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

REPLY BRIEF FOR THE PETITIONERS

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A typical risk disclosure under Item 105 of Regulation S-K is not false or misleading for purposes of Section 10(b) and Rule 10b-5(b) merely because the company does not disclose that the specified triggering event for the warned-of risk had occurred in the past. The Ninth Circuit held to the contrary, and it was mistaken. No reasonable investor would interpret a risk disclosure using probabilistic, forward-looking language as impliedly representing that the specified triggering event had never occurred in the past, particularly in light of the regulatory context. Meta's warnings that business harm could result in the event of data misuse did not imply that Meta had never *previously* experienced such misuse.

In defending the judgment below, respondents have little to say about the actual statements Meta made. Instead, after a quixotic attempt to avoid resolution of the question presented—which has divided the courts of appeals, and on which the Ninth Circuit has taken an outlying position—respondents contend that the element of *falsity* depends entirely on whether any information omitted from a typical risk disclosure would have been *material* to a reasonable investor. The government proposes a similar approach.

That approach is flawed. It equates the discrete elements of falsity and materiality in a way that would sow confusion in the lower courts. And because risk disclosures are required under Item 105, it would result in a regime under which companies would be required to disclose every previous material incident they have experienced—effectively creating a sweeping regime of omissions liability. The Court recently rejected an attempt to shift the focus of Section 10(b) and Rule 10b-5(b) "from fraud to disclosure" and to "create an affirmative duty to disclose any and all material information." *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 264-265 (2024). The Court should reject respondents' similar attempt here.

Although all parties agree that the "virtual certainty" rule adopted by a majority of the courts of appeals is incorrect (albeit for different reasons), it is certainly an improvement on the Ninth Circuit's approach, which respondents and the government defend and which would trigger serious concerns about overdisclosure and fraud by hindsight. Under either petitioners' correct rule or the majority rule, the Ninth Circuit's judgment should be reversed.

A. Respondents Cannot Avoid A Decision On The Question Presented By Manufacturing Agreement Between The Parties

Before turning to the merits, respondents attempt to avoid review by arguing (Br. 12-18) that the parties agree on the answer to the question presented. That is simply incorrect.

Petitioners' consistent position, both at this stage and at the certiorari stage (Br. 21-25; Pet. 26-27), is that a typical forward-looking risk disclosure is not misleading merely because it fails to identify a previous occurrence of the specified triggering event. See *Kolominsky* v. *Root, Inc.*, 100 F.4th 675, 689 (6th Cir. 2024); *Bondali* v. *Yum! Brands, Inc.*, 620 Fed. Appx. 483, 491 (6th Cir. 2015). Under the majority view, the failure to disclose a previous occurrence of the triggering event is misleading only if the company knows that the occurrence is virtually certain to cause the warned-of harm. See Pet. 19-22. By contrast, respondents effectively support the Ninth Circuit's approach, under which the failure to disclose a previous occurrence of the triggering event is misleading, regardless of whether there was a known risk of harm from the occurrence. See Pet. App. 24a. Respondents add only that the omitted occurrence must be material. See, *e.g.*, Br. 23. The parties' positions are thus diametrically opposed.

They also lead to different outcomes before this Court. As the government recognizes (Br. 31), petitioners' approach would require reversal. Meta's risk disclosures warned that data misuse could result in business harm. The Ninth Circuit determined that those disclosures were misleading because they omitted "the fact of the [data] breach itself": namely, Cambridge Analytica's alleged 2015 misuse of Facebook user data. Pet. App. 25a. If, as petitioners argue, the mere omission of a previous occurrence of the specified triggering event does not render

such risk disclosures misleading, then the Ninth Circuit's rule is incorrect, and its judgment cannot stand. By contrast, respondents are seeking affirmance of the Ninth Circuit's judgment.

