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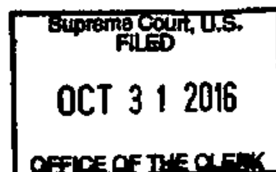

IN THE

Supreme Court of the United States

LEIDOS, INC.,

Petitioner,

v.

INDIANA PUBLIC RETIREMENT SYSTEM, INDIANA STATE TEACHERS' RETIREMENT FUND, AND INDIANA PUBLIC EMPLOYEES' RETIREMENT FUND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREW S. TULUMELLO
Counsel of Record
JASON J. MENDRO
JOSHUA D. DICK
CHRISTOPHER M. RIGALI
JOHN D. AVILA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioner Leidos, Inc.

QUESTION PRESENTED

Under Section 10(b) of the Securities Exchange Act of 1934 and its accompanying Rule 10b–5, an omission may be fraudulent only if the omitted information is necessary to make an affirmative statement "not misleading." Thus, "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, 45 (2011). In the decision below, however, the Second Circuit held that a company can be liable for securities fraud merely for omitting information required by a Securities and Exchange Commission ("SEC") regulation, even if those disclosures are not necessary to make affirmative statements not misleading.

The question presented is:

Whether the Second Circuit erred in holding—in direct conflict with the decisions of the Third and Ninth Circuits—that Item 303 of SEC Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5.

PARTIES TO THE PROCEEDING

In addition to Leidos, Inc. (formerly known as SAIC, Inc.), Kenneth C. Dahlberg, Walter P. Havenstein, Mark W. Sopp, Deborah H. Alderson, and Gerard Denault were initially named defendants in the district court, but all claims against them were dismissed, and dismissal of those claims has been affirmed on appeal.

Respondents, lead plaintiffs in the district and circuit courts, are the Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund.

RULE 29.6 STATEMENT

Petitioner Leidos, Inc. ("Leidos") was named SAIC, Inc. when this litigation was filed. Petitioner continued to do business as SAIC until September 2013, when it changed its name to Leidos and spun off a separate, publicly traded company under its former name. Although the corporation currently doing business as SAIC is not a party to this litigation, Petitioner is referred to herein as "the Company" or "SAIC" to ensure consistency with the briefing and decisions below. Leidos is a publicly held corporation, and no publicly held company holds 10% or more of Leidos' stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–26a) is reported at 818 F.3d 85. The opinions of the district court granting in part and denying in part Defendant's motion to dismiss, granting Defendant's motion for reconsideration, and denying Plaintiffs' post-judgment motion for relief are unreported and attached at App. 27a–87a.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2016. A timely petition for rehearing was denied on August 2, 2016. App. 88a–89a. The jurisdiction of this Court is invoked 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), Securities and Exchange Commission Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5, and Securities and Exchange Commission Regulation S-K, Item 303, 17 C.F.R. § 229.303, are reproduced in the Appendix, *infra*, at 90a–108a.

STATEMENT OF THE CASE

This case presents a deep split of authority with respect to one of the most important—and frequently invoked—provisions of the federal securities laws. The Second and Ninth Circuits, which see more

federal securities cases than the rest of the circuits combined, are in open disagreement regarding whether Item 303 of Securities and Exchange Commission ("SEC") Regulation S-K ("Item 303") creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b–5 (hereinafter referred to collectively as "Section 10(b)"). The Second Circuit answered that question in the affirmative and, in so doing, recognized that its "conclusion is at odds with the Ninth Circuit." Both circuits claim to find support for their positions in a Third Circuit opinion; but that opinion, authored by then-Circuit-Judge Alito, explicitly held that Item 303 does not "impose[] an affirmative duty of disclosure . . . that could give rise to a claim under Rule 10b–5." *Oran v. Stafford*, 226 F.3d 275, 286 n.6 (3d Cir. 2000). Thus, the Second Circuit's holding has created a 2-1 division of authority, and it is also inconsistent with views expressed within the Sixth and Eleventh Circuits.

As a result of this split, SAIC faces potential liability for an alleged Section 10(b) violation that it would not be facing had this suit been filed in a different jurisdiction. This inconsistency is already fueling forum shopping in Section 10(b) litigation. This Court should right the ship that the Second Circuit has taken off course.

Certiorari should be granted not only to resolve a circuit split on an important and recurring question of federal law, but also to clarify the scope of the duty to disclose under Section 10(b). This Court has held that Section 10(b) and Rule 10b–5 do "not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*,

563 U.S. 27, 44 (2011). And "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b–5." *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (internal quotation marks omitted).

Since the enactment of Section 10(b) in 1934 and the promulgation of Rule 10b–5 eight years later, this Court has recognized *only two* situations giving rise to an affirmative duty to disclose. *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 an issuer voluntarily speaks, it has a duty to disclose "material fact[s] necessary to make . . . statements made . . . not misleading." 17 C.F.R. § 240.10b–5(b). From this latter rule it necessarily follows that "companies can control what they have to disclose . . . by controlling what they say to the market." *Matrixx*, 563 U.S. at 45.

The Second Circuit dramatically expanded the scope of omissions liability under Section 10(b). It holds that issuers may be liable for federal securities fraud by omitting information required to be disclosed by SEC regulations, even if that information is not necessary to make affirmative disclosures not misleading. The Second Circuit now imposes liability for violating the disclosure requirements of Item 303, requirements that are, according to the SEC, "intentionally general" and "inapposite" to *Basic*'s test for materiality under Section 10(b). This rule undermines the principles espoused by this Court in *Basic* and *Matrixx*, conflicts with the decisions of this Court cautioning against further judicial expansion of

Section 10(b) liability, and directly departs from the holdings of the Third and Ninth Circuits.

This Court's review is necessary to resolve an acknowledged circuit split and to clarify the circumstances under which there exists a duty to disclose that is actionable under Section 10(b). In doing so, this Court can establish a uniform standard and ensure the fair and consistent application of the federal securities laws throughout the nation.

