NO. 04-763

IN THE

Supreme Court of the United States

BAXTER INTERNATIONAL INCORPORATED,
HARRY M. JANSEN KRAEMER, JR., BRIAN P. ANDERSON,
JOHN QUICK, THOMAS J. SABATINO, JR., TIMOTHY B. ANDERSON,
KAREN J. MAY, JAMES R. HURLEY, GREGORY P. YOUNG,
ERIC A. BEARD, NORBERT G. REIDEL, AND JAMES M. GATLING,

Petitioners,

v.

BRIAN ASHER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE*
THE AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC.,
THE NATIONAL INVESTOR RELATIONS INSTITUTE, AND
THE NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF PETITIONER

BRIAN E. PASTUSZENSKI
Counsel of Record
WILLIAM L. PRICKETT
INEZ H. FRIEDMAN-BOYCE
SCOTT T. LASHWAY
TESTA, HURWITZ & THIBEAULT, LLP
125 High Street
Boston, Massachusetts 02110
(617) 248-7000

Counsel for Amici Curiae

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

Does the Private Securities Litigation Reform Act's safe harbor for forward-looking statements require an issuer of a forward-looking statement to:

(i) identify the "principal risks" that the company "objectively faced" when it made the forward-looking statement, as the Seventh Circuit held in its amended opinion in this case -- a standard that will discourage issuers from providing investors with any forward-looking information by: (1) requiring potentially burdensome discovery into the risk environment facing an issuer notwithstanding the across-the-board stay of discovery enacted as part of the Private Securities Litigation Reform Act; (2) preventing resolution at the motion to dismiss stage of a defense based on the Safe Harbor; and (3) undermining the predictability of application and hence the safety of the Safe Harbor; or

(ii) "warn[ ] of risks of a significance similar to that actually realized," such that an investor is put "sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preference for risk and reward," as the Eleventh and Sixth Circuits have held -- a standard that: (1) does not require discovery and therefore is consistent with the discovery stay provisions of the Reform Act; (2) renders the Safe Harbor effective at the motion to dismiss phase of a securities action; and (3) provides predictable protection to issuers who make forward-looking statements, and encourages the dissemination of forward-looking information into the marketplace?

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INTERESTS OF AMICI CURIAE

The American Society of Corporate Secretaries, Inc. ("ASCS"), the National Investor Relations Institute ("NIRI"), and the New England Legal Foundation ("NELF") (collectively "Amici") submit this memorandum in support of the petition for writ of certiorari filed by Baxter International Incorporated ("Petitioner").[1] Founded in 1946, ASCS has over 4,000 members, representing approximately 2,800 public companies. Its members cooperatively address issues relating to corporate governance and public disclosure under the securities laws. Founded in 1969, NIRI likewise is a national organization comprised of over 4,500 members, representing most of the largest publicly-traded companies in the United States. NIRI focuses on public companies' communications with the investing public. Founded in 1977, NELF is a non-profit, public interest organization whose members include corporations, law firms, individuals, and others from all parts of New England and the United States who believe in NELF's mission of promoting balanced economic growth, protecting the free enterprise system, and defending economic rights.

The protection that the Private Securities Litigation Reform Act's safe harbor provision affords public companies -- and the certainty of its application -- are critically important to the members of ASCS, NIRI, and NELF, as well as to public companies generally. The Seventh Circuit's decision in this case, however, makes entirely uncertain, if

[1] Pursuant to the Court's Rule 37(6), Amici state that no counsel for any party authored this brief and the accompanying motion in whole or in part, and no person or entity other than Amici, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(2)(a), letters from Baxter International Inc.'s and Brian Asher's counsels consenting to the filing of this brief have been submitted to the Clerk.

not eliminates, that protection. By requiring that plaintiffs be allowed to take discovery relating to the risk environment facing an issuer who has made a forward-looking statement, the Seventh Circuit's decision will prevent our members and other publicly-traded issuers from defeating meritless securities litigation at the motion to dismiss stage in cases -- like this one -- that challenge forward-looking statements accompanied by meaningful cautionary language.

