No. 23-980

In the Supreme Court of the United States

FACEBOOK INC., et al.,

v.

AMALGAMATED BANK, et al.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of securities firms, banks, and asset managers across the globe. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA regularly files amicus briefs in cases such as this one that have broad implications for financial markets, and frequently has appeared as amicus curiae in this Court.

Many of amici's members are subject to the U.S. securities laws, and will be harmed by both the theory of liability adopted by the court of appeals in this case and

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel made a monetary contribution to the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Consistent with Rule 37.2, all counsel of record received timely notice of amici's intent to file this brief.

by the uncertainty and division among circuits regarding liability for risk disclosures.

INTRODUCTION

Since 2005, the SEC has required public companies to concisely discuss in their public filings "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105. In these risk disclosures, companies advise investors of a wide range of future risks that could harm the business and shareholders' investment—including such threats as cybersecurity breaches, environmental hazards, or supply chain disruptions, to give a few examples.

In recent years, plaintiffs have latched onto those risk disclosures as the purported basis for a wave of event-driven, hindsight-based securities fraud suits. These suits generally do not allege that the company's risk disclosures were misleading about the *future* risk to the business. Instead, they claim that those forward-looking disclosures misled investors about *past* events that somehow relate to those future risks.

Fundamental securities law principles ought to shut the door on those claims. Although companies must ensure that their statements are not false or misleading to a reasonable investor, see *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186, 191 (2015), absent an affirmative duty to disclose, they are not required to share all material information that investors may care about, see *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44-45 (2011).

Risk disclosures create no such affirmative duty. These disclosures are inherently forward-looking; they tell investors what factors *may* cause harm to the company at some point in the future. Reasonable investors

thus do not look to those statements to understand what has already happened to the company. So a securities fraud claim alleging that a company's risk disclosure was misleading because it failed to disclose a *past* event should not make it out of the gate.

Yet the lower courts have taken markedly different approaches to addressing these backward-looking risk disclosure claims. Some courts have immediately dismissed such claims. Others have signaled that a forward-looking risk disclosure may be misleading if the company knows (but does not disclose) that a warned-of risk is already materializing and all but certain to harm the company. A few years ago, the Ninth Circuit broke new ground by holding that a company's forward-looking discussion of cybersecurity risks was misleading because the company had not simultaneously disclosed a past security breach it had already taken steps to fix. And now, in the divided decision below, the Ninth Circuit has gone even further, adopting a rule that a company's risk disclosure must inform the public of every past incident that *could* harm the business, "even if the harm caused by the breach was completely 'unknown' to [the company]" at the time it issued its risk disclosure. Pet. App. 46a (Bumatay, J., concurring in part and dissenting in part); see Pet. App. 8a-12a.

This Court's guidance is urgently needed to resolve the deep split over the viability of backward-looking risk disclosure claims. The current state of the law in the lower courts creates considerable uncertainty for public companies and investors about what companies must say in their risk disclosures. While two terms ago the Court declined to review the Ninth Circuit's prior decision, see *Alphabet Securities Litigation*, No. 21-594, events since that decision have only increased the

need for this Court's review. Two more courts of appeals have weighed in on risk-disclosure claims, adding to the overall state of confusion in the lower courts. See *Indiana Pub. Ret. Sys.* v. *Pluralsight, Inc.*, 45 F.4th 1236, 1255-1256 (10th Cir. 2022); *In re Marriott Int'l, Inc.*, 31 F.4th 898, 904 (4th Cir. 2022). And in new guidance on disclosing cybersecurity incidents, the SEC has adopted a disclosure regime that, while overbroad in its own right, would still largely be superseded by the expansive disclosure requirements resulting from the Ninth Circuit's decision in this case. See 88 Fed. Reg. 51,896.

