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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DOUGLAS WILENS
Counsel of Record
ROBBINS GELLER RUDMAN & DOWD LLP
120 E. Palmetto Park Road
Suite 500
Boca Raton, FL 33432
(561) 750-3000
dwilens@rgrdlaw.com

Counsel for Respondents

February 8, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

COUNTER-QUESTIONS PRESENTED

Petitioner requests that the Court determine whether "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."

The counter-questions presented are:

1. Whether petitioner waived appellate review by not preserving the above-referenced issue in any proceedings in the district court or in the Second Circuit;

2. Whether the Court's resolution of the above-referenced issue is premature and academic because, due to the Second Circuit's interlocutory decision, the parties are presently litigating two factually overlapping Section 10(b) claims in the district court, one of which is unaffected by the petition or any potential ruling by the Court on the merits;

3. Whether the circuit split identified by petitioners is insufficiently developed and involves a narrow issue that is not of great importance in securities fraud litigation; and

4. Whether prior Second Circuit precedent correctly establishes that, in appropriate cases, Item 303 of SEC Regulation S-K can provide a duty to disclose in claims involving Section 10(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Broadly viewed, this case involves a massive kickback and overbilling scheme by which SAIC, Inc. ("SAIC"), n/k/a Leidos, Inc., swindled the City of New York ("NYC") out of nearly $700 million on a lengthy project known as CityTime. But, as framed by the ongoing proceedings, the present action is narrower in scope, focusing on a securities fraud perpetrated by SAIC on its investors through a failure to make mandatory disclosures regarding the CityTime fraud in its March 2011 Form 10-K ("March 2011 10-K") filed with the Securities & Exchange Commission ("SEC").

In a well-reasoned opinion, the Second Circuit vacated the district court's denial of a post-judgment motion for leave to amend, reinstating a claim under §10(b) of the Securities Exchange Act of 1934. *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016).[1] More specifically, the Second Circuit held that, in connection with the CityTime fraud, respondents[2] adequately alleged that SAIC omitted material information in its March 2011 10-K by failing to disclose: (1) a loss contingency under Statement of Financial Accounting Standards No. 5 ("FAS 5"); and (2) a known uncertainty under Item 303 of SEC Regulation S-K, 17 C.F.R. §229.303(a)(3)(ii) ("Item 303"). *See id.* at 93-96. The Second Circuit further concluded that respondents sufficiently alleged scienter under the heightened pleading standards of the Private Securities Litigation Reform Act ("PSLRA"). *Id.* at 96-97.

---

[1] Unless otherwise noted, internal citations are omitted and emphasis is added.

[2] Respondents are the court-appointed lead plaintiffs, Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund.

Although the parties are now litigating this remanded action in the district court, SAIC has filed a petition for a writ of certiorari requesting that this Court determine whether Item 303 can provide a duty to disclose sufficient to establish liability under §10(b). *See* Petition for a Writ of Certiorari ("Pet.") at 2. From this narrow question, SAIC also asks the Court "to clarify the scope of the duty to disclose under Section 10(b)," seeking a broad, bright-line ruling that statutes and regulations with explicit disclosure requirements can never create a duty to disclose for §10(b) purposes. *See* Pet. at 2-3. The Court should deny the petition for several reasons.

First, despite declaring that the Item 303 question presented by the petition involves an "issue of central importance to private securities litigation," Pet. at 10, SAIC did not deem this issue "important" enough to raise at any point in the proceedings below. Not in the district court. Nor in the Second Circuit. Rather, throughout every stage of this litigation (including five rounds of briefing), SAIC has steadfastly maintained that the Item 303 violation was "inadequately pleaded" due to insufficient facts. SAIC never argued that Item 303, or any other statute or regulation, cannot provide a duty to disclose under §10(b) as a matter of law. *See SAIC*, 818 F.3d at 94. Notwithstanding its failure to preserve the issue, SAIC points to a footnote in the Second Circuit's decision, which simply repeated part of its prior holding from *Stratte-McClure v. Stanley*, 776 F.3d 94 (2d Cir. 2015), as a basis to demonstrate that the Item 303 issue was "passed upon" below. Pet. at 32; *see SAIC*, 818 F.3d at 94 n.7. But that bare footnote is too thin a reed on which to base a certiorari petition. It hardly constitutes the reasoned judgment of the Second Circuit on what SAIC characterizes as an "extensively litigated and critically important area

of federal securities law" that necessitates further review by this Court. *See* Pet. at 32.

Second, the Second Circuit's decision below did not end the litigation. To the contrary, because the Second Circuit remanded the action, and denied a motion to stay the mandate, the parties are currently litigating the case in the district court. Moreover, the Court's resolution of the petition on the merits will not end the litigation either, as the Second Circuit independently upheld the §10(b) claim based on a FAS 5 violation, which remains live and unaffected by SAIC's petition. Thus, the interlocutory nature of the Second Circuit's decision counsels against certiorari review at this time.