SUMMARY OF ARGUMENT

Amici urge the Court to grant certiorari and reverse the amended decision of the Seventh Circuit panel in this case ("Panel").[2] The Panel's decision concludes that under the safe harbor for forward-looking statements ("Safe Harbor"), enacted as part of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (1995), discovery is necessary to determine the "principal risks" or "major risks" of which the defendant was aware at the time the challenged statement was made. The Seventh Circuit's ruling must be reversed because:

[2] On September 3, 2004, the Seventh Circuit issued a revised opinion that made minor changes to its original July 29, 2004 opinion. Asher v. Baxter Int'l Inc., 377 F.3d 727 (7th Cir. 2004), *as amended* (Sept. 3, 2004). The amended decision removed language that overtly required an assessment of the defendant's state of mind. Despite these cosmetic changes, however, the Panel nonetheless left standing its erroneous holding that discovery is necessary in order to evaluate whether the defendant's cautionary language reflected the "principal" risks (rather than "important" or "relevant" risks) of which the defendant was aware at the time it made the challenged statements. Unless otherwise noted, all references to the Seventh Circuit's decision in this memorandum will be to the amended decision.

- It conflicts with the unambiguous language of the Safe Harbor itself and with its legislative history, both of which make clear that the adequacy of the disclosed risks are to be determined at the motion to dismiss stage and without discovery;
- It conflicts with the automatic stay of discovery under the Reform Act, which applies in any securities case involving a challenge to the Safe Harbor as a defense;
- It undermines Congress' purpose in enacting the Safe Harbor in the first place -- i.e., to provide issuers with consistently-applied protection when making forward-looking statements in order to encourage those issuers, including members of Amici, to share with investors their insights about anticipated future financial and operating results, management's plans for the future, and other forward-looking information without fear of liability and potentially burdensome discovery if their forward-looking statements are later challenged in litigation; and
- It will discourage publicly-traded companies, including members of Amici, from providing the market with forward-looking information.

Under the Seventh Circuit's amended decision, a defense asserted under the first prong of the Safe Harbor may no longer be resolved on a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) ("Federal Rule 12(b)(6)"). Both the plain language of the Reform Act and its legislative history, however, make clear that the sufficiency of cautionary language accompanying an issuer's forward-looking statements is to be assessed: (1) solely on the basis of the language itself without reference to other facts; and (2) as a matter of law, on a motion to dismiss under Federal Rule 12(b)(6) and without costly and potentially burdensome discovery. That this determination is to be made without

discovery is reinforced by the existence of the automatic, omnibus discovery stay enacted as part of the Reform Act. See 15 U.S.C. § 77z-2(f) (2000); 15 U.S.C. § 78u-5(f) (2000). That provision automatically stays *all* discovery in a securities case pending the district court's resolution of a defendant's motion to dismiss. The Seventh Circuit's amended opinion effectively nullifies the discovery stay in cases challenging revenue and earnings projections, expectations about new product introductions, and other forward-looking statements, contrary to the bedrock principle of statutory construction that all parts of a statute are to be given effect.

The Seventh Circuit's decision conflicts with every previously-reported decision at both the circuit and district court levels that has considered the first prong of the Safe Harbor. None of those decisions requires assessment of the "major" or "principal" risks actually facing a defendant at the time a challenged statement was made, and all have recognized that the adequacy of cautionary language is to be determined, as a matter of law, on a motion to dismiss. This consistent interpretation of the Safe Harbor has led to predictability and certainty of application in these other circuits, providing comfort to issuers that making a forward-looking statement will not open the floodgates to discovery and will not expose them to potentially unlimited liability, thus encouraging issuers to provide the market with forward-looking guidance. Indeed, encouraging issuers to provide such guidance was one of the Safe Harbor's cornerstones. See infra, §§ I and II.

Under the Seventh Circuit's construction of the Safe Harbor, however, every attack on a forward-looking statement -- no matter how abusive the lawsuit -- will permit discovery into the risks actually facing a defendant, including which risks the defendant chose to highlight and which not,

at the time it made the statement. This construction almost certainly will discourage issuers (including members of Amici) from making forward-looking statements to the investing public, because the Safe Harbor will no longer provide the protection that Congress intended or the predictability of judicial interpretation on which issuers have come to rely. See infra, § III.

For these reasons and those discussed herein, ASCS, NIRI, and NELF respectfully submit that it is essential that the Court grant certiorari, and reverse the Panel's decision.

