NO. 23-980

In the Supreme Court of the United States

FACEBOOK, INC., ET AL,

Petitioners,

v.

AMALGAMATED BANK, ET AL.,

Respondents.

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

BRIEF OF THE SOCIETY FOR CORPORATE GOVERNANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1946, the Society for Corporate Governance ("Society") is a professional association of more than 3,700 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve more than 1,000 public and private companies and non-profit organizations of almost every size and industry. The Society's members support the work of corporate boards and executive management regarding corporate governance and disclosure, compliance with corporate and securities laws and regulations, and adherence to stock-exchange listing requirements. The Society's mission is to support corporate governance professionals through education, collaboration, and advocacy, with the ultimate goal of creating long-term shareholder value through better governance.

The Society's members are often responsible for preparing corporate disclosures and other outward-facing statements on behalf of public companies, including Forms 10-K and 10-Q, proxy statements, and other disclosures required by the Securities and Exchange Commission ("SEC"). The Society provides

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

information to its members concerning regulatory developments and best practices in such filings.

The Society has a direct and substantial interest in this case because its members are directly involved with the preparation of the types of disclosures and public statements that are at the heart of this dispute. In the opinion below, the U.S. Court of Appeals for the Ninth Circuit held that Respondents adequately pleaded falsity because the Risk Factors section of Petitioner's 2016 Form 10-K described a prospective risk using purely hypothetical terms. *See* Pet. App. 23a. As the leading American association of corporate secretaries and other governance professionals, the Society is well-positioned to explain the practical implications of the opinion below.

This case presents important legal questions regarding how companies should understand and follow the requirements of Regulation S-K and how best to provide investors with accurate, useful disclosures of business risk. In this brief, the Society focuses on the particular purposes served by different sections of Form 10-K filings and the negative consequences that will occur if the Ninth Circuit's ruling is allowed to blur and undermine the important conceptual and practical distinctions between the Risk Factors and other 10-K sections. This Court should reverse the judgment of the court of appeals to avoid diluting the utility of the Risk Factors section to investors, and to prevent the imposition of unnecessary burdens on public companies and those who assist in preparing their securities filings.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Regulation S-K calls for public company registrants to disclose "material factors that make an investment in the registrant or offering speculative or risky." It also calls for registrants to do so "[c]oncisely." And it instructs them to do so under the heading "Risk Factors"—emphasizing a focus on potential future events that have not yet materialized. Nothing in Regulation S-K suggests that a Risk Factors discussion must mention every operational and reputational hiccup that a company has ever encountered. As Judge Bumatay's dissent below correctly put it, prior case law likewise "does not require that a company disclose every bad thing that ever happened to it" in a discussion of risk factors. Pet. App. 46a. And this makes sense; risk evaluation is a forward-looking project, and Regulation S-K does not call for a recitation of past negative events. The decision below, however, misinterprets Regulation S-K in a manner that, unless reversed, will incentivize registrants to disclose those past events under what would become an ever-lengthening Risk Factors section. Investors, in turn, will encounter a deluge of irrelevant information when they turn to the Risk Factors section of a Form 10-K or 10-Q, depriving them of the utility that it was designed to have.

That is not how registrants have viewed Risk Factor disclosures under Regulation S-K. As shown by the examples cited below, the focus of Risk Factor discussions by registrants across a variety of industries has been on risks that might materialize in

the future, not examples of similar situations that have happened in the past. A Risk Factor section that does not discuss prior circumstances where a stated risk factor has materialized does not imply anything about the past. No reasonable investor would read it that way.

2. Contrary to what Respondents might argue, reversing the decision below would not shield all negative internal events from the eyes of investors. A variety of other sections of periodic reports are far better suited for discussions of material past negative events or existing trends, including Management Discussion and Analysis (Item 303), Description of Business (Item 101, usually headlined "Business"), Legal Proceedings (Item 103), and Cybersecurity (Item 106).[2] Their presence in periodic reports, as well as the broader mix of information available to modern investors, makes it inconceivable that any reasonable investor would construe a discussion of future risk factors to mean anything one way or the other about whether a particular risk had materialized in the past. As Judge Bumatay's dissenting opinion concluded, "if a reasonable investor thought so based on Facebook's 10-K statements, that 'reasonable' investor wasn't acting so reasonably." Pet. App. 44a–45a.

