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IN THE  
**Supreme Court of the United States**

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THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY  
PENSION FUND, AND THE CEMENT MASONS LOCAL 526  
COMBINED FUNDS, On Behalf of Themselves and All  
Others Similarly Situated,

*Petitioners,*

vs.

OMNICARE, INC., JOEL F. GEMUNDER, DAVID W. FROESEL, JR.,  
CHERYL D. HODGES, EDWARD L. HUTTON, AND  
SANDRA E. LANEY,

*Respondents.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Sixth Circuit**

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**REPLY BRIEF IN SUPPORT OF PETITION FOR A  
WRIT OF CERTIORARI**

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The Sixth Circuit's decision below and the decisions of several other Circuits clearly conflict with decisions of the Eighth Circuit concerning application of Rule 9(b) to Securities Act of 1933 ("Securities Act") §11 claims.<sup>1</sup> Respondents candidly acknowledge that the conflict has already produced a string of petitions seeking this Court's review. *See* Brief in Opposition ("Opp.") at 12 n.8. The by now well-developed conflict warrants this Court's attention.

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<sup>1</sup> Compare Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 20a-21a (decision below, citing decisions of other circuits) with *In re Acceptance Ins. Cos. Sec. Litig.*, 423 F.3d 899, 903 (8th Cir. 2005); *Romine v. Acxiom Corp.*, 296 F.3d 701, 704-05 (8th Cir. 2002); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314-16 (8th Cir. 1997).

Respondents' primary response is to invoke this Court's Rule 11, which states that "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, *before judgment is entered in that court*, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."<sup>2</sup> Yet Rule 11 has no application here, as the Petition for a Writ of Certiorari was filed only *after* the Sixth Circuit had entered its judgment in this matter. The Petition seeks review of the Sixth Circuit's published opinion that accompanied its judgment.

Respondents quote Justice Brennan's dissenting opinion in *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 350-51 (1985), as though it were the opinion of the Court, for the proposition that "the Court will exercise pre-judgment certiorari review only in cases 'of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons.'" Opp. at 7 (quoting *Walters*, 473 U.S. at 350-51 (Brennan, J., dissenting)). But dissents are not holdings of the Court, and discussions of the limited circumstances when "certiorari review can be obtained before the court of appeals renders judgment," *Walters*, 473 U.S. at 350, are simply irrelevant. So is Respondents' string-cite of cases dealing with certiorari to review district-court decisions where appeals were taken to Circuit Courts that had not yet reviewed the trial court's decision or entered an appellate judgment.<sup>3</sup> For here the Sixth Circuit has both entered its judgment, and issued a precedential published opinion.

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<sup>2</sup> Supreme Court Rule 11 (emphasis added); see Opp. at i, 12 (quoting the rule).

<sup>3</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("Petitioner filed a notice of appeal to the Eighth Circuit, but both

Respondents quote another dissenting opinion for the proposition that this Court's practice "reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed."<sup>4</sup> But here Petitioners clearly did not prevail on the issue of whether their Securities Act §11 claims are subject to Rule 9(b)'s heightened pleading standards. The Sixth Circuit held: "We agree with Defendants that, since the GAAP violations sound in fraud, Rule 9(b) must apply." Pet. App. at 21a.

Respondents suggest that review of a clear conflict among the Circuits must be postponed because the Sixth Circuit's published opinion and judgment remanding the matter for further proceedings constitutes an "interlocutory" order. But where circuits are in conflict on an important point of law, this Court frequently grants review of federal appellate decisions that have remanded for further proceedings.<sup>5</sup> It is particularly apt to do so in cases dealing with pleading standards.<sup>6</sup>

Federal securities claims should be subject to uniform pleading standards, wherever filed. Given the clear conflict

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petitioner and the United States . . . petitioned for certiorari before judgment."); *Wilson v. Girard*, 354 U.S. 524, 526 (1952) ("petitioners appealed to the Court of Appeals for the District of Columbia, and, without awaiting action by that court on the appeal, invoked the jurisdiction of this Court").

<sup>4</sup> Opp. at 5 (citing and quoting Justice Scalia's dissenting opinion in *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004)).

<sup>5</sup> See, e.g., *Merck & Co. v. Reynolds*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1784 (Apr. 27, 2010) (reviewing and resolving conflict on statute-of-limitations issue after Third Circuit had remanded for further proceedings, see *In re Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, 543 F.3d 150, 172 (3d Cir. 2008)).

<sup>6</sup> See, e.g., *Dura Pharms., Inc. Corp. v. Broudo*, 544 U.S. 336, 340 (2005); *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 316-17 (2007).

among the circuits on a basic rule of pleading that affects many federal securities cases, this Court's review is warranted. The Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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