Respondents resort to sleight of hand when they argue that the parties agree on the answer to the question presented. That question refers to situations in which "the past event presents *no known risk* of ongoing or future business harm." Pet. Br. i (emphasis added). But respondents omit the word "known" from the question and then claim to "agree" with petitioners that, where a previous occurrence of the specified triggering event presents "*no risk* of business harm," it is "immaterial" and need not be disclosed. Br. 12-13 (emphasis added).

Any such "agreement" is entirely academic here. Respondents contend that the omitted information at issue here *was* material, and thus that the failure to identify the alleged previous occurrence of data misuse rendered the risk disclosure misleading. Petitioners argue that the failure to identify that previous occurrence did not render the risk disclosure misleading (as the Ninth Circuit incorrectly held, see Pet. App. 24a). There is thus no agreement between the parties. Respondents' effort to manufacture agreement should be seen for what it is: a cynical attempt to eke out an affirmance, or at least a remand to a recently favorable panel, without prevailing on the legal question actually before the Court.

B. Risk Disclosures Under Item 105 Are Not Misleading Merely Because They Do Not Disclose Previous Occurrences Of The Specified Triggering Event Or The Present Risk Of Harm From Such Occurrences

On the merits, all the parties agree (Pet. Br. 20; Resp. Br. 13, 22; U.S. Br. 14-15) that whether an omission renders a statement misleading depends on how a reasonable investor would understand the statement in the context in

which it was made. And as petitioners have explained and the government agrees (Pet. Br. 22; U.S. Br. 27), a typical disclosure under Item 105 warns of a harm that "could" or "may" arise from a future triggering event. No reasonable investor would interpret that kind of risk disclosure as impliedly representing that the triggering event had never occurred in the past. Respondents' and the government's contrary arguments lack merit.

1. Respondents first argue that petitioners are proposing a "categorical rule" under which "risk-factor statements are categorically incapable of misleading reasonable investors about past events." Resp. Br. 18-19; see U.S. Br. 20. Not so. Petitioners are arguing only that a probabilistic, forward-looking risk disclosure that warns of harm that could flow from a triggering event is not misleading *merely* because the statement does not disclose a previous occurrence of the triggering event. Something more is required: in order to be misleading, the disclosure must make some additional representation about a fact in the past or present, whether explicitly or implicitly. See Pet. Br. 24-25.

Petitioners are thus advocating for the same type of rule that the Court recognized in *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015). There, the Court held that a statement of opinion could be misleading based on an embedded statement of fact, such as an embedded statement about how the speaker formed the opinion or on which facts the speaker based the opinion. See *id.* at 188-191. So too with respect to risk disclosures, which can be false or misleading based on the presence of an embedded fact in the disclosure. The problem for respondents is that the forward-looking risk disclosures of the kind at issue here contain no such embedded facts; they are agnostic about the past or present state of affairs.

Respondents and the government offer a series of hypotheticals (Resp. Br. 20-23; U.S. Br. 13-15) in which a reasonable investor could view a probabilistic, forward-looking risk disclosure as conveying information about past events. As a preliminary matter, most of those hypotheticals involve statements made by individuals in ordinary conversation, rather than disclosures by an SEC registrant in a formal filing required by law. Respondents and the government are thus comparing apples to oranges: a reasonable investor reading a statement in a registrant's Form 10-K filing would consider all of the surrounding context, as well as the applicable federal securities laws. See pp. 9-11, *infra*.

But even setting aside the differing contexts, most of the statements in the hypotheticals fall within categories that petitioners recognize can be false or misleading. As already noted, see p. 5, a forward-looking risk disclosure can be false or misleading based on a fact necessarily embedded in the disclosure. That explains why respondents' hypothetical statements about children possibly eating a cake when they had already eaten it, and the government possibly revoking a business's license when the license has already been revoked, are misleading. See Resp. Br. 21. Those statements impliedly represent that the cake still exists and the license is still effective.