[2] References herein to Item numbers are to the respective Items under Regulation S-K.

ARGUMENT

I. The Ninth Circuit's Misreading of the Implications of a Forward-Looking Risk Factor Ignores the Plain Text of Regulation S-K, Item 105, and Common Understanding.

In Petitioner's Form 10-K filing for fiscal year 2016, Petitioner stated as a "Risk Factor" that "improper access to or disclosure of our data or user data … could harm our reputation and adversely affect our business." J.A. 439. Respondents allege that this statement was false because it implied that Petitioner had never suffered any improper access or disclosure of user data, when in fact Cambridge Analytica had misused Facebook user data to assist the Ted Cruz presidential campaign. *See* J.A. 281–283. The Ninth Circuit accepted this theory. *See* Pet. App. 23a. Respondents assert that Facebook committed securities fraud as a result of making this prospective statement about possible risk.

The decision below held that Facebook could not rely on the forward-looking nature of the relevant Risk Factor to disclaim the implication that there were no past events of data misuse. *See* Pet. App. 23a–26a. Rather, the Ninth Circuit held that "Facebook represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired." *See* Pet. App. 24a. This decision misunderstands the different sections of periodic SEC filings and their prescribed purposes under

Regulation S-K. If left uncorrected, the decision will undermine the utility of Risk Factor disclosures in filings required by 15 U.S.C. § 78m. If hypothetical statements about risks that may materialize in the future must be read as factual assertions about past events or known trends in the present, then companies—and the Society members who assist them with Form 10-Ks and other disclosures—may feel compelled to add lengthy recitations of all past events, material or otherwise, to avoid potential liability. Doing so would substantially dilute the value to investors of Risk Factor disclosures.

The Risk Factors section of a periodic filing is not the place for a public company to state past events or existing trends because, by definition, it is forward-looking. Regulation S-K requires registrants to "provide under the caption 'Risk Factors' a discussion of the material factors that make an investment in the registrant or offering *speculative or risky*." 17 C.F.R. § 229.105 ("Item 105") (emphasis added). Black's Law Dictionary defines "risk" to mean "the *uncertainty* of a result, happening, or loss; the chance of injury, damage, or loss; esp., the existence and extent of the *possibility* of harm." *Risk*, Black's Law Dictionary (12th ed. 2024) (emphases added). Merriam-Webster defines "risk" to mean the "*possibility* of loss or injury," or "the *chance* that an investment (such as a stock or commodity) will lose value." *Risk*, Merriam-Webster Dictionary, https://tinyurl.com/5n7pbwf6 (emphasis added). These definitions show that the regulation is focused on *uncertainty* and *possible*

outcomes—potential future events which are not currently known.

Item 105 also uses the word "speculative," which further orients the Risk Factor disclosures toward risks that might affect shareholders' future returns, not merely any negative event that could happen to a business. Black's Law Dictionary defines "speculation" to mean "the buying or selling of something with the expectation of profiting from price fluctuations." *Speculation*, Black's Law Dictionary (12th ed. 2024). Merriam-Webster's definitions for "speculative" include "theoretical rather than demonstrable" and "of, relating to, or being a financial speculation." *Speculative*, Merriam-Webster Dictionary, https://tinyurl.com/2a8t6b67. Under this language, risks are properly described under Item 105 only insofar as they may affect the future value of a shareholder's investment. *See, e.g., Emps.' Ret. Sys. of City of Baton Rouge & Par. of E. Baton Rouge v. MacroGenics, Inc.*, 61 F.4th 369, 393 (4th Cir. 2023) (explaining that risk factors should inform investors "'how the risks may affect their *investment*'" (emphasis added)) (quoting *Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 103 (1st Cir. 2013)).