Third, in 2015, this Court rejected a certiorari petition raising the question of whether Item 303 establishes a duty to disclose under §10(b) that purported to involve the same circuit split identified here. *Cohen v. NVIDIA Corp.*, 135 S. Ct. 2349 (2015). SAIC identifies no new developments in the law that would require the Court to revisit that earlier denial. In fact, in the nearly 35 years since the SEC promulgated Item 303, SAIC identifies only a few circuit-level decisions even addressing this issue (and two did so only in dicta), undermining its brash assertion that Item 303 represents "one of the most important–and frequently invoked–provisions of the federal securities laws." *See* Pet. at 1. As to its broader request for clarification, SAIC identifies no circuit split at all, which is unsurprising given that the circuit courts uniformly recognize that "a duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak." *See*, *e.g.*, *Stratte-McClure*, 776 F.3d at 102.

Fourth, the Second Circuit's prior *Stratte-McClure* decision—the ostensible basis of the petition—correctly concluded that Item 303 violations, like other rules and regulations governing the disclosure of information to investors, has a place in §10(b) jurisprudence. It determined that Item 303, which mandates disclosure of information that the SEC explicitly deems significant to investors, can provide a duty to disclose in "appropriate cases" because "omitting an item required to be disclosed [in SEC filings] can render that financial statement misleading." 776 F.3d at 102. The Second Circuit did not "dramatically expand[] the scope of omissions liability under Section 10(b)," as SAIC contends, Pet. at 3; rather, it carefully restricted Item 303 to the confines of a traditional §10(b) claim by requiring a plaintiff to plead materiality, scienter, and every other recognized §10(b) element in order to properly state a claim. Accordingly, because SAIC offers no legitimate reason for the Court to overturn this ruling, the petition should be denied.

STATEMENT OF THE CASE

A. Regulatory Background

In 1982, the SEC adopted a comprehensive set of rules designed to revise and improve the disclosure requirements for companies filing documents pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. 47 FR 11380 (Mar. 16, 1982). Among these new requirements, the SEC implemented Item 303, which requires corporate management to provide investors in SEC filings with a "discussion and analysis" of the company's "financial condition and results of operations." 17 C.F.R. §209.303. More specifically, Item 303 mandates disclosure of, *inter alia*, "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." 17 C.F.R. §209.303(a)(3)(ii).

In 1989, the SEC published interpretive guidance on Item 303's disclosure requirements. *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Investment Company Act Release No. 16,961, 1989 SEC LEXIS 1011 (May 18, 1989). The SEC explained that a "disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation." *Id.* at *13. Such disclosures, according to the SEC, "give investors an opportunity to look at the registrant through the eyes of management by providing a historical and prospective analysis of the registrant's financial condition and results of operations, with particular emphasis on the registrant's prospects for the future." *Id.* at *54-55.

B. Factual Background[3]

In 2000, SAIC became the prime contractor on CityTime, a NYC project commissioned, with an initial budget of $63 million, to create and implement an automated timekeeping program for employees of various NYC agencies. ¶98. SAIC placed great emphasis on this project because it internally valued the market opportunity from subsequent licensing of the CityTime timekeeping software at over $2 billion, and

[3] Citations to the operative complaint are referenced herein as "¶__." The factual allegations contained in the complaint are deemed true at the dismissal stage. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

it further believed that CityTime's success would lead to an expanded presence in NYC. ¶¶106-115.

In 2002, SAIC hired Gerard Denault ("Denault") to serve as Deputy Project Manager on the CityTime project. ¶31. With day-to-day control over the project, Denault and fellow SAIC employee Carl Bell ("Bell"), orchestrated a lucrative kickback and overbilling scheme with the assistance of certain co-conspirators employed by NYC. ¶¶312-314. Denault and Bell received side payments for directing staffing business on the CityTime project to friendly third-party staffing companies. *Id.* In turn, these staffing contractors, under Denault's direction, submitted inflated and falsified invoices for work on the CityTime project, which SAIC forwarded to NYC for payment. ¶¶191-198, 206-208.

Despite internal complaints that Denault's staffing decisions violated numerous company policies, SAIC did nothing to curtail Denault's authority or the perceived overbilling because the project became so profitable for SAIC. ¶¶128-131, 135, 244-247, 420-421. By April 2010, NYC paid SAIC approximately $628 million under the CityTime contract, nearly 10 times the original contract price. ¶129. The final tally reached close to $700 million. ¶148.