Petitioners also recognize that a statement can contain an embedded premise about the *current* state of affairs. That is why it would be false for a teenager to convey a "risk" that "he may fail one of his finals" when he has already failed one: the teenager is falsely implying that there is a possibility he may not fail any of his finals when in fact there is no such possibility. Resp. Br. 21. Likewise with a statement that the government "might" be planning to build a road when it is *already* planning to do so (as evidenced by its condemnation of the land). See *ibid*.

Those hypotheticals differ from more typical risk disclosures such as the ones at issue here, which merely warn that a future triggering event might bring about some future consequence, without implying anything about whether the triggering event had occurred in the past or presented a present risk of harm.

To the extent petitioners disagree with the outcome on respondents' remaining hypotheticals, it illustrates why petitioners' position must be correct. A statement that "[a chemical plant's] facilities are particularly at risk of fire" is not misleading simply because "a significant fire recently occurred." Resp. Br. 21. That said, if the recent fire had *destroyed* the facilities, the statement would be misleading for the reason stated above: the statement impliedly represents that the facilities are still in existence. See p. 6. The same is true of a statement that "an investment in a baby formula company could be lost if significant food safety issues were discovered": no reasonable investor would view such a forward-looking statement to say anything about whether food-safety issues had occurred in the past. Resp. Br. 22. Similarly, a statement that "a rise in crime could reduce the value of the property" is not rendered misleading by a recent outbreak of crime. U.S. Br. 14.

Notably, respondents appear to recognize that not every forward-looking risk disclosure contains an implied premise that the specified triggering event has never occurred in the past. For example, respondents acknowledge that the failure to disclose "a recent fire at a [Costco] warehouse" would not render misleading the statement that "fire risks hav[e] the potential to disrupt a business." Br. 22. And the government takes a similar position with respect to the statement that "[n]ext month's outdoor concert will be canceled if it rains on the scheduled day" and the omission that "it had rained the previous day." Br. 14.

The same is true here with respect to Meta's disclosures that data misuse could cause business harm.[1]

2. The lower-court decisions cited by respondents and the government (Resp. Br. 14 n.4; U.S. Br. 15-17) do not move the needle. Many of those decisions either apply the "virtual certainty" standard or approvingly discuss it. See, *e.g.*, *Karth* v. *Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021). Others involve false statements of present fact, see, *e.g.*, *FindWhat Investor Group* v. *FindWhat.com*, 658 F.3d 1282, 1298 (11th Cir. 2011); false statements of opinion, see *Glazer Capital Management, L.P.* v. *Forescout Technologies, Inc.*, 63 F.4th 747, 779 (9th Cir. 2023); or statements other than probabilistic, forward-looking risk disclosures, see, *e.g.*, *Rubinstein* v. *Collins*, 20 F.3d 160, 170-171 (5th Cir. 1994). And still others do not address the element of falsity at all, but rather discrete elements such as materiality and scienter. See, *e.g.*, *Siracusano* v. *Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177-1183 (9th Cir. 2009), aff'd, 563 U.S. 27 (2011); *In re Westinghouse Securities Litigation*, 90 F.3d 696, 708 (3d Cir. 1996).

3. Respondents and the government look for support in the common law of fraud (Resp. Br. 23-24; U.S. Br. 13), focusing on its recognition that statements about the future can imply facts about the past. But the common law merely recognizes that an opinion or forward-looking

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[1] Respondents contend that one of the sentences in Meta's allegedly misleading risk disclosures makes no "mention of business harm." Br. 7; see J.A. 281-282; Pet. App. 189a. But business harm is still the focus of the disclosure. See Pet. App. 44a (Bumatay, J., dissenting). The title of the subsection where the sentence is located states that security breaches and data misuse "could harm [Meta's] reputation and adversely affect [its] business." J.A. 439. And the very next sentence refers to consequences to Meta's business from data misuse. See J.A. 440.

statement can embed within it a statement of fact—a point petitioners have acknowledged. See p. 5, *supra*. The authorities respondents and the government cite do not address the question whether a disclosure under Item 105 that some harm may materialize if a triggering event were to occur contains an embedded statement that the triggering event has never occurred in the past.