A. Factual And Procedural Background

1. SAIC is a leading applied technology company that provides scientific, engineering, systems integration, and technical services in the defense, national security, energy, environmental, and health care sectors. The facts giving rise to this lawsuit concern SAIC's contract with the City of New York (the "City"), entered into in 2001, to develop and implement an automated time, attendance, and workforce management solution for City agencies. Def. C.A. Br. 5. The project, known as "CityTime," was completed in 2011. *Id.* As of October 2011, CityTime supported more than 163,000 City employees and nearly 70 City departments. *Id.* It has been hailed by City officials, including former Mayor Bloomberg, as "a great success." *Id.*

While the project was under way, two SAIC employees, project manager Gerard Denault and chief systems engineer Carl Bell, in conjunction with CityTime's primary subcontractor and consultants to the City of New York, formulated an elaborate kickback scheme under which the subcontractor paid kickbacks to Denault and Bell for each hour it billed to the project, resulting in overcharges. App. 5a. The scheme's participants went to great lengths to conceal all aspects of the conduct from both the City and

SAIC, laundering illicit payments through a complex system of U.S. and international shell companies and bank accounts, and silencing SAIC employees through intimidation and threats. Def. C.A. Br. 6. SAIC and its management remained wholly unaware of the improper activity.

Federal and local investigators uncovered the scheme and, in December 2010, prosecutors announced the filing of a criminal complaint against four (non-SAIC) consultants to the City's Office of Payroll Administration. App. 5a. SAIC eventually learned of improper billing by Denault on the CityTime project and subsequently terminated him (in May 2011), and offered to reimburse the City for all time he billed to the project. App. 6a. Denault and Bell were both charged by federal prosecutors, including federal honest services charges for defrauding SAIC. Bell's guilty plea was announced in June 2011, and Denault was convicted, after a trial, in November 2013. *Id.*

The City formally demanded repayment from SAIC on June 29, 2011, which SAIC timely disclosed two days later in a filing with the SEC. Def. C.A. Br. 10. In March 2012, SAIC announced that it had entered into a deferred prosecution agreement ("DPA") with the U.S. Attorney's Office. App. 8a. Under the DPA, SAIC agreed to pay more than $500 million in fines and forfeitures, accepted responsibility for Denault and Bell's conduct, and submitted to the supervision of a corporate monitor for three years. *Id.*

2. Plaintiffs, Respondents here, initiated this lawsuit for securities fraud in 2012. They asserted claims against SAIC and several of its officers and directors for violations of Sections 10(b) and 20(a) of

the Exchange Act. In sum and substance, Plaintiffs claimed that certain SAIC statements, including SEC filings, contained false statements and omissions pertaining to CityTime.

SAIC moved to dismiss for failure to state a claim. The district court agreed with SAIC that, with respect to the vast majority of the claims, Plaintiffs failed to adequately plead the scienter and false statement or omission elements of a Section 10(b) claim. App. 51a. The court initially declined to dismiss a subset of claims based on alleged deficiencies in SAIC's annual report on Form 10-K, filed on March 25, 2011 (the "March 2011 10-K"). App. 71a. These claims asserted that the March 2011 10-K, which did not contain a discussion of the CityTime project, failed to comply with Generally Accepted Accounting Principles ("GAAP") and omitted disclosures required by Item 303. *Id.* But upon reconsideration, the court found that the GAAP and Item 303 claims were insufficiently pled under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). App. 48a. It dismissed the complaint in its entirety and later denied Plaintiffs' motion seeking leave to file another amended complaint. App. 35a–36a. Plaintiffs appealed.

B. The Second Circuit's Holding Entrenched A Deep And Expressed Circuit Split

On appeal, the Second Circuit reversed in part, holding that Plaintiffs adequately alleged that SAIC failed to make required disclosures under Item 303 in its March 2011 10-K.[1] App. 2a. Item 303 requires

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[1] The court also reinstated Plaintiffs' claims based on SAIC's purported failure to disclose a "loss contingency" in accordance with GAAP. App. 14a–16a, 26a.

that certain public filings, including a company's quarterly and annual reports, contain a discussion and analysis of the company's financial condition and results of operations. 17 C.F.R. § 229.303(a). This section is commonly referred to as "Management's Discussion & Analysis," or simply "MD&A." Relevant here, the regulation requires management to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." *Id.* § 229.303(a)(3)(ii).

Central to this petition, the Second Circuit held that omitting statements purportedly required under Item 303 could give rise to securities fraud liability under Section 10(b). App. 17a. The Second Circuit's holding rested on the application of *Stratte-McClure v. Morgan Stanley*, decided just months earlier, which held that "a failure to make a required Item 303 disclosure . . . is indeed an omission that can serve as the basis for a Section 10(b) securities fraud claim." 776 F.3d 94, 100 (2d. Cir. 2015). In that case, the court expressly acknowledged that its Item 303 holding created a circuit split. *Id.* at 103 ("[O]ur conclusion is at odds with the Ninth Circuit's recent opinion in *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046 (9th Cir. 2014).").

The Second Circuit's expressed disagreement with the Ninth's Circuit's *NVIDIA* decision was two-fold. *First*, in its view, *NVIDIA* rested on a misguided interpretation of a Third Circuit opinion, *Oran v. Stafford*, 226 F.3d 275. In the Second Circuit's view, *Oran*, which *rejected* an attempt to assert a Section 10(b) claim predicated on an alleged violation of Item 303, "actually suggested, without

deciding, that in certain instances a violation of Item 303 *could* give rise to a material 10b–5 omission." *Stratte-McClure*, 776 F.3d at 103. *Second*, unlike the Ninth Circuit, the Second Circuit thought it both relevant and persuasive that a number of prior decisions, including two of its own, held that Item 303 omissions were actionable under Sections 11 and 12 of the Securities Act of 1933 (the "Securities Act"). *Id.* at 104 (discussing *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 116 (2d Cir. 2012), and *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715–16 (2d Cir. 2011)).

