No. 16-581

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondents concede, as they must, that the circuits are divided on the question presented: whether Item 303 of Regulation S-K creates a duty to disclose that is actionable under Section 10(b). Br. in Opp. at 18. Respondents do not dispute that the Second Circuit expressly departed from the Ninth Circuit's decision in *NVIDIA*, and they wrongly interpret then-Circuit Judge Alito's holding for the Third Circuit in *Oran*. While Respondents speculate that flagrant forum shopping is not occurring, shareholders have filed at least 22 new cases asserting claims based on Item 303 in the Second Circuit since *Stratte-McClure* was decided. As Petitioner's *amici* observe, the Exchange Act's venue provisions make virtually every publicly traded company subject to suit in the Second Circuit; thus, the Second Circuit's error will have a profound effect on securities litigation if it is not corrected. *See* Br. of Sec. Indus. & Fin. Markets Ass'n & U.S. Chamber of Commerce as Amicus Curiae at 15; Br. of Nat'l Ass'n of Mfrs. as Amicus Curiae at 7. Institutional plaintiffs and their counsel are moving aggressively to capitalize on the Second Circuit's new font of Item 303-based 10(b) liability, and three federal courts of appeals already have reached black-and-white holdings on the viability of this theory. There are no benefits to further percolation.

Respondents urge the Court to ignore the acknowledged circuit split based on "vehicle" issues that are spurious and on the bizarre claim that the question presented is not sufficiently important to warrant this Court's attention. These responses are meritless.

I. The Question Presented Is Preserved And Warrants Immediate Review

A. The Court Of Appeals Passed Upon The Issue Below

Respondents do not dispute that this Court's "traditional rule" permits a grant of certiorari where the question presented has been "pressed *or* passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added); *see Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 464–65 (10th ed. 2014) ("Even though an issue may not have been raised in the lower court, if that court actually passes on the issue sua sponte, the petitioner may properly present the question to the Supreme Court."). Instead, they argue that the Second Circuit did not actually pass upon the Item 303 issue. Br. in Opp. at 12. But this contention is spectacularly wrong.

The "passed upon" standard is satisfied when a court of appeals expressly applies the rule of a prior decision to the facts of the case before it. Pet. at 30. That is precisely what the Second Circuit did here. Respondents concede that the Second Circuit expressly invoked *Stratte-McClure* at the outset of its Item 303 analysis. Br. in Opp. at 13. Yet remarkably, Respondents assert that the Second Circuit's application of *Stratte-McClure* is insufficient because the court's citation to that case came in a footnote. *Id.* at 2, 11, 13. This argument makes no sense. The court could not have "*h[eld]* that respondents adequately alleged a § 10(b) claim . . . based on violations of FAS 5 and Item 303," *id.* at 9 (emphasis added), without making the predicate determination that Item 303 creates a duty to speak for purposes of

Section 10(b). Moreover, Respondents' suggestion that the "passed upon" standard is satisfied only if the court of appeals regurgitates and reaffirms the legal analysis set forth in a prior opinion is unsupported by law and common sense. It is hardly surprising that the court below invoked *binding* precedent established just *four* months earlier by a prior panel of the Second Circuit rather than re-invent the analysis. Nothing more was required for the issue to have been "passed upon" below.

Respondents read *Williams* as standing for the narrow proposition that a party is relieved of its obligation to argue against squarely applicable circuit precedent only if it was a party to previous litigation in which the same issues were litigated. Br. in Opp. at 13–14. But such a reading would eviscerate the "passed upon" standard and cannot be reconciled with *Williams*' reasoning, which emphasized the futility of asking a court of appeals to overturn recent and controlling circuit precedent. 504 U.S. at 44.

While the "pressed or passed upon" rule is predicated on a policy favoring review with "the benefit of thorough lower court opinions to guide [this Court's] analysis of the merits," Br. in Opp. at 14–15, Respondents' invocation of this policy is mystifying given their concession that two courts of appeals have "expressly decided, based on well-defined arguments presented by the parties, whether Item 303 can supply a duty to disclose," *id.* at 11 (citing *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100–04 (2d Cir. 2015), and *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014)). Those two decisions—not to mention then-Judge Alito's analysis in *Oran*, and several other cases (*see* Pet. at 16–17)—unquestionably provide the

"thorough analysis" necessary to guide this Court's consideration of the question presented.