NYC officials finally took notice of the exorbitant costs of the CityTime project, and began investigating concerns about widespread timekeeping improprieties. ¶¶209-218. These efforts soon led to a criminal investigation coordinated by the U.S. Attorney for the Southern District of New York ("USAO") and NYC's Department of Investigation ("DOI"). On December 15, 2010, the USAO and DOI jointly announced that criminal charges had been filed against numerous individuals involved in fraudulently inflating the cost

of the CityTime project. ¶¶322-324. Although SAIC was not then charged or named, the criminal complaint clearly implicated SAIC–identified therein as the "Lead Software Developer"–in the misconduct. ¶¶326-327. Around the time of the announcement, the DOI was interviewing Denault about the scheme, after which he was served with a federal grand jury subpoena. ¶¶343-344. SAIC and Bell also received federal grand jury subpoenas. ¶¶341-342, 383. SAIC engaged outside counsel to conduct an internal investigation, and retained (and paid for) independent counsel to represent Denault and Bell in any criminal proceedings. ¶¶349-354, 363-366, 391.

As news of the scandal quickly spread, NYC Mayor Michael Bloomberg announced a forensic audit of the CityTime project with a goal of recouping any improperly paid funds. ¶370. Mayor Bloomberg further publicly questioned SAIC's continued involvement on the CityTime project, given its role in the underlying criminal activity. ¶371. Around the same time, SAIC lost contract bids for additional work from NYC and New York State, valued at approximately $160 million, as officials emphasized "too many unanswered questions" regarding SAIC's "unclear" role in the CityTime fraud. ¶¶355-362. For its part, SAIC's internal investigation revealed, *inter alia*, pervasive timekeeping irregularities on the CityTime project, as memorialized in a March 9, 2011 report prepared by an internal audit team. ¶¶393-397.

On March 25, 2011, against the backdrop of these swirling investigations, SAIC filed the March 2011 10-K. ¶496. In the Management Discussion & Analysis section required by Item 303, SAIC omitted any discussion of the CityTime project, ignoring the governmental investigations, the alleged misconduct, or the

adverse impact of these developments on its business. ¶¶427-428. Further, despite representing that SAIC's financial statements complied with Generally Accepted Accounting Principles ("GAAP") in all respects, SAIC failed to disclose any loss contingencies regarding the CityTime project, as required by FAS 5. ¶¶429-440.

On June 2, 2011, SAIC issued a press release acknowledging, for the first time, the existence of "investigations relating to the CityTime contract" and described, among other things, the status of the criminal proceedings. ¶¶503-508. On June 29, 2011, Mayor Bloomberg sent a letter to SAIC demanding reimbursement of approximately $600 million paid to SAIC for the CityTime project. ¶¶511-512. Mayor Bloomberg expressed that the "scheme to defraud was so pervasive" that virtually all of the money received by SAIC was "tainted, directly or indirectly, by fraud." *Id.* On August 31, 2011, SAIC announced that its quarterly financial results were adversely impacted by the "wind[ing] down" of the CityTime project, and that it was "probable" that SAIC would have to make restitution to NYC for wrongful conduct on the project. ¶¶516-517.

On March 14, 2012, the USAO and DOI jointly announced that SAIC had entered into the Deferred Prosecution Agreement. ¶¶413-415. The press release stated that SAIC agreed to pay the "staggering sum" of nearly $500.4 million in restitution and penalties for its role in the CityTime fraud, described as the "Largest Known Single Recovery in a State or Municipal Contract Fraud Case." *Id.* As part of the agreement, SAIC "accept[ed] responsibility for the illegal conduct alleged against Denault and admitted by Bell during the course of the CityTime project." ¶420. In late 2013, a jury found Denault and others

guilty of several criminal charges, including conspiracy to defraud NYC and fraud against NYC. ¶¶40-41. Bell previously pled guilty to similar charges. ¶42.

C. Procedural Background

On August 27, 2012, respondents filed an amended complaint alleging that SAIC and certain of its former executives committed securities fraud under §10(b) by knowingly or recklessly making misstatements and omissions concerning SAIC's involvement in the CityTime fraud. All defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that respondents failed to satisfy the PSLRA's heightened standards for pleading falsity and scienter. The district court denied in part SAIC's motion to dismiss. It sustained a §10(b) claim against SAIC based on violations of FAS 5 and Item 303 concerning material omissions in SAIC's March 2011 10-K. The court dismissed all other claims, including claims against all named individual defendants.

SAIC moved to reconsider, reiterating prior arguments that respondents failed to plead the surviving claims with sufficient particularity. This time the district court agreed, and entered final judgment in favor of SAIC. Respondents sought to vacate the judgment so that they could file a proposed amended complaint. In denying that motion, the court held that allowing leave to file the proposed amended complaint was futile because it failed to adequately plead disclosure violations under FAS 5 and Item 303, and scienter.

The Second Circuit vacated the judgment, holding that respondents adequately alleged a §10(b) claim in the proposed amended complaint based on violations of FAS 5 and Item 303 in the March 2011 10-K.