Applying *Stratte-McClure*, the Second Circuit reinstated Plaintiffs' Section 10(b) claim based on purported Item 303 omissions in the March 2011 10-K. App. 23a. SAIC petitioned for panel rehearing and rehearing en banc. That petition was denied on August 2, 2016. App. 88a–89a.

REASONS FOR GRANTING THE PETITION

The Second Circuit holds that a "duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 102 (2d Cir. 2015). One such regulation is Item 303. According to the Second Circuit, issuers may be liable for federal securities fraud merely by omitting certain information required for disclosure by Item 303, even if those omissions do not make any affirmative statements misleading. *Id.* at 100; App. 17a. This conclusion has resulted in a clear and acknowledged 2-1 circuit split, is at odds with several decisions of this Court, and undermines clearly expressed Congressional intent.

First, the Second Circuit's Item 303 holdings directly conflict with the decisions of the Third and

Ninth Circuits, which hold that Item 303 does not create a duty to disclose for purposes of Section 10(b). Its stance is also inconsistent with positions expressed within the Sixth and Eleventh Circuits. In addition, the Second Circuit's holdings directly contravene this Court's express guidance regarding disclosure duties under Section 10(b).

Second, the Second Circuit's minority view expands the right of private litigants to bring federal securities fraud claims far beyond the scope this Court has authorized, and in direct opposition to Congress's intent to curb the expansion of Section 10(b) liability, as manifested in the PSLRA. This unnecessary and unjustified enlargement of Section 10(b) liability will impose significant litigation, discovery, and disclosure costs on issuers and will negatively affect the quality of information available to the securities markets.

The clashing approaches among the federal courts of appeals powerfully demonstrate the need for a uniform rule on whether plaintiffs may assert Section 10(b) claims based on omissions that are not necessary to make affirmative statements not misleading. This is a question of critical importance given the sheer volume of securities litigation in the United States,[2] particularly in the Second and Ninth Circuits, which see more federal securities cases than the rest of the circuits combined.[3] The Second

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[2] According to the most recent statistics, there were 189 federal securities fraud class action claims filed in 2015 alone. *See* Cornerstone Research, *Securities Class Action Filings: 2015 Year in Review*, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2015-Year-in-Review.

[3] *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*,

Circuit's decisions have spurred a proliferation of Section 10(b) claims predicated on Item 303 omissions—twenty-one new cases alleging Item 303 violations have been filed since October 2014 in the Second Circuit, as compared to just five in the Ninth Circuit. The stark disagreement among the circuits on an issue of central importance to private securities litigation is fueling untoward forum shopping and producing inconsistent results under what should be uniform federal securities laws.

I. CERTIORARI IS NECESSARY TO RESOLVE A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF FEDERAL SECURITIES LAW AND TO CLARIFY THE SCOPE OF AN ISSUER'S DUTY TO DISCLOSE

The Second Circuit holds that a company's omission of disclosures required by Item 303 can subject it to Section 10(b) liability. That holding places the Second Circuit alone among the federal courts of appeals in its treatment of the relationship between Item 303 and Section 10(b): two other courts of appeals (the Third and Ninth Circuits) have held that Item 303 *does not* create an independent duty to disclose for purposes of Section 10(b), and opinions within at least two more (the Sixth and Eleventh Circuits) have expressed views inconsistent with the Second Circuit's position. Moreover, the Second Circuit's Item 303 holdings contravene *Matrixx* and significantly expand the circumstances under which omissions liability can arise under Section 10(b). Review by this Court is necessary to resolve a question

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NERA Economic Consulting, at 9 (Jan. 25, 2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

that has deeply divided the circuit courts of appeals and to clarify the circumstances under which a duty to disclose arises for purposes of Section 10(b).

A. The Second Circuit's Holdings Deeply Conflict With The Decisions Of Other Federal Courts Of Appeals

1. The Second Circuit stands alone among the federal courts of appeals in holding that Item 303 creates an actionable duty to disclose for purposes of Section 10(b). The Third and the Ninth Circuits have held just the opposite. And the Sixth and Eleventh Circuits have suggested, without deciding, that Item 303 cannot serve as the basis for a claim under Section 10(b).

In *Stratte-McClure*, the Second Circuit expressly acknowledged its split with the Ninth Circuit on the Item 303 issue, stating: "[O]ur conclusion is at odds with the Ninth Circuit's recent opinion in *In re NVIDIA Corp. Securities Litigation.*" 776 F.3d at 103.

In *NVIDIA*, decided just three months before *Stratte-McClure*, the Ninth Circuit held that "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b–5." 768 F.3d 1046, 1056 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2349 (2015). The court began by examining the fundamental principles set forth by this Court in *Basic* and *Matrixx*: Section 10(b) and Rule 10b–5 do not create an affirmative duty to disclose, and disclosure is required only when necessary "'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Id.* at 1054 (alteration in original) (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011)). The court then rejected plaintiff's contention that Item 303 creates a duty to disclose and held that such a duty "must be

separately shown according to the principles set forth . . . in *Basic* and *Matrixx Initiatives*." *Id.* at 1056.

The Ninth Circuit's holding rested in large part on the Third Circuit's decision in *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000). *Oran* was the first court of appeals case to address directly whether Item 303 creates a duty to disclose for purposes of Section 10(b). In that case, plaintiffs alleged that defendant was aware of a trend or uncertainty relating to its products—a potential link between defendant's drugs and a serious heart condition—that it was required to disclose under Item 303. *Id.* at 287. Plaintiffs contended that defendant's failure to make a required Item 303 disclosure was actionable under Section 10(b).