Not all negative business events impact the value of a business's shares. Every company faces day-to-day setbacks that do not make an investment in that company risky. Just so in this case: When Facebook issued its 2016 Form 10-K, Cambridge Analytica's misuse of data had already become public knowledge, without any negative impact on the stock price. *See* Pet. at 7 (citing Dist. Ct. Dkt. 146-10, at 2-

4). Previous incidents like the Cambridge Analytica episode would be out of place under the "Risk Factors" heading whether or not they affected the stock price, because Item 105 is *prospective*. The Ninth Circuit's approach lacks any support in the plain language of Item 105, which focuses on future risks, which are presently hypothetical. Item 105 does not require registrants to parse the materiality of past events at all. Worse still, the Ninth Circuit's approach would call for a discussion of all prior circumstances where a risk factor materialized, even where it had no effect on the stock price.

Public filings by other companies reflect the widespread understanding that Item 105's focus should be on hypothetical future events. Companies often describe risks that "could" or "may" occur and damage the business in the future. For example:

- "Reputational value is based in large part on perceptions of subjective qualities, and even isolated incidents may erode trust and confidence and have adverse effects on our business and financial results … . Our brand could be adversely affected if our public image or reputation were to be tarnished by negative publicity." Chewy, Inc. Form 10-K at 13 (Mar. 20, 2024), https://tinyurl.com/Chewy2310-K.

- "The potential physical effects of climate change, such as increased frequency and severity of storms, floods, fires, freezing conditions, sea-level rise and other climate-

related events, could adversely affect our operations, infrastructure and financial results. Operational impacts resulting from the potential physical effects of climate change, such as damage to our network infrastructure, could result in increased costs and loss of revenue." AT&T Inc. Form 10-K, at 9 (Feb. 23, 2024), https://tinyurl.com/ATT2310-K.

- "Our financial condition and results of operations are influenced by changes in the prices of motor fuel, which may adversely impact our margins, our customers' financial condition and the availability of trade credit. … General economic and political conditions, acts of war or terrorism and instability in oil producing regions, particularly in the Middle East, South America, Russia and Africa could significantly impact crude oil supplies and refined product petroleum costs." Sunoco LP Form 10-K, at 14 (Feb. 17, 2023) https://tinyurl.com/Sunoco2310-K.

In each of these examples, the company's hypothetical phrasing conforms to Item 105's focus on uncertainty and possibilities, rather than describing past events or known, current trends.

Under Respondent's theory, each of these disclosures could be deemed misleading on the basis of a supposed implication that the risk has never materialized before. Cert. Br. in Opp. at 11

("[T]reating a materialized risk as merely hypothetical misleadingly implies that the risk has not yet transpired.")]. But the "could" and "may" phrasing is inherently forward-looking, which is consistent with Item 105. It cannot reasonably be read as implying that such risks have not transpired in the past. Indeed, it would be nonsensical to read these Risk Factors and conclude that Chewy had *never once* experienced "negative publicity," or that acts of war by Russia had *not ever* influenced motor fuel prices for Sunoco in 2022, or that AT&T's operations had *never* been affected by storms, floods, fires, or other climate-related events. Any reasonable investor presumes, for example, that a nationwide service provider like AT&T experiences many climate-related disruptions to its operations, and a complete recitation of such events would be pointless, unreasonably burdensome on AT&T, and unhelpful to investors. Similarly, the very next risk factor in Facebook's 2016 Form 10-K after its user data risk disclosure reads, "Unfavorable media coverage could negatively affect our business." J.A. 441. No reasonable investor would read this disclosure as a claim that Facebook had never before suffered unfavorable media coverage.

Insofar as forward-looking Risk Factors could be misleading as to past events or existing conditions, this Court should allow such a reading only where the risk disclosure implies *a specific fact* that is incorrect. For example, "a caution that 'the price of our primary input may rise above $5 next quarter' could certainly cause a reasonable investor to conclude that the price was, at present, $4.99 or less." *In re Mylan N.V. Sec.*

Litig., No. 16-cv-7926 (JPO), 2018 WL 1595985, at *9–10 (S.D.N.Y. Mar. 28, 2018). But such specificity is not the norm, and the Court should not extend liability outside this narrow exception. Otherwise, litigants will continue to deliberately misread companies' statements concerning hypothetical future risks to mean that such risks have never materialized in the past, subverting the plain, forward-looking focus of Item 105.