Notably, the Second Circuit rejected SAIC's arguments that the Item 303 claim was "inadequately pleaded." 818 F.3d at 94. After determining that Item 303 violations require allegations of "actual knowledge," the Second Circuit found that respondents pled facts "support[ing] a strong inference that SAIC actually knew (1) about the CityTime fraud before filing its Form 10-K on March 25, 2011, and (2) that it could be implicated in the fraud and required to repay the City the revenue generated by the CityTime contract." *Id.* at 95. It also determined that respondents sufficiently alleged the Item 303 omissions were material, given the "seriousness of the CityTime fraud and the alleged importance of the CityTime project to SAIC's future presence in the City and its ability to sell similar services to other municipalities around the United States." *Id.* at 96. Finally, the Second Circuit "conclude[d] that the allegations support the inference that SAIC acted with at least a reckless disregard of a known or obvious duty to disclose when, as alleged, it omitted . . . material information from its March 2011 10-K." *Id.*[4] The Second Circuit subsequently denied SAIC's petition for panel rehearing and for rehearing *en banc*.

Critically, through the various stages of motion practice before the district court, SAIC never challenged whether Item 303 creates a duty to disclose necessary to allege a material omission under a §10(b). Similarly, SAIC failed to press this issue on appeal in the Second Circuit. Yet, following the Second Circuit's order denying the rehearing petition, SAIC moved to stay issuance of the mandate pending resolution of a

[4] The Second Circuit affirmed the judgment for all remaining claims raised on appeal against SAIC and the individual defendants.

forthcoming petition for writ of certiorari. In that motion, SAIC asserted–for the first time–that an Item 303 violation cannot support an actionable omission under §10(b). The Second Circuit summarily denied the motion, and issued the mandate. As the parties presently litigate the remanded §10(b) claim based on violations of both Item 303 and FAS 5 in the district court, SAIC filed the present petition.

REASONS FOR DENYING THE PETITION

A. SAIC Failed to Preserve the Question Presented in the Lower Courts

This case presents an inappropriate vehicle for resolving a purported circuit split between the Second and Ninth Circuits on the Item 303 duty to disclose issue. Unlike in *Stratte-McClure* and *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014), where the respective circuit courts expressly decided, based on well-defined arguments presented by the parties, whether Item 303 can supply a duty to disclose, the Second Circuit here undertook no such analysis and made no such rulings. This is hardly surprising. As SAIC plainly concedes, it did not raise this "important" and "critical" issue in any proceedings before the district court. *See* Pet. at 31-32. That alone foreclosed SAIC from raising the issue for the first time on appeal to the Second Circuit. *See*, *e.g.*, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.").

SAIC's suggestion that it "had no reason to raise the issue" before the Second Circuit had decided *Stratte-McClure* makes little sense. *See* Pet. at 32. No matter

how "severely deficient" it believed respondents' complaint was, *id.* at 31, SAIC could have challenged the then-unresolved Item 303 issue–or even the broader issue of whether a statute or regulation can support a duty to disclose–as a basis for dismissal in the district court, but chose not to do so. This inexcusable failure amounts to waiver. *See Nortel Networks*, 539 F.3d at 132 ("Having reviewed Milberg's filings and oral presentation to the district court regarding this issue, we conclude that Milberg has waived this argument by failing to present it below.").

Similarly, SAIC made no effort to preserve any issue introduced in its petition in the Second Circuit appeal. As it did in the district court proceedings, SAIC argued on appeal that respondents failed to establish the elements of an Item 303 violation, not that Item 303 could not provide a duty to disclose for §10(b) purposes. *See SAIC*, 818 F.3d at 94 (rejecting SAIC's arguments that the Item 303 claim was "inadequately pleaded"). It also did not challenge the broader issue of whether a duty to disclose derived from a statute or regulation conflicts with prior Supreme Court precedent or the plain language of §10(b). These purportedly critical issues were also conspicuously absent from SAIC's subsequent petition for rehearing. Consequently, SAIC waived its ability to raise these issues for the first time before this Court. *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (same).[5]

[5] Additionally, SAIC never informed the Second Circuit that its *Stratte-McClure* decision was the subject of a certiorari petition based on a conflict with the Ninth Circuit's *NVIDIA* decision.

Nonetheless, SAIC submits that this Court may still consider the petition because the Second Circuit "passed upon" the question presented in the decision below. Pet. at 30-31. It bases this position on nothing more than the Second Circuit's reference in a footnote to a portion of the prior *Stratte-McClure* holding. Pet. at 32. However, the footnote reference to *Stratte-McClure* does not amount to the Second Circuit's "considered judgment" on an important issue that warrants review from this Court. *See Illinois v. Gates*, 462 U.S. 213, 223 (1983). To be sure, the Second Circuit did not (and certainly did not intend to) issue a new or expanded rule of law on whether Item 303 provides a duty to disclose under §10(b) in this case; all it did was make a limited reference to a rule of law that was not at issue on appeal and not disputed by SAIC.