The Third Circuit, in an opinion authored by then-Circuit-Judge Alito, rejected this argument. The court quickly dismissed the contention that Item 303 creates an independent cause of action. 226 F.3d at 287. It then considered whether Item 303 "imposes an affirmative duty of disclosure . . . that, if violated, would constitute a material omission under Rule 10b–5." *Id.* *Oran* observed that "a duty to disclose may arise when there is insider trading, a statute requiring disclosure, or an inaccurate, incomplete or misleading prior disclosure." *Id.* at 285–86. Notwithstanding this observation, the Third Circuit then "reject[ed] [the] claim that SEC Regulation S-K, Item 303(a) impose[s] an affirmative duty of disclosure on [companies] that could give rise to a claim under Rule 10b–5." *Id.* at 286 n.6; *id.* at 287–88.

The primary basis for the court's conclusion was that Item 303's "disclosure obligations extend considerably beyond those required by Rule 10b–5."

226 F.3d at 288. Item 303 "mandates disclosure of specified forward-looking formation, and [provid]es its own standard for disclosure—*i.e.*, reasonably likely to have a material effect." Management's Discussion & Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, Exchange Act Release No. 26831, Investment Company Act Release No. 16961, 43 SEC Docket 1330, 1989 WL 1092885, at *6 n.27 (hereinafter "SEC Guidance"). In the Third Circuit's view, this standard would likely mandate the disclosure of information that would not be considered "material" under the test set forth in *Basic*. *Oran*, 226 F.3d at 288. In *Basic*, this Court recognized that silence is not usually misleading under Section 10(b) and Rule 10b–5, and therefore a plaintiff must do more than show an incomplete statement—he or she must demonstrate the omission of a *material* fact. 485 U.S. 224, 238 (1988). And, when information pertains to "contingent or speculative" events (i.e., forward-looking information), materiality "depend[s] at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Id.* (internal quotation marks omitted).

Oran recognized the critical distinction between Item 303's standard for the disclosure of forward-looking information and *Basic*'s "probability/ magnitude" test. *Oran*, 226 F.3d at 288. The court noted that the SEC itself had admonished that *Basic*'s test "is inapposite to Item 303 disclosure." *Id.* (quoting SEC Guidance, 1989 WL 1092885, at *6 n.27). Thus, because Item 303 requires disclosure of significantly more information than Section 10(b),

plaintiffs bringing claims under Section 10(b) cannot simply point to "a violation of SK-303's reporting requirements"—they must "'separately show[]'" the existence of a duty to disclose. *Id.* (quoting *Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 608 (N.D. Cal. 1991)).

Oran's reasoning was expressly adopted by the Ninth Circuit in *NVIDIA*, which similarly concluded that "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b–5." 768 F.3d at 1056.

2. The Ninth Circuit also rejected plaintiffs' reliance on two Second Circuit cases holding that Item 303 is actionable under Sections 11 and 12 of the Securities Act. *See* 768 F.3d at 1055–56 (citing *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012); *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715–16 (2d Cir. 2011)). The Second Circuit, in contrast, found these cases persuasive with respect to its Section 10(b) and Rule 10b–5 analysis. *Stratte-McClure*, 776 F.3d at 101–02, 104. The *Stratte-McClure* court reasoned that since "Section 12(a)(2)'s prohibition on omissions is textually identical to that of Rule 10b–5"—both make unlawful the omission of material facts that are necessary in order to make other statements not misleading—it would be anomalous to conclude that Item 303 omissions are actionable under Section 12(a)(2) but not under Section 10(b) and Rule 10b–5. *Id.* at 104.

Stratte-McClure failed to acknowledge, however, that *Panther Partners* and *Litwin* did *not* base their reasoning on Section 12(a)(2), but rather on Section 11, which expressly imposes strict liability for the failure to disclose any information required to be

disclosed in a registration statement. *See Litwin*, 634 F.3d at 716 ("The primary issue before us is . . . whether Blackstone's Registration Statement and Prospectus omitted material information that Blackstone was legally required to disclose."); *see also Panther Partners*, 681 F.3d at 120 ("One of the potential bases for liability under §§ 11 and 12(a)(2) is an omission in contravention of an affirmative legal disclosure obligation. . . ."). Indeed, in both cases, the Second Circuit opined that "Section 11 imposes *strict liability* on issuers" for "omit[ing] to state a material fact required to be stated" in a registration statement and "Section 12(a)(2) imposes similar circumstances for misstatements and omissions in a prospectus." *Panther Partners*, 681 F.3d at 120 (emphasis added); *see also Litwin*, 634 F.3d at 715.

The distinction between Section 10(b) and Section 11 is crucial, however, as the Ninth Circuit observed. Under Section 11, "liability arises from 'an omission in contravention of an affirmative legal disclosure obligation.'" *NVIDIA*, 768 F.3d at 1055–56 (quoting *Panther Partners*, 681 F.3d at 120). But there is "no such requirement under Section 10(b) or Rule 10b–5." *Id.* at 1056. Under Section 10(b), "material information need not be disclosed unless omission of that information would cause other information that is disclosed to be misleading." *Id.* (citing *Matrixx*, 563 U.S. at 43).

Notably, the Securities Exchange Act of 1934, which contains Section 10(b), was passed only a year after the Securities Act of 1933, which contains Section 11. The absence in Section 10(b) of language imposing affirmative legal disclosure obligations—which was expressly included in Section 11—strongly suggests that Congress did not intend to impose

disclosure liability under Section 10(b) for omissions based on regulatory disclosure obligations. *See generally W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991) (applying rule that different text in statutes on same subject matter suggests difference in Congressional intent). If Congress wanted to impose Section 10(b) liability for failing to disclose information required to be stated in SEC filings, it could have easily (and expressly) done so, just as it had done the year before. The Second Circuit's heavy reliance on *Panther Partners* and *Litwin*—two decisions unquestionably premised on Section 11—was a critical error in a case involving Section 10(b).