To be sure, some public companies—influenced by the uncertainty arising from reasoning like that in the decision below—have noted in their Risk Factor discussions that an identified risk has previously materialized and may continue to affect business. While some companies may choose to include this information, it is not (and should not be) required. As one example, Abbott Laboratories stated: "Fluctuation in foreign currency exchange rates has adversely affected and may continue to adversely affect Abbott's financial statements and its ability to realize projected sales and earnings." Abbott Laboratories Form 10-K, at 13 (Feb. 16, 2024), https://tinyurl.com/Abbott2310-K. This phrasing—that a risk "has affected" the company—precludes any claim that the company has implied that the risk never materialized previously. But such phrasing does not tell a reasonable investor anything substantive about what happened in the past. For that information, reasonable investors may look elsewhere in the same Form 10-K, and see that Abbott is exposed to shifting foreign currency rates, the scale of Abbott's exposure, and recent gains and losses related to foreign currency forward exchange

contracts. *See* Abbott Laboratories Form 10-K, at 22, 39–41, 62–65 (Feb. 16, 2024), https://tinyurl.com/Abbott2310-K. Thus, the "has affected" phrasing in Abbott's Risk Factors discussion is repetitive of later sections in the same 10-K. Respondent's theory of liability is thin indeed if it could be remedied by such minor wordsmithing.

Instead of abandoning the plain language of Regulation S-K, and the common understanding among practitioners who are Society members, the Court should reaffirm that Item 105 calls for *prospective* disclosures. Hypothetical phrasing about the future does not generally imply the absence of past incidents, and, as discussed next, other sections of the Form 10-K will disclose already-materialized risks as necessary.

II. Materialized Risks or Trends Will Be Properly Disclosed in Other Sections of a Form 10-K If Necessary.

In contrast to the Risk Factors under Item 105, several other sections of the Form 10-K require companies to describe the recent activities and condition of the company, including materialized risks. Four sections are worth understanding in context and practice: Management Discussion and Analysis (Item 303, "MD&A"), Description of Business (Item 101, usually headlined, "Business"), Legal Proceedings (Item 103), and Cybersecurity (Item 106). Whereas Risk Factors reflect uncertainty, possibility, and unknown outcomes in the future, Regulation S-K directs these other sections of a Form 10-K to describe

what is known about recent events and existing trends and practices. Given the substantive allocation these Items provide between the hypothetical and the factual, reasonable investors will not misread future-focused Risk Factors to imply that a particular risk has not previously materialized.

A. Management Discussion and Analysis – Item 303

Regulation S-K states that the "objective of the [management] discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant … ." 17 C.F.R. § 229.303(a) (Item 303). To comply with the Regulation, "[t]he discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." *Id.* Although Item 303 calls for some evaluation of risk in this section, the "focus" on events and uncertainties already "known" to management distinguishes the MD&A from the perspective of the Risk Factors. *Id.*

Required disclosures under Item 303 include:

- "Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way." *Id.* § 229.303(b)(1)(i).

- "Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected." *Id.* § 229.303(b)(2)(i).

- "Describe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." *Id.* § 229.303(b)(2)(ii).

The SEC advises that, in total, the MD&A "gives the company's perspective on the business results of the past financial year." Securities & Exchange Comm'n, *How to Read a 10-K/10-Q* (Jan. 25, 2021), https://tinyurl.com/3s5fuhdy.

