No. 23-184

In the

Supreme Court of the United States

KAREN M. SUBER,

Petitioner,

v.

VVP SERVICES, LLC, et al,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

In their Opposition, Respondents highlight that Petitioner and Petitioner's "lead counsel" are graduates of Harvard Law School, one of an array of distinguished law schools within this great nation of ours. [Opposition, p. 25]. One lesson, among many other lessons, Petition and Petitioner's lead counsel have learned as part of the Harvard Law School community and through the efforts of some of our nation's greatest and most prolific legal scholars and thought leaders, including Professors John Coates, Charles Fried, Lani Guinier, Annette Gordon-Reid, Charles Ogletree, Richard Parker, David Wilkins, the Hon. Leo J. Strine, Jr. (ret.), the Hon. Nancy J. Gertner (ret.), and the Hon. Stephen Breyer (ret.), is that lawyers should not – *lawyers* **cannot** – make misrepresentations before any court, whether the U.S. District Court for the Southern District of New York, the U.S. Court of Appeals for the Second Circuit, the U.S. Supreme Court or any other court. To make misrepresentations is to impede the truth-seeking function of the courts, the foundation of the American legal system, which is the embodiment of Article III of the U.S. Constitution.

The imperative of the truth-seeking function has been recognized for centuries. *See, e.g.*, *ABF Freight System, Inc. v. Nat'l Labor Relations Bd.*, 510 U.S. 317, 323 (1994) ("False testimony in a

formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings."), *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) ("It is precisely the function of a judicial proceeding to determine where the truth lies."), *Cliquot's Champagne*, 70 U.S. 114, 141 (1865) ("While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth."). *See also United States v. Tsarnaev*, 142 S. Ct. 1024, 1038 (2022) and *Kansas v. Cheever*, 571 U.S. 87, 95 (2013) (in each case, recognizing the "truth-seeking function" of the courts). Filing false affidavits on material facts is supposed to be a non-starter. Filing false affidavits on material facts to get a case dismissed pre-discovery is supposed to be unheard-of. Having a panel of the Second Circuit affirm this and other relevant lawlessness of Respondents is supposed to be reversed by the Supreme Court of the United States.

Throughout these proceedings and in their Opposition, Respondents have made, and continue to make, misrepresentations – all with an intent to obscure the facts and legal issues in the Petition. *See, e.g.*, PETITIONER'S MOTION TO STRIKE THE CORRELL AFFIDAVITS, [1:20-cv-08177-(AJN), No. 88, Feb. 23, 2021]; PLAINTIFF'S EMERGENCY MOTION TO SUPPLEMENT THE RECORD ON APPEAL [Appeal No. 21-2629, No. 70,

Apr. 4, 2022]; LETTER TO THE HON. ALISON J. NATHAN, [1:20-cv-08177 (AJN), No. 165, Apr. 24, 2023] ("**Indicia of Respondents' Jurisdictional Misrepresentations**"). Petitioner and Petitioner's counsel are left to ask questions similar to those asked by world-renowned ethics professor Bruce A. Green of Fordham Law School, another distinguished law school, as suggested by his aptly titled article, Green, Bruce A. and Roiphe, Rebecca, *Lawyers and the Lies They Tell*, WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY, Vol. 69, 2022 (Dec. 10, 2021).

Respondents' misrepresentations cannot, and must not, obfuscate that the Petition embodies an ideal vehicle to achieve the following:

> To address the unconstitutional inconsistencies among the standards used to define the "arising from" prong of the NEW YORK LONG-ARM STATUTE, N.Y. C.P.L.R. §302(a)(1);
>
> To close the gap between the DUE PROCESS CLAUSE of the Fourteenth Amendment, U.S. CONST., amend. XIV, and the NEW YORK LONG-ARM STATUTE;
>
> *and*

> To standardize the framework for applying 28 U.S.C. §1631 to eliminate inconsistencies among the Circuits.

Not granting certiorari will result in the opportunity cost of not clarifying the issues above and be tantamount to endorsement by the Supreme Court of pervasive misrepresentations by Respondents that derailed the proceedings below to the wrong result.

ARGUMENT

I. Respondents Continue Their Pervasive, Profligate Misrepresentations

A. Petitioner Did Not Engage in Forum Shopping in Selecting New York to Commence the Underlying Action

Respondents suggest Petitioner engaged in "forum shopping." [Opposition, p. 31]. As discussed in Petitioner's Second Amended Complaint ("**SAC**") [1:20-cv-08177 (AJN), No. 92], Petitioner selected New York as the forum to commence this action for myriad reasons, as evidenced in the SAC and other pleadings filed throughout this multi-year proceeding, including:

1. Petitioner was a citizen of New York when lured by Respondents to relocate from New York to California.

2. Respondents sold unregistered securities to New York investors, including the New York Yankees, and in so doing, took advantage of the regulatory framework that is THE MARTIN ACT, N.Y. GEN. BUS. LAW, ARTICLE 23-A.