3. The Second Circuit's holding is also inconsistent with positions taken by the Sixth and Eleventh Circuits. In *In re Sofamor Danek Grp., Inc.*, the Sixth Circuit considered "plaintiffs['] suggest[ion] . . . that defendants' disclosure duty under the Rule 10b–5 claim may stem from Item 303." 123 F.3d 394, 403 (6th Cir. 1997) (citation omitted). "Perhaps so," the court stated, "but . . . we do not find the argument persuasive." *Id.* And in *Thompson v. RelationServe Media, Inc.*, the Eleventh Circuit considered whether a violation of Item 303 of Regulation *S-B*—a regulation "materially identical" to Item 303 of Regulation S-K—could be actionable under Section 10(b) and Rule 10b–5. 610 F.3d 628, 682 n.78 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part). The concurring opinion, arguing that sanctions should be imposed for the plaintiff's "laughable" Section 10(b) claim, noted that "[t]he assumption that Item 303 of Regulation S-B would impose an actionable duty to speak under Rule 10b–5 is generous." *Id.* at 680, 682 n.78.

4. The present circuit split has led and will continue to lead to vastly disparate outcomes in the lower courts. Indeed, the split has already sown deep confusion among the district courts. *Compare Ash v. PowerSecure Int'l, Inc.*, No. 14-cv-92, 2015 WL 5444741, at *10–11 (E.D.N.C. Sept. 15, 2015) ("This court finds *Oran*'s reasoning, and *NVIDIA*'s interpretation of *Oran*, persuasive."), *with Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 94 F. Supp. 3d 1035, 1047 (D. Minn. 2015) ("The Second Circuit's reasoning is persuasive and consistent with this Court's reading of *Oran*.").

Further, the split has and will encourage forum shopping, as plaintiffs will assert questionable Item 303/Section 10(b) claims in the Second Circuit—but not the Third and Ninth Circuits—to take advantage of a favorable legal standard. This problem is exacerbated in the securities context given the liberal nature of the Exchange Act's venue provision that allows suits to be brought "in the district wherein any act or transaction constituting the violation occurred," or "in the district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a); *see also Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985).

Indeed, since *NVIDIA* and *Stratte-McClure* were decided, the difference in the number of Section 10(b) complaints asserting violations of Item 303 in the Second and Ninth Circuits is striking. From October 2, 2014—when *NVIDIA* was decided—to the present, only five complaints based in part on Item 303 have been filed in the Ninth Circuit, while *twenty-one* have been filed in the Second Circuit. The circuit split has resulted in more than *four times* as many Item 303 securities fraud complaints being filed within the

Second Circuit as compared to the Ninth Circuit. This Court can and should create a uniform interpretation of this point of law in order to end forum shopping and the divergent application of federal securities laws.[4]

B. The Second Circuit's Duty To Disclose Rule Contradicts This Court's Precedents

This Court should grant certiorari not only to resolve a division of authority on an important and recurring question of federal securities law, but also to clarify the circumstances under which Section 10(b) imposes an actionable duty to disclose.

Just over five years ago, this Court reaffirmed that "[Section] 10(b) and Rule 10b–5 do not create an affirmative duty to disclose any and all material information." *Matrixx*, 563 U.S. at 44. This Court's cases establish that "an affirmative duty to disclose" may arise under *only two* circumstances: (1) where confidential information is used in violation of a relationship of trust and confidence (e.g., a fiduciary relationship), *see, e.g., Chiarella*, 445 U.S. 222, 230; and (2) when statements would be rendered misleading in the absence of the omitted information, *see* 17 C.F.R. § 240.10b–5(b); *Matrixx*, 563 U.S. at 44. In the latter situation, which concerns a party's affirmative statements, an important corollary provides that "companies can control what they have to disclose under these provisions by controlling what they say to the market." *Matrixx*, 563 U.S. at 45. The circuit courts of appeals have consistently adhered to

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[4] The parties in *Stratte-McClure* did not petition this Court for review. Plaintiffs in *NVIDIA* did so, and their petition was denied. *See* 135 S. Ct. 2349 (2015). Importantly, however, *this case* demonstrates that the question presented is mature and will continue to be a recurring issue in federal securities law that warrants urgent resolution by this Court.

this principle. *See, e.g.*, *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 174 (3d Cir. 2014); *Miss. Pub. Emps. Ret. Sys. v. Bost. Sci. Corp.*, 649 F.3d 5, 29 (1st Cir. 2011); *Minneapolis Firefighters' Relief Ass'n v. MEMC Elec. Materials, Inc.*, 641 F.3d 1023, 1029 (8th Cir. 2011).

In *Stratte-McClure*, the Second Circuit correctly recognized that omissions are actionable only if there is a duty to speak. 776 F.3d at 101. In its view, however, *three* circumstances may give rise to that duty. *Id.* The first two—trading on inside information and correcting otherwise misleading statements—have long been approved by this Court and are not at issue here. But the third circumstance—when a statute or *regulation* mandates disclosure—has no basis in this Court's precedents. To be clear, this Court has never held that an SEC regulation creates a duty to disclose that is actionable under Section 10(b). To the contrary, such a duty undermines this Court's holding, articulated in *Matrixx*, that an issuer has the ability to control what it says to the market for purposes of liability under Section 10(b). That bedrock principle of federal securities law has shaped the expectations and behavior of public companies and their legal and other disclosure advisors. Contrary to this Court's position and settled expectations in the securities markets, the Second Circuit holds that mere silence (or a non-misleading omission) can subject an issuer to securities fraud liability.

The Second Circuit maintained that it and its "sister circuits have long recognized that a duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak." *Stratte-McClure*, 776 F.3d at 102 (citing *Gallagher v.*

Abbott Labs., 269 F.3d 806, 808 (7th Cir. 2001); *Oran*, 226 F.3d at 285–86; *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992), *Backman v. Polaroid Corp.*, 910 F.2d 10, 20 (1st Cir. 1990) (en banc)). That is spectacularly wrong. Even a cursory analysis of those authorities reveals that while this proposition is occasionally referenced in the legal standards section of opinions, not one of those courts has found Section 10(b) liability based on a failure to disclose information required to be disclosed by a statute or regulation. *See, e.g.*, *Gallagher*, 269 F.3d at 810 (finding no Section 10(b) liability); *Oran*, 226 F.3d at 285–88 & n.6 (rejecting argument that Item 303 imposes affirmative duty to disclose); *Glazer*, 964 F.2d at 157 (reciting proposition, but no discussion of statutes or regulations bearing on case); *Backman*, 910 F.2d at 15–17 (similar).

