No. _____

IN THE

Supreme Court of the United States

QUALITY SYSTEMS, INC., ET AL.,
Applicants,

v.

CITY OF MIAMI FIRE FIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST, ET AL.,
Respondents.

APPLICATION DIRECTED TO THE HONORABLE ANTHONY M. KENNEDY FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 1, 2017

LIST OF PARTIES AND RULE 29.6 STATEMENT

In the court of appeals, the plaintiffs/appellants were City of Miami Fire Fighters' and Police Officers' Retirement Trust and Arkansas Teacher Retirement System, and the defendants/appellees were Quality Systems, Inc. (QSI) and several of its executives and directors: Sheldon Razin, Steven Plochocki, and Paul Holt.

QSI is a publicly traded company and has no parent corporation. No publicly-held corporation or other publicly-held entity owns 10% or more of its stock.

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To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, QSI and the individual defendants (collectively, "Applicants") respectfully request a 29-day extension of time, to and including January 26, 2018, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The court of appeals issued its opinion on July 28, 2017, and denied Applicants' petition for rehearing and rehearing *en banc* on September 29, 2017. (A copy of the Ninth Circuit's decision, available at 865 F.3d 1130, and of the Order denying rehearing and rehearing *en banc*, are attached.) Currently, any petition would be due on December 28, 2017. This

application has been filed more than 10 days before the date a petitions would be due. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

1. This case involves the safe harbor created by the Private Securities Litigation Reform Act of 1995 (PSLRA). In the decision below, the Ninth Circuit held that a defendant cannot utilize the safe harbor for forward-looking statements (*see* 15 U.S.C. § 78u-5(c)) unless it admits that any associated *non*-forward-looking statements are false or misleading. Op. 30, 33-34. That decision directly conflicts with the PSLRA's text, with the decisions of other courts, and with the policy objectives underlying the safe harbor provision.

In enacting the PSLRA, Congress sought to encourage companies to provide investors with important forecasts concerning their expected future performance, while protecting companies from frivolous lawsuits based on those projections. To that end, the PSLRA contains a safe-harbor provision that shields from liability any projection about the future—known as a "forward-looking statement"—that either (1) is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement," or (2) is not "made with actual knowledge" that the statement is false. 15 U.S.C. § 78u-5(c)(1). No such protection extends to non-forward-looking statements (*i.e.*, factual assertions about current or past performance), which remain subject to liability under the traditional standards set forth elsewhere in the securities laws.

Here, Respondents sued Applicants alleging securities fraud with respect to forward-looking *and* non-forward-looking statements that Applicants made in connection with QSI's financial performance and future prospects. Op. 6-11. Applicants invoked the PSLRA safe harbor with respect to the forward-looking statements, and the district court agreed that those statements were protected by the safe harbor and thus were not actionable under the PSLRA. Op. 17; *see also In re Quality Sys., Inc. Sec. Litig.,* 60 F. Supp. 3d 1095, 1101-03 (C.D. Cal. 2014). The Ninth Circuit (Judges Reinhardt, Fletcher, and Paez) reversed. It held that the safe harbor's first prong does not apply when a company's forward-looking statement is accompanied by a non-forward-looking statement that the plaintiff alleges is false or misleading—unless the company admits the non-forward-looking statement's falsity. Op. 30, 33-34.

The Ninth Circuit's holding flouts the terms of the PLSRA and substantially erodes the protections granted by the safe harbor. The PSLRA only requires a company's cautionary language to address its forward-looking statements. *See* 15 U.S.C. § 78u-5(c). Nothing in the safe-harbor provision requires a cautionary statement to warn against the particular risk associated with the defendant's *non*-forward-looking statements—even if those latter statements are false or misleading. Such non-forward-looking statements might (or might not) be independently actionable under the securities laws, but they do not categorically negate safe-harbor protection for the defendant's forward-looking statements. By its plain language, the safe harbor protects the forward-looking statements so long as they

are accompanied by meaningful warnings identifying *other* important factors that might cause actual results to differ.