ARGUMENT

I. The Panel's Decision Conflicts With The Reform Act's Plain Language And Congress' Intent.

Under the first prong of the Safe Harbor, a forward-looking statement will not give rise to private securities liability if the statement is: (1) "identified as forward-looking"; and (2) "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement," or is immaterial. 15 U.S.C. § 77z-2(c)(1)(A); 15 U.S.C. § 78u-5(c)(1)(A). Both the plain language of the statute and Congress' unequivocal intent, as stated expressly in the Conference Committee report accompanying the Act ("Conference Report"), make clear that application of this prong of the Safe Harbor "shall be based upon the sufficiency of the cautionary language . . . and does not depend on the state of mind of the defendant." Joint Explanatory Statement of the Committee of Conference, Statement of Managers, H.R. Conf. Rep. No. 104-369, 104th Cong., at 44 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730 ("Conf. Rep.").

Instead, the focus of the Safe Harbor inquiry is on whether the forward-looking statement is accompanied by "meaningful cautionary language" setting forth "important factors" that could cause actual results to differ materially from expectations. See 15 U.S.C. § 77z-2(c)(1)(A); 15 U.S.C. § 78u-5(c)(1)(A).[3] The Conference Report explains that "meaningful" cautionary statements are those that "convey substantive information about factors that realistically could cause results to differ materially from those projected in the forward-looking statement." Conf. Rep. at 44. Accord Helwig v. Vencor, Inc., 251 F.3d 540, 558-59 (6th Cir. 2001) (en banc); Ehlert v. Singer, 245 F.3d 1313, 1320 (11th Cir. 2001). Nothing in the Reform Act or the Conference Report suggests that a court must evaluate -- as the Panel requires -- the risks actually facing a defendant at the time a statement is made in order to assess whether the risks disclosed were the "principal" risks.[4] See 15 U.S.C. § 77z-(c)(1)(B); 15 U.S.C. § 78u-5(c)(1)(B); Conf. Rep. at 44. Specifically, by requiring discovery into the "principal" risk factors of which the defendant was aware at the time each forward-looking statement was made, the Panel's decision cuts squarely against the statute's plain language and Congress' express intent.

The Panel's holding also implicitly requires courts to rank the importance of the risk factors known to an issuer at

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[3] The Conference Report defines "important factors" in terms of relevancy: "Stated factors identified in the cautionary statement must be *relevant* to the projection and must be of a nature that the factor or factors *could* actually affect whether the forward-looking statement is realized." Conf. Rep. at 43-44 (1995) (emphasis added).

[4] The Conference Committee made clear that the Safe Harbor was "not to provide an opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made." Conf. Rep. at 43-44.

the time a challenged statement was made in order to assess whether "important variables" were deliberately "omitted." Although the Panel's amended decision dropped language from its initial decision explicitly requiring a court to examine the risks "thought at the time" to be the important risks -- referring instead to those risks "objectively faced" by the issuer, the Panel's holding inevitably will result in inquiry into what a defendant knew at the time it made its forward-looking statements. Indeed, the context in which the Panel's own revised words are used suggest as much. In its amended opinion, the Panel remarked that the plaintiffs say "that [Baxter's] projections were too rosy," and that the "bad news that (plaintiffs contend) Baxter well knew in November 2001 did not cast even a shadow on the cautionary statement." Baxter, 377 F.3d at 728, 731. In this context, the Panel explained its conclusion that discovery was necessary in order to identify the "principal risks" facing Baxter at the time it made its forward looking statements. Id. at 734 ("This raises the possibility . . . that Baxter *omitted important variables* from the cautionary language and so made projections more certain than its internal estimates . . . warranted.") (emphasis added).

This inquiry into "important variables" that a defendant "omitted" necessarily implies an assessment of what the defendant knew and therefore could choose to omit. This is contrary to what Congress intended, because the Committee Report expressly contemplates assessment of the adequacy of cautionary language "without examining the state of mind of the defendant." Conf. Rep. at 44.