Even more importantly, the proposition that statutes or regulations can create omissions liability under Section 10(b) arises from a *single sentence* found in a First Circuit opinion *rejecting* an expansion of disclosure duties. *See Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 27 (1st Cir. 1987). In *Roeder*, the First Circuit affirmed the dismissal of a Section 10(b) complaint, concluding that plaintiff failed to establish that defendant had a duty to disclose the company's illegal kickback payments. *Id.* at 28. Plaintiff "claim[ed] that a corporation has an affirmative duty to disclose all material information even if there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosures." *Id.* at 27. The court disagreed, noting "[t]he prevailing view . . . is that there is no such affirmative duty of disclosure." *Id.*

In rejecting plaintiff's argument that a corporation has a duty to disclose all material information "even if there is . . . no statute or regulation requiring disclosure," the First Circuit plainly did not hold that statutes and regulations requiring disclosure in fact impose such an affirmative duty. Notably, the authorities cited by *Roeder* reference affirmative duties to disclose arising from insider trading and correcting misleading statements, but nowhere suggest that statutes and regulations themselves give rise to such duties. *See Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3d Cir. 1982) ("[T]he plaintiffs have not called our attention to any case . . . which imposed any duty of disclosure under the Federal Securities Laws on a corporation which is not trading in its own stock and which has not made a public statement. We decline to do so on the facts of this case."); *Schlanger v. Four-Phase Sys. Inc.*, 582 F. Supp. 128, 133 (S.D.N.Y. 1984) ("While the federal securities laws do *not* impose a general duty upon an issuer to disclose material facts or new developments when it is *not* trading in its own securities, it does have a duty to make certain that any statement it does issue is truthful and complete, and does not materially misrepresent the facts existing at the time of the announcement.") (emphases in original); *Warner Commc'ns, Inc. v. Murdoch*, 581 F. Supp. 1482, 1489 n.12 (D. Del. 1984); *Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395, 409 (N.D. Ill. 1984).

Moreover, *Roeder*'s reference to "statute[s] or regulation[s] requiring disclosure" stems from its *disapproval* of *Issen v. GSC Enterprises, Inc.*, 538 F. Supp. 745 (N.D. Ill. 1982), cited by plaintiff for the proposition "that all material information had to be disclosed in annual reports 'notwithstanding the

absence of an explicit statutory or regulatory duty to do so.'" *Roeder*, 814 F.2d at 27 n.2 (quoting *Issen*, 538 F. Supp. at 750). The First Circuit flatly rejected that proposition. It is illogical to suggest that, in dismissing an attempt to expand the Section 10(b) duty to disclose, the First Circuit actually broadened the scope of the duty. This underlying proposition therefore has no support in *Roeder* or any other supporting case law.

Nevertheless, subsequent cases, including *Stratte-McClure*, have apparently misconstrued *Roeder*'s passing reference to "statutes and regulations" to create an entirely new third circumstance giving rise to a duty to disclose. This faulty premise provided the core of the Second Circuit's reasoning in *Stratte-McClure*, and accordingly laid the groundwork for the opinion below. The Second Circuit's erroneous conclusion that a company cannot control what it has to disclose by limiting its affirmative disclosures in the first instance upends a fundamental tenet of federal securities law and should not be allowed to stand.

II. THE SECOND CIRCUIT'S DECISIONS PRESENT ISSUES OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

Left undisturbed, the Second Circuit's holdings would upset the securities and financial markets by exposing issuers to potentially massive liability for omitting information that might later be found to be a "trend" or "uncertainty" under Item 303. The potential for liability, coupled with an irreconcilable circuit split, fuels uncertainty that is harmful to both individual investors and the securities markets in general. *See, e.g.,* 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."). As this Court has acknowledged, "uncertainty and excessive litigation can have ripple effects" that are damaging to 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).

1. The Second Circuit's decisions represent an unprecedented expansion of the Section 10(b) implied private right of action that will lead to a significant increase in securities fraud claims. Congressional intent and this Court's precedents strongly counsel against that expansion. In 1995, Congress enacted the PSLRA in response to substantial abuses in private securities litigation. *See, e.g.*, H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). This Court explained, "[i]t is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the [Section] 10(b) private cause of action as then defined but chose to extend it *no further*." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 166 (2008) (emphasis added). Other decisions have likewise recognized that the Section 10(b) implied private right of action should not be expanded further by the courts. In *Central Bank of Denver*, the Court held that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation." 511 U.S. at 177. And in *Stoneridge*, the Court declined to extend Section 10(b) liability to vendors and customers who allegedly assisted a company in issuing fraudulent financial statements. 552 U.S. at 160–61. In reaching these conclusions, this Court admonished that "the § 10(b) private right should not

be extended beyond its present boundaries." *Id.* at 165. Contrary to *Central Bank* and *Stoneridge*, the Second Circuit has now vastly expanded the sweep of private Section 10(b) claims, and this Court should act to protect its carefully-drawn boundaries.

Further, it is well-settled that Item 303, by itself, does not create a private cause of action. *See, e.g.*, *Oran*, 226 F.3d at 287 (collecting cases). Plaintiffs should not be permitted to do an end-run around this established rule merely by repleading their claims as Section 10(b) violations premised on a duty supposedly springing from Item 303. As this Court stated in *Alexander v. Sandoval*, "a private plaintiff may not bring a suit based on a regulation . . . for acts not prohibited by the text of the statute." 532 U.S. 275, 286 (2001) (quoting *Cent. Bank of Denver*, 511 U.S. at 173 (internal brackets omitted)). The right to sue "must come, if at all, from the independent force" of the *actual statute* being invoked. *Id.* at 286. The Second Circuit's holding allows plaintiffs to avoid this principle by recasting Item 303 violations as statutory violations under Section 10(b).