3. Respondents engaged in substantial activities within New York that relate to Petitioner's causes of action; ***however***, Respondents masked those activities and that relatedness through their knowing submission of false affidavits as indicated by the Indicia of Respondents' Jurisdictional Misrepresentations.

4. Respondents used Petitioner's legal work product in a manner requiring Petitioner to resign pursuant to RULE 1.16 OF THE NEW YORK RULES OF PROFESSIONAL CONDUCT.

5. California will be a more expensive forum in which to litigate Petitioner's

> claims, particularly when compared to Petitioner's home forum of New York, as Petitioner is neither a citizen nor resident of California, *nor is Petitioner a California-barred attorney*.

The reasons underlying Petitioner's forum selection do not support forum shopping. To be considered forum-shopping the reasons have to be "wholly frivolous." *William Gluckin Co. v. Int'l Playtex Corp.*, 407 F.2d 177, 178 (2d Cir. 1969) ("Discussing that forum shopping may be inferred where the reasons for choice are "wholly frivolous."). Forum shopping ***may*** have occurred ***if*** Petitioner had elected to commence the underlying proceeding in or around Kansas City, Missouri (1) where Respondents have, according to public filings, maintained a registered office and (2) a jurisdiction in which one of the Respondents has already lost a $6.1 million jury verdict for proceedings in connection with that Respondent's breach of fiduciary duties and other fraud-related causes of action. [*See, e.g.*, SAC, ¶39, pp. 26-27; Exhibit 20(A)-(B)].

B. Respondents Conducted Business in New York

In their Opposition, Respondents continue to falsely assert:

> [Respondents] did not transact business in New York, all of the conduct about which Petitioner complained occurred in California.

[Opposition, p. 5.].

However, even the District Court found Respondents Raizada and Sclavos transacted business in New York in the form of investment solicitation activities within New York that caused Petitioner to be compelled to resign. [App. 29, 31]. *See infra* Section II. Moreover, when the District Court found Respondents transacted business in New York, the District Court did not have the benefit of facts Respondents deliberately withheld from and/or deliberately misrepresented to the District Court. *See* Indicia of Respondents' Jurisdictional Misrepresentations discussed *supra* p. 3.

C. Opinions Offered by Petitioner Continue to be of Precedential Value and Are Not "Stale" as Respondents Wrongfully Claim

Respondents mischaracterize Second Circuit jurisprudence regarding the "arising from" prong of the NEW YORK LONG-ARM STATUTE by incorrectly asserting:

> Notably, all the Second Circuit opinions upon which Petitioner relies to identify

> other phrases that courts have used to describe the "arising from" prong as purportedly creating inconsistencies or confusion predate the New York Court of Appeals' decision in *Licci II*.

[Opposition, p. 12].

If Respondents' assertion above were correct, that would suggest none of the "other phrases" or opinions cited by Petitioner were used by the Second Circuit in connection with the "arise from" prong of the NEW YORK LONG-ARM STATUTE ***AFTER*** "*Licci II*," *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327 (2012). Yet, that is **NOT** the case. As the Court will recall from the Petition, those "other phrases" used included, among others: "strong nexus," "substantial nexus," "sufficiently related," and "sufficient nexus." [Petition, p. 14]. The foregoing phrases were used to describe the "arise from" prong in the following cases, respectively: *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 764 (2d Cir. 1983), *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 59 (2d Cir. 1985), *Agency Rent a Car Sys., Inc. v. Grand Rent a Car*, 98 F.3d 25, 31 (2d Cir. 1996), and *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997). [Petition, p. 15]. The foregoing cases, in fact, have been cited after *Licci II* in support of issues relating to the NEW YORK LONG-ARM STATUTE. *Edwardo v. The Roman Catholic Bishop of Providence*, 66 F.4th