4. The regulatory context of Item 105 confirms that a typical forward-looking risk disclosure is designed to convey information about what might happen to a company in the future, not what has happened in the past. See Pet. Br. 21, 23. Respondents' and the government's arguments that the regulatory context supports their position do not withstand scrutiny.

a. Respondents' and the government's primary argument (Resp. Br. 27-28; U.S. Br. 18-19, 23-24) is that Item 105 may require the disclosure of past events when those events create a future risk of loss for investors. But that misses the point. The question here is not whether Item 105 can ever require the disclosure of past events in particular circumstances. It is whether an investor would understand a typical forward-looking risk disclosure under Item 105—one that warns of a harm that "could" or "may" materialize if a specified triggering event were to occur in the future—as impliedly representing that the triggering event had never occurred in the past, so as to give rise to liability for securities fraud.

In that regard, Item 105 supports petitioners' position. Item 105 is inherently forward-looking because it focuses on "risk"—*i.e.*, the possibility of a *future* loss. Even under respondents' view that Item 105 sometimes requires the disclosure of past events, disclosure would be required only because the past event would create a risk of future loss. See Resp. Br. 27-28. Knowing that Item 105 is focused on future threats to an investment, the reasonable

investor would not interpret a risk disclosure that says nothing about the past and speaks entirely in probabilistic, forward-looking terms as making an implied representation about past events.

b. Even on their own terms, respondents' arguments concerning the regulatory context fall short. Respondents note that Item 105 advises registrants to draft risk disclosures in "plain English" and not to include generic risk factors that could apply to any registrant. Br. 27. That may be true, but it does not follow that a probabilistic, forward-looking risk disclosure under Item 105 inherently "impl[ies] relevant information about the company's present and recent experiences." *Ibid.*

Respondents further contend that, because some SEC regulations require disclosure of past and present circumstances, the "natural inference" is that no disclosure regulation is "limited to only the past or the future." Br. 31. But it is a well-settled principle that when the SEC, like any other "deliberative body," "includes particular language in one section of a [regulation] but omits it in another, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion." *SEC* v. *Levin*, 849 F.3d 995, 1003-1004 (11th Cir. 2017) (quoting *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)) (second alteration in original).

Respondents make much of the sample risk factors set out in former Item 503, before it was amended and recodified as Item 105. See Resp. Br. 29; see also U.S. Br. 18. But those now-removed examples—referring, for instance, to "[y]our lack of an operating history" and "[y]our business or proposed business"—are relics from a time when the risk-disclosure requirement applied only to new registrants. In that situation, disclosure of information about the current state of the business was necessary for investors to have sufficient information to evaluate a

newly registered company. It does not follow that a forward-looking statement disclosing a risk from the future occurrence of a triggering event would imply that the triggering event had never occurred in the past.

c. Respondents, joined by the government, also contend (Resp. Br. 31-33; U.S. Br. 23-24) that the SEC's practice is consistent with their approach. But the 2018 guidance on which they rely merely explains that a company may need to report about a previous denial-of-service incident because doing so would provide context about "the types of potential cybersecurity incidents that pose particular risks to the company's business and operations." 83 Fed. Reg. 8,170 (Feb. 26, 2018). Nowhere does the guidance state that it would be *fraud* for a registrant to warn about a risk of cybersecurity attacks in the future without stating that an attack has occurred in the past. As for the 2019 SEC guidance, it does not discuss Item 105 or Form 10-K at all, but instead simply makes general statements about a company's "reporting obligations." See SEC, Intellectual Property and Technology Risks Associated With International Business Operations (Dec. 19, 2019).

