No. 15-694

IN THE

Supreme Court of the United States

HARMAN INTERNATIONAL INDUSTRIES, INC., ET AL.,

Petitioners,

v.

ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY ON PETITION FOR A WRIT OF CERTIORARI

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The D.C. Circuit's interpretation of the meaningful cautionary statement safe harbor departs dramatically from the majority approach. Most circuit courts determine the safe harbor's applicability by examining the cautionary statement's terms. Whether the statement is allegedly false or misleading, or whether the issuer has knowledge of a falsity, does not determine the statement's meaningfulness. The question is whether the statement discloses a risk of significance similar to the one actually realized. In contrast to this approach, the D.C. Circuit credited a disputed allegation about obsolescence, which can be proved only by examining Harman's knowledge. It held Harman's cautionary statements non-meaningful because they were allegedly false in light of alleged historical fact.

About this conflict, APERS says very little. It claims not to understand how the D.C. Circuit's rule, which precluded safe harbor protection for allegedly misleading statements, was outcome determinative. APERS disclaims any split while quoting the language creating it. APERS effectively ignores decisions requiring courts to examine "only the cautionary statement accompanying the forward-looking statement." *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010) ("*Goodman Life*"). And, it claims that knowledge was not necessary to the D.C. Circuit's analysis, even though there is no way to prove that Harman's cautionary statements were misleading without resorting to knowledge evidence.

With respect to the puffery doctrine, the D.C. Circuit's holding conflicts directly with Third and Fifth Circuit decisions holding that "strong" and

"very strong" are puffery. The courts reached these different results due to their fundamentally different interpretations of the puffery doctrine. According to the D.C. Circuit, language incapable of objective verification can become non-vague and material if tied to a product and time period. But the majority of courts have held that investors do not rely on management's characterization of results as strong, solid or good. Regardless of context, the terms are not verifiable facts. For these reasons, and those discussed below, the Petition should be granted.

I. THE COURT SHOULD RESOLVE THE CONFLICTS OVER THE MEANINGFUL CAUTIONARY STATEMENT SAFE HARBOR.

A. APERS cannot distinguish the decisions rejecting the D.C. Circuit's rule that "cautionary statements cannot be 'meaningful' under the PSLRA if those statements are themselves misleading in light of [purported] historical facts" (Opp. 7). *See Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 729 (7th Cir. 2004); *Goodman Life*, 594 F.3d at 795; *Institutional Inv'r Grp. v. Avaya, Inc.*, 564 F.3d 242, 256 n.23 (3d Cir. 2009).

APERS attempts to distinguish the *Asher* decision by labeling the key language *dicta* and claiming that the case discusses only the kinds of risk factors that cautionary statements must disclose. Opp. 9, 10. But, the court affirmatively held that a cautionary statement cannot be non-meaningful due to its alleged false or misleading nature; otherwise, the safe harbor would "never work[]." *Asher*, 377 F.3d at 729. The court was not discussing the rule that cautionary statements need only identify principal risks. *See*

Opp 10. That discussion comes later in the court's opinion. *See Asher*, 377 F.3d at 730-31.

APERS cannot distinguish the Third Circuit's *Avaya* decision by arguing that, there, a statement merely "turn[ed] out" to have been false, but here, Harman's statement was allegedly false in light of "historical facts." Opp. 11. Avaya had stated that it was "on track" to grow its revenue and margin, "that [it] was not offering unusual and increased discounts," and that the "[p]ricing environment is—has been fairly stable." *Avaya*, 564 F.3d at 247-48, 256. At the time of those statements, however, the plaintiffs alleged that "'Avaya was in fact encountering serious pricing pressures and was forced to grant unusually large discounts in negotiations with clients," which was eviscerating margins. *Id.* at 249-50.

Under the D.C. Circuit's rule, Avaya's cautionary statements about the possibility of increased price and product competition, *see id.* at 257-58, would not have received safe harbor protection. Crediting plaintiffs' allegations, the D.C. Circuit would have held Avaya's statements misleading due to the alleged "historical fact" of excessive discounting, price competition and already-realized margin pressure. *See* Pet. App. 27a (holding Harman's cautionary statements misleading because they allegedly failed "to account for the materialization, rather than the abstract possibility, of the important risk").

