No. 21-594

IN THE

# Supreme Court of the United States

IN RE ALPHABET INC. SECURITIES LITIGATION
ALPHABET INC., LAWRENCE E. PAGE, SUNDAR PICHAI, GOOGLE LLC, KEITH P. ENRIGHT, AND JOHN KENT WALKER, JR.,

*Petitioners*,

v.

STATE OF RHODE ISLAND, OFFICE OF THE RHODE ISLAND TREASURER ON BEHALF OF THE EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND; LEAD PLAINTIFF, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondent*.

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

## REPLY BRIEF IN SUPPORT OF CERTIORARI


IGNACIO E. SALCEDA
BENJAMIN M. CROSSON
BETTY CHANG ROWE
STEPHEN B. STRAIN
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304

CATHERINE E. STETSON
*Counsel of Record*
NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

*Counsel for Petitioners*


*Additional counsel listed on inside cover*

KATHERINE B. WELLINGTON
DANIELLE DESAULNIERS STEMPEL
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

*Counsel for Petitioners*

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## REPLY BRIEF IN SUPPORT OF CERTIORARI

## INTRODUCTION

The question in this case is straightforward: Should a risk disclosure statement in a securities filing describe future risks or must it also disclose past events? There is a circuit split on that question, as the Ninth Circuit acknowledged below. And the answer affects countless companies every year—as *amici* the Chamber of Commerce of the United States, the Securities Industry and Financial Markets Association, Business Roundtable, and the Washington Legal Foundation all confirm.

Every public company must include risk disclosures in its securities filings. Every Fortune 100 company has a risk disclosure similar to the one here—listing "cybersecurity as a material risk" and "explaining how a future cybersecurity incident could destabilize operations, harm consumer confidence, and invite regulatory scrutiny." *Amicus* Br. of Chamber of Commerce of the United States of America *et al.* 4 ("Chamber Br."). And every public company is likely to experience a cybersecurity vulnerability each year; indeed, some may experience hundreds or thousands each *month*. *See* Pet. 31-32. Whether public companies must disclose past cybersecurity issues as "risk factors"—and if not, face securities class actions seeking tens or hundreds of millions of dollars—is a question worthy of this Court's attention.

Respondents' brief barely engages with the significant problems raised by the decision below and its widespread impact on companies throughout the country, who must now comply with the Ninth Circuit's rule for "risk" disclosures. Respondents instead devote most of their attention to arguing that the Ninth Circuit's approach is correct—despite the numerous courts that disagree. Nor do Respondents grapple with the plain meaning of "risk," which refers to *future* events that may or may not occur, not events that have already materialized. This Court should resolve this issue now, before the Ninth Circuit's decision leads to a massive proliferation of securities class actions against major companies.

## ARGUMENT

### I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT.

In two circuits, companies must describe *future risks* in their risk disclosures; they need not disclose past or present events. *See* Pet. 16-17. In four circuits, companies must disclose as "risks" events that have already occurred. *See id.* at 18-21. This Court should grant certiorari to resolve that clear split.

Respondents contend that there *is* no split, because the circuits agree that whether a risk is "material" depends on "context." Opp. 24-25. But this petition does not ask the Court to address when a risk is material. It asks this Court to determine what qualifies as a "risk" in the first place—and that is the issue that has divided the circuits. *See* Pet. i, 15-21.

Respondents next claim that the split is "[i]llusory." Opp. 27. Respondents do not dispute, however, that the First, Third, and D.C. Circuits agree with the Ninth Circuit's position. *See id.* at 24-27. And despite Respondents' best efforts to minimize the Sixth Circuit's decision in *Bondali* v. *Yum! Brands, Inc.*, 620 F. App'x 483 (6th Cir. 2015), and the Fourth Circuit's decision in *Dice* v. *ChannelAdvisor Corp.*, 671 F. App'x 111 (4th Cir. 2016) (per curiam), Respondents cannot explain away an acknowledged split.

In *Bondali*, the Sixth Circuit agreed with the position of "several courts" that "cautionary statements are not actionable to the extent plaintiffs contend defendants should have disclosed risk factors 'are' affecting financial results rather than 'may' affect financial results." 620 F. App'x at 491 (internal quotation marks omitted). The Sixth Circuit explained that it reached "[t]his conclusion" "for good reason": "Risk disclosures" in securities filings "are inherently *prospective* in nature." *Id.* This clear holding—acknowledged by the Ninth Circuit, Pet. App. 25a n.6—demonstrates the split.