Respondents also rely on recent SEC enforcement actions as evidence that the SEC has taken their view of the truth or falsity of Item 105 risk disclosures. See Br. 32-33 & nn.11-12. The government echoes that argument. See Br. 18-19. But the SEC's recent practice is far less applicable than respondents and the government make it seem. Several of the actions cited are not factually analogous to this case.[2] And in the one analogous example, the court

[2] See, *e.g.*, *SEC* v. *Mylan N.V.*, Civ. No. 19-2904, Dkt. 1, at 2, 11 (D.D.C. Sept. 27, 2019) (alleging that a company had misrepresented that a federal agency "may" take a position that would result in future business harm, where the agency had already privately informed the

dismissed the SEC's claims on the ground that, in light of the relevant disclosures, the registrant "did not have a duty to disclose the fact of individual cyber intrusions or attacks." *SEC* v. *SolarWinds Corp.*, Civ. No. 23-9518, 2024 WL 3461952, at *37-*39 (S.D.N.Y. July 18, 2024). In addition, the actions related to cybersecurity warrant little weight, given that the SEC has now separately codified a rule that affirmatively mandates disclosure of past cybersecurity attacks. See 17 C.F.R. 229.106. And while respondents suggest that the Court could defer to the SEC's practice "if the Court believes that [Item 105] is ambiguous," Br. 33 n.13, the government does not join in that request, and respondents identify no textual ambiguity in Item 105 that would justify deference.[3]

C. Respondents' And The Government's Materiality-Based Approach Is Erroneous

Nowhere do respondents seriously engage with the language of petitioners' risk disclosures. That is unsurprising, because their approach to the question presented focuses exclusively on the materiality of the past event

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company that it would take that position); *SEC* v. *True North Finance Corp.*, 909 F. Supp. 2d 1073, 1104 (D. Minn. 2012) (holding that a statement about a past event improperly concealed the true nature of the event); *SEC* v. *Tecumseh Holdings Corp.*, 765 F. Supp. 2d 340, 352-356 (S.D.N.Y. 2011) (holding that it was false or materially misleading for a company to project millions of dollars in profit when the company was losing money).

[3] The government notes in passing that the SEC "brought and settled an enforcement action that relied on the same theory of falsity that respondents assert." Br. 18. But Meta neither admitted nor denied the allegations in that complaint, see J.A. 661, and neither respondents nor the government argues that the settlement has any effect here. In addition, the cited settlement encompassed two separate enforcement actions, see Resp. Br. 6 n.2, and Meta paid only a small fraction of the overall settlement to resolve the SEC claims related to Cambridge Analytica. See J.A. 246-257.

omitted from a risk disclosure and treats all typical risk disclosures as making implicit representations about the past. In particular, respondents suggest that whether a disclosure is false or misleading turns on whether the undisclosed occurrence was "minor" and immaterial, or "extraordinary in scale and harm" and thus material. Br. 23. On that view, "[i]ssuers need not disclose events that are immaterial because their effect on the business is minor, because they happened too long ago to matter, or because the public already knows about them." Br. 40.

For its part, the government pays lip service to the language of the disclosure, but it too ultimately defaults to arguing that falsity focuses on whether a reasonable investor "would view the undisclosed occurrence as significant to an appraisal of the company's business prospects"—*i.e.*, whether the omitted occurrence was material. Br. 14.

Respondents' and the government's approach to the question presented effectively treats forward-looking statements as *per se* misleading when unaccompanied by a laundry list of past material occurrences of the specified triggering event. While incorrectly criticizing petitioners for proposing a categorical rule, they are thus proposing a categorical rule of their own, cabined only by materiality. The Court should reject that misguided approach.

1. Respondents' approach to the question presented collapses the element of falsity into the distinct element of materiality. In an omissions case, the element of falsity mandates an inquiry "into the meaning of the statement to the reasonable investor and its relationship to truth." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc). By contrast, the element of materiality asks whether "there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the rea-

sonable shareholder." *TSC Industries* v. *Northway*, 426 U.S. 438, 449 (1976); see *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988). Falsity and materiality are thus distinct inquiries.