II. The Panel's Decision Directly Conflicts With The Decisions Of Several Other Circuits.

By requiring discovery into: (1) the risk environment surrounding an issuer at the time a challenged statement was

made in order to assess the "principal" risks facing it; and (2) what risks the issuer chose to "omit" from its cautionary language, the Baxter Panel's decision not only conflicts with the Reform Act and the Conference Report, but also creates a troubling circuit split. Specifically, the Panel's decision conflicts with the prior decisions of every circuit and district court that has considered a defense asserted under the first prong of the Safe Harbor. See Baxter, 377 F.3d at 732. Circuit court splits provide ripe situations for resolution by the Court generally. The split created by the Seventh Circuit's decision, however, is especially significant here. This is because the potentially burdensome and invasive discovery that will follow an issuer's invocation of the Safe Harbor, coupled with the unpredictability that the Panel's decision has injected into application of the Safe Harbor, will deter issuers from giving forward-looking guidance, thereby undermining the very purpose of the Safe Harbor itself.

A. Every Prior Circuit And District Court Decision Has Applied The Safe Harbor On A Motion To Dismiss And Without Discovery.

In direct conflict with the Baxter opinion, several circuit courts have affirmed dismissal of securities claims based on the first prong of the Safe Harbor, prior to discovery and as a matter of law upon a motion to dismiss filed under Federal Rule 12(b)(6). Under the Panel's decision, before ruling on a Safe Harbor defense and after costly discovery, a district court must determine what the defendant was aware of at the time the statement was made:

> For all we can tell, the major risks Baxter objectively faced when it made its forecasts were exactly those that, according to the complaint, came to pass . . . . This raises the possibility -- no greater confidence is possible

> before discovery -- that Baxter omitted important variables from the cautionary language . . . .

Baxter, 377 F.3d at 734.

The Eleventh Circuit, in Harris v. Ivax Corporation, 182 F.3d 799 (1999), a widely cited case, correctly rejected the plaintiffs' argument that the issuer's Safe Harbor warning was ineffective because it failed to disclose risks of which the issuer allegedly was aware at the time it issued its forward-looking statements. The court explained that "[w]hen an investor has been warned of risks of a significance similar to that actually realized, she is sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preference for risk and reward." Id. at 807. Concluding that under the Safe Harbor's first prong the "defendant's state of mind is irrelevant," the Court affirmed dismissal of the lawsuit under Federal Rule 12(b)(6) based solely on the issuer's cautionary language, without discovery into the risks actually faced by the issuer or what risks the issuer may have "omitted." Id. at 803-04 (citing Conf. Rep. at 44).

Adopting the Eleventh Circuit's decision in Harris, the Sixth Circuit, in Helwig v. Vencor, Inc., 251 F.3d 540 (2001), acknowledged that Congress intended courts to assess the adequacy of Safe Harbor cautionary language on a motion to dismiss, without discovery. Id. at 554 (citing 15 U.S.C. § 78u-5(e), which instructs courts to consider "any cautionary statement accompanying the forward-looking statement" on a motion to dismiss). Looking solely at the particular cautionary language used by the defendant issuer, the Sixth Circuit concluded that this language was not "meaningful" because it was in fact boilerplate -- "blanket statements" that did not examine risks peculiar to the issuer. Id. at 559.

Similarly, in Miller v. Champion Enterprise, Inc., 346 F.3d 660 (6th Cir. 2003), the Sixth Circuit, relying on Harris, reaffirmed that the adequacy of cautionary language under the Safe Harbor is to be determined on the basis of the language itself, and without regard to what the defendant allegedly knew or what risks the defendant allegedly may have chosen to "omit":

> [T]he first prong of the safe harbor provided for in the [Reform Act] makes the state of mind irrelevant. In other words, if the statement qualifies as "forward-looking" and is accompanied by sufficient cautionary language, a defendant's statement is protected *regardless of the actual state of mind*.

Id. at 672 (internal citations omitted) (emphasis added). The Miller Court then found the issuer's cautionary language to be effective, and affirmed dismissal of the case, with prejudice, under Federal Rule 12(b)(6). Id. at 677-78, 691.