In practice, events or trends in the MD&A often include materialized risks that correspond to prospective risks described in the Risk Factors section. If they are material, then known trends and events that are not included in the Risk Factors can often be found in the MD&A. For example, Allstate's Form 10-K for fiscal year 2022 included the following Risk Disclosure:

> *Losses from changing climate and weather conditions may adversely affect our financial condition, profitability or cash flows*

> Climate change affects the occurrence of certain natural events, such as increasing the frequency or severity of wind, tornado, hailstorm and thunderstorm events due to increased convection in the atmosphere. There could also be more frequent wildfires in certain geographies, more flooding and the potential for increased severity of hurricanes due to higher sea surface temperatures. As a result, incurred losses from such events and the demand, price and availability of reinsurance coverages for automobile and homeowners insurance may be affected.
>
> Climate change may also impact insurability by impairing our ability to identify and quantify potential hazards that will result in losses and offer our customers products at an affordable price.

Allstate Corporation Form 10-K, at 28–29 (Feb. 16, 2023), https://tinyurl.com/Allstate2210-K.

Notably, Allstate stopped writing new homeowners insurance policies in the state of California in November 2022, due in part to increased wildfire risk. *See* Michael R. Blood, *California insurance market rattled by withdrawal of major companies*, Associated Press (June 5, 2023), https://tinyurl.com/3c44wx5n. Allstate's 2023 Form 10-K did not mention this decision in its Risk Disclosure, but insofar as Allstate's decision to pause its California homeowners business is material to

investors, it was not omitted from the Form 10-K. Rather, it appeared in the MD&A, where Allstate wrote: "Starting in the fourth quarter of 2022, we no longer write new homeowners business in the state of California, although we will offer continuing coverage to existing customers. We also reduced homeowners new business in Florida." Allstate Corporation Form 10-K, at 45 (Feb. 16, 2023), https://tinyurl.com/Allstate2210-K.

The effect of Allstate's Form 10-K was to divide neatly (and appropriately) the concept of prospective, hypothetical risk from that of existing, materialized risk, and logically present them in separate sections. This division follows the language of Item 303 and Item 105, discussed above. It would be contrary to the purpose and focus of Risk Factors to allow a plaintiff to misread Allstate's Risk Factor on climate change as a factual assertion that Allstate had *never* incurred losses from climate events, and in any event, the material impacts of increased fire risk do appear in the MD&A.

B. Description of Business – Item 101

Item 101 of Regulation S-K directs companies to "[d]escribe the general development of the business of the registrant, its subsidiaries, and any predecessor(s)" in a section of the Form 10-K generally titled "Business." 17 C.F.R. § 229.101(a). This obligation is further described in numerous subsections of Item 101. Distilling the section for investors, the SEC advises: "'Business' requires a description of the company's business, including its

main products and services, what subsidiaries it owns, and what markets it operates in. This section may also include information about recent events, competition the company faces, regulations that apply to it, labor issues, special operating costs, or seasonal factors." Securities & Exchange Comm'n, *How to Read a 10-K/10-Q* (Jan. 25, 2021), https://tinyurl.com/3s5fuhdy. Broadly, this Business section is an overview of the company's anatomy and operations, while the MD&A is focused on results. *Id.*

As with the MD&A, the Business section can contain factual disclosures related to the past materialization of certain forward-looking Risk Factors. For example, FedEx Corporation noted as a Risk Factor: "Our inability to quickly and effectively restore operations following adverse weather or a localized disaster or disturbance in a key geography could adversely affect our business and results of operations," and cited climate change as contributing to this risk. FedEx Corp. Form 10-K, at 34–35 (July 15, 2024), https://tinyurl.com/fedex2310-k. Meanwhile, in the "Business" section of the same 10-K, FedEx stated that "facility resiliency" is increasingly important "due to the physical risks of climate change and the strain of electrification on the grid." *Id.* at 23. Therefore, "FedEx is conducting pilot tests of various technologies to provide backup power to our facilities." *Id.* The Risk Factors disclose a hypothetical problem which "could" occur, while the "Business" section describes a present, factual trend.