They are also not coextensive. "Even with respect to information that a reasonable investor might consider material," *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 45 (2011), disclosure is not required unless the omitted "material fact" is "necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b). That is not to say that the materiality of the omitted fact is irrelevant, but it is insufficient to render a statement misleading—the omitted material fact must also be "necessary" to render the affirmative statement "not misleading." *Ibid.* That separate inquiry is essential, because Rule 10b-5(b) "do[es] not create an affirmative duty to disclose any and all material information." *Macquarie*, 601 U.S. at 264 (citation omitted).

Respondents' theory would turn that fundamental principle of federal securities law on its head. Under Item 105, registrants are required to warn of future events that could render an investment in the registrant "risky." 17 C.F.R. 229.105(a). But under respondents' theory, the very statements that Item 105 requires companies to make—that is, statements about future triggering events that might result in business harm—would require disclosure of all material previous occurrences of the triggering event. Indeed, respondents are candid about this point, arguing that "the recent occurrence of an adverse event is indisputably a 'factor' that could make an investment risky" and thus require disclosure under Item 105. Resp. Br. 27-28; see U.S. Br. 23.

On that view, Item 105 would impose a sweeping duty to disclose all material information, with the failure to do

so resulting in liability under Rule 10b-5(b). Item 105 would require a company to make statements about future events that might trigger business risk, and respondents' theory of falsity would then require disclosure of all material previous occurrences of the same event. The upshot of that would thus be to impose a form of pure-omissions liability strikingly similar to the one this Court rejected just months ago in *Macquarie* with respect to Item 303. See 601 U.S. at 265. As in that case, the Court should reject respondents' attempt to "shift[] the focus" of Section 10(b) and Rule 10b-5(b) "from fraud to disclosure." *Ibid.*

2. Like the Ninth Circuit's decision, respondents' approach treats all typical risk disclosures as implicitly representing that the specified triggering event had not occurred in the past. That would lead to the same risks of overdisclosure and fraud-by-hindsight lawsuits that petitioners have already identified (Br. 32-38). Respondents' and the government's efforts to address those concerns fall flat.

Respondents and the government first attempt to downplay those risks by suggesting (Resp. Br. 14-15 & n.4; U.S. Br. 15) that other circuits have already embraced their expansive approach to falsity. That is incorrect. Under the majority rule, a company is required to disclose a previous occurrence of a triggering event in its risk disclosure only if it knows that the occurrence was "virtually certain" to harm the business. See Pet. Br. 39-41. The Ninth Circuit rejected that rule by dispensing with the "virtual certainty" requirement, see *ibid.*, and both respondents and the government similarly eschew it, see Resp. Br. 43; U.S. Br. 27. Tellingly, neither respondents nor the government point to any real-life examples of Form 10-K filings that contain the laundry-list disclosures

of previous occurrences of triggering events that they claim other circuits have mandated.

Respondents are also wrong to suggest that the Court responded to concerns about overdisclosure and fraud-by-hindsight lawsuits when it set the standard for materiality in *Basic*, *supra*. Resp. Br. 39; see U.S. Br. 26. Whether in *Basic* or elsewhere, this Court has never suggested that materiality alone can substitute for rigorous application of the falsity requirement.

It is no great leap to recognize that the sweeping disclosure regime respondents read into Item 105 would stack the deck in favor of overdisclosure. Nor would a materiality-only approach cure fraud by hindsight; if a company's stock drops when new information comes to light, that information will always seem material in hindsight. Neither respondents nor the government adequately explain how to apply their approach free from hindsight bias; indeed, both fall prey to hindsight bias in relying on allegations that Cambridge Analytica secretly continued to misuse misappropriated user data to support the Trump campaign, even though respondents waived any theory based on that continued misuse. See, *e.g.*, Resp. Br. 5-6, 49; U.S. Br. 32-33; but see Pet. Br. 12 (discussing waiver).