The panel appeared to believe that a cautionary statement can never qualify as "meaningful" if it does not include such an admission. Op. 30. The panel justified this conclusion by noting that the falsity of the non-forward-looking statements "is clearly an 'important factor' of which investors should be made aware." *Id.* at 33. In doing so, the panel wrongly assumed that the safe harbor requires cautionary statements to warn against *all* "important factors." But the statutory text imposes no such requirement. Indeed, the PSLRA's legislative history makes clear that the cautionary language must identify some—but "*not all*"—such factors. H.R. Rep. No. 104-369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743 (emphasis added); *see also Slayton v. American Express Co.*, 604 F.3d 758, 771-73 (2d Cir. 2010); *Harris v. Ivax Corp.*, 182 F.3d 799, 807 (11th Cir. 1999). And that requirement was plainly satisfied here. *See In re Quality Sys., Inc. Sec. Litig.,* 60 F. Supp. 3d at 1102-03 ("[E]ach cautionary statement identifies specific factors that may affect the forward-looking statements including, *inter alia*, volume and timing of systems sales and installations, length of sales cycles and installation process, impact of incentive payments under the ARRA on sales, the development by competitors of new or superior technologies, and political or regulatory influences in the healthcare industry.").

No court has ever endorsed the Ninth Circuit's extreme rule requiring a defendant to admit that its non-forward-looking statements are false or misleading

in order to secure safe-harbor protection for its forward-looking statements. Indeed, the Ninth Circuit's decision directly conflicts with *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242 (3d Cir. 2009), and similar decisions by other courts. In *Avaya*, the court considered plaintiffs' allegation that false statements of current and historical fact "diluted" the sufficiency of cautionary language accompanying forward-looking projections. *Id.* at 258. In rejecting this argument, the Third Circuit found it self-evident that where *forward*-looking statements are accompanied by cautionary language warning of risks *with regard to the forward-looking statements themselves*, the falsity of proximate *non*-forward-looking statements is irrelevant. *Id.* at 257-58. The court found that the cautionary language at issue was sufficient to protect defendant's forward-looking statements under the safe harbor, even though (1) that language did not address the falsity of accompanying non-forward-looking statements, and (2) those non-forward-looking statements were held to be actionably false. *Id.* at 257-58, 267. That result is squarely at odds with the decision below. And until now, no other court has required cautionary language about forward-looking statements to admit the alleged falsity of non-forward-looking statements in order to render the safe harbor applicable.

If allowed to stand, the panel's decision will effectively nullify the PSLRA's safe harbor for forward-looking statements. Going forward, every time a company fails to meet its previously-disclosed projections and suffers a stock-price drop, securities plaintiffs will argue that the safe harbor does not apply to a company's

forward-looking statements because they were accompanied by false non-forward-looking statements. The result will be vastly to broaden the scope of liability in securities cases by eliminating the safe harbor's independent protection for forward-looking statements, and cause companies to stop providing investors with meaningful forecasts and projections. This is precisely the opposite of what Congress wanted the PSLRA to accomplish.

2. This case presents complex and important issues concerning the scope of the PSLRA's safe harbor. At present, the petition in this case is due on December 28, just after the winter holidays. Undersigned counsel is scheduled to present oral argument to this Court in *Florida v. Georgia*, Original Case No. 142, on January 8, 2018, and has an additional oral argument scheduled before the Second Circuit in *North American Soccer League v. United States Soccer Federation*, Case No. 17-3585, on December 15, 2017. In order to allow sufficient time to narrow the issue or issues that warrant this Court's consideration and prepare a petition for certiorari that will best assist this Court's review, Applicants therefore respectfully request a 29-day extension of the time for filing the petition, until January 26, 2018.

December 1, 2017

Respectfully submitted,

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