Most importantly, as Judge Bumatay's partial dissent makes clear, the Ninth Circuit's decision below went much further than *Alphabet* and adopted the most extreme approach yet to risk-disclosure claims, holding that a social media company was required to disclose a past data breach even if it had no basis to believe that breach would harm the company's business (i.e., that it would "make an investment in the [company] . . . risky"). That decision all but guarantees that every incident that, with the full benefit of hindsight, can be said to have harmed a public company's business will spawn securities fraud claims alleging that the company should have disclosed the event sooner. As the only way to play defense against that outcome, companies will be forced to bloat their future risk disclosures with descriptions of past events—even those that the company does not believe will have any real-world impact on its business. Such prophylactic disclosures will inevitably lead to "a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that

is most relevant." Chair Mary Jo White, *The Path Forward on Disclosure*, Sec. & Exch. Comm'n (Oct. 15, 2023), https://tinyurl.com/4eyxzfu7. As Congress, the SEC, and this Court have all recognized, that regime harms both companies and investors, and this Court should grant review now to prevent that harm from materializing.

DISCUSSION

A. Risk-disclosure claims have contributed to a wave of meritless securities fraud suits.

1. Baseless securities fraud litigation continues to be a pervasive problem in the U.S. economy. In 2019, plaintiffs filed 428 securities class actions, more than double the average figure for the decade prior. See U.S. Chamber of Commerce Inst. for Legal Reform, *An Update on Securities Litigation*, IRL Briefly 3 (Mar. 25, 2020) https://tinyurl.com/nh94bh3y. That was no blip; new claims for 2023 continued to outpace prior years. See Cornerstone Research, *Securities Class Action Filings: 2023 Year in Review* 1 (2023), https://tinyurl.com/3pdre7nu. "To put this in the simplest terms, the likelihood of a U.S.-listed company getting hit with a securities suit is the highest it has ever been." Kevin LaCroix, *Federal Court Securities Suit Filings Remain at Elevated Levels*, D&O Diary (Jan. 1, 2020), https://tinyurl.com/5ymrnwat.

Only a tiny minority of these securities class actions end in judgment for the plaintiff class. See Cornerstone, *Securities Class Action Filings* 6. But all of them impose massive costs on American businesses. As plaintiffs' lawyers well know, many companies will settle even baseless suits to avoid the expense and uncertainty of litigation. See *Novak* v. *Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (noting the prevalence of "strike

suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries"). The threat of securities fraud liability has even made it difficult for many public companies to insure their directors and officers. See U.S. Chamber Inst. for Legal Reform, *An Update on Securities Litigation* 6.

A growing proportion of those suits arise out of so-called event-driven litigation. Plaintiffs seize on a headline-grabbing incident that harms a company (and its stock price) and allege that the company misled investors about some aspect of the event. *Id.* at 2; see Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1335 (2022); Matt Levine, *Everything Everywhere is Securities Fraud*, Bloomberg (Jan. 26, 2019), https://tinyurl.com/49av5ubd ("And so contributing to global warming is securities fraud, and sexual harassment by executives is securities fraud, and customer data breaches are securities fraud, and mistreating killer whales is securities fraud."). These suits effectively seek to extract payments from the company based on the principle that "anything bad that is done by or happens to a public company is also securities fraud." *Id.*

2. Plaintiffs pursuing such strategies have increasingly relied on the risk disclosures companies must make in their securities filings as the purported basis for their claims. Since 2005, the SEC has required public companies to disclose "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105 (Item 105). Companies must disclose those risk factors in both their annual 10-K and their quarterly 10-Q reports. See 70 Fed. Reg. 44,722, 44,786 (Aug. 3. 2005). The SEC has directed companies to focus on material risks to their particular businesses

(rather than generic risks that threaten the entire market), and to explain those risks in a concise, readable way (so that they may be readily understood by ordinary investors). See *ibid.*; see also 85 Fed. Reg. 63,726, 63,745-63,746 (Oct. 8, 2020). Item 105 does not require companies to attempt to quantify risks or predict the likelihood they will occur. As much as companies try to keep risk disclosures brief and easily digestible, they have come to make up a major part of public companies' filings. The risk disclosures in a Fortune 100 company's 10-K may run dozens of pages, with paragraphs devoted to each risk.

Because companies' risk disclosures must address the most pertinent risks that could harm their businesses, they are fertile ground for event-driven securities suits premised on a decline in stock price. The playbook is now all too familiar. A company will state in its risk disclosures that its business could suffer some particular harm in the future (say, a decline in revenue) if a certain incident were to occur (such as a major supply chain disruption). Sometime later, the company in fact suffers a decline in revenue (the warned-of harm), and the stock price drops as a result. If there is any hint that a supply-chain disruption had ever previously occurred (the kind of incident the company warned *could* cause the harm), plaintiffs immediately sue the company. The theory is that the company's risk disclosures were somehow fraudulent for not disclosing the past incident—regardless of whether the company believed that incident would in fact cause any harm to its business.