SAIC's reliance on *United States v. Williams*, 504 U.S. 36 (1992), is misplaced. There, the Court's grant of certiorari turned on unique circumstances where the petitioner, the federal government, served as a party both in the existing case as well as in a prior Tenth Circuit case that created binding precedent. *Id.* at 43-44. Although the government had failed to challenge the "squarely applicable, recent circuit precedent" in the case at bar, the Court refused to reconsider its earlier grant of certiorari, concluding:

> It is a permissible exercise of our discretion to undertake review of an important issue

---

Given its belief that the Item 303 disclosure issue is of "central importance to private securities litigation," Pet. at 10, SAIC should have alerted the Second Circuit that the Supreme Court was considering, and subsequently rejected, a request to resolve that circuit split. Its failure to do so demonstrates that the present petition is a mere afterthought, conjured as a last-ditch effort to avoid potential liability for egregious Item 303 violations.

> expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent.

Id. at 44-45. In this case, the circumstances are vastly different, as SAIC failed to "contest" the issue of whether Item 303 can provide a duty to disclose, the Second Circuit did not "expressly decide" that issue below, and SAIC–a non-party to the Second Circuit's binding decision in *Stratte-McClure*–effectively conceded the correctness of that decision by failing to raise any challenge to it in this litigation. *See id.*

At a minimum, SAIC should have followed the course set forth in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). In that case, faced with binding precedent, the petitioner still "raised and preserved" a contract claim by arguing the legal points succinctly in its Federal Circuit appellate brief. *Id.* at 125. Rejecting a claim of waiver, this Court recognized the fact "[t]hat petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile." *Id.*

In other words, SAIC should have made some effort to preserve the duty to disclose issue in the lower courts, even though such efforts may have proven futile. *Springfield*, 480 U.S. at 258-59 (Petitioner "has informed us of no special circumstances explaining its failure to preserve this question."). Otherwise, the Court is "without the benefit of thorough lower court opinions to guide [its] analysis of the merits."

Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012). After all, the Court "is a court of final review and not first view," and the first time that the parties brief supposedly critical issues on whether Item 303 provides a duty to disclose should not be in connection with a petition for writ of certiorari. *See id.*; *see also United States v. Bestfoods*, 524 U.S. 51, 72 (1998) (expressing reluctance to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus."); *cf. Pa. Dep't of Corrs.*, 524 U.S. at 212 (declining review of question that "Petitioners raise[d] . . . in their [Supreme Court] brief, but . . . was addressed by neither the District Court nor the Court of Appeals. . . .").

B. The Second Circuit's Interlocutory Ruling is Not Ripe for Review

Contrary to SAIC's contention, the question presented is not ripe for review. The Second Circuit's decision was clearly interlocutory, as it vacated the final judgment and remanded the action to the district court for further proceedings, holding that respondents' proposed amended complaint adequately pled §10(b) claims. That alone is sufficient grounds to deny the petition. *See*, *e.g.*, *Bhd. Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

Moreover, in light of the Second Circuit's denial of SAIC's motion to stay issuance of the mandate pending the filing of the petition, the parties are litigating the action in the district court. Consequently, as the litigation proceeds, the contours of the case may change dramatically–through voluntary dismissal, class certification, summary judgment, or settlement–before the Court can render a decision on the merits.

This ever-changing landscape may render the Court's work superfluous. Under such circumstances, the Court is better served, at a minimum, waiting until a final judgment has been entered before considering the Item 303 question presented by SAIC. *See Abney v. United States*, 431 U.S. 651, 656 (1977) (recognizing "a firm congressional policy against interlocutory or 'piecemeal' appeals" and observing that "courts have consistently given effect to that policy").

While SAIC correctly notes that the Court, on occasion, has considered significant issues arising from interlocutory appeals, Pet. at 30, it neglects to address a complicating factor in this case: the Second Circuit revived the §10(b) claim based not only on violations of Item 303, but also on violations of GAAP, namely FAS 5, which are not the subject of the petition.[6] Thus, should the Court grant the petition and rule favorably on the merits for SAIC, it will not end this case, as respondents will still have a live dispute pending in the district court involving the same pool of recoverable damages available for the Item 303 violation. The existence of this viable claim, based on the same underlying facts and circumstances as the Item 303 claim, further counsels against certiorari review.

---

[6] Despite SAIC's suggestion, neither *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 (2011), nor *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), involved situations where the Court considered "some," but not all, of the claims revived by the Ninth Circuit. *See* Pet. at 30. Those cases turned on whether the plaintiffs sufficiently pled specific elements applicable to an indivisible §10(b) claim. *Matrixx*, 563 U.S. at 30-31 (materiality and scienter); *Dura*, 563 U.S. at 338 (loss causation).

C. The Identified Circuit Split is Neither Sufficiently Developed Nor is the Item 303 Issue of Great Importance

The primary basis for SAIC's certiorari petition is a purportedly "deep and expressed" circuit split over whether Item 303 establishes a duty to disclose for claims based on §10(b) of the Securities Exchange Act. Pet. at 6. What SAIC downplays, however, is that this Court already considered and rejected a certiorari petition involving this same purported circuit split in 2015, and nothing has materially changed since that time. *See Cohen*, 135 S. Ct. at 2349; Pet. at 18 n.4.

