, Basic,* and *Matrixx Initiatives* Pertaining to Omissions Under Rule 10b-5.

This Court should also grant this petition because the Sixth Circuit contradicted this Court's binding precedent regarding omissions liability under Rule 10b-5. *See* SUP. CT. R. 10(c). Beginning almost forty years ago when this Court has confronted whether omissions of information are actionable or misleading under Rule 10b-5, it has clearly and consistently held such omissions may are only misleading when a duty to disclose has been breached. The Sixth Circuit blatantly rejected this established rule as if DeCiancio had crafted it *ex nihilo*, *see* App. 12 ("Absent a duty to disclose, *the argument goes* . . .") (emphasis added), and omitted an essential and significant element of omissions liability under federal securities law.

In *Chiarella*, this Court held "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." 445 U.S. at 235. Later

in *Basic*, this Court was explicit, holding "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." 485 U.S. at 239 n.17; *see also United States v. O'Hagan*, 521 U.S. 642, 680 (1997) (Thomas, J., concurring in part and dissenting in part) ("Nondisclosure *where there is a pre-existing duty to disclose* satisfies our definitions of fraud and deceit for purposes of the securities laws.") (emphasis added) (citing *Chiarella*, 445 U.S. at 230).

And addressing the creation of disclosure duties in *Matrixx Initiatives*, this Court highlighted "it bears emphasis that § 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information." 563 U.S. at 44–45. Indeed, "[e]ven with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under these provisions by controlling what they say to the market." *Id.* Despite this Court's painstakingly clear precedent on these well-settled principles of securities law, the Sixth Circuit failed to even acknowledge them.

The Sixth Circuit wholly ignores the rules established in *Chiarella, Basic, and Matrixx Initivities*, and instead adopts a contrary rule holding "that the 'materiality' of the withheld information does not depend strictly on the existence of a duty to disclose that has been codified by statute or prescribed by regulation." *See* App. 13. This rule directly contradicts the letter and spirit of this Court's aforementioned decisions by conflating materiality with a duty to disclose.

The SEC does impose disclosure duties regarding prior criminal convictions on some issuers. For instance, 17 C.F.R. § 229.401(f) (2010) regulates disclosure of

criminal convictions occurring within the preceding ten years for directors or officers of publicly-traded corporations. Since Medical Safety Solutions was a private company and Jackson's convictions were well-over ten years old, even this regulation is inapplicable.

The Sixth Circuit failed to point to any applicable statute, regulation, or source of law that would give rise to a duty to disclose convictions that were entirely extrinsic to the charged fraudulent scheme. *See* App. 13–14. Both *Stitsky* and *Bachynsky* similarly fail to name any statutory or regulatory duty to disclose the respective prior convictions at issue in each case, and simply pronounce the duty *ex post* to the alleged failure to disclose.

Further, the Second, Sixth, and Eleventh Circuits' approach presents an unworkable rule that deprives persons of notice and paints nondisclosure as fraudulent *ex post* to the defendants' alleged omissions. This Court has routinely considered such retroactive rules to violate due process. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964) ("The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court."). Indeed, not only was the Sixth Circuit's application improper, but it led the jury to falsely conclude a defendant has committed fraudulent acts in his nondisclosure. In ignoring settled securities law, these circuits have deprived criminal defendants of fair trials through unfiltered presentation of propensity evidence to juries; a practice this Court can and must correct.

III. This Case Presents an Excellent Vehicle for this Court's Review.

This case presents an ideal vehicle for this Court to address the conflicting application of federal securities law and subsequent prejudicial evidentiary practices, because references to Jackson's inadmissible convictions thoroughly permeated DeCiancio's trial.

Moreover, the issues are preserved and were clearly presented below. Counsel for DeCiancio and his codefendants objected to admission of these convictions prior to, and during trial. *See* App. 11–12, 58–65. This issue was thoroughly briefed in DeCiancio's appeal and was squarely addressed by the Sixth Circuit in its decision. *See* App. 12–16.

While the Sixth Circuit ultimately applied plain error review, the court's *sua sponte* application of plain error was not only improper, but extremely peculiar. The government did not allege a preservation issue at any point in its briefing, nor could it reasonably do so. DeCiancio and his codefendants objected to the use of Jackson's convictions in a motion *in limine*, App. 58–59, and the government directly addressed the Rule 404(b) issue in its response to the motion. App. 69–72.

Further, the Sixth Circuit wrongfully strayed from the proper application Federal Rule of Criminal Procedure 51(b). The error was preserved—DeCiancio and his codefendants objected repeatedly to this evidence at trial. *E.g.*, App. 181–82. And even if it was not, it satisfied plain error. *See Rosales-Mireles v. United States*, ___ U.S. ___, 138 S. Ct. 1897, 1906 (June 18, 2018) ("[C]ourts 'should' correct a forfeited plain error that affects substantial rights 'if the error "seriously affects the fairness,

integrity or public reputation of judicial proceedings." ' ") (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

The Sixth Circuit wrongfully used plain error as a tool to affirm, finding that in light of *Stitsky* and *Bachynsky,* the error was not clear. Yet, it simply failed to engage the abundance of binding authority holding otherwise—clearly settling questions of omissions liability under federal securities law in a way directly adverse to the holdings of *Stitsky* and *Bachynsky*.

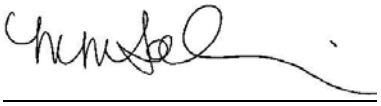
Finally, this case provides an opportunity to correct lower courts' trend of disregarding binding Supreme Court precedent. The Sixth Circuit gave little credence to this Nation's overriding policy of excluding prejudicial propensity evidence in the form of extrinsic prior criminal convictions. *See Michelson*, 335 U.S. at 475–76. The position of the Sixth, Second, and Eleventh Circuits renders this Court's holding in *Michelson* largely meaningless through the erroneous application of securities law.

The government never offered, and the lower courts never relied upon, an alleged legitimate Rule 404(b)(2) purpose; it simply based its case for admissibility on an incorrect "direct proof" reliance theory under the federal securities laws. Accordingly, this case presents an ideal opportunity to bring clarity to rules necessary to ensure due process of law in criminal jury trials.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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