Because the Second Circuit passed upon the Item 303 issue, Respondents' "waiver" arguments are misdirected and wrong in any event. Petitioner retained the right to challenge Respondents' theories of liability at any point during the litigation, even as late as a trial. *See* Fed. R. Civ. P. 12(h)(1)–(2) (defense of failure to state a claim is not waived if not raised in a motion to dismiss). The most Respondents can say is that Petitioner could have noted its disagreement with *Stratte-McClure* in a footnote in its Second Circuit brief. But the Second Circuit's Item 303 analysis would not have been *any* different had Petitioner done so there or in the district court, rather than focus on Respondents' other pleading deficiencies, which led to dismissal of the entire case.

The waiver cases cited by Respondents bear no resemblance to this case, as they all involved a situation where the question presented was neither pressed nor passed upon below. Br. in Opp. at 12 (citing *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206 (1998), and *Springfield v. Kibbe*, 480 U.S. 257 (1987)). In *Yeskey*, the Court declined to address a constitutional challenge not addressed by either of the lower courts and raised for the first time in petitioner's merits brief. 524 U.S. at 212–13. In *Kibbe*, the Court's dismissal was based on the petitioner's failure to object to a jury instruction, invoking Rule 51, and his failure to raise the issue explicitly in the petition. *See Williams*, 504 U.S. at 43 n.3. Moreover, *In re Nortel Networks Corp. Securities Litigation* merely holds that *appellants* may not seek reversal based on new arguments. 539 F.3d 129, 132 (2d Cir. 2008). By contrast, it is well settled that the

prevailing party may seek affirmance on any ground supported by the record. *See, e.g.*, *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015); *Janese v. Fay*, 692 F.3d 221, 225 (2d Cir. 2012). *Williams* excused Petitioner from "pressing" for the overruling of directly applicable precedent in the Second Circuit, but in any event, the issue was clearly passed upon by that court, which is all that is required.

B. The Question Presented Is Ripe For Review, And This Court's Resolution Would Dispose Of Respondents' Item 303 Claim

Despite Respondents' assertion that the question presented is "not ripe for review," Br. in Opp. at 15, this Court's resolution would be dispositive of Respondents' Item 303 claim. The presence of ongoing litigation weighs *in favor of* certiorari, not against it, because the parties may needlessly expend resources (or consider a settlement), *see id.*, on a legally deficient claim. Moreover, the presence of an additional claim not at issue in this appeal poses no obstacle to this Court's review.

Respondents argue that the ongoing district court litigation "alone is sufficient grounds to deny the petition," and they express consternation that intervening events could occur before this Court rules on the merits. Br. in Opp. at 15 (citing *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967)).[1] But this Court frequently reviews circuit court decisions remanding cases for further consideration. Indeed, many of this Court's

[1] *Bangor* involved a remand by the court of appeals for *further fact-finding*. *Id.* at 328. The sufficiency of the district court's factual findings is not at issue in this case; rather, this Court is called upon to review a pure question of law.

landmark securities cases had the identical procedural posture as this case, in which (1) the district court entered judgment in favor of the defendants; (2) the court of appeals reversed and remanded; and (3) the defendants petitioned for a writ of certiorari. *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37 (2011); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 140–41 (2011); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 340 (2005).

Similarly, the fact that this Court's ruling would not completely terminate the litigation is no bar to granting certiorari. *See* Pet. at 30. Respondents' assertion that *Dura* did *not* involve a "situation[] where the Court considered 'some,' but not all, of the claims revived by the Ninth Circuit," Br. in Opp. at 16 n.6, is flatly incorrect. In *Dura*, the Ninth Circuit reinstated claims that defendant had made material misstatements regarding the development and testing of its Albuterol Spiros device *and* sales of its Ceclor antibiotic. *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933, 935 (9th Cir. 2003). The sole question presented to this Court was whether plaintiffs had adequately pled loss causation as to the Albuterol Spiros statements. *Dura*, 544 U.S. at 340–41. The misstatement claims regarding Ceclor remained in the district court. *See Broudo*, 339 F.3d at 941. Thus, this Court granted certiorari to resolve a circuit split regarding loss causation pleading standards *notwithstanding* the presence of additional claims remaining in the district court. *See Dura*, 544 U.S. at 340.

