No. 23-980

# In the Supreme Court of the United States

FACEBOOK, INC., ET AL., PETITIONERS,

*v.*

AMALGAMATED BANK, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR *AMICI CURIAE* LAW PROFESSORS AND FORMER OFFICIALS OF THE SECURITIES AND EXCHANGE COMMISSION SUPPORTING PETITIONERS


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## INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are law professors and former officials of the Securities and Exchange Commission ("SEC"). They have spent years studying and advising on the federal securities laws, the SEC's enforcement practices, and securities class action litigation. They have an interest in the appropriate construction and operation of the laws in those areas. Amici are:[2]

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[1] No counsel for a party authored this brief in whole or in part. Pursuant to Rule 37.6, amici confirm that no party, counsel for a party, or person "other than the amicus curiae, its members, or its counsel," made a monetary contribution to its preparation or submission.

[2] The views in this brief are those of the amici curiae only and not necessarily of any of the institutions with which they are or have been affiliated. The names of the institutions are included for identification only.

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## SUMMARY OF ARGUMENT

This should not be a hard case. The SEC has directed that companies strive to simplify their risk factor disclosures—to get rid of boilerplate, repetitive, and bloated disclosures—and to make them more streamlined and informative for investors. The Ninth Circuit's disclosure standard is the antithesis of that.

The courts of appeals have held that the "risk factors" section of a company's Form 10-Ks, Form 10-Qs, and other public filings need disclose only forward-looking risks or, at most, past events companies know will harm the business. The Ninth Circuit rejected that approach, holding that risk disclosures must include past instances when the risks came to fruition even where companies had no basis to believe that those past events harmed or would harm the business.

Among other deficiencies, the Ninth Circuit's outlier standard fosters the very 'throw in the kitchen sink' approach to risk disclosures that the SEC has sought to reform. If allowed to stand, the Ninth Circuit's standard would also allow inventive plaintiffs to circumvent the SEC's "materiality" requirement, which guides the types of risks that should be disclosed. And it would encourage companies to report speculative and immaterial risks—if only to avoid lawyer-driven securities actions—reverting

to a system of information overload and "overwarning" that would undermine rather than facilitate informed decision-making.

The Court should thus not only reverse the decision below, it should make clear, as it has in multiple other contexts, that meaningful disclosure does not mean *more* disclosure.

## ARGUMENT

### I. THE NINTH CIRCUIT'S RULE WOULD UNDERMINE THE SEC'S RISK-DISCLOSURE REGIME AND HURT INVESTORS

The Ninth Circuit rejected the prevailing standards for what information companies must include in the required "risk factors" section of their Form 10-Ks, Form 10-Qs, and other public filings to comply with Item 105 of Regulation S-K, 17 C.F.R. § 229.105. One circuit has held that risk disclosures need not discuss past instances when a risk came to fruition, and six other circuits have concluded that companies must disclose past events only if the companies knew the events had harmed or would inevitably harm the business. Petition for Writ of Certiorari at 18-21. By contrast, the Ninth Circuit held that risk disclosures must include past instances when the risks came to fruition even where the companies had no basis to believe that those events would harm the business. That outlier approach is contrary to common sense and will undermine the SEC's risk-disclosure regime and hurt investors.

#### A. The SEC's Risk-Disclosure Regime

SEC rules require risk disclosures from certain market participants. Since 2005, subject companies have been required to describe the material risks of an investment in the company's securities in both annual and periodic reports filed with the SEC pursuant to Regulation S-K ("Reg S-K").

Over time, concerns emerged that disclosures were becoming longer and more detailed yet less effective. In 2016, the SEC investigated its disclosure regime under Reg S-K and issued a concept release that emphasized numerous concerns it had received about the growing length of risk factor disclosures. See Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,955 (Apr. 22, 2016). In 2019, a prominent "study found that registrants increased the length of risk factor disclosures from 2006 to 2014 by more than 50 percent in terms of word count * * * and that this increase in risk factor word count may not be associated with better disclosure." Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,743 n.198 (Oct. 8, 2020) (citing Anne Beatty et al., *Are Risk Factor Disclosures Still Relevant? Evidence from Market Reactions to Risk Factor Disclosures Before and After the Financial Crisis*, 36 Contemp. Acct. Res., 805 (2019)).