The Third Circuit found Avaya's cautionary statements meaningful notwithstanding the omissions. *Avaya*, 564 F.3d at 257-58. It also reasoned that "'one can complain that the cautionary statement must have been inadequate' whenever 'the

firm's disclosures (including the accompanying cautionary statements) are false or misleadingly incomplete,'" but that "such a view would divest the Safe Harbor of any function, since there is no potential liability—and thus no need for Safe Harbor protection—where there is nothing false or misleading about a firm's statements." *Id.* at 256 n.23 (quoting *Asher*, 377 F.3d at 729). On these facts, the D.C. Circuit's and Third Circuit's decisions are irreconcilable.

The same is true of the Eleventh Circuit's decision in *Ehlert v. Singer*, 245 F.3d 1313, 1317-18 (11th Cir. 2001). While, as APERS notes (Opp. 12-13), the court found the cautionary statements meaningful, it did so only after holding that "a material and misleading omission can fall within the forward-looking safe-harbor." *Ehlert*, 245 F.3d at 1317. This holding was critical to the result. Plaintiffs had alleged that the cautionary statements were "materially misleading," because the issuer had already decided that it would not "provide free Year 2000 compliant upgrades" to certain customers and was curtailing services to them. *Id.* at 1318.

The D.C. Circuit would not have held the cautionary statements in *Ehlert* meaningful. Under its rule, the statements were misleading and could not be meaningful in view of the omitted historical facts—the past decisions regarding upgrades and servicing. The Third Circuit rejected this result and examined the statements to determine whether they disclosed risks similar to those actually realized. *Id.* at 1319-20. Thus, the courts are not adopting "minor linguistic discrepancies" (Opp. 13 n.4) but applying different

legal rules leading to different results: safe harbor preclusion v. safe harbor eligibility.[1]

Accordingly, APERS' repeated claim that this case is different because it involves alleged "historical fact" is incorrect. *See* Opp. 7, 8, 10, 13. Whether a statement is false or misleading when uttered will always turn on the existing and "historical" facts at that time. Thus, all the conflicting cases involve so-called historical fact.

In all events, while APERS and the D.C. Circuit refer to alleged obsolescence as an "historical fact," it is really a *disputed* fact. Harman disputes that its inventory was obsolete and un-saleable at the time of the purported misstatements. By crediting APERS' allegations, the D.C. Circuit gutted the safe harbor. All plaintiffs are required to allege a false or misleading statement. Harman cannot effectively challenge those allegations on a motion to dismiss.

Finally, APERS claims that Harman "does not meaningfully argue" that the D.C. Circuit's rule "is incorrect" or that Harman's statements would be

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[1] According to APERS, Harman "conceded" that a specific warning on obsolescence was required. Opp. 7. This is incorrect. Harman agreed that the issue before the D.C. Circuit was whether it had provided cautionary statements identifying risks of a significance similar to those actually realized. *See* Pet. App. 60a. Harman argued that it did so through specific cautionary statements about the increasingly competitive and margin-challenged PND market (Pet. App. 72a-74a); Harman's increasing PND inventory (*id.* at 74a n.8); the rapidly changing nature of PND technology (*id.* at 72a); and the business risk of failing to keep up with those changes (*id.* at 72a-73a). The district court found those statements meaningful. *Id.* at 73a-74a, 82a. Harman never agreed that a specific cautionary statement on obsolescence was required.

meaningful under the majority approach. Opp. 7, 8. That argument is demonstrably wrong. *See* Pet. 23-28. Indeed, the only party who has not provided a merits-based analysis is APERS. It nowhere explains how the safe harbor can have meaning under the D.C. Circuit's rule.

B. With respect to the materials courts may use to evaluate whether a cautionary statement is meaningful, APERS asserts that the Fifth, Sixth, Ninth, and Eleventh Circuits "*nowhere*" hold "that courts may not examine anything outside the 'four corners' of the statements themselves." Opp. 18 n.9 (emphasis in original). But, the Eleventh Circuit has expressly held that it can examine "only the cautionary statement accompanying the forward-looking statement" to determine the safe harbor's applicability. *Goodman Life*, 594 F.3d at 795. And, in the cited cases, the courts limit their analysis to the statements' four corners. *See id.* at 795; *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010); *Miller v. Champion Enters. Inc.*, 346 F.3d 660, 667-68 (6th Cir. 2003).