Further, Respondents' FAS 5 and Item 303 claims are governed by different disclosure requirements and will require discovery of different evidence. *Compare* Financial Accounting Standards Board, FAS No. 5,

Accounting for Contingencies ¶ 10 (1975), *with* 17 C.F.R. § 229.303(a)(3)(ii). Therefore, contrary to Respondents' assertion that any ruling would be "premature and academic," reversal of the court of appeals would completely terminate half of Respondents' remaining claims and expedite resolution of the litigation.

II. Certiorari Should Be Granted To Resolve The Acknowledged Circuit Split

The Second Circuit recognized in *Stratte-McClure* that its opinion created a circuit split, 776 F.3d at 106, and Respondents concede its existence, Br. in Opp. at 18. Respondents contend, however, that this case is unimportant and unworthy of certiorari because (a) this Court previously declined to resolve the split, *id.* at 3, 17; and (b) there have been only "a few circuit-level decisions" addressing the issue, *id.* at 17. These arguments are specious.

Respondents cite this Court's denial of certiorari in *NVIDIA* for their contention that the split is not "of great importance." Br. in Opp. at 17. Respondents read too much into that denial and ignore that resolution of the Item 303 question in that case would have been "academic," as the Ninth Circuit affirmed the dismissal of plaintiffs' claim for failure to plead scienter. *NVIDIA*, 768 F.3d at 1046, 1048, 1064. Thus, this Court's conclusion regarding whether Item 303 creates a duty to disclose under Section 10(b) would have had no impact on the case. No such concerns are present here, however, as the question presented is a threshold, claim-dispositive issue.

Respondents also mistakenly downplay the importance of a three-way split involving the two circuits in which most securities claims are filed. Indeed, Respondents entirely ignore the warping

impact that the Second Circuit's ruling is having on federal securities practice. There were 189 total securities class actions filed in 2015, with most of those filed in the Second and Ninth Circuits. Pet. at 9 n.2 & 3. Since *Stratte-McClure*, 22 new complaints alleging Item 303 "violations" of Rule 10b–5 have been filed in the Second Circuit alone. By contrast, only *five* such complaints have been filed in the Ninth Circuit. The Second Circuit is the destination of choice for the litigation of new and heretofore non-viable Item 303 claims.

Until *Stratte-McClure*, the prevailing view in the lower courts had nearly *always* been that Item 303 is not "a magic black box in which inadequate allegations under Rule 10b–5 are transformed . . . into adequate allegations under Rule 10b–5." *Ash v. PowerSecure Int'l, Inc.*, No 14-cv-92, 2015 WL 5444741, at *11 (E.D.N.C. Sept. 15, 2015); *see also Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 583 (E.D. Va. 2006); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 258 F. Supp. 2d 576, 632 (S.D. Tex. 2003). Just as this Court views with skepticism broad claims of new authority derived from "long extant statute[s]," *UARG v. EPA*, 134 S. Ct. 2427, 2444 (2014), this Court should not endorse a novel theory of Section 10(b) liability when the supposed predicate is a regulation that has been in effect since 1982. That is especially true in the absence of *any* indication, let alone a clear indication, that Congress intended to authorize the SEC to create new obligations that could be enforced by private litigants. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Sci-Atlanta*, 552 U.S. 148, 162–63 (2008).

Future cases will add little, if anything, to the legal debate, because the question presented does not lend itself to any middle ground. Respondents completely ignore the confusion in the lower courts. *Compare Ash*, 2015 WL 5444741, at *11 ("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*."). As *Ash* and *Beaver County* demonstrate, the lower courts have essentially sided with the Second or Ninth Circuits, and future opinions would likely do the same. Under these circumstances, the circuit split cannot be characterized as unimportant to federal securities law. Br. in Opp. at 17. Because of the strong incentives to sue in the Second Circuit and pressures to settle, fewer cases will reach the appellate level. Meritless Item 303 claims are proliferating at an aggressive pace, and only this Court's review can put an end to this abuse of Rule 10b–5.

