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 SECURITIES LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who focus their scholarship and teaching on federal securities law and are nationally recognized experts on the subject. *Amici* include:

- Joel Seligman: President Emeritus at the University of Rochester and Dean Emeritus and Professor at Washington University School of Law. He is the co-author of the 11-volume treatise, *Securities Regulation* (6th ed. 2022) and the author of two histories of financial regulation, including *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (3d ed. 2003). Professor Seligman has published 20 books and over 40 articles on securities regulation and corporate law. From 2007 to 2015, he served on the Financial Industry Regulatory Authority.
- Donald C. Langevoort: Thomas Aquinas Reynolds Professor of Law at Georgetown University Law Center. He is the co-author of *Securities Regulation: Cases and Materials* (10th ed. 2022) and many law review articles about securities law. He has testified before numerous Congressional committees on issues relating to securities litigation reform. Previously, he served as Special Counsel in the SEC's Office of the General Counsel.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution.

- John C. Coffee, Jr.: Adolf A. Berle Professor of Law at Columbia University School of Law. He is the co-author or co-editor of several casebooks, including *Securities Regulation: Cases and Materials* (13th ed. 2015); *Cases and Materials on Corporations* (8th ed. 2013); and *Business Organizations and Finance* (11th ed. 2010). Professor Coffee served on the Legal Advisory Committee to the New York Stock Exchange (NYSE) and on the Legal Advisory Board to the National Association of Securities Dealers (NASD). He regularly testifies before Congressional committees on issues of securities and finance law.

- Thomas Lee Hazen: Cary C. Boshamer Distinguished Professor of Law at University of North Carolina at Chapel Hill School of Law. He is the author of a seven-volume treatise on *Securities Regulation* (8th ed. 2023) as well as a hornbook entitled *The Law of Securities Regulation* (7th ed. 2017). Professor Hazen also authored a monograph on securities law that was commissioned by the Federal Judicial Center. Moreover, he co-authored multivolume treatises on derivatives regulation, broker-dealer regulation, and corporate law.

- James D. Cox: Brainerd Currie Distinguished Professor of Law at Duke Law. He has co-authored, among other works, *Securities Regulations Cases and Materials* (10th ed. 2022) and a multi-volume treatise *Cox and Hazen on Corporations* (2nd ed. 2003). Professor Cox has served as a member of the American Law Institute, the NYSE Legal Advisory Committee, the NASD Legal Advisory Board, and the Standing Advisory Group for the Public

Company Accounting Oversight Board. He has testified before the House and Senate on insider trading, class actions, and market reform.

- Theresa A. Gabaldon: Lyle T. Alverson Professor of Law at George Washington University Law School. She is the co-author of *Securities Law* (6th ed. 2019), *Securities Regulation* (9th ed. 2018), and *Business Organizations* (3d ed. 2023) and has published many law review articles on securities and corporate law.
- Cynthia A. Williams: Professor of Law and Roscoe C. O'Byrne Chair at Indiana University Maurer School of Law. She has co-authored *Business Organizations: Cases, Problems, and Case Studies* (5th ed. 2022) and *The Embedded Firm: Corporate Governance, Labor, And Finance Capitalism* (2011). Professor Williams previously served as a member of the U.S. Environmental Protection Agency's Environmental Finance Advisory Board.
- Madison Condon: Associate Professor at Boston University School of Law. She has published numerous articles about financial risk, climate change, and regulation and her research has been relied upon by the SEC and U.S. Department of Labor in rulemakings.
- George S. Georgiev: Associate Professor of Law at Emory University School of Law. He has testified before the House and Senate on SEC disclosure rules. In 2024, the SEC appointed him to a four-year term as a member of its Investor Advisory Committee. Professor Georgiev's scholarship on securities and corporate law has been selected for

> republication in anthologies such as *Securities Law Review*.[2]

Together, *amici* have a long-term interest in securities law being consistently and coherently developed and applied. That interest also extends to the principles around misleading half-truths and materiality, which are implicated here.

SUMMARY OF ARGUMENT

This case can and should be resolved by the well-known prohibition against telling misleading half-truths in securities filings and the traditional standard for materiality under federal securities law. *Amici* respectfully urge the Court to apply those longstanding principles here.