Other circuit court decisions have affirmed the dismissal of securities fraud claims, prior to discovery and pursuant to Federal Rule 12(b)(6), based on the Safe Harbor's first prong. See, e.g., Baron v. Smith, 380 F.3d 49, 55-57 (1st Cir. 2004) (affirming dismissal of complaint where statements were forward-looking and accompanied by sufficient cautionary language); Rombach v. Chang, 355 F.3d 164, 173-78 (2d Cir. 2004) (same).[5] In addition to this split at the Circuit Court level, numerous district courts from around the country have granted motions to dismiss based on the Safe Harbor's first prong, and no district court decision

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[5] See also Ehlert v. Singer, 245 F.3d at 1316-20 (affirming dismissal of complaint because forward-looking statements were accompanied by sufficiently cautionary statements).

prior to Baxter of which Amici are aware holds that application of the Safe Harbor requires discovery.[6]

B. Baxter's Requirement That A Court Identify The "Principal Risks" Facing An Issuer Also Conflicts With Other Circuit Decisions.

The Baxter decision gives rise to not one but two circuit court splits. Contrary to the law in every other circuit that previously has considered the issue, the Baxter opinion requires the district court to weigh or rank the causal significance of the various risks of which a defendant was aware when making a statement in order to determine whether the cautionary language identified the "principal risks" or "major risks" facing the issuer. Baxter, 377 F.3d at 732, 734-35. Under Baxter, if an issuer does not disclose such "principal" risks (even though the issuer identified "important risks," as the statute requires), its cautionary language will not be found effective. See id.

Consistent with the statute's plain language, however, other circuits have held that the statute "does not require a listing of *all* factors," Harris, 182 F.3d at 807, but mandates only the articulation of "important" risks. The "failure to include the particular factor that ultimately causes the

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[6] See, e.g., Asher v. Baxter Int'l Inc., Civ. A. Nos. 02-C-5608, 02-C-5742, 02-C-5807, 02-C-6085, 02-C-6175, 02-C-6267, 2003 WL 21825498 (N.D. Ill. July 24, 2003); In re Copper Mountain Sec. Litig., 311 F. Supp. 2d 857 (N.D. Cal. 2004); Barr v. Matria Healthcare, Inc., 324 F. Supp. 2d 1369 (N.D. Ga. 2004); In re Midway Games, Inc. Sec. Litig., 332 F. Supp. 2d 1152 (N.D. Ill. 2004); Gavish v. Revlon, Inc., Civ. A. No. 00-7291, 2004 WL 2210269, (S.D.N.Y. Sept. 30, 2004); Albert Fadem Trust v. American Elec. Power Co., 334 F. Supp. 2d 985 (S.D. Ohio 2004); In re PEC Solutions, Inc. Sec. Litig., Civ. A. No. 03-CV-331, 2004 WL 1854202 (E.D. Va. May 25, 2004); Sandmire v. Alliant Energy Corp., 296 F. Supp. 2d 950 (W.D. Wis. 2003).

forward-looking statement not to come true will [thus] not mean that the statement is not protected by the safe harbor." Id. (quoting Conf. Rep. at 44). See Stavros v. Exelon Corp., 266 F. Supp. 2d 833, 843 (N.D. Ill. 2003) (concluding that a company "need not list all factors that might affect results"). Accord Helwig, 251 F.3d at 559; Friedman v. Rayovac Corp., 295 F. Supp. 2d 957, 990 (W.D. Wis. 2003).[7] These cases, and the Conference Report on which they rely, cannot be squared with the Baxter Panel's requirement that issuers identify the "principal risks" or "major risks" that they face in order to be protected by the first prong of the Safe Harbor.

III. The Panel's Decision Undermines The Safe Harbor By Discouraging Forward-Looking Guidance, And Also Guts The Reform Act's Discovery Stay.

Congress enacted the Safe Harbor "to encourage issuers to disseminate information to the market without fear of open-ended liability." Conf. Rep. at 32. Congress recognized that "understanding a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm." Id. at 43 (quoting testimony of Richard Breeden, former Chairman of the U.S. Securities and Exchange Commission ("SEC")). Indeed, in an opinion pre-dating the Baxter decision, the Seventh Circuit itself recognized that "[i]nvestors value securities because of beliefs about how firms will do tomorrow, not because of

[7] See also Kurtzman v. Compaq Computer Corp., Civ. A. No. H-99-779, 2002 WL 32442832 at *22 (S.D. Tex. Mar. 30, 2002) (warning must "mention some, but not all, 'important factors' . . ."); Rasheedi v. Cree Research, Inc., Civ. A. Nos. 1:96CV00890, 1:96CV01069, 1997 WL 785720, at *2 (M.D.N.C. Oct. 17, 1997) (defendants need not "caution against every conceivable factor that may cause results to differ"); Conf. Rep. at 44.