III. *Stratte-McClure* Was Decided Incorrectly And Is Inconsistent With This Court's Prior Decisions

Respondents' defense of the Second Circuit's decision on the merits is also thoroughly unconvincing. Br. in Opp. at 21–26. The Second Circuit's Item 303 holding rested on the proposition that statutes and regulations create actionable duties to speak for Section 10(b) purposes. Pet. at 19–22. Although Respondents assert that this proposition represents a "longstanding rule," Br. in Opp. at 21, they offer *no rebuttal* to the point that the proposition lacks *any* actual support in *this* Court's precedents. *See* Pet. at 19–22. Faced with this Court's statement

in *Matrixx* that "companies can control what they have to disclose under [Section 10(b) and Rule 10b–5] by controlling what they say to the market," 563 U.S. at 45, Respondents contend that "courts have long held" that "pure omissions" can be actionable under Section 10(b), Br. in Opp. at 20. Tellingly, the only case Respondents cite in support of this contention is *In re Vivendi, S.A. Securities Litigation*, which cites *Stratte-McClure* for the proposition that statutes and regulations can create an actionable duty to speak. *See* 838 F.3d 223, 239 & n.8 (2d Cir. 2016). This circular reasoning utterly fails to explain how the Second Circuit's Item 303 holding can be squared with *Matrixx* and the many circuits that have followed it.[2] Indeed, this case perfectly illustrates the importance of this principle of law. In its March 2011 10-K, Petitioner did not make any statement to the market about CityTime, thereby "controlling what [it said] to the market." *Matrixx*, 563 U.S. at 45. If Petitioner is liable in these circumstances, then there is absolutely no ability to stay silent *under Rule 10b–5* with respect to *any* "trend" or "uncertainty" covered by Item 303.

Respondents also assert that *Oran v. Stafford* somehow "aligns with" *Stratte-McClure*. Br. in Opp. at 22. But then-Judge Alito's *Oran* opinion was unequivocal: it "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." 226 F.3d 275, 286 n.6 (3d Cir. 2000); *id.* at 288. And it is undisputed that the Second Circuit held just the opposite. *Stratte-McClure*, 776 F.3d at 102.

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[2] *See, e.g.*, *City of Edinburgh Council v. Pfizer*, 754 F.3d 159, 174 (3d Cir. 2014); *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 898 (8th Cir. 2002).

Finally, Respondents dedicate several pages to arguing that "pleading an Item 303 violation" in the Second Circuit is actually "quite difficult." Br. in Opp. at 23. This completely misses the point. The Second Circuit is the only circuit to hold that a violation of Item 303 *per se* satisfies the omission element of a Section 10(b) claim. In other words, non-disclosure of Item 303 information is, *in and of itself*, an omission in the Second Circuit, but not the Ninth or Third. This clearly makes it easier to bring claims in the Second Circuit, as demonstrated by the fact that plaintiffs' counsel, including those representing Respondents here, are now selectively picking this forum. *See* Appendix A.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 21, 2017

APPENDIX

APPENDIX A

Complaints alleging violations of Section 10(b) of the Securities Exchange Act premised on alleged violations of Item 303 of Regulation S-K (filed on or after January 12, 2015).

(*) indicates that docket lists Robbins Geller Rudman & Dowd as counsel.

Second Circuit (22)

1. *Teachers Ins. & Annuity Ass'n of Am. v. Am. Realty Capital Props., Inc.*, No. 15-cv-00421-AKH (S.D.N.Y. Jan. 20, 2015).*

2. *Khunt v. Alibaba Grp. Holding Ltd.*, No. 15-cv-00759-CM (S.D.N.Y. Jan. 30, 2015).*

3. *Lord Abbett Affiliated Fund, Inc. v. Am. Int'l Grp.*, No. 15-cv-00774-LTS (S.D.N.Y. Feb. 2, 2015).