C. Legal Proceedings – Item 103

Item 103 of Regulation S-K, which requires disclosure of legal proceedings, provides another contrast to the forward-looking disclosures required by Item 105. Item 103 requires a registrant to "[d]escribe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject." 17 C.F.R. § 229.103(a). It also provides that a registrant should include "any such proceedings known to be contemplated by governmental authorities." *Id.*

This plain language of Item 103 focuses on presently existing conditions rather than hypothetical future outcomes. It asks registrants to describe "pending" legal proceedings to which a registrant "is" a party. *Id.* Even where discussing a "contemplated" proceeding, involving future uncertainty, the regulatory text only seeks proceedings which are "known" to be contemplated by governmental authorities. *Id.* If the risk of litigation has materialized into an open case or the company has been threatened with an enforcement action, then the place to disclose that fact to investors, and where they would expect it, is in the Legal Proceedings section prescribed by Item 103, not the Risk Factors disclosures.

Public filings again reflect the proper distinction, presenting investors with hypothetical disclosures separately from known events and

information. For example, the Risk Factors section of the FY 2023 Form 10-K of Exxon Mobil Corporation ("Exxon") made the following disclosures about litigation:

> We also may be adversely affected by the outcome of litigation … by state and local government actors as well as private plaintiffs acting in parallel that attempt to use the legal system to promote public policy agendas (including seeking to reduce the production and sale of hydrocarbon products through litigation targeting the company or other industry participants), gain political notoriety, or obtain monetary awards from the company.

Exxon Form 10-K, at 4 (Feb. 28, 2024), https://tinyurl.com/Exxon2310-K. This description of possible future harm does not identify known lawsuits. In comparison, in its Legal Proceedings disclosures pursuant to Item 103, Exxon describes a materialized risk—litigation that has already been filed:

> State and local governments and other entities in various jurisdictions across the United States and its territories have filed a number of legal proceedings against several oil and gas companies, including ExxonMobil, requesting unprecedented legal and equitable relief for various alleged injuries purportedly connected to climate change. These lawsuits assert a variety of

> novel, untested claims under statutory and common law.

Exxon Form 10-K, at 104 (Feb. 28, 2024), https://tinyurl.com/Exxon2310-K.[3]

Bath and Body Works, Inc. followed a similar approach in its Form 10-K for FY 2023. The Risk Factors described the company's general exposure to various consumer protection laws, including a prohibition against printing too many digits of a credit card on a receipt, and the Legal Proceedings section listed three class actions alleging that exact violation. *See* Bath & Body Works, Inc. Form 10-K at 18, 23 (Mar. 22, 2024), https://tinyurl.com/BBW2310-K.

Again, for both Exxon and Bath and Body Works, and for public companies generally, the division of these disclosures between Risk Factors and Legal Proceedings reflects Regulation S-K's clean, logical division between prospective risks on the one hand, and known facts and trends on the other.

D. Cybersecurity – Item 106

The SEC updated Regulation S-K in 2023 to add Item 106, regarding cybersecurity. Though this rule was not operative when Facebook issued the Form 10-K at issue in this case, Item 106 makes plain that materialized risks from existing or previous data breaches should appear in this new Cybersecurity

[3] This disclosure is provided in Note 16 to Exxon's Consolidated Financial Statements, which is incorporated by reference in its Legal Proceedings disclosures.

section. Item 106 requires a registrant to provide various disclosures concerning cybersecurity, including, among other things, a description of:

- "the registrant's processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats in sufficient detail for a reasonable investor to understand those processes";

- "whether any risks from cybersecurity threats, including as a result of any previous cybersecurity incidents, have materially affected or are reasonably likely to materially affect the registrant, including its business strategy, results of operations, or financial condition and if so, how";

- "the board of directors' oversight of risks from cybersecurity threats"; and

- "management's role in assessing and managing the registrant's material risks from cybersecurity threats."

17 C.F.R. § 229.106(b). Like Items 303, 101, and 103, Item 106 focuses on current, known cybersecurity issues, including risks caused by "previous cybersecurity incidents." *Id.* With this Item 106 in place, it would not be reasonable for an investor to conclude that a cybersecurity-related Risk Factor worded in purely hypothetical terms must imply that no such risk has ever materialized. Rather, if the company has suffered the sort of cybersecurity

incident described in the Risk Factor disclosures, a description of that event would appear in the Cybersecurity section, if material. *See* 17 C.F.R. § 229.106(b)(2).