In 2020, the SEC amended the disclosure requirements "to address the lengthy and generic nature of the risk factor disclosure presented by many registrants." *Id.* at 63,742. The SEC cited comment letters and the 2019 study, which attributed the growing length of risk factor disclosure to the fear of litigation for failing to disclose risks that later materialized. See *id.* at 63,742, 63,743. Recognizing that repetitive and generic risk disclosure can "obscure relevant information or render it difficult to evaluate the importance of the information," 2016 Concept Release at 23,995, the SEC amended Item 105 of Reg S-K, requiring that if a company's risk factor disclosure section exceeds 15 pages, the company must provide a summary risk factor disclosure that is no longer than two pages. The amendment further changed the standard for disclosure from the "most significant" risks to "material" risks, with the aim that it would "result in risk factor disclosure that

is more tailored to the particular facts and circumstances of each registrant, which should reduce the disclosure of generic risk factors and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants." 2020 Amendments Release at 63,744.

As discussed next, the Ninth Circuit's approach contravenes the SEC's goal of risk factors that are "more tailored" to the "material risks." And by requiring a historical catalogue of known, past events that have no implications for forward-looking risk assessment, the Ninth Circuit adopted a standard that is antithetical to the purpose of risk-factor disclosures.

### B. The Decision Below Undermines the SEC'S "Materiality" Requirement

The Ninth Circuit's approach waters down Reg S-K Item 105's "materiality" limitation by requiring companies to make overly cautious risk disclosures for past events even when the company has no reason to suspect those events will harm the business in the future.

Materiality is a guiding principle under federal securities laws the SEC has used since 1937. See 2016 Concept Release at 23,925. In 1982, the SEC formally adopted this Court's materiality standard articulated in *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438 (1976). See Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380, 11,393-94 (Mar. 16, 1982). And in 1988, this Court applied the materiality standard from *TSC Industries* to Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988).

Information is material if there is a substantial likelihood that a reasonable investor would consider it important or significant in deciding whether to buy or sell a security or how to vote as a shareholder. When a

relevant event is contingent or speculative, materiality will depend on a balancing of the probability that the event will occur and the anticipated magnitude of the event to the company. In adopting the materiality standard for risk disclosures under Item 105, the SEC likewise advised that "the term *material*, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security." Modernization of Regulation S–K Items 101, 103, and 105, 84 Fed. Reg. 44,358, 44,376 (Aug. 23, 2019) (quoting 17 C.F.R. § 240.12b-2 (emphasis added)); see *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 193 (2016) ("Under any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" (quoting 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003)); see also Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (outlawing untrue statements of material fact or omissions of material fact).

The Ninth Circuit's decision treats past events as material even if there is no reason to believe they will harm the business, undermining the purpose of the materiality requirement. After all, when there is no reason to believe a *past* event poses a *current* risk of harm, the event is not a matter "to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security." *Ibid.* Put differently, no reasonable investor would change their investing behavior based on past events that did not harm the company.

The decision below is all the more troublesome because the court deemed the omitted information material even though news reports made it widely known

to the public in 2015, over a year *before* Facebook filed the forward-looking risk factor statements at issue. The Ninth Circuit drew this conclusion despite recognizing that "if the market has already 'become aware of the allegedly concealed information,' the allegedly false information or material omission 'would already be reflected in the stock's price' and the market 'will not be misled.'" *In re Facebook Inc. Sec. Litig.*, 87 F.4th 934, 948 (9th Cir. 2023) (quoting *Provenz* v. *Miller*, 102 F.3d 1478, 1492 (9th Cir. 1996)).

The Ninth Circuit also incongruously concluded that a non-disclosure of a past event may be material even where the company includes a forward-looking risk factor about the same type of risk. A simple example illustrates the fallacy: in baseball, a team may advise that if it rains, a game may be delayed. It would be absurd to assert that warning of possible rain delays is misleading unless the team also posts a list of every game that has been postponed because of rain in the past. Yet the Ninth Circuit's rule would the Ninth Circuit's rule would render the team's warning inadequate unless it also included all past rain delays, with no temporal limit.

### C. The Decision Below Will Harm Investors Through Overwarning and Information Overload

The Ninth Circuit's decision undermines the SEC's requirements aimed at "risk factor disclosure that is more tailored to the particular facts and circumstances of each registrant [to] reduce the disclosure of generic risk factors and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants." 2020 Amendments Release at 63,744. If left standing, the Ninth Circuit's standard would encourage, if not require, companies to disclose the cumulative history of their business, no matter how immaterial to the risk of future business harm.