Indeed, SAIC points to no material developments in the law over the last 18 months that would warrant the Court's intervention at this juncture. In the past year or so, no other circuit court has examined whether Item 303 provides a duty to disclose for §10(b) claims. This is not surprising, as Item 303 violations do not represent a heavily litigated area of securities fraud claims, contrary to SAIC's repeated declarations otherwise. *See* Pet. at 1-2, 32. In fact, SAIC only identifies a few circuit-level decisions on the subject since Item 303 became effective in 1982 and the SEC provided interpretive guidance in 1989, and those decisions are largely inconclusive.

For example, both *Stratte-McClure* and *NVIDIA* drew support from *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000), in which the Third Circuit held that an Item 303 violation "does not automatically give rise to a material omission under Rule 10b-5," and then refused to apply the duty under the specific facts of the case. *Id.* at 288 ("Because plaintiffs have failed to plead any actionable misrepresentation or omission under that Rule, SK-303 cannot provide a basis for liability."). The Sixth Circuit discussed Item 303 in

dicta, in a case where "Item 303 [was] not even cited in the complaint," commenting without elaboration that arguments in favor of an Item 303 duty to disclose were not "persuasive." *In re Sofamor Danek Grp.*, 123 F.3d 394, 402-03 (6th Cir. 1997). In *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628 (11th Cir. 2010), the Eleventh Circuit did not consider Item 303 at all, but Judge Tjoflat, in a footnote within a lengthy concurring/dissenting opinion addressing a regulation "materially identical" to Item 303, stated that any assumption that Item 303 provides a duty to disclose was "generous." *Id.* at 682 n.78; *cf. Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1222 n.37 (1st Cir. 1996) (First Circuit recognized that a plaintiff "may sue under Section 10(b) and Rule 10b-5 for nondisclosures of material facts omitted from [offering] documents in violation of the applicable SEC rules and regulations.").[7]

Thus, because SAIC has presented no new authorities to consider, and offered questionable interpretations of prior circuit decisions, the Court should allow the Item 303 issue to further percolate in the lower courts before attempting to resolve a nascent circuit split. *See Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").[8]

---

[7] While noting that the SEC may initiate enforcement actions to police alleged Item 303 violations, SAIC identifies only a handful of such actions from the past 35 years. *See* Pet. at 24-25. This further undermines SAIC's claims that Item 303 issues are ubiquitous.

[8] SAIC's concerns about the rise of "forum shopping" lack any foundation. While pointing to unidentified complaints raising

Perhaps recognizing that the narrow Item 303 dispute raises an issue of limited concern, SAIC broadens the scope of its petition, asking the Court "to clarify the circumstances under which a duty to disclose arises for purposes of Section 10(b)." Pet. at 11. In essence, SAIC seeks a bright-line rule that corporations can never be liable for failing to disclose material information where a statute or regulation mandates disclosure to investors and others. One problem with this proposed rule (among many) is that SAIC fails to identify any circuit court decisions endorsing it. To the contrary, numerous circuit courts recognize that a duty to disclose may arise in §10(b) cases where a statute or regulation requires disclosure of certain specified information. *See*, *e.g.*, *Stratte-McClure*, 776 F.3d at 101; *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 471 (6th Cir. 2014); *In re K-Tel Int'l Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002); *Oran*, 226 F.3d at 285-86; *Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir. 1990). Consequently, while SAIC contends that these and other circuit courts cases are "spectacularly wrong," Pet. at 20, there is simply no circuit conflict on this manufactured issue for the Court to resolve.

SAIC skirts the absence of conflicting authorities by asserting that the creation of a duty to disclose based on statutory or regulatory disclosure requirements "undermines the principles espoused by this Court in

---

Item 303 violations filed in the Second Circuit since 2014, SAIC provides no context for the Court to evaluate this forum shopping charge. *See* Pet. at 17-18. Other than unsupported accusations, SAIC cites no specific complaints that were filed, and offers no verifiable details about the allegations in those complaints that would allow the Court to determine whether improper forum shopping has occurred.

Basic and *Matrixx*." Pet. at 3. Not true. Those cases clearly state that "[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); *Matrixx*, 563 U.S. at 45 (same). This does not mean, as SAIC seems to suggest, that pure omissions are inactionable in light of §10(b)'s reference to an "affirmative misstatement." *See* Pet. at 18-22. Rather, courts have long held that, "[a]bsent an actual statement, a complete failure to make a statement–in other words, a 'pure omission,'–'is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts.'" *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016).

Contrary to SAIC's position, *Matrixx* does not hold any differently. In dicta, the Court restated the unremarkable proposition that "§10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." 563 U.S. at 44. But the Court made no ruling on the nature and scope of any applicable duty to disclose. Instead, it merely reassured that "companies can control what they have to disclose" to investors "by controlling what they say to the market." *Id.* at 45. That control is not diminished simply because a company must comply with disclosure requirements imposed by a statute or regulation. Companies remain free to couch their disclosures in any terms they choose, so long as they accurately and completely disclose information required by statute or regulation. *See* Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1680 (2004) ("It follows to us that a deliberate omission has the same potential to mislead [as an affirmative misrepresentation]–the reader of the disclosure sees that the issuer is responding to the disclosure obligation and is

entitled to assume that the response is not only accurate but complete as well. In other words, she actually can be misled by the omission."). The Court should reject SAIC's efforts to bootstrap a request for clarification on an uncontroversial issue on which the circuit courts are in agreement.