APERS wrongly claims that courts "could never find the statement inadequate." Opp. 17 n.9. Under the majority approach, courts evaluate the cautionary statements against the actually-realized risk. *See Goodman Life*, 594 F.3d at 795; *In re Cutera*, 610 F.3d at 1107; *Miller*, 346 F.3d at 667-68. If the cautionary statement discloses significantly similar risks, it is meaningful; no more is required.

C. APERS does not deny, and cannot deny, that the appellate courts are deeply divided over the role, if any, an issuer's alleged knowledge should play in

determining whether cautionary statements are meaningful. *See* Pet. 18-22. APERS claims that knowledge played no role in the D.C. Circuit's decision. But the only way to prove PND inventory levels, the inventory's value, and what, if any, discount would be required to sell the inventory at the time of the alleged misstatements is through Harman's internal records and files—its knowledge. Thus, while "historical facts that happen to be within Harman's knowledge . . . [and] Harman's knowledge itself" might sometimes be "analytically distinct" (Opp. 16), here, they are one and the same. Presumably for this reason, APERS has not identified a basis for its obsolescence allegations apart from alleged reports of Harman's purported knowledge.[2]

Here, too, APERS erroneously asserts that obsolescence is an established fact. Opp. 17. Harman disputes that its PNDs were obsolete and un-saleable at the time of the asserted misstatements. Resolving the dispute not only requires a resort to knowledge evidence but delays the safe harbor's availability until summary judgment, contrary to the safe harbor's purpose.

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[2] APERS makes several footnote arguments that call for summary treatment. APERS argues that Harman should have moved to dismiss the complaint under the "actual knowledge" prong of the safe harbor. Opp. 17 n.7. But APERS alleged actual knowledge to avoid dismissal under this prong. *See* Pet. App. 61a. APERS wrongly claims that Harman's reading of the safe harbor would preclude any consideration of obsolescence. Opp. 17 n.8. Under the majority approach, asserted obsolescence is not ignored. Rather, the courts analyze whether the issuer's cautionary statements adequately identified risks of a significance similar to the one actually realized. *See, e.g.*, *In re Cutera Sec. Litig.*, 610 F.3d at 1112.

APERS purports to be confused (Opp. 15 n.6) by the fact that cases holding knowledge irrelevant to the safe harbor involve alleged misstatements of "historical fact." Pet. 20-21. Harman's point is that, unlike the D.C. Circuit, none of those courts found the alleged misstatement of historical fact dispositive. Moreover, the cases prove Harman's broader point that, for evidentiary purposes, the issuer's knowledge is not as readily separated from "historical fact" as the D.C. Circuit and APERS assume.

Finally, APERS misconstrues Harman's argument regarding the duty to disclose. Pet. 19-20. The D.C. Circuit held that Harman's cautionary statements were *misleading* due to an omission of alleged historical fact. Pet. App. 23a. But an omission is not misleading unless there is a duty to disclose the information, which turns on knowledge. *See* Pet. 20. By holding Harman's cautionary statements misleading, the D.C. Circuit made an implied holding about Harman's knowledge, thereby implicating the split of authority.

D. The conflict between the D.C. Circuit and the Third and Fifth Circuits over whether "very strong" is puffery provides yet another ground for granting certiorari. APERS cannot reconcile the conflicting cases on the ground that Harman's statement was tied to a product and time period. Opp. 20-21. In *Galati v. Commerce Bancorp, Inc.*, 220 F. App'x 97, 101-02 (3d Cir. 2007) (internal quotation marks omitted), "strong" was tied to the performance of the "public finance division" and specific fiscal years. *Id.* "[S]trong top-line revenue growth" was tied to "strong deposit growth" over the same periods. *Id.* Regard-

less of the ties, the Third Circuit held the statements optimistic "puffery." *Id.*

As for APERS suggestion that the Third Circuit's decision has less weight because it was not published, the opinion is citable. *See* Fed. R. App. P. 32.1. Regardless of whether it is published or not, it provides a basis for granting certiorari. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991); *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 34 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209 (1974).