Respondents' approach would also gut the statutory safe harbor and common-law bespeaks-caution doctrine. Respondents suggest (Br. 37-38) that petitioners are arguing for duplicative protection for risk disclosures on top of those doctrines. But that misapprehends petitioners' argument. From the start, risk disclosures have served as "cautionary language" that qualifies forward-looking statements and thus protects *those* statements under the statutory safe harbor and common-law bespeaks-caution doctrine. See, *e.g.*, *EP Medsystems, Inc.* v. *EchoCath, Inc.*, 235 F.3d 865, 872-874 (3d Cir. 2000). But courts have

held that, if a risk disclosure is false or misleading, the corresponding forward-looking statement is *also* stripped of protection. See, *e.g.*, *ibid*. By vastly expanding the circumstances in which risk disclosures are deemed false or misleading, respondents and the government expose to challenge a wide range of previously immune forward-looking statements—revenue projections, future business plans or objectives, and the like. That new font of liability underscores the reach and destabilizing effect of respondents' and the government's proposed approach.

Respondents and the government ultimately suggest that, if overdisclosure or fraud-by-hindsight lawsuits become a problem, Congress or the SEC could always step in. See Resp. Br. 40; U.S. Br. 26-27. That suggestion reflects confusion about the proper institutional roles in this case. Because respondents' cause of action came into existence without congressional involvement, this Court has relied on "practical consequences" in interpreting Rule 10b-5 and has continually stressed that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163, 165 (2008).

This Court thus has the responsibility to decide whether the expansion of liability adopted by the Ninth Circuit, and effectively endorsed by respondents and the government, is appropriate here. The harmful "practical consequences of [such] an expansion" are "appropriate to examine in circumstances like these," and they "provide a further reason to reject" respondents' and the government's approach. *Stoneridge*, 552 U.S. at 163. And of course, if the government wants companies to be required to disclose past material adverse events, the SEC can invoke the rulemaking process to impose such a

requirement, as it did last year in the specific context of cybersecurity. See 17 C.F.R. 229.106.

D. The Judgment Below Should Be Reversed

Under either petitioners' approach or the alternative approach adopted by a majority of the courts of appeals, the judgment below should be reversed.

1. Under the proper approach to assessing a probabilistic, forward-looking risk disclosure under Item 105, no reasonable investor would have been misled by the risk disclosures at issue here. Those disclosures clearly indicated that Meta was warning of the risk of potential harm to the company and that the triggering event was a future security breach or data misuse. The disclosures used probabilistic, forward-looking language, and Meta expressly stated that the word "may" and "similar expressions" were "intended to identify forward-looking statements," J.A. 410. See Pet. Br. 26-29.

To the extent respondents and the government offer any theory for how Meta's statements could have been factually misleading, it hinges entirely on the proposition that Cambridge Analytica's alleged misuse of Facebook user data—with the benefit of hindsight—would have been material to a reasonable investor. According to the government, the 2015 reporting "had not *fully apprised* the public of the firm's misuse of consumer data." U.S. Br. 32 (emphasis added). But that argument improperly eliminates the falsity inquiry that is the subject of the question presented and replaces it with a materiality-only inquiry. And it improperly conflates the initial misuse of user data for the Cruz campaign (which is the basis for respondents' claims) with allegations that Cambridge Analytica continued to misuse that data for the Trump campaign (which respondents expressly abandoned below). See pp. 20-21, *infra*.