D. The Second Circuit Correctly Decided the Item 303 Question in *Stratte-McClure*

Finally, failing to demonstrate that this action presents a suitable vehicle for granting certiorari, SAIC devotes a large portion of its petition to arguing the merits. While such extended merits briefing is misplaced in a certiorari petition, respondents offer this short response.

The Second Circuit's prior decision in *Stratte-McClure* was well-reasoned and correctly decided. Starting from the longstanding rule that a duty to disclose may arise from a "statute or regulation requiring disclosure," the Second Circuit noted that "Item 303 of Regulation S-K imposes disclosure requirements on companies filing SEC-mandated reports, including quarterly Form 10-Q reports." 776 F.3d at 101. "Due to the obligatory nature of these regulations," the Second Circuit reasoned that "a reasonable investor would interpret the absence of an Item 303 disclosure to imply the nonexistence of 'known trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations.'" *Id.* Accordingly, because "omitting an item required to be disclosed on a 10-Q can render that financial statement misleading," the Second Circuit concluded that "Item 303's affirmative duty to disclose in Form 10-Qs can serve as the basis for a securities fraud claim under Section 10(b)." *Id.* at 101-02.

SAIC's criticisms of *Stratte-McClure* are not well-founded. While SAIC advocates for a blanket rule preventing Item 303 from ever serving as the basis for a duty to disclose in §10(b) cases, the Second Circuit's approach applies more appropriately on a case-by-case basis. *See id.* at 102 ("Item 303 imposes the type of duty to speak that can, *in appropriate cases*, give rise to liability under Section 10(b)."). This flexible rule aligns with the Third Circuit's analysis in *Oran*. *Id.* at 103 ("*Oran* actually suggested, without deciding, that in certain instances a violation of Item 303 *could* give rise to a material 10b-5 omission.") (emphasis in original); *cf. Oran*, 226 F.3d at 288 ("We . . . hold that a violation of SK-303's reporting requirements does not *automatically* give rise to a material omission under Rule 10b-5.").

It is also consistent with this Court's prior securities law precedents, which have rejected efforts by defendants to impose strict, bright-line standards for imposing liability. *See Basic*, 485 U.S. at 235-36, 239-40 (rejecting a bright-line "agreement-in-principle" materiality test, concluding that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information," which involves a "fact-specific inquiry" that does not adhere to any "rigid formula."); *Matrixx*, 563 U.S. at 40, 43 (rejecting a "categorical rule" based on "statistical significance" alone, and emphasizing that "assessing the materiality of adverse event reports is a 'fact-specific' inquiry that requires consideration of the source, content, and context of the reports."); *see also Shaw*, 82 F.3d at 1210 ("As desirable as bright-line rules may be, this question [of the defendant's disclosure obligations] cannot be answered by reference to such a rule.").

Yet, SAIC seemingly attacks this very flexibility, suggesting that Item 303's "intentionally general" disclosure requirements are contrary to the narrow scope of §10(b) and will lead to a proliferation of unwarranted securities litigation. *See generally* Pet. at 22-30. But the Second Circuit's analysis demonstrates that pleading an Item 303 violation is quite difficult. Most notably, Item 303 contains an "actual knowledge" requirement. *SAIC*, 818 F.3d at 95 ("The plain language of Item 303 confirms our previous assumption that it requires the registrant's actual knowledge of the relevant trend or uncertainty."). According to the Second Circuit, "[i]t is not enough that [the registrant] should have known of the existing trend, event, or uncertainty." *Id.* Rather, to trigger a duty to disclose, a plaintiff must plead "allegations [that] support a strong inference that [the registrant] actually knew" about an identifiable "uncertainty" or "event" at the time of filing. *Id.*

Moreover, the Second Circuit also held that the "failure to make a required disclosure under Item 303 . . . is not by itself sufficient to state a claim for securities fraud under Section 10(b)." *Stratte-McClure*, 776 F.3d at 102. To be sure, Item 303 requires a "material" omission. *Id.* Seizing on this point, SAIC asserts that, "because Item 303 requires disclosure of significantly more information than Section 10(b)"–*i.e.*, information that is "reasonably likely to have a material effect" on the company's operations–the Second Circuit wrongly expanded the scope of Item 303 beyond what the SEC intended. *See* Pet. at 13-14. However, the Second Circuit directly addressed and reconciled the differing "materiality" inquiries under Item 303 and §10(b):

> Since the Supreme Court's interpretation of "material" in Rule 10b-5 dictates whether a private plaintiff has properly stated a claim, we conclude that a violation of Item 303's disclosure requirements can only sustain a claim under Section 10(b) and Rule 10b-5 if the allegedly omitted information satisfies *Basic*'s test for materiality. That is, a plaintiff must first allege that the defendant failed to comply with Item 303 in a 10-Q or other filing. Such a showing establishes that the defendant had a duty to disclose. A plaintiff must then allege that the omitted information was material under *Basic*'s probability/magnitude test, because 10b-5 only makes unlawful an omission of "material information" that is "necessary to make . . . statements made" . . . "not misleading."