Respondents point to *Bondali*'s statement that "there 'may be circumstances under which * * * a risk disclosure might support Section 10(b) liability.' " Opp. 27 (quoting 620 F. App'x at 491) (alteration omitted). That does not undermine the disagreement; if anything, it underscores the extreme nature of the Ninth Circuit's position. The Sixth Circuit professed itself uncertain whether a risk disclosure *could ever* support Section 10(b) liability—whereas the Ninth Circuit now imposes such liability as a matter of course.

Respondents maintain that *Bondali*'s holding "was unnecessary to the result." *Id.* But the Sixth Circuit's alternative holding that plaintiffs' pleadings were insufficient does not undermine the split. And multiple courts have recognized *Bondali*'s primary holding as the Sixth Circuit's position on the question presented. *See* Pet. App. 25a n.6; *see also, e.g.*, *In re ChannelAdvisor Corp. Sec. Litig.*, No. 5:15-CV-00307-F, 2016 WL 1381772, at *5 (E.D.N.C. Apr. 6, 2016); *Indiana Pub. Ret. Sys.* v. *Pluralsight, Inc.*, No. 1:19-CV-00128-JNP-DBP, 2021 WL 1222290, at *14 (D. Utah Mar. 31, 2021).

Respondents point out that *Bondali* is unpublished. But "there is no reason to believe the Sixth Circuit * * * will change course." Chamber Br. 9. Many district courts also follow *Bondali*. *See, e.g.*, *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 543 F. Supp. 3d 96, 134 (D. Md. 2021); *Indiana Pub. Ret. Sys.*, 2021 WL 1222290, at *14; *In re ChannelAdvisor Corp.*, 2016 WL 1381772, at *6. And this Court has granted certiorari in cases involving a division of authority among published and unpublished decisions. *See, e.g.*, *Lamps Plus, Inc.* v. *Varela*, No. 17-988 (cert. granted Apr. 30, 2018).

Respondents also attempt to undermine *Dice*. *See* Opp. 28. But the Fourth Circuit "thoroughly reviewed the record and the relevant legal authorities," 671 F. App'x at 112, and agreed with the district court's conclusion that "it is unlikely that a reasonable investor would * * * infer" from cautionary language in a risk disclosure "anything about [the company]'s current" situation, *In re ChannelAdvisor Corp.*, 2016 WL 1381772, at *6. District courts in the Fourth Circuit follow *Dice*, further demonstrating the split. *See, e.g.*, *In re Marriott*, 543 F. Supp. 3d at 128, 134.

This division in authority has led to extensive confusion among the district courts. In the last year alone, at least three district courts diverged on whether companies must disclose risks that have become current problems. *See id.* at 134; *Indiana Pub. Ret. Sys.*, 2021 WL 1222290, at *14; *Behrendsen* v. *Yangtze River Port & Logistics Ltd.*, No. 19-CV-00024 (DLI)(LB), 2021 WL 2646353, at *7 (E.D.N.Y. June 28, 2021). *Marriott*—which follows *Dice*—takes the opposite position from the Ninth Circuit in a case involving "the second largest data breach in history." *In re Marriott*, 543 F. Supp. 3d at 108, 134 ("[R]isk factor disclosures are not intended to educate investors about harms currently affecting the company."). That some district courts addressed the question presented *and* other issues, *see* Opp. 28-29, does not undermine the pressing need for review. The confusion among the district courts supplies all the more reason to grant certiorari; this split is not dormant, but seismically active.

## II. THE DECISION BELOW IS WRONG.

Respondents spend most of their brief arguing that the decision below is correct.[1] Time, and merits review, will tell. But Respondents' merits defense does not undermine the need for this Court's review, given the acknowledged split and the important issues at stake. And in any event, the decision below is wrong.

The Ninth Circuit held that "[r]isk disclosures that speak entirely of as-yet-unrealized risks and contingencies and do not alert the reader that some of these risks may already have come to fruition can mislead reasonable investors." Pet. App. 24a (internal quotation marks and alterations omitted). But a "risk" is something that might happen in the future—not something that happened in the past or present. *See* Pet. 24-26; *Amicus* Br. of Washington Legal Foundation 8 ("WLF Br."). A risk disclosure that discusses future potential harms is not misleading, regardless of whether similar events have already occurred. The Ninth Circuit's contrary conclusion is inconsistent

[1] Petitioners disagree with Respondents' characterization of the facts and preserve the right to dispute Respondents' allegations.

with the plain meaning of "risk" and the expectations of reasonable investors. *See* Pet. 21-29.

Respondents nevertheless argue that the decision below is correct for three reasons. Each fails.