4. *Klein v. Alibaba Grp. Holding Ltd.*, No. 15-cv-00811-CM (S.D.N.Y. Feb. 3, 2015).

5. *Twin Sec., Inc. v. Am. Realty Capital Props., Inc.*, No. 15-cv-01291-AKH (S.D.N.Y. Feb. 20, 2015).

6. *In re Salix Pharm., Ltd.*, No. 14-cv-08925-KMW (S.D.N.Y. May 8, 2015).[1]*

[1] This Consolidated Class Action Complaint filed on May 8, 2015 included an Item 303 allegation.

7. *Cent. States, S.E. & S.W. Pension Fund v. Petroleo Brasileiro S.A.*, No. 15-cv-03911-JSR (S.D.N.Y. May 21, 2015).*

8. *Wash. State Inv. Bd. v. Petroleo Brasileiro S.A.*, No. 15-cv-03923 (S.D.N.Y. May 21, 2015).*

9. *Vora Special Opportunities Master Fund, Ltd. v. Am. Realty Capital Props., Inc.*, No. 15-cv-04107 (S.D.N.Y. May 28, 2015).

10. *NN Inv. Partners B.V. v. Petroleo Brasileiro S.A.*, No. 15-cv-04226-JSR (S.D.N.Y. June 2, 2015).*

11. *Aura Capital Ltd. v. Petroleo Brasileiro S.A.*, No. 15-cv-04951-JSR (S.D.N.Y. June 24, 2015).

12. *Plumbers & Steamfitters Local 137 Pension Fund v. Am. Express Co.*, No. 15-05999-PGG (S.D.N.Y. July 30, 2015).*

13. *N. Collier Fire Control & Rescue Dist. Firefighter Pension Plan v. MDC Partners, Inc.*, No. 15-cv-06034-RJS (S.D.N.Y. July 31, 2015).

14. *Thomas v. Shiloh Indus., Inc.*, No. 15-cv-07449-KMW (S.D.N.Y. Sept. 21, 2015).

15. *Waters-Cottrell v. Fifth Street Fin. Corp.*, No. 15-cv-01488-MPS (D. Conn. Oct. 14, 2015).

16. *Blackrock ACS U.S. Equity Tracker Fund v. Am. Realty Capital Props., Inc.*, No. 15-cv-08464-AKH (S.D.N.Y. Oct. 27, 2015).

17. *Clearline Capital Partners LP v. Am. Realty Capital Props., Inc.*, No. 15-cv-08467-AKH (S.D.N.Y. Oct. 28, 2015).

18. *Hurwitz v. Fifth St. Fin. Corp.*, No. 15-cv-08908-LAK (S.D.N.Y. Nov. 12, 2015).

19. *Wexler v. Supercom Ltd.*, No. 15-cv-09650-PGG (S.D.N.Y. Dec. 9, 2015).*

20. *Beisel v. La Quinta Holdings Inc.*, No. 16-cv-03068-AJN (S.D.N.Y. Apr. 26, 2016).*

21. *Bulcock v. Unilife Corp.*, No. 16-cv-03976-RA (S.D.N.Y. May 26, 2016).

22. *Axar Master Fund, Ltd. v. Bedford*, No. 17-cv-00426 (S.D.N.Y. Jan. 20, 2017).

Ninth Circuit (5)

1. *Huang v. Alibaba Grp. Holdings Ltd.*, No. 15-cv-04991-CM (C.D. Cal. Feb. 4, 2015).

2. *Chao v. Alibaba Grp. Holdings Ltd.*, No. 15-cv-05020-CM (C.D. Cal. Feb. 16, 2015).

3. *Zamir v. Bridgepoint Educ., Inc.*, No. 15-cv-00408-JLS-DHB (S.D. Cal. Feb. 24, 2015).

4. *O'Silva v. Alibaba Grp. Holdings Ltd.*, No. 15-cv-05002-CM (C.D. Cal. Mar. 24, 2015).

5. *Maverick Fund, L.D.C. v. First Solar, Inc.*, No. 15-cv-01156-DGC (D. Ariz. June 23, 2015).