To avoid these well-established legal principles, Petitioners seek to craft an exception to those general principles for risk statements specifically made under Item 105. More specifically, they argue for a rule that Item 105 disclosures are inherently "forward-looking" and thus can never be misleading about past events. That argument is both legally misguided and imprudent.

First, the argument is wrong as a matter of law. The common law, recent precedent, and leading scholarship all augur against Petitioners' proposed rule. Whether risk disclosures discuss the future, present, or past, they are equally capable of containing misleading half-truths, which are plainly prohibited by Rule 10b-5. Moreover, a number of federal courts have rightly applied the prohibition on misleading

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[2] The views expressed by *amici* do not necessarily reflect the views of the institutions with which they are or were associated, whose names are included solely for identification purposes.

half-truths to corporate statements made in risk disclosures much like the ones in this case. Noted scholars of securities law have likewise recognized the importance and general applicability of liability for misleading half-truth claims. This principle is consistent with the common law of torts, which often imposed liability for half-truths that misled people with respect to prior events.

Second, Petitioners' proposed rule would be anomalous and disruptive. This Court has roundly rejected a "bright-line" or "categorical" rule for materiality much like what Petitioners essentially propose today. For good reason: it has long been hornbook law that whether something is materially misleading is an inherently fact-specific finding that requires considering the "total mix" of information and viewing the facts in context. *Amici* agree that materiality is not amenable to categorical rules here, let alone bright line exceptions to fit particular types or sub-types of risk disclosure statements. Since the 1990s, the SEC has also expressly rejected the use of bright-line rules in assessing materiality, as highlighted by both the then-Chairman and a formal staff bulletin. Additionally, Petitioners' proposed rule would circumvent the statutory safe harbor that Congress enacted in the PSLRA for certain forward-looking statements.

At the end of the day, applying Petitioners' proposed rule (i.e., that Item 105 statements can never be misleading about prior events) to its own 10-K filing from 2016 illustrates how confusing and misguided that rule would actually become. In the section of that filing about cyber-security risks, Petitioners chose to interlace both "forward-looking" events and "previous events" in describing cyber-security risks. Under their

own rule, the first sentence could be actionable, but the second sentence could not. That makes little sense.

Instead, this Court should maintain and apply well-established securities law principles and affirm the Ninth Circuit.

ARGUMENT

Contrary to Petitioners' argument, it is entirely possible for risk disclosures to contain half-truths that mislead investors about past events and that are material. Indeed, courts and scholars have regularly recognized that it is misleading to state that an already-materialized risk is merely hypothetical. Moreover, under Petitioners' new rule, certain types of statements would become categorically incapable of being materially misleading. That would effectively carve a bright-line exception into the normal fact-specific analysis for materiality. But this Court has already rejected attempts to create categorical new rules about materiality, *e.g., Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011), and it should do so here too.

I. RISK DISCLOSURES CAN CONTAIN HALF-TRUTHS THAT MISLEAD INVESTORS ABOUT THE PAST.

Petitioners go to great lengths to reframe this case in terms of the specific contents of risk disclosures under Item 105 and to suggest such disclosures are inherently "forward-looking" and thus can never mislead investors about prior events.[3] But that claim

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[3] In the alternative, Petitioners argue they would prevail under the "virtually certain" rule that arises in other circuits. Pet. Br. 39-41; *see also Indiana Public Retirement System v. Pluralsight, Inc.*, 45 F.4th 1236, 1256 (10th Cir. 2022) (examining whether a previous occurrence of the triggering event is "virtually certain to

obscures a significant general principle that applies across Rule 10b-5 claims: statements containing misleading half-truths about the past can mislead investors and are therefore actionable under Section 10(b).

As this Court underscored last Term, Rule 10b-5 bars companies from engaging in materially misleading half-truths, which are "representations that state the truth only so far as it goes, while omitting critical qualifying information." *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*, 601 U.S. 257, 263 (2024) (quoting *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188 (2016)). *See also Omnicare, Inc. v. Laborers Dist. Council Constr. Industry Pension Fund*, 575 U.S. 175, 192 (2015) ("[L]iteral accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another")).