*First*, Respondents argue that it is up to the "trier of fact" to determine whether an omission would be "misleading" to a reasonable investor. Opp. 13. In Respondents' view, that is because a "contextual rule governs" that inquiry, such that it must always turn on "the full context available to an investor." *Id.* at 14. As the disagreement among the circuits makes clear, however, the purpose of a "risk" disclosure—and whether, based on the plain meaning of "risk," it must disclose past events—is a legal question for the courts. *See Bondali*, 620 F. App'x at 492 (affirming grant of motion to dismiss); *Dice*, 671 F. App'x at 112 (same). Courts have drawn similar bright-line rules in other securities cases. *See, e.g.*, *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 182-183 (2015) (holding that a pure statement of opinion that accurately reflects the speaker's belief is not an "untrue statement of * * * fact"). If the Court does not adopt a clear rule, securities plaintiffs will file a raft of litigation alleging that companies should have included whatever additional fact plaintiffs later claim was necessary to "contextualize" a disclosed risk.

*Second*, Respondents contend that even if Alphabet's risk disclosure did not need to discuss past events, Alphabet was required to disclose the bug as a current security problem or a future risk. *See* Opp. 16-17. Respondents are wrong on both counts.

Multiple courts have held that risk disclosures "warn an investor of what harms *may* come to their investment," not "what harms are currently affecting the company." *Bondali*, 620 F. App'x at 491; *see, e.g.*, *In re Marriott*, 543 F. Supp. 3d at 134. That is because risk disclosures "inherently concern[ ] future events," and thus do not create any "misimpression in the minds of reasonable investors about the present or the past, much less a misleading impression about whether certain events that *could occur* in the future have *already occurred*." WLF Br. 5. To the extent a company *chooses* to discuss present events in its risk disclosure statement, that discussion must not be misleading. *See* Pet. 25-26. But Alphabet's risk disclosure did not "communicate[ ] anything about * * * present security"—and thus could not have misled a reasonable investor on that issue. Chamber Br. 12-13.

Tellingly, Respondents do not defend the Ninth Circuit's view that disclosing a risk "creates the false impression that no risks have yet materialized." WLF Br. 5. The Ninth Circuit had no basis to reach that conclusion, and Respondents do not cite anything to support it. *See id.* at 4 ("[T]he Ninth Circuit never explains *how* or *why* reasonable investors would be misled.").

Nor did Alphabet's risk disclosure statement misrepresent the future risks facing the company. "A forward-looking discussion of a specific risk is not misleading solely because it does not also include all information detailing the company's vulnerability to that risk." Chamber Br. 13; *see Employees' Ret. Sys. of R.I.* v. *Williams Cos.*, 889 F.3d 1153, 1164 (10th Cir. 2018) ("Rule 10b-5 prohibit[s] *only* misleading and untrue statements, not statements that are incomplete." (internal quotation marks omitted)). Alphabet's risk disclosures did not create a false impression about the risks it was facing. To the contrary, "Alphabet accurately described the risks to consumers' confidence and the company's financial health from a security bug." Chamber Br. 14.

At bottom, Respondents complain that Alphabet should have provided them with more information. But Rule 10b-5 does not require companies to adhere to the impossible standard of "complete" disclosures; it requires that, when a company discloses information, it provide sufficient context to ensure it is not misleading. *See* Pet. 23; *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011). There is no freestanding requirement that companies disclose information about security bugs—to the contrary, the SEC has suggested that companies should *not* disclose information about current security issues.[2]

*Third*, Respondents argue that the alleged omission is material. That is not the right question. The question before this Court is whether omitting a past event in a risk disclosure is a securities violation in the first place. *See* Pet. i, 15 n.5. Respondents consistently

[2] Respondents fault Alphabet for not disclosing that the security bug "exposed significant problems with Google's ability to find and fix security issues." Opp. 17. But the SEC guidance on which they rely instructs that a company should *not* disclose information that "could compromise its cybersecurity efforts." Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8166, 8169 (Feb. 26, 2018) (to be codified at 17 C.F.R. pts. 229, 249); *see, e.g.*, Rebecca Rabinowitz, Note, *From Securities to Cybersecurity: The SEC Zeroes in on Cybersecurity*, 61 B.C. L. Rev. 1535, 1570 n.186 (2020) (noting that a "former SEC-commissioner * * * suggested that disclosure of cybersecurity risks at all is contrary to the public interest by bringing those issues to light for exploitation by hackers").

elide that distinction. They argue that there is no justification for "excluding" past-event disclosures "from the definition of materiality." Opp. 22 (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 236 (1988)). They cite a nonbinding SEC document about when a cybersecurity risk becomes material. *See* Opp. 14-15, 18; Pet. App. 23a-24a (referencing this guidance in discussing materiality). They claim that Alphabet's failure to disclose the remediated security bug was material because it "altered the 'total mix' of information available to investors." Opp. 16, 18-20; *see Basic*, 485 U.S. at 231-232 (stating "total mix" materiality test). And they highlight the panel's conclusion that Alphabet's alleged omission was material because "Google's business model is based on trust." Opp. 17, 19 (arguing that the panel's "trust" theory relates to materiality). But none of those arguments addresses the question here—whether it was misleading to not include information about a past (or present) security bug in a disclosure about *future* risks.