how they did yesterday," and that "[w]hen the issuer adds its [forward-looking] information and analysis to that assembled by outsiders, the *collective* assessment will be more accurate even though a given projection will be off the mark." Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 514 (7th Cir. 1989) (emphasis in original). Ironically, the Baxter Panel also recognized that "unless it is possible to give a concrete and reliable answer" to the question of when the Safe Harbor will apply and immunize an issuer from liability, "the harbor is not 'safe'." Baxter, 377 F.3d at 729.

Since the Reform Act's passage, issuers have come to depend on the heretofore reliable protection provided by the Safe Harbor: i.e., if meaningful cautionary language is used, a challenge to a forward-looking statement, without more, will be subject to dismissal on a motion to dismiss. If left standing, however, the Seventh Circuit's interpretation of the Safe Harbor likely will lead to thousands of Amici's members and other issuers located across the United States being unwilling to disclose publicly forward-looking information.[8]

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[8] The impact of the Panel's decision is unlikely to be limited to the Seventh Circuit, a fact further supporting the Court's involvement. As one commentator observed, "[Judge] Easterbrook's ruling is a departure from other circuits, but given his national influence, lawyers said it's a ruling that has to be taken seriously everywhere, not just in the three states the ruling covers -- Illinois, Indiana and Wisconsin." Phyllis Plitch, *Lawsuit Safe Harbor May Not Protect Companies from Danger*, Wall St. J., Sept. 2, 2004, at C3.

A. The Safe Harbor Was Designed To Encourage Forward-Looking Disclosures.

Congress adopted the Safe Harbor "to enhance market efficiency by encouraging companies to disclose forward-looking information." Conf. Rep. at 44.[9] Over 30 years ago, when the SEC began addressing the appropriateness of protecting forward-looking statements, scholars observed:

> If there is any hope that the public or even the [investment] professionals can make an informed investment judgment, it must start from a crystallization of all of the plethora of information into a projection for the future. The management is in the best position to make the initial estimate; on the basis of it the professional or investor could then make his own modifications. No other single [piece of information] could add as much meaning to the unmanageable and unfocused flow of facts in present Commission documents.

2 Louis Loss & Joel Seligman, Securities Regulation, 633 (3d ed. rev. vol. 1999) (quoting Homer Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. Rev. 1151, 1199 (1970)).[10] Recognizing the importance to

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[9] Regulations issued by the SEC reflect this principal objective as well. For example, Reg. S-B, Item 10(b) provides that the Commission "encourages . . . management's projections of future economic performance." SEC Reg. S-B, 17 C.F.R. § 228.10 (2004). See also Securities Offering Reform, 69 Fed. Reg. 67392, 67402-03 (proposed Nov. 17, 2004) (to be codified at 17 C.F.R. §§ 228, 229, 230, 239, 240, 243, 274) (summarizing SEC's approach to encouraging forward-looking statements).

[10] Accord Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 Cornell L. Rev. 907, 917-22 (1989).

investors of forward-looking guidance from issuers, the SEC itself argued for a robust safe harbor provision at the time the Reform Act was being debated in Congress. In that regard, SEC Chairman Arthur Levitt explained that:

> The more investors know and understand management's future plans and views, the sounder the valuation is of the company's securities and the more efficient the capital allocation process. Yet, corporate America is hesitant to disclose projections and other forward-looking information, because of excessive vulnerability to lawsuits if predictions ultimately are not realized.

141 Cong. Rec. S9133-01 (daily ed. June 27, 1995) (letter from SEC Chairman Levitt to Sen. D'Amato, Chairman, Committee on Banking, Housing, and Urban Affairs, dated May 19, 1995).

Congress included the Safe Harbor to encourage the flow of the most meaningful information to investors -- forward-looking disclosures. Since its enactment, the Safe Harbor, as the courts have consistently interpreted it, has done just that by assuring issuers that they can make forward-looking disclosures without fear of abusive lawsuits that cannot be terminated on motions to dismiss. The Panel's decision, however, has thrown that comfort into jeopardy.