For decades, circuits throughout the country have found that misleading half-truths are actionable under Rule 10b-5 with regards to a wide variety of statements. *See, e.g., In re Vivendi, S.A. Sec. Litig.*, 838 F. 3d 223, 240 (2d Cir. 2016) ("The rule against half-truths . . . comports with the common-law tort of fraudulent misrepresentation, according to which 'a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.'") (citing Restatement (Second) of Torts, § 529, cmt. a (1977)); *SEC. v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011), rev'd on other grounds, *Gabelli v. S.E.C.*, 568 U.S. 442 (2013) ("The law is well settled that so-called

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result in the warned of harm to [the company's] business."). That rule does not change the basic principle that describing a risk as purely hypothetical when it has actually already occurred can be materially misleading.

half-truths—literally true statements that create a materially misleading impression—will support claims for securities fraud.") (internal quotation marks omitted); *Vervaecke v. Chiles Heider & Co. Inc.*, 578 F.2d 713 n.2 (8th Cir. 1978) ("We conclude that misrepresentations, and omissions in the nature of misrepresentations (misleading statements, half-truths), are appropriately considered alike in this case under 10b-5(2).").

Moreover, numerous federal courts have specifically applied the prohibition on misleading half-truths to corporate statements made in risk disclosures that treated a transpired event as a purely hypothetical risk. "[I]f a company is warning investors about future risks and the company's efforts to deal with them, a reasonable investor would infer that those risks have not yet happened. If the 'risk' has already happened or is then happening, the company has a duty to say so. Omitting that information makes the statements misleading." *Stadium Cap. LLC v. Co-Diagnostics, Inc.*, No. 22-cv-06978 (AS), 2024 WL 456745, at *2 (S.D.N.Y. Feb. 5, 2024) (citations omitted). The Eleventh Circuit embraced this logic in *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1299 (11th Cir. 2011): "'to warn that the untoward may occur when the event is contingent is prudent, to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.' [*SEC v. Merchant Capital,* 483 F.3d 747, 769 (11th Cir. 2007)] (quoting *Rubinstein v. Collins,* 20 F.3d 160, 171 (5th Cir. 1994))"). *See also Oklahoma L. Enf't Ret. Sys. v. Papa John's Int'l, Inc.*, 444 F. Supp. 3d 550, 562 (S.D.N.Y. 2020) ("[R]isk disclosures are actionable misleading half-truths when a company discloses a risk that could have an impact on its business when, in fact, that risk has already materialized."); *Constr.*

Laborers Pension Tr. for S. California v. CBS Corp., 433 F. Supp. 3d 515, 536 (S.D.N.Y. 2020) (same); *Plumbers And Pipefitters Nat'l Pension Fund v. Tableau Software, Inc.*, No. 17-CV-5753, 2019 WL 2360942, at *4 (S.D.N.Y. Mar. 4, 2019) (holding that risk disclosures were misleading where "the company was already experiencing significant setbacks [from the disclosed risk] . . . at the time the 10-K was issued" without also disclosing that the setback had occurred).

The long-standing prohibition against misleading half-truths in corporate risk disclosure statements specifically was affirmed by this Court only months ago in *Macquarie*, which concerned liability under Rule 10b-5(b) for a risk disclosure statement that is similar to Item 105. *Macquarie* held that the risk disclosures required by Item 303 of SEC Regulation S-K "require[] disclosure of information necessary to ensure that statements already made are clear and complete." *Macquarie*, 601 U.S. at 258.

Securities law scholars have repeatedly recognized the importance and general applicability of liability for misleading half-truth claims. *See, e.g.,* 7 Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* 512-515 (6th ed. 2022) (discussing misleading half-truths and common law SEC fraud).[4] In the technology context, "if a product press release announced that a company's new line of computers was on schedule to be released [in the future], but failed to mention that

[4] *See also* Alan R. Bromberg, et al, *Bromberg & Lowenfels on Securities Fraud*, § 2:182 (2d ed. 2024) ("Clause 2 [of Rule 10b-5], by its own terms, operates only if some statement is made, and thus outlaws half-truths and other forms of partial silence or failure to disclose."); John H. Matheson, *Corporate Disclosure Obligations and The Parameters of Rule 10b-5:* Basic Inc. v. Levinson *and Beyond*, 14 J. Corp. L. 1, 14 (1988) ("In addition, rule 10b-5 specifically proscribes half-truths.").

development of the new software needed to operate the computers was behind schedule [presently or in the past] . . . [then] a misleading half-truth has been told." Robert A. Prentice and J. Langmore (1994), *Beware of Vaporware: Product Hype and the Securities Fraud Liability of High-Tech Companies*, 8 Harv. J.L. & Tech. 1, 23 (1994). The SEC applied similar logic several years ago when it warned that it can be misleading to treat "previously experienced" cyber-security incidents as a purely hypothetical risk. *See* Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8166, 8170 (Feb. 26, 2018).