The government argues that "[t]he fact that [Meta's] risk statements explicitly acknowledged past hacking and other cyberattacks * * * exacerbated the misleading nature of describing misuse of customer data as only a future risk." Br. 32. That is a curious argument. Even if "[t]he data misuse at issue here was not a cyberattack," *ibid.*, Meta's risk disclosures expressly indicated that various efforts improperly to obtain Facebook user data had occurred in the past. See J.A. 439. The government offers no basis to conclude that a reasonable investor, perusing the broad range of examples of unauthorized uses that Meta disclosed, would be misled to believe that no third party had ever gained access to user data, or misused that data, through other means—any more than a reasonable investor would be misled by Meta's risk disclosure that "unfavorable media coverage could negatively affect our business" to believe that Meta had never received unfavorable media coverage. J.A. 441. And that is particularly true here because the relevant misuse of data had been publicly reported by the time Meta made the statements in its 2016 10-K. See Pet. Br. 28.

2. Petitioners would also prevail under the "virtual certainty" standard, under which a risk disclosure is misleading only if the company knows that the warned-of risk is virtually certain to materialize. See Pet. Br. 39-41. Although the parties all agree that the "virtual certainty" standard is incorrect, it would still be a significant improvement on the Ninth Circuit's approach, implicitly endorsed by respondents and the government. The "virtual certainty" standard at least has the benefit of being more aligned with the actual wording of typical risk disclosures, in that it recognizes that such disclosures do not categorically imply that the triggering event had never occurred in the past. It also avoids the worst of the practical problems created by the decision below. In particular, the

"virtual certainty" standard does not require the disclosure of a previous occurrence of the triggering event any time that information would be material to an investor, regardless of whether the previous occurrence was virtually certain to result in the warned-of harm.

The government criticizes the "virtual certainty" standard on the ground that it would "scramble the elements of a securities-fraud claim." Br. 27. That is ironic, because the government's own approach would equate falsity and materiality. See pp. 13-14, *supra*. In any event, respondents' and the government's real issue with the "virtual certainty" standard appears to be that, under it, the omission of material information will not alone give rise to liability—which would undercut their desired requirement that investors disclose all previous occurrences of adverse events that a reasonable investor would want to know. See Resp. Br. 47; U.S. Br. 27-28. But that is a virtue of the rule, not a vice. Because there is no generalized duty to disclose all material information to investors, something more than bare materiality is needed to show that omitted information renders a probabilistic, forward-looking risk disclosure misleading.

Respondents and the government also argue (Resp. Br. 48-50; U.S. Br. 30) that petitioners would not prevail under the "virtual certainty" standard even if the court were to adopt it. But again, that argument depends on a theory of liability that respondents expressly abandoned below. In the district court, respondents were unable adequately to allege that anyone responsible for the risk disclosures had knowledge of Cambridge Analytica's alleged continued misuse of user data for the Trump campaign after Cambridge Analytica certified that the data had been destroyed. See Pet. App. 123a. On appeal to the Ninth Circuit, respondents expressly disclaimed that theory. See Resp. C.A. Reply Br. 3 n.1. Accordingly, if respon-

dents' claim is to succeed at this juncture, they must show that the risk disclosures were misleading because they failed to disclose Cambridge Analytica's *initial* misuse of user data in support of the Cruz campaign. See Pet. Br. 41 n.4.

Respondents cannot do so. The complaint contains no allegations that any initial misuse in support of the Cruz campaign was virtually certain to cause business harm. And Meta had no reason to know that the release of additional information about the initial misuse was certain to cause such harm in 2018, because it had already been widely reported in the news media and did not result in a drop in Meta's stock price or otherwise cause material business harm. See Pet. Br. 28, 41.

In pointing out that Meta's share price dropped in 2018 when the scandal broke, respondents ignore (Br. 49) that the subsequent 2018 Guardian article reported the alleged *continued* misuse of data in support of the Trump campaign, at a time of heightened concern about foreign involvement in American elections. See J.A. 634-641. And regardless of whether the public reporting of the initial misuse fully disclosed all of the details (Resp. Br. 49-50), the disclosure of the fact of that initial misuse did not result in business harm, and respondents cannot point to any allegation supporting the inference that Meta knew the publication of additional details was virtually certain to cause business harm.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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