69 (2d Cir. 2023) (citing *Beacon Enters., Inc.*, **predating *Licci II***, for the proposition that the "arise from" prong requires a direct relation between the cause of action and in-state business transactions); *Universal Trading & Inv. Co. v. Credit Suisse (Guernsey) Ltd.*, 560 F. App'x 52, 4 (2d Cir. 2014) (citing *Hoffritz for Cutlery, Inc.*, **predating *Licci II***, in connection with the court's jurisdictional analysis); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013) (also citing *PDK Labs, Inc.*, **predating *Licci II***, in connection with the court's jurisdictional analysis). *See Tam v. MIH CP Sols.*, 21-CV-2148 (RPK) (PK), at *8 (E.D.N.Y. Dec. 5, 2022) (""A claim 'arises out of' a defendant's transaction of business in New York 'when there exists "a substantial nexus" between the business transacted and the cause of action sued upon.'" *Agency Rent a Car Sys., Inc. v. Grand Rent a Car Corp.*, 98 F.3d 25, 31 (2d Cir. 1996) (citation omitted)."); *Yehuda v. Zuchaer*, 21-CV-7092 (VEC), at *6 (S.D.N.Y. June 21, 2022) ("But Yehuda has not alleged adequately that his claims arose from that business transaction, the second element of [the NEW YORK LONG-ARM STATUTE]. That element requires a "substantial nexus" between the transaction in New York and the cause of action. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.2d 158, 166 (2d Cir. 2005) (citation omitted).").

Respondents also wrongfully assert that Petitioner's argument in respect of the NEW YORK LONG-ARM STATUTE "hinges on outdated and stale opinions," suggesting opinions issued after the date of "*Licci II*," are "stale." [Opposition, p. 12]. Yet, cases after *Licci II* (and even *Licci III*) continue to reference cases that pre-date *Licci II*. *See, e.g.*, *Daou v. BLC Bank, S.A.L.*, 42 F.4th 120, 129 (2d Cir. 2022) (""To establish personal jurisdiction under [the NEW YORK LONG-ARM STATUTE], two requirements must be met: (1) The defendant must have transacted business within the state; and (2) the claim asserted must arise from that business activity." *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006), citing *McGowan v. Smith*, 52 N.Y.2d 268, 273, 437 N.Y.S.2d 643, 419 N.E.2d 321 (1981)."); *Applied Research Invs. v. Lin*, 22-CV-7100 (VSB), at *9 (S.D.N.Y. Sep. 27, 2023) ("I also find that there is "some articulable nexus between the business transacted and the cause of action sued upon." *McGowan v. Smith*, 52 N.Y.2d 268, 272 (N.Y. 1981)."); and *Moussaoui v. Bank of Beirut & the Arab Countries*, 22-cv-6137 (ER), at *10 (S.D.N.Y. Sep. 14, 2023). *Accord Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 329 (N.Y. 2016) ("This inquiry is "relatively permissive" (id. at 339, 960 N.Y.S.2d 695, 984 N.E.2d 893, citing *McGowan v. Smith*, 52 N.Y.2d 268, 437 N.Y.S.2d 643, 419 N.E.2d 321 [1981], and *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 527

N.Y.S.2d 195, 522 N.E.2d 40 [1988]), and does not require causation, but merely "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim" ([*Licci II* at 339]). The claim need only be "in some way arguably connected to the transaction" ([Id. at 340].") (Cleaned up).

II. The Decisions Below Were Wrong

The District Court's Opinion and Order [App. 16-42] and the Second Circuit's Order [App. 2-15] are replete with factual and legal errors. As one of several examples: Neither the District Court nor the Second Circuit properly analyzed Petitioner's claim, "Wrongful Termination, Via Constructive Discharge" ("**Wrongful Termination COA**"). [SAC, pp. 75-76, ¶¶155-160, SAC-Exhibit-24]. The District Court found Petitioner's Wrongful Termination COA was related to the investment solicitation activities. [App. 33]. The District Court also found Respondents Raizada's and Sclavos's investment solicitation activities constituted a "business transaction" for the purposes of the NEW YORK LONG-ARM STATUTE. [App. 24; App. 9-10]. The District Court further found Petitioner-Plaintiff was "forced to resign in part because Defendants were providing her work assignments that involved fraudulent activity and professional misconduct. One such work project, according to

Plaintiff, involved the solicitation of investments from the New York Yankees." [App. 33]. The above must be viewed alongside relevant pleadings:

1. Mr. Raizada was, and Plaintiff is informed that, Mr. Raizada continues to be, an officer and employee of Vision Venture Partners and VVP Services, with compensation taking the form of both cash and/or perquisites.

SAC, p. 11, ¶14.

2. Mr. Sclavos was, and Plaintiff is informed that, Mr. Sclavos continues to be, an officer and employee of Vision Venture Partners and VVP Services, with compensation taking the form of both cash and/or perquisites.

SAC, p. 12, ¶16; App. 17 ("Defendants Amit Raizada and Stratton Sclavos are individuals domiciled in California and are both officers and employees of Vision Venture and VVP.").

3. VVPS was a services company providing back-office administration, accounting, marketing, business

> development and human resources services for service operating companies and investments, including, for example, investment solicitation activities on behalf of affiliated companies like Vision Esports and others.