The decision below is wrong, and this Court should grant certiorari to correct it.

## III. THE COURT SHOULD ADDRESS THE IMPORTANT QUESTION PRESENTED.

This case is an ideal vehicle to address whether a risk disclosure must describe only future risks or instead include past (or present) events. The Ninth Circuit held that Alphabet was subject to suit because its risk disclosure did not "alert the reader" to a cybersecurity "risk" that had allegedly "come to fruition." Pet. App. 24a (internal quotation marks and alteration omitted). This is not a factbound question; it is a legal issue that has divided the circuits.

Respondents assert that the decision below is unlikely to have a significant impact. *See* Opp. 24. But, as the *amici* explain, the Ninth Circuit's decision goes further than prior rulings and creates a perfect storm for class action litigation. Securities litigation is already at an all-time high, with "9 percent of U.S.-listed companies subject to securities suits in 2019—more than 2.5 times the rate from 1997 to 2018." Chamber Br. 4. And cybersecurity events are increasingly common. "Nearly every major business experiences some sort of cyber incident in a given year," with "only 4 percent of 1,500 companies" in one survey reporting that they did not experience "a cyber incident in 2019." *Id.* at 5; *see* Pet. 31-32. Even Respondents acknowledge that "all companies face some degree of cybersecurity concerns." Opp. 21 n.4.

"As this case shows, the new model is for plaintiffs' counsel * * * to await news of a cyber incident, and then bring suit claiming that the company failed to adequately disclose the incident itself or the risk it posed to the company"—spawning endless securities lawsuits. Chamber Br. 5-6 (citing numerous examples). And by Respondents' lights, because a "contextual" approach applies to determine whether an alleged omission is misleading, class action plaintiffs are always entitled to discovery and a trial. *See* Opp. 13, 20. The Ninth Circuit's decision below paints a target around public companies in cases involving cybersecurity bugs or incidents.

This has significant repercussions for public companies and investors. Requiring companies to disclose *ongoing* security bugs and incidents as "risks"—before they are addressed—creates an opportunity for hackers to exploit those vulnerabilities. *See supra* p. 9 n.2.

Requiring companies to disclose *past* security bugs and incidents as "risks" will transform already lengthy risk disclosures into a sprawling chronicle of past events, exposing companies to significant litigation over whether they properly disclosed such events. *See* Pet. 29. Risk disclosure statements were designed to *protect* companies against securities litigation. *Id.* at 33-34. The decision below transforms such statements into a potent tool for class action litigation, imposing significant costs on public companies.

Respondents also contend that this Court's review will "not fully resolve the case." Opp. 30. That is not a reason to deny certiorari; granting review and deciding the question presented will resolve the central issue at stake in this litigation and address a circuit split. *See, e.g.*, *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 485 (2015) (resolving split on interlocutory review). And in any event, Respondents' Rule 10b-5(a) and (c) claims, and their Section 20(a) claims, are based on the same theory of liability as their Rule 10b-5(b) claims—as the Ninth Circuit recognized below. *See* Pet. App. 36a-37a. Respondents' claims thus rise and fall together.

Respondents ask this Court to await further percolation, but such percolation is unlikely to occur. *See* Pet. 35-36; 15 U.S.C. § 78aa(a) (jurisdiction over Section 10(b) claims lies anywhere the company transacts business). After this decision, class action plaintiffs will file securities suits based on allegedly inadequate risk disclosures in the Ninth Circuit, or in other courts that require disclosure of past or present events in risk statements. As a practical matter, then, public companies must comply with the Ninth Circuit's rule or face litigation. *See* WLF Br. 12. Given the very real impact of the decision below on public companies throughout the country, the Court should address the important question presented now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IGNACIO E. SALCEDA
BENJAMIN M. CROSSON
BETTY CHANG ROWE
STEPHEN B. STRAIN
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304

CATHERINE E. STETSON
*Counsel of Record*
NEAL KUMAR KATYAL
KATHERINE B. WELLINGTON
DANIELLE DESAULNIERS STEMPEL
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

*Counsel for Petitioner*

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