It is notable that the *amicus* brief by certain law professors supporting Petitioners does not actually endorse Petitioners' argument that risk disclosures (either generally or specifically under Item 105) are incapable of misleading investors about the occurrence of past events.[5] Instead, that *amicus* brief argues that it would be wrong to hold that companies must disclose events that are immaterial because they risk no business harm. *See* Brief of *Amicus Curiae* Law Professors and Former Officials of the Securities and Exchange Commission Supporting Petitioners at 5-7. The brief also suggests that such immaterial disclosures would harm investors through information overload. *Id.* at 7-10. But those arguments miss the point: as both the undersigned *amici* and Respondents agree, it would be wrong to require immaterial disclosures in risk disclosure statements such as Item 105 – and the Ninth Circuit did not suggest otherwise. Petitioners are asking instead for blanket immunity for Item 105 disclosures that reference past events.

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[5] Nor do those *amici* support Petitioners' claim that they would prevail under an alternative rule. Pet. Br. 39.

The prohibition against misleading half-truths in the securities law finds its roots in common law, primarily tort law.[6] As Respondents explain in detail, the common law of torts contains numerous examples of misleading half-truths made about previous events or statements. *See generally* Restatement (Second) of Torts § 551, *Liability for Nondisclosure* (1977) (June 2024 update) (discussing multiple cases of misleading half-truths involving previous actions); Restatement (Second) of Torts § 529, *Representation Misleading Because Incomplete* (1977) (June 2024 update). Moreover, the common law also features cases where statements about risks and contingent *future* events are capable of misleading about the *past*. *See, e.g.*, *Berger v. Security Pac. Info. Sys. Inc.*, 795 P.2d 1380 (Colo. Ct. App. 1990) (finding a misleading half-truth when a company recruiting a new employee disclosed that the company was highly solvent and had a secure future, but omitted to disclose the company's past financial losses and that the employee's project faced a significant risk of defunding).

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[6] "Th[e] rule [of half-truths] recurs throughout the common law. In tort law, for example, 'if the defendant does speak, he must disclose enough to prevent his words from being misleading.'" *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 189 n.3 (2016) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 106, p. 738 (5th ed. 1984)). "Contract law also embraces this principle." *Id.* (quoting Restatement (Second) of Contracts § 161, Comment *a,* p. 432 (1979)). "'A classic example of an actionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property.'" *Macquarie*, 144 S. Ct. 891 (quoting *Universal Health Services*, 579 U.S. at 188-189). The Court has also "used this [common law] definition in other statutory contexts." *Universal Health Servs.*, 579 U.S. at 189 n.3 (citing *Matrixx,* 563 U.S. at 44).

At bottom, Petitioners seek to constrict artificially the rule against misleading half-truths by arguing that if companies describe a material risk without disclosing that it already occurred, then that is not a misleading half-truth (because investors supposedly believe Item 105 *only* refers to the future). But that is legally erroneous. As reflected in the case law (and common sense), it can materially mislead investors to state that an already-materialized risk is merely hypothetical. That precept applies in equal measure to statements about risk factors. In light of *amici*'s scholarship and surveys on securities law, there is no reason to create an exception to that general rule for Item 105.

II. THIS COURT HAS NEVER CREATED CATEGORICAL RULES ABOUT MATERIALITY AND SHOULD DECLINE PETITIONERS' INVITATION TO DO SO HERE.

Under Petitioners' proposed rule, Item 105 disclosures would be considered categorically incapable of materially misleading investors about the past. That argument effectively asks this Court to carve a bright-line exception into the typical standards for analyzing what is materially misleading. According to Petitioners, "forward-looking" risk disclosures could be analyzed for materiality only with respect to statements made about the future, Pet. Br. 15. By contrast, Item 105 disclosures that relate to (or imply something about) previous events would be categorically exempt from the normal assessment of materiality.