The statements in *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869-70 (5th Cir. 2003), were also tied to specifics. The statement that the issuer's "fundamentals are strong" responded to questions about a one-day stock price drop. *Id.* at 860. The statement that "[i]n the past year we have assembled the core assets and capabilities for strong growth in our key markets" was tied to a market (Buenos Aires) and the "past year." *Id.* The statement that "[t]he pipeline of private transactions and announced public tenders that we are pursuing remains very strong" was tied to 60 privatizations that were scheduled to occur in the second half of 1999. *Id.* at 860, 870.

But unlike the D.C. Circuit, the Fifth Circuit held the terms "strong" and "very strong" puffery on the ground that "analysts rely on facts in determining the price of a security," not a company spokesman's positive characterization of facts. *Rosenzweig*, 332

F.3d at 869 (internal quotation marks and citation omitted).[3]

The Fifth Circuit's analysis proves that conflicting legal rules are driving the different results. The D.C. Circuit held that immeasurable statements of corporate optimism are not puffery where "tied to a product and time period." Pet. App. at 35a. The tie, in the court's view, provides "specifics that an investor could use to evaluate the statement's veracity." *Id.*

But the majority of courts recognize that "[a]nalysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen." *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993); *see also Rosenzweig*, 332 F.3d at 870 (citing and quoting *Raab*). To those courts, no amount of tie to a product or time period can make the word "strong" a fact. *See In re Level 3 Commc'n, Inc. Sec. Litig.*, 667 F.3d 1331, 1340 (10th Cir. 2012). Thus, while the D.C. Circuit cited many correct principles of the puffery doctrine (*see* Opp. 19, 22-23), it missed the key principle that investors will not be defrauded by corporate optimism that cannot be verified as fact. Even if verified, it is the underlying fact, not the optimism, on which investors rely.

In this way, the D.C. Circuit's interpretation of the puffery doctrine departs dramatically from the majority interpretation. While APERS considers this departure "entirely irrelevant to whether this Court

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[3] APERS says nothing about the other cases that have held synonymous terms—like "solid" and "good"—immaterial puffery. *See* Pet. 30 n.2.

should grant *certiorari*," Opp. 22, conflicts in principle satisfy the requirements of Supreme Court Rule 10(a). *See* Stern & Gressman, SUPREME COURT PRACTICE 242 (10th ed.); *see also Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764 (1985) (involving a "conflict in principle"). Here, the D.C. Circuit's decision implicates both a direct conflict and a conflict in principle. *See* Pet. 29-32.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE IMPORTANT QUESTIONS PRESENTED.

APERS does not dispute that the questions presented are exceptionally important and recurring. Pet. 34-36. While APERS suggests that there is no harm to waiting for another potential grant (Opp. 25), the D.C. Circuit gutted the meaningful cautionary language safe harbor and effectively precluded its use at the motion to dismiss stage. The decision undercuts the safe harbor's goal. *See* Pet. 35. Accordingly, there is harm to waiting, and there is risk that an issuer will not have the appetite to litigate through discovery. *Id.*

APERS is correct that it did not brief the first question presented. Opp. 24. The primary issue before the D.C. Circuit and the district court—was the role of knowledge in the meaningfulness analysis. *See* Pet. App. 60a-69a. The D.C. Circuit attempted to avoid this question by adopting its own, new rationale—that the statement's alleged omission of "historical fact" rendered it misleading and non-meaningful as a matter of law. Pet. App. 23a. Harman understandably did not raise the split earlier; it was not implicated by the parties' arguments.

In addition, APERS fails to explain why the D.C. Circuit's innovation renders this case a poor vehicle. No jurisdictional or other such bar exists. The D.C. Circuit, Third Circuit, Seventh Circuit, and Eleventh Circuit have all explained their reasoning. And the merits briefs will inform the Court of the arguments.

APERS' alternative argument, that the split has not been recognized by appellate courts (Opp. 14 n.5, 24), also fails. Appellate courts frequently fail to realize conflicts and perceive some that are illusory. This Court routinely grants *certiorari* in the first instance and has dismissed cases in the second. *See* SUPREME COURT PRACTICE at 241 n.19, 242 n.20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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