The absence of a private claim under Section 10(b) for violations of Item 303 does not mean that issuers will be free to disregard SEC regulations. Indeed, the SEC's enforcement powers are "not toothless," *Stoneridge*, 552 U.S. at 166, as demonstrated by actions it has taken against companies for violations of Item 303, *see, e.g.*, *In the Matter of Bank of Am. Corp.*, Exchange Act Rel. No. 34-72888, 2014 WL 4101590 (Aug. 21, 2014); *In the Matter of Salant Corp. & Martin F. Tynan*, Exch. Act Rel. No. 34-34046, 51 S.E.C. 1099 (May 12, 1994); *SEC v. Melchior*, No. 90-C-1024J, 1993 WL 89141, at *13 (D. Utah Jan. 14, 1993); *In the Matter of Caterpillar, Inc.*, Exch. Act Rel.

No. 34-30532, 50 S.E.C. 903 (Mar. 31, 1992); *SEC v. Ronson*, No. 83-3030, 1983 WL 1357 (D.N.J. Aug. 15, 1983). And issuers will of course be liable for violations of the Securities Act provisions for which Congress has authorized private actions. *See, e.g.*, *Panther Partners & Litwin*, *supra*.

2. Allowing claims predicated on alleged Item 303 violations also encourages fraud-by-hindsight pleading, as Item 303 primarily concerns "soft information" that is easily susceptible to manipulation by plaintiffs' attorneys. Two characteristics of Item 303 give rise to serious concerns that Item 303 will be used as a powerful (and frequently employed) vehicle to assert hindsight Section 10(b) claims, which the PSLRA was intended to weed out.

First, the SEC has vested management with the authority and responsibility to determine what, if anything, must be disclosed under Item 303. According to SEC Guidance, management must make two judgment calls in determining whether disclosure is required under Item 303:

> (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the

> registrant's financial condition or results of operations is not reasonably likely to occur.

SEC Guidance, 1989 WL 1092885, at *6.

As the Guidance makes clear, management may determine, at either step of the analysis, that the circumstances do not require disclosure. For example, management may determine that a single executive's departure from the company is unlikely to have a material effect on the company's financial condition and results of operations. But that assessment may prove wrong when the former executive lures a third of the company's customers to his or her new firm.

Given that Item 303's requirements are "intentionally general," SEC Guidance, 1989 WL 1092885, at *1, management's assessments are easily second-guessed with the benefit of hindsight. As a result, plaintiffs will have little difficulty alleging that an event that *did occur* was in fact *reasonably likely* to occur, notwithstanding the facts available to management at the time of decision-making. This sort of hindsight pleading has long been criticized in the federal securities context. *See, e.g.*, *Ezra Charitable Trust v. Tyco Intern., Inc.*, 466 F.3d 1, 6 (1st Cir. 2006) ("Pleading fraud by hindsight, essentially making general allegations that defendants knew earlier what later turned out badly, is not sufficient.") (citation and internal quotation marks omitted). This "to disclose or not to disclose" dilemma presented by the Item 303 issue simply does not exist under the traditional Section 10(b) framework, because there a company can control what it has to disclose by controlling in the first instance what it says to the market. *Matrixx*, 563 U.S. at 45.

Securities fraud actions premised on Item 303 violations flip this proposition on its head.

Second, the hindsight problem is exacerbated by the fact that Item 303 concerns the disclosure of "soft information." *See* Denise Voight Crawford & Dean Galaro, *A Rule 10b–5 Private Right of Action for MD&A Violations?*, 43 No. 3 Sec. Reg. L.J. Art. 1 (2015) (observing that "Item 303 concerns disclosures of soft information and is therefore difficult to evaluate" and that "the MD&A disclosure standard is not particularly clear"). In contrast to "'hard' information," which is "'typically historical information or other factual information that is objectively verifiable,'" "'soft' information . . . includes predictions and matters of opinion," and is not susceptible to objective verification. *Sofamor Danek*, 123 F.3d at 401–02 (citation omitted). The concepts at the core of Item 303—"trends" and "uncertainties"—are so malleable that it will take only the slightest bit of creativity to identify a "trend" or "uncertainty" that a company should have disclosed. *See, e.g.*, Ted J. Fiflis, *Soft Information: The SEC's Former Exogenous Zone*, 26 UCLA L. Rev. 95, 95–96 (1978) ("Few regularly recurring problems are more agonizing to corporate managers . . . than those involving securities law disclosure requirements. . . . That courts are quite willing to second-guess disclosure decisions after a plaintiff's attorney artificially focuses the spotlight of attention on the particular failure of disclosure serves to increase the pain."). In short, the nature of Item 303 itself militates in favor of disallowing the type of claim Plaintiffs have pursued in this case.

3. Illustrating the points above, many Section 10(b) claims that have been dismissed for failure to

state a claim might have survived and proceeded to expansive discovery had they simply been recast as omitting "trends" or "uncertainties." For example, *Roeder*, discussed *supra*, dismissed a claim premised on defendant's failure to disclose (until indictment was imminent) that the company was under investigation for paying bribes to obtain subcontracts. 814 F.2d at 28. However, based on the Second Circuit's logic in the opinion below, plaintiffs simply could have rewritten their complaint to allege that defendant's management omitted the "uncertainty" of possible cancellation of government contracts or reputational harm from the ongoing investigation. Stated differently, the Second Circuit's rule will permit plaintiffs to bring securities fraud actions for every conceivable kind of conduct, so long as management is aware of any uncertainty that could be "reasonably likely" to result in a material impact on the company.