AFFIDAVIT OF ANGELA CORRELL [1:20-cv-08177 (AJN), No. 103-1 (Mar. 19, 2021)].

It logically follows the investment solicitation activities and "business transaction" attributed to Raizada and Sclavos must also be attributed to Respondent VVP Services ("**VVPS**"), ***the employer of Respondents Raizada, Sclavos AND Petitioner***. Thus, if Respondents Raizada and Sclavos engaged in investment solicitation activities and a "business transaction" as employees of Respondent VVPS, ***then, so too, did their employer, Respondent VVPS***.

Yet, the District Court incorrectly and illogically concluded, and the Second Circuit erroneously affirmed:

> However, only Sclavos and Raizada engaged in a business transaction in New York in relation to this activity, and Plaintiff cannot bring a claim for wrongful termination via constructive discharge against them. […] Plaintiff does not argue that

> either was her employer, nor does she allege facts from which the Court could conclude that either was her employer. Plaintiff instead alleges that it was VVP Services who extended an offer of employment, Dkt. No. 92 ¶¶ 41-42, but, as discussed above, Plaintiff has not demonstrated that VVP Services engaged in a business transaction of any kind.

[App. 33-34. (Emphasis supplied.)].

Inquiries logically following and highlighting the erroneous reasoning of the District Court include:

1. If, as employees of VVPS, Raizada and Sclavos engaged in investment solicitation activities and a "business transaction," how is it possible the District Court concluded: "Plaintiff has not demonstrated that VVPS engaged in a business transaction of any kind"? [App. 34].

2. Inferentially, then: With (i) Raizada, Sclavos, and VVPS engaging in investment solicitation activities and a "business transaction," (ii) investment solicitation activities and

> a "business transaction" being related to Petitioner's Wrongful Termination COA, and (ii) VVPS having been Petitioner's employer, how could the District Court not have found personal jurisdiction over at least VVPS with respect to the Wrongful Termination COA?

Furthermore, those inferential errors of logic were lost on the Second Circuit. For other errors in reasoning and misstatements by the District Court left unexamined by the Panel, *see* Petitioner-Appellant's Brief submitted to the Second Circuit on Feb. 2, 2022, pp. 45-59.

III. Unpublished Summary Orders Are Just as Effective Vehicles as Published Opinions in Correcting Errors Made by Lower Courts

On three separate occasions, Respondents make reference to the Second Circuit's opinion below [App. 2-15] as an "unpublished summary order." [Opposition, pp. 1, 2, 20]. Respondents' use of the phrase seems as if they are implying unpublished opinions are "less than" published opinions. *How could it be that errors of an inferior court are less likely to be corrected if they appear in an unpublished opinion. Is that justice? See* David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685

(2009) (Noting among other things "several nonconstitutional flaws in the unpublication system that call out for Supreme Court action, including: … 2) that the authority of appellate courts to write single-use opinions reduces judicial rigor and jeopardizes the rightness of individual outcomes; … 5) that unpublished cases unfairly limit litigants' ability to seek review; and 6) that the system of selective publication creates an appearance of unfairness and impropriety."). The answer to the foregoing question necessarily must be "no." Errors in unpublished orders or opinions are just as much in need of correction by an appellate court as errors in published opinions. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (The Supreme Court reversed a short, unpublished, unsigned summary order issued by a panel of the Second Circuit).

IV. The Questions Presented in the Petition Merit Review by the U.S. Supreme Court

The issues within the questions presented in the Petition have been fully briefed and argued in one form or another over the last three years since the underlying proceeding was commenced. There is more than sufficient argumentation from both sides on the issues of law and fact relating to the NEW YORK LONG-ARM STATUTE, the DUE PROCESS CLAUSES of the U.S. CONST., amend. V and U.S. CONST., amend.

XIV and 28 U.S.C. §1631. *See Youakim v. Miller*, 425 U.S. 231 (1976) (Explaining though the Supreme Court may not normally decide issues not exactly as presented below, the Supreme Court is not precluded from doing so). Here, the issues are "squarely presented and fully briefed." *Carlson, v. Green*, 446 U.S. 14, 17 n.2 (1980). These issues are of paramount importance as they go to the heart of whether Petitioner, or *similarly-situated plaintiffs*, will have remedies in any jurisdiction at all; issues presented directly affect the access of a plaintiff to remedies through the federal courts, which are supposed to "comprise one great system for the administration of justice." *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514, 517 (4th Cir. 1955). The Supreme Court has cited *Internatio-Rotterdam, Inc.* on at least two occasions. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465 n.8 (1962), *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 34 n.9 (1960).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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