Notably, these suits almost never contend that the company's statements about the risks to its business were themselves inaccurate. Instead, they are premised on a notion that reasonable investors rely on risk

disclosures to understand what has (or has not) happened in the past. The upshot of this theory is that, when a company truthfully discusses future risks to its business, it must also disclose any past or ongoing information about incidents that could cause the warned-of harm.

This case is a prime example. Facebook warned investors that certain kinds of incidents ("security breaches and improper access to or disclosure of our data or user data, or other hacking and phishing attacks on our systems") *could* cause specific harms to the company (damage to Facebook's "reputation and . . . business") and thus "make an investment [in Facebook] risky." Pet. App. 42a. Those risk disclosures were unquestionably accurate, and plaintiffs in this case do not contend otherwise. But plaintiffs alleged that the statements were nonetheless misleading because the company had not simultaneously disclosed a *past* incident involving the improper dissemination of user data—even though Facebook had thoroughly investigated that incident and believed it posed no ongoing threat to Facebook's business at the time the statements were made. Pet. App. 11a-12a.

As described below, the courts of appeals have adopted varying approaches to these kinds of risk disclosure-based claims. And in its divided decision below, the Ninth Circuit adopted the most extreme approach yet.

B. The courts of appeals are deeply divided over the standard for risk-disclosure claims.

The Ninth Circuit's decision below opens a new front in a long-running split over whether plaintiffs may state a securities fraud claim by alleging that a forward-looking risk disclosure was misleading for failing to disclose a past or ongoing event. One court of

appeals has expressly rejected such claims, holding that reasonable investors do not rely on forward-looking risk disclosures to determine what happened in the past. A number of other courts permit *some* risk disclosure-based claims, but only when the plaintiff adequately alleges that the company knew that the warned-of harm to its business (the decline in revenue or reputational harm) has materialized or is certainly imminent. In the decision below, the Ninth Circuit adopted an extreme outlier position, holding that companies must disclose any past incident that *might* ultimately cause harm to the business—even if the company "did not know whether" the harm was likely to arise at the time it made its statement. Pet. App. 46a (Bumatay, J., dissenting).

That deep split more than meets this Court's standards for certiorari. At a minimum, there can be no doubt that courts are generally confused about how to approach risk disclosure-based claims. This Court's review is needed to resolve the current state of affairs, which creates considerable uncertainty for public companies by imposing conflicting rules about what they must say about the *past* when making risk warnings about the *future.* See U.S. Br. at 17-18, *Cyan, Inc.* v. *Beaver City Emps. Ret. Fund*, 583 U.S. 416 (No. 15-1439) (arguing for review in light of the substantial confusion in the lower courts).

1. The Sixth Circuit has squarely rejected the argument that forward-looking risk disclosures can mislead reasonable investors about what occurred in the past. As the court explained, "[r]isk disclosures like the ones accompanying 10-Qs and other SEC filings are inherently *prospective* in nature." *Bondali* v. *Yum! Brands, Inc.*, 620 Fed. Appx. 483, 491 (6th Cir. 2015). Accordingly, "[t]hey warn an investor of what harms *may*

come to their investment," but do not "educate investors on what harms are currently affecting the company." *Ibid.* As a result, a company cannot be held liable in the Sixth Circuit for failing to disclose that an incident mentioned in its risk disclosures happened in the past.