This case vividly illustrates this new potential to expand federal securities fraud claims. Here, Plaintiffs allege that SAIC was required to disclose "trends" or "uncertainties" stemming from the government's ongoing investigation consisting, at the time, of subpoenas from federal authorities requesting documents and information from SAIC and two of its employees, none of whom had been identified as targets of the investigation. App. 17a. Plaintiffs allege that the investigation presented potential "reputational risks" that could result in the loss of future business. *Id.* But any civil or criminal investigation could be opportunistically and retroactively characterized as a potential "trend" or "uncertainty" that may cause "reputational risks." Thus, under the Second Circuit's holdings, every company would be *required* to make an apparently

extensive Item 303 disclosure when it or one of its employees is the subject of a government investigation, even in circumstances where the government has not indicated that the issuer is a "target" or otherwise has done anything wrong. This runs contrary to the established rule that "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information." *Chiarella*, 445 U.S. at 235.

4. Permitting plaintiffs to bring securities fraud actions premised on Item 303 violations will lead to increased litigation, discovery costs, and exorbitant settlement demands, imposing significant costs on issuers and the securities markets. "[L]itigation under Rule 10b–5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). This concern is magnified here because allowing Section 10(b) claims predicated on Item 303—the requirements of which are "intentionally general," SEC Guidance, 1989 WL 1092885, at *1—will undoubtedly lead defendants "to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank of Denver*, 511 U.S. at 189.

5. Further, compliance with the Second Circuit's rule will have negative impacts on shareholders and the market. Issuers will likely respond to the perceived risk of Section 10(b) liability by inundating investors with a flood of non-material information. This Court has already expressed concern that companies will "'bury the[ir] shareholders in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking.'"

Basic, 485 U.S. at 231 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976)). Subjecting companies to Section 10(b) liability based on purported violations of Item 303 will severely undercut Item 303's intent to promote meaningful disclosure to investors. *See* SEC Guidance, 1989 WL 1092885, at *1. It would thus be inappropriate for courts to embrace a new, capacious vehicle for bringing Section 10(b) claims, when doing so would defeat the very purpose of disclosure regulations.

III. THE QUESTION IS CLEANLY PRESENTED AND RIPE FOR REVIEW

This case presents an appropriate opportunity for this Court to resolve whether Item 303 creates a duty to disclose for purposes of Section 10(b) liability.

First, the question presented is dispositive of whether Plaintiffs have pled a viable Section 10(b) claim predicated on a purported Item 303 omission. Should this Court grant certiorari and rule in favor of SAIC, Plaintiffs' claim will be dismissed as a matter of law. In the securities context, this Court has frequently granted review where, as here, a district court has granted a motion to dismiss and a court of appeals has revived some or all of plaintiffs' others claims. *See, e.g.*, *Matrixx*, 563 U.S. at 27; *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

Second, the question presented has been preserved and is ripe for adjudication. The Second Circuit "passed upon" the question presented in holding that SAIC could be liable under Section 10(b) for a purported Item 303 omission. An issue is "passed upon" when a court of appeals expressly applies the rule of a prior decision to the facts of the case before it. *United States v. Williams*, 504 U.S. 36, 43 & n.4 (1992); *see also Lebron v. Nat'l R.R. Passenger Corp.*,

513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" (alterations in original) (quoting *Williams*, 504 U.S. at 41)). That rule is dispositive here.

It is no bar to a grant of certiorari when a petitioner did not demand that the court of appeals overrule a "squarely applicable, recent circuit precedent," especially when there have been "no intervening developments in the law." *Williams*, 504 U.S. at 44 (internal quotation marks omitted). SAIC was not required to advocate futilely for a panel to overrule a decision issued by a different panel of the same court just four months earlier. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) ("[A] panel of this Court is bound by the decisions of prior panels . . . .") (internal quotation marks omitted); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (petitioner's decision not to develop the question presented in the lower court "reflect[ed] counsel's sound assessment that the argument would be futile," as prior decision of same court with identical facts had reached opposite result). Indeed, this Court has concluded that imposing such a condition to review would be "unreasonable." *Williams*, 504 U.S. at 44.

Plaintiffs are equally misguided in suggesting, as they did at the rehearing stage, that this Court cannot consider the question presented because it was not raised in the district court. Plaintiffs' complaint was severely deficient with respect to multiple elements of their Section 10(b) claims, and SAIC won complete dismissal of *all* claims with prejudice early in the litigation. After Plaintiffs appealed, the Second Circuit decided *Stratte-McClure* four months before

SAIC filed its brief. SAIC had no reason to raise the issue until the case reached the Second Circuit, where it was already squarely foreclosed by *Stratte-McClure*. In any event, the Second Circuit nonetheless proceeded to "pass upon" the question presented.

The opinion below expressly acknowledged that its Item 303 holding was premised on *Stratte-McClure*. App. 16a–17a ("In *Stratte-McClure*, we held that Item 303 imposes an 'affirmative duty to disclose . . . [that] can serve as the basis for a securities fraud claim under Section 10(b)." (alterations in original)). This case, therefore, corresponds precisely to the scenario presented in *Williams*, where this Court concluded there was "no doubt" the question presented had been passed upon in the lower courts. *Williams*, 504 U.S. at 43 & n.4.

The question is cleanly presented and important. Until this Court provides definitive guidance, issuers will be subject to disparate and potentially enormous liability based merely on the forum chosen by plaintiffs' counsel. The open and acknowledged circuit split is already fueling forum shopping and a dramatic increase in Item 303 litigation. Fraud-by-hindsight claims are mounting, in direct contravention of this Court's decisions, and they are introducing significant uncertainty over the scope of public company reporting obligations and disclosure duties. The Court's intervention is needed now to restore uniformity to an extensively litigated and critically important area of federal securities law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW S. TULUMELLO
Counsel of Record
JASON J. MENDRO
JOSHUA D. DICK
CHRISTOPHER M. RIGALI
JOHN D. AVILA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atulumello@gibsondunn.com
Counsel for Petitioner

October 31, 2016