By "bring[ing] an overabundance of information within its reach," the Ninth Circuit's rule would require companies to "bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making." *Basic, Inc.*, 485 U.S. at 231 (quoting *TSC Industries*, 426 U.S. at 488) (cleaned up). Regulators, courts, and scholars repeatedly have recognized the risks of "information overload" or "overwarning" in the securities and numerous other contexts. The principle is always the same: "more disclosure can mean less effective disclosure." Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 Wash. U. L. Q. 417, 446 (2003).

"Studies show that at some point, people become overloaded with information and make worse decisions than if less information were made available to them." *Id.* at 419. "In particular, studies show that when faced with complicated tasks that involve vast quantities of information, people tend to adopt simplifying decision strategies that require less cognitive effort, but that are less accurate than more complex decision strategies." *Id.* "The net result of having access to more information, combined with using a less accurate decision strategy as the information load increases, is often an inferior decision." *Id.* (discussing studies). "Borrowing Brandeis' terminology, in addition to being a disinfectant, sunlight can also be blinding." *Id.*

Information overload can result in investors becoming "overwhelmed and confused." *Id.* at 441. "Making matters worse, studies show that people do not always focus on the most relevant information but might become distracted by less relevant information." *Id.* at 442. "[T]he more information there is, the more each bit of it is diluted. The immediate and salient crowds out the less attention-grabbing." Donald C. Langevoort, *Toward*

*More Effective Risk Disclosure for Technology-Enhanced Investing*, 75 Wash. U. L. Q. 753, 759 (1997) (footnote omitted). As a result, "[w]hen the average investor is presented with disclosure that is too long and complex to be processed efficiently, the overload can hinder informed decision-making and thereby defeat the very purpose of disclosure requirements." Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 Baylor L. Rev. 139, 162 (2006).

The problem of information overload or "overwarning" is well recognized across subject-matter areas, and in an array of different contexts. For instance, this Court has recognized that consumer protection disclosures must avoid "information overload," because "*[m]eaningful* disclosure does not mean *more* disclosure." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568, (1980) (discussing liability for a failure to disclose under the Truth in Lending Act). Drug labels that include too many warnings risk "overshadow[ing]" more important information. *Merck Sharp & Dohme Corp.* v. *Albrecht*, 587 U.S. 299, 304 (2019). And "[r]equiring a product manufacturer to imagine and warn" of risks based on "how its product might be used with other products or parts[,] []would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users." *Air & Liquid Sys. Corp.* v. *DeVries*, 586 U.S. 446, 454 (2019). Other courts and agencies have recognized the risks of overwarning; as one court put it: "To warn of all potential dangers would warn of nothing." *O'Neil* v. *Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012) (quotation marks omitted).[3]

[3] See, *e.g.*, *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 57 F.4th 327, 330 (1st Cir. 2023) ("[O]ne of [the FDA's] objectives is to prevent

(footnote continued on next page)

The SEC and its officials have recognized that information overload can hinder informed decision-making. *E.g.*, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,919 (Apr. 22, 2016) ("There is also a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities."); Ripken, *supra*, at 162 ("Even former SEC Chairman Arthur Levitt noted that '[t]oo much information can be as much a problem as too little' and '[m]ore disclosure does not always mean better disclosure.'").

Nevertheless, the decision below demands that companies saturate their disclosures with overwhelming information about past events despite no reasonable belief that these events present risks of harm to the business. If allowed to persist, this requirement would result in material information being overlooked or diluted and lead to worse, not better, decisions.

The Court should not only reverse the Ninth Circuit, it should make clear, as it has in other contexts, that "[m]eaningful disclosure does not mean more disclosure." *Ford*, 444 U.S. at 568.

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overwarning, which may deter appropriate use of medical products, or overshadow more important warnings." (quotation marks omitted)); *Cerveny* v. *Aventis, Inc.*, 855 F.3d 1091, 1102 (10th Cir. 2017) (same); *Robinson* v. *McNeil Consumer Healthcare*, 615 F.3d 861, 869 (7th Cir. 2010) (same); *U.S. Aviation Underwriters, Inc.* v. *United States*, 562 F.3d 1297, 1300 (11th Cir. 2009) (noting "the dangers of over warning" in forecasting turbulence to aircraft pilots); *CTIA – The Wireless Assoc.* v. *City of Berkeley*, 487 F. Supp. 3d 821, 834 (N.D. Cal. 2020) (agreeing with FCC that city ordinance on risks of cell phone usage presented risk of overwarning).

**CONCLUSION**

The Court should reverse the decision below.

Respectfully submitted.

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