Both this Court and scholars of securities law have regularly rejected the proposition that what constitutes a materially misleading statement is amenable to bright-line rules. For example, in *Matrixx*

Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011) this Court roundly rejected a "bright-line" or "categorical" rule much like that proposed by Petitioners in this case. *Id.* at 1318 ("The defendant urged a **bright-line** rule . . . . We observed that any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive. We thus rejected the defendant's proposed rule . . . .") (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 232–36 (1988)) (internal quotations and citations omitted) (emphasis added). *See also id.* at 1319 ("As in *Basic*, Matrixx's **categorical rule** would artificially exclude information that would otherwise be considered significant to the trading decision of a reasonable investor.") (quoting *Basic*, 485 U.S. at 236) (internal quotations omitted) (emphasis added). Instead, the Court unanimously reaffirmed that materiality under federal securities law must be assessed under the "total mix" standard. *Id.* at 1321 ("The question remains whether a reasonable investor would have viewed the nondisclosed information as having significantly altered the **total mix** of information made available.") (quoting *Basic*, 485 U.S. at 232) (internal quotations omitted) (emphasis added). Specifically, the Court explained that materiality is "an inherently fact-specific finding . . . ." *id.* at 1318 (quoting *Basic*, 485 U.S. at 236) (internal quotations omitted), and therefore conducted a fact-intensive inquiry about what reasonable investors would have considered in that case, *id.* at 1319–21. *Matrixx* was consistent with this Court's prior rulings that determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and

the significance of those inferences to him . . . ." *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

Indeed, it has long been hornbook law that the materiality standard in the securities context is not amenable to categorical rules, let alone bright line exceptions to fit specific types or sub-types of statements or claims. Professor Thomas Lee Hazen, who authored a leading treatise on federal securities law for the Federal Judicial Center, *see Federal Securities Law* (4th ed. 2022), underscored that "[m]ateriality is highly factual and thus **<u>defies a bright-line definition</u>**," Thomas Lee Hazen, *1934 Act Reporting—Assessing Materiality of Disclosures—An Overview,* 2 Law Sec. Reg. § 9:20 (2024) (emphasis added). "Materiality consists of those facts which a reasonable investor would consider significant in making an investment decision." 2 Law Sec. Reg. § 9:20. "Materiality depends not upon the literal truth of statements, but upon the ability of reasonable investors to become accurately informed. In assessing materiality, courts should not focus alone on one particular sentence that is part of a larger statement without considering the entirety of the statements in question." *Id.* As reflected in *Matrixx*, the lynchpin of the materiality analysis is examining the "total mix" of information:

> A finding of materiality is based on the total mix of information available. . . . In assessing the total mix of information that is available, courts will look beyond filings mandated by the federal securities laws. Information that is generally circulated through the media will be considered in assessing the total mix. In evaluating the total mix of information available, the courts consider the efficiency of the market and the extent to which the available information is absorbed into

> the total mix and ultimately reflected in the market price. The total mix of information is evaluated in terms of the information that is publicly available and accessible to investors.

2 Law Sec. Reg. § 9:20. *Accord* Brian J. Boyle, *Bright-Line Rules and Inefficient Markets: The Third Circuit's 10b-5 Materiality Doctrine is Ripe for Revision*, 57 Vill. L. Rev. 683, 684 (2012) ("Simply put, **no categorical, bright-line rule** can define materiality. . . .") (emphasis added). *See also* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 Tulane L. Rev. 639, 718-23 (2021) (discussing *TSC Industries* and the "total mix" standard).

Likewise, since the 1990s, the SEC itself has also explicitly rejected the use of bright-line rules in assessing materiality. Chairman Arthur Levitt underscored that "[m]ateriality is **not a bright line cutoff** of [a particular percent or level of statement]. It requires consideration of all relevant factors that could impact an investor's decision." Remarks by Chairman Arthur Levitt, Securites and Exchange Commission, "The 'Numbers Game'," NYU Center for Law and Business (Sept. 28, 1998), https://www.sec.gov/news/speech/speecharchive/1998/spch220.txt (emphasis added).

The SEC formalized this view in 1999, issuing a bulletin that explained:

> Under the governing principles, an assessment of materiality requires that one views the **facts in the context** of the "surrounding circumstances," as the accounting literature puts it, or the "**total mix**" of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the "total mix"

> includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality. Court decisions, Commission rules and enforcement actions, and accounting and auditing literature have all considered "qualitative" factors in various contexts.