B. Because Of The Unpredictability It Unleashes, The Panel's Decision Discourages Forward-Looking Disclosures.

A few months before Congress enacted the Safe Harbor, former SEC Commissioner Steven Wallman remarked that "[a]ny safe harbor that is crafted needs to be consistent." See Steven Wallman, Address at Stanford Law

School's "Tools for Executive Survival" Program (June 22, 1995), *available at* http://www.sec.gov/news/speech/speech archive/1995/spch049.txt 22. Until the Baxter decision, the consistent application of the Safe Harbor by other circuit and district courts at the motion to dismiss stage, without resorting to discovery, had given rise to a predictable, reliable source of protection for issuers making forward-looking statements. The Panel's decision undermines that consistency and predictability, and subjects issuers to the prospects of unlimited discovery and unlimited liability -- the very things that the Reform Act was enacted to curb.

Congress passed the Reform Act "to protect investors, issuers, and all who are associated with our capital markets from abusive securities litigation." Conf. Rep. at 32. One of the chief concerns associated with such abusive litigation was the prospect of time-consuming and extremely burdensome discovery, which Congress believed was leading many businesses to agree to extortionate settlements in order to avoid or curtail the cost and distraction associated with such discovery. See id. at 37, 44; *Private Securities Litigation Reform Act of 1995: Hearing before Senate Comm. on Banking, Housing, and Urban Affairs, Sec. Subcomm.*, 104th Cong., 1995 WL 83860 (Mar. 2, 1995) (statement of former SEC Commissioner J. Carter Beese, Jr.). These concerns led to the inclusion in the Reform Act of both the Safe Harbor and the discovery stay. Conf. Rep. at 44.[11]

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[11] See Conf. Rep. at 44 (1995); 141 Cong. Rec. S17933-04, at S17935 (Dec. 5, 1995) (letter from SEC Chairman Levitt and Commissioner Wallman to Sen. D'Amato dated Nov. 15, 1995) ("We understand the need for a greater flow of useful information to investors in the markets and we share your desire to protect companies and their shareholders from the costs of frivolous litigation."); Harold S. Bloomenthal, Securities Law Handbook, 2-375 (2001 ed. Clark Boardman Callaghan 2001) (noting that the large number of frivolous securities fraud class actions "impose heavy costs on defendants as a result of the extensive

Contrary to Congress' intent in passing the Reform Act, the Baxter decision will discourage, if not shut off completely, disclosure of internal projections and other guidance by issuers. See Allan Horwich, *Is There a Breach in the Breakwater of the Statutory Safe Harbor for Forward-Looking Statements?*, Wall St. Lawyer, Sept. 2004, *available at* http://www.realcorporatelawyer.com/wsl/wsl10904.html ("Until the Supreme Court resolves these questions, the utility of the safe harbor as a means of disposing of a case on a motion to dismiss is uncertain -- for both sides."). Under the Baxter Panel's interpretation, issuers will no longer be able to have confidence that meaningful cautionary language will protect them from liability and the potentially huge costs and distraction of discovery. Even in the most egregious cases of abusive litigation, Plaintiffs will argue that they are automatically entitled to discovery because, under the Panel's decision, district courts cannot determine, as a matter of law, whether issuers have "omitted" from their warning the "principal" risks that they actually faced. See Baxter, 377 F.3d 730, 733, 734. See also PRNewswire, *Milberg Weiss Bershad & Schulman LLP Announces Precedent-Setting Decision in Seventh Circuit under Federal Securities Laws*, July 30, 2004, *available at* http://sev.prnewswire.com/banking-financial-services/20040730/NYF07130072004-1.html (public statement by leading plaintiffs' firm, on day after issuance of Baxter decision, that adequacy of cautionary statements can no longer be determined on a motion to dismiss).