Though Item 106 is recent, public filings already reflect the same practical approach of filing prospective Risk Factors in Item 105, and known events and trends under Item 106. For example, in its FY 2023 Form 10-K, Sunoco LP disclosed Risk Factors concerning cybersecurity, including that "[c]ybersecurity attacks, data breaches and other disruptions affecting us, or our service providers, could materially and adversely affect our business, operations, reputation, and financial results." *See* Sunoco LP Form 10-K, at 21 (Feb. 16, 2024), https://tinyurl.com/Sunoco2410-K. In contrast, in its Cybersecurity section of the same Form 10-K, Sunoco described a known state of vulnerability: "Due to the number of acquisitions made by the Partnership over the past few years and the time it takes to implement technology standards across the enterprise, certain assets may be in different stages of integration and may have incomplete cybersecurity controls applied." *Id.* at 40. Though neither section reflects an actual cybersecurity incident, the example demonstrates again that materialized risks or trends properly appear in the Cybersecurity section, rather than in the Risk Factors section.

E. The Ninth Circuit Decision Would Muddy the Respective Purposes of the Form 10-K Sections and Undermine the Utility of the Risk Factors.

Reasonable investors will not benefit from a holding that demands a litany of all previously materialized risks in the Risk Factors section. Item 105 calls for the company to discuss hypothetical circumstances under Risk Factors, but the Ninth Circuit's decision would allow plaintiffs to misread them as being representations about past events. Companies would be compelled to append a list of every negative incident they ever suffered within the scope of each Risk Factor, or else face liability for supposedly misleading statements. The end result would be an overstuffed Risk Factors section, akin to a "document dump" that swamps a litigant with irrelevant files, making it harder to identify what is actually important.

Indeed, the SEC has stressed the importance of succinctness in Risk Factor discussions. In a 2020 rulemaking, it wrote that Risk Factors should be "concise," and criticized the "lengthy and generic nature of the risk factor disclosure presented by many registrants." *See* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63746 (Oct. 8, 2020). The SEC considered imposing a page limit, and ultimately decided to encourage filers to be concise by imposing a separate short-form summary requirement for any Risk Factor discussions over 15 pages. *Id.* But surveys show that the rule change did not achieve the goal of shortening Risk Factor

discussions, largely due to registrants' fear of event-driven litigation. *See* Dean Kingsley et al., *SEC Risk Factors Disclosure Analysis*, Harvard Law School Forum on Corporate Governance (Dec. 3, 2023), https://tinyurl.com/yxubyfhj; Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63743 (Oct. 8, 2020) ("Commenters … attributed the growing length of risk factor disclosure to the fear of litigation for failing to disclose risks if events turn negative."). The majority opinion below did not address these concerns, nor reconcile its approach with the plain text of Item 105. With no statutory grounding, it expands the daunting threat of fraud liability faced by public companies and the people who manage them, and moves the law a step closer to an absurdist nightmare where "everything, everywhere is securities fraud," as two SEC Commissioners critically phrased the concept. Mark T. Uyeda, *Remarks at the "SEC Speaks" Conference 2022*, (Sept. 9, 2022), https://tinyurl.com/bd9sj4d8; *see also* Hester M. Peirce, *Outdated: Remarks before the Digital Assets at Duke Conference*, (Jan. 20, 2023), https://tinyurl.com/5n8s47h8 ("And although some might suggest otherwise, everything, everywhere is not securities fraud.").[4]

Respondents' theory of liability disregards that the Risk Factors in a Form 10-K are prospective by design, and ignores that if a negative business event

[4] Both Commissioners cited Matt Levine, *Everything Everywhere is Securities Fraud*, Bloomberg (June 26, 2019) https://tinyurl.com/4e4cuae7.

is material, it can appear in a different section of a 10-K. Unless reversed, the Ninth Circuit's decision will give plaintiffs a continuing license to graft unreasonable inferences onto public companies' assessments of their future risks. Companies, in turn, will file ever-longer Risk Factor discussions, imposing undue costs and burdens on filers while detracting from the SEC's goal of concise Risk Factors, ultimately rendering them less useful to investors. The Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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