SEC, 17 CFR Part 211, Release No. SAB 99, Staff Accounting Bulletin No. 99 (Aug. 12, 1999) (emphasis added). Federal courts treat this particular SEC Staff Accounting Bulletin, known as SAB 99, as persuasive guidance.[7]

Similarly, the Financial Accounting Standards Board expressly "**rejected a formulaic approach**" to analyzing materiality "in favor of an approach that takes into account all the relevant considerations." *Id.* (emphasis added). The logic that the SEC set forth in

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[7] *See, e.g., Ganino v. Citizens Util. Co.,* 228 F.3d 154, 163-64 (2d. Cir. 2000) ("[B]ecause SEC staff accounting bulletins 'constitute a body of experience and informed judgment,' and SAB No. 99 is thoroughly reasoned and consistent with existing law – its non-exhaustive list of factors is simply an application of the well-established *Basic* analysis to misrepresentations of financial results – we find it persuasive guidance for evaluating the materiality of an alleged misrepresentation." (internal citation omitted)); *United States v. Kipp*, No. 315CR00244MOCDSC, 2017 WL 2662983, at *18 (W.D.N.C. June 20, 2017), *aff'd*, 793 F. App'x 166 (4th Cir. 2019) ("Courts examining qualitative materiality regularly look to [SAB 99] for guidance [about materiality]").

1999 applies equally to assessing materiality today and in the instant context of risk disclosures.

Petitioners are attempting to upend the "total mix" standard by creating a special, bright-line rule that separates "forward-looking" from "previous events" for purposes of assessing materiality under Item 105. That proposed approach cannot be squared with this Court's precedents or the established views of either the SEC or scholars of securities law. Attempts to slice and dice materiality with new categorical rules or sub-rules for different types of statements would considerably muddy the waters for jurists, practitioners of securities law, and reasonable investors alike.

Indeed, applying Petitioners' proposed rule to its own 10-K filing from 2016 illustrates how confusing and misguided it would actually become. In the section of that filing about risk factors, Petitioners interlaced both "forward-looking" events and "previous events" in describing cyber-security risks.

> ***Security breaches and improper access to or disclosure of our data or user data, or other hacking and phishing attacks on our systems, <u>could harm</u> our reputation and adversely affect our business***.
>
> Our industry is prone to cyber-attacks by third parties seeking unauthorized access to our data or users' data. Any failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data could result in the loss or misuse of such data, which **<u>could harm</u>** our business and reputation and diminish our competitive position. In addition, computer malware, viruses, social engineering (predominantly spear phishing attacks), and

> general hacking have become more prevalent in our industry, **<u>have occurred on our systems in the past</u>**, and will occur on our systems in the future.

J.A. 439-440 (emphasis added) . Therefore, Petitioners' rule would apply a materiality analysis to the first sentence about user data (which is the focus of this litigation), but exempt the very next sentence about hacking risks (which features the past tense). That is both odd and atextual, and it violates the principle that assessing materiality is a contextual, fact-specific inquiry.

Additionally, Petitioners' efforts to fashion a judge-made categorical rule about "forward-looking" statements would effectively circumvent the statutory safe harbor that Congress already created for certain forward-looking statements in the PSLRA, 15 U.S.C. § 78u-5(c)). The statutory safe harbor has a number of distinct limitations and prerequisites (including a detailed definition of a "forward-looking statement," § 78u-5(i)(1)). Petitioners' proposal sidesteps the PSLRA safe harbor that Congress enacted and would allow companies to claim the same protection without having to satisfy the statutory requirements. That cannot be right. Congress is clearly attentive to the policy arguments about 'hindsight-driven' litigation and has provided certain statutory solutions that it deems necessary and appropriate. Congress also chose to impose specific prerequisites and limitations upon the PSLRA safe harbor, all of which would have been unnecessary had the statute incorporated the unqualified safe-harbor that Petitioners now invent. And to the extent that Congress anticipated the need for future safe harbor provisions, in the same section of the PSLRA, it expressly delegated that authority to the SEC, § 78u-5(g). That indicates that Congress

viewed the SEC as the proper forum to request other safe harbors through a standard rulemaking process wherein the SEC could appropriately weigh the necessity and preconditions of a new rule.

Ultimately, Petitioners' invitation to devise a new bright-line rule is uncalled for and confounding. This Court should adhere to the "total mix" standard, as it has for decades, which is clear, well-established, and benefits the consistent application of securities law.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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