776 F.3d at 103. In short, the Second Circuit struck a fair balance: not all Item 303 violations lead to potential liability under §10(b); only those that involve a material omission under the standards established in *Basic* will suffice. *See id.* at 103-04; *cf. Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716-17 (2d Cir. 2011) (In §11 case, the Second Circuit determined that plaintiff alleged material omissions under Item 303 using a standard of materiality derived from *Basic*.).

SAIC's attacks do not end there, however. It also raises concerns that the Second Circuit's rule "[a]llowing claims predicated on alleged Item 303 violations" will "encourage[] fraud-by-hindsight pleading." Pet. at 25. Such concerns are overblown. Regardless of any perceived "creativity" from the plaintiffs' bar, Pet. at 27, the fact remains that fraud-by-hindsight pleading is impermissible under the PSLRA, whether the §10(b)

claim involves Item 303 or otherwise. Deriving a duty to disclose from an Item 303 violation does nothing to undermine that well-established principle. The Second Circuit understood this point when it concluded that a plaintiff seeking to invoke Item 303 must also plead the traditional §10(b) elements to state a claim, including scienter. *Stratte-McClure*, 776 F.3d at 103 ("Of course, as with any Section 10(b) claim, a plaintiff must also sufficiently plead scienter, a 'connection between the . . . omission and the purchase or sale of a security,' reliance on the omission, and an economic loss caused by that reliance."). SAIC offers no reason to believe that federal courts will somehow weaken the PSLRA's heightened pleading standards when faced with alleged Item 303 violations.

The Second Circuit's respective analysis of the pleadings in *Stratte-McClure* and *SAIC* bear this out. In *Stratte-McClure*, the Second Circuit "conclude[d] that plaintiffs have adequately alleged that Defendants breached their Item 303 duty to disclose that Morgan Stanley faced a deteriorating subprime mortgage market that, in light of the company's exposure to the market, was likely to cause trading losses that would materially affect the company's financial condition." 776 F.3d at 104. Nonetheless, the court affirmed the dismissal of the complaint, holding that "Plaintiffs failed adequately to plead scienter." *Id.* Specifically, the court found that the complaint's scienter "facts do not 'approximat[e] actual intent' to mislead investors by failing to make Item 303 disclosures." *Id.* at 106.

By contrast, and despite SAIC's attempts to recast the facts, *see* Pet. at 28-29, the Second Circuit here correctly held that respondents stated a §10(b) claim based in part on Item 303 violations. *SAIC*, 818 F.3d

at 94-96. The court found that respondents adequately pled SAIC's actual knowledge of uncertainties involving the CityTime scandal. *Id.* at 95. As the court further elaborated, "by early March 2011 SAIC was aware that it faced serious, ongoing criminal and civil investigations that exposed it to potential criminal and civil liability and that ultimately did result in criminal charges and substantial liability." *Id.* at 95 n.8. The court also determined that SAIC's omissions were material, explaining that the "seriousness of the CityTime fraud and the alleged importance of the CityTime project to SAIC's future presence in the City and its ability to sell similar services to other municipalities around the United States makes us reluctant to conclude at this stage that the alleged misstatements were 'so obviously unimportant' either quantitatively or qualitatively that they could not be material." *Id.* at 96. Finally, the court held that respondents "have plausibly alleged that SAIC acted with the requisite scienter when it violated . . . Item 303" based upon "allegations . . . [which] strongly suggest that by March 9, 2011 . . . SAIC knew about Denault's kickback scheme, the extent of the CityTime fraud, and . . . that it risked civil and criminal fines and penalties, let alone losing a significant number of current and future government contracts." *Id.*

These contrasting decisions demonstrate that the federal courts are remarkably adept at analyzing the sufficiency of securities fraud complaints and determining whether allegations pass muster under the PSLRA. Where applicable, Item 303 violations form one small part of that process. But SAIC offers no compelling reason for overturning the Second Circuit's common-sense ruling that Item 303 can provide a duty to disclose in §10(b) actions in appropriate cases. The Court should deny the petition.

CONCLUSION

SAIC's petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS WILENS
Counsel of Record
ROBBINS GELLER RUDMAN &
DOWD LLP
120 E. Palmetto Park Road
Suite 500
Boca Raton, FL 33432
(561) 750-3000
dwilens@rgrdlaw.com

Counsel for Respondents

February 8, 2017