In short, despite the discovery stay, any issuer who makes a forward-looking statement will now be subject to full-

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discovery that is likely to ensue and often result in the defendants being forced to settle").

blown discovery. It will be impossible to "containerize" this discovery. Because the Baxter decision requires an assessment of the "principal" or "major" risks facing an issuer, plaintiffs will argue that they are now entitled to wide-ranging discovery regarding an issuer's financial statements, its market and customer base, its competition, its technology and research and development efforts, and so on in order to understand the myriad financial, technological, competitive, and market risks faced both internally and externally. Few issuers will be prepared to forego the protections of the discovery stay and open themselves up to massive discovery and potential liability that could flow from making a forward-looking statement. Conversely, by not making any forward-looking statements, an issuer will continue to be protected by the Reform Act's stay of discovery pending the court's resolution of the issuer's motion to dismiss, as a matter of law, on whatever bases may be available to the issuer. See 15 U.S.C. § 77z-2(f); 15 U.S.C. § 78u-5(f). See, e.g., Newby v. Enron Corp., 338 F.3d 467, 472-73 (5th Cir. 2003) (interpreting discovery stay broadly); Medhekar v. United States Dist. Court, 99 F.3d 325, 328 (9th Cir. 1996) (same).

C. Baxter Nullifies The Discovery Stay.

Had it so intended, Congress could have explicitly provided plaintiffs with a mechanism under the Safe Harbor to seek at least limited discovery. Congress, however, not only did not do that, but also provided for an across-the-board stay of all discovery pending decision on a defendant's motion to dismiss. See 15 U.S.C. § 77z-2(f); 15 U.S.C. § 78u-5(f). The purpose of the discovery stay is "to prevent unnecessary imposition of discovery costs on defendants." Conf. Rep. at 37. The discovery stay "is precisely the device that Congress intended to be used . . . to prevent suits in which a foundation for the suit can not be pleaded," Miller, 346 F.3d at 691, and "[t]he stay of discovery operates to

prevent plaintiffs with baseless claims from squeezing a nuisance settlement from an innocent defendant." Id. Although the Safe Harbor and the stay of discovery provisions appear in separate parts of the statute, Congress no doubt understood them to be complementary mechanisms. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (court must look to "the whole law, and to its object and policy," and not a single provision).

Not only would permitting discovery as to the adequacy of cautionary language be irreconcilable with Congress' clear intent, see Conf. Rep at 44, but it would be irreconcilable with -- and effectively nullify -- the Reform Act's discovery stay whenever an issuer asserts the Safe harbor as a defense. As noted above, the discovery plaintiffs will seek under the Panel's decision will be no less broad than the discovery they would seek in any case upon lifting of the discovery stay. The Panel's interpretation of the Safe Harbor thus cannot co-exist with the discovery stay. A statute, however, must be interpreted so as to "give effect, if possible, to every clause and word of a statute" and never to "emasculate an entire section." Bennett v. Spear, 520 U.S. 154, 173 (1997) (citation omitted). This is precisely what the Baxter decision does, however -- emasculate the discovery stay. By ignoring the purpose and plain language of the Safe Harbor as consistently interpreted by every other court to consider it previously, and by gutting the discovery stay, the Panel's decision undoes two of the Reform Act's "principal" and "most significant provisions." SEC Commissioner Isaac C. Hunt, Jr., Address at the 1998 Orange County Public Co. Forum (Feb. 12, 1998), *available at* http://www.sec.gov/news/speech/speecharchive/1998/spch204.txt ("Among the Act's most significant measures are . . . a statutory safe harbor for forward-looking statements . . . [and] a discovery stay during the pendency of a motion to dismiss . . . ."); *Hearing Before Senate Comm. on Banking, Housing, and Urban Affairs, Sec. Subcomm.*,

105th Cong. (1997) (statement of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission), *available at* banking.senate.gov/97_07hrg/072497/witness/levitt.htm (“Among the Act’s principal provisions are: (i) a ‘safe harbor’ for forward-looking statements; [and] (ii) a stay of discovery while a motion to dismiss is being decided . . . .”).

CONCLUSION

For the reasons above, Amici respectfully request that the Court grant certiorari and reverse the Seventh Circuit’s decision.

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Respectfully submitted,

Brian E. Pastuszenski
Counsel of Record
William L. Prickett
Inez H. Friedman-Boyce
Scott T. Lashway
TESTA, HURWITZ & THIBEAULT, LLP
125 High Street
Boston, Massachusetts 02110
(617) 248-7000

Counsel for The American Society of Corporate Secretaries, Inc., The National Investor Relations Institute, and The New England Legal Foundation, Amici Curiae