2. Other circuits permit plaintiffs to base claims on risk disclosures only when they allege that the business knew the warned-of *harm* "had already begun to materialize at the time the statement was made." *Karth* v. *Keryx Biopharms., Inc.*, 6 F.4th 123, 138 (1st Cir. 2021); see *Pluralsight*, 45 F.4th at 1255-1256 (10th Cir. 2022) ("Where risk factors have been found materially misleading, the risk had materialized or was virtually certain to occur."); *Williams* v. *Globus Med., Inc.*, 869 F.3d 235, 241 (3d Cir. 2017) ("[A] company may be liable under Section 10b for misleading investors when it describes as hypothetical a risk that has already come to fruition."); see also *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104, 106 (D.C. Cir. 2015) (finding a company's risk disclosures misleading and ineligible for the PSLRA's safe harbor protection because they did not inform investors that the warned-of harm "had already manifested itself").[2] In these circuits, it is not enough to allege that an *incident* similar to the one the company identified as potentially creating certain risks has occurred. Rather, the plaintiff must allege that the *harm*—i.e., what makes "an investment in the [company] . . . risky," 17 C.F.R. § 229.105—is "near

[2] The Fourth Circuit also recently signaled agreement with this approach. See *Marriott Int'l*, 31 F.4th at 904 ("[W]arning of risks that could or may occur might be misleading to a reasonable investor where the defendant knew that those risks had materialized."). In that case, however, the defendant had stated that it had experienced cyberattacks in the past. *Id.* at 904-905.

certain[]" to arise at the time of disclosure. *Karth*, 6 F.4th at 137-138. In that situation, the company "cannot tell a hiker that a mere ditch lies up ahead" when it "knows the hiker is actually approaching the precipice of the Grand Canyon." *Id.* at 137.

The Third Circuit's decision in *Williams* is emblematic of this approach. There, a company that relied in part on independent contractors warned investors that terminating those relationships could harm its sales. See 869 F.3d at 241. But the company did not disclose that it was *already* shifting business from independent contractors to its in-house sales team. The Third Circuit held that the company's failure to tell investors that the shift was already occurring was not misleading because the shift had not yet affected the company's sales. In other words, the company's disclosure remained true at the time it was made: terminating contractor relationships might hurt the company's bottom line in the future (but had not yet begun to do so).

3. The Ninth Circuit in this case set itself apart as an outlier in risk-disclosure litigation. Until now, the governing decision in that circuit was *In re Alphabet Securities Litigation*, 1 F.4th 687 (9th Cir. 2021). There, Alphabet warned investors that "[i]f our security measures are breached resulting in the improper use and disclosure of user data," "customers may curtail or stop using our products of services, and we may incur significant legal and financial exposure." *Id.* at 694-695. At the time Alphabet made that statement, it was aware of a security bug affecting its social networking platform but had already taken steps to fix it. An internal memorandum had stated that disclosure of the bug "would likely trigger immediate regulatory interest," *id.* at 696, but there was no allegation that the security bug posed an imminent harm to the company.

The court nonetheless allowed the plaintiffs' claim to move forward. *Id.* at 704.

Then, in the decision below, the Ninth Circuit went even further to the extreme. The majority accepted that, at the time it issued its risk disclosure, "Facebook did not yet know the extent of the reputational harm it would suffer as a result" of an incident of data misuse. Pet. App. 24a. In any other circuit, that would have resolved the case. But according to the majority below, it did not matter whether Facebook knew its reputation would suffer. Rather, plaintiffs could pursue their claim simply because Facebook was aware that the incident had occurred and that it *could* "harm [its] reputation" or "adversely affect [its] business." Pet. App. 42a.

The majority reached that conclusion over a vigorous dissent from Judge Bumatay, who argued that *Alphabet* did not "transform every risk statement into a false or misleading statement if a risk later comes to fruition" or "create a new requirement that a company disclose every bad thing that ever happened to it." Pet. App. 46a-47a. As Judge Bumatay saw it, there was a critical difference between *Alphabet* and this case: Whereas Alphabet's internal memorandum signaled that it "knew a risk had come to fruition," the plaintiffs here did not "allege that Facebook knew that [data] breaches would lead to immediate harm to its business and reputation." Pet. App. 47a-48a.

But the majority refused to adhere to Judge Bumatay's reading of *Alphabet*, instead expressly holding that a risk disclosure may be "materially misleading" even if the company *did not know* any harm would "materialize" at the time it issued the statement. Pet. App. 24a. That decision leaves no doubt about the Ninth Circuit's departure from every other court of appeals to

address risk disclosure-based claims. Plaintiffs in the Ninth Circuit—and only the Ninth Circuit—can pursue securities fraud claims any time an incident mentioned in a risk disclosure has occurred, no matter the likelihood of harm to the company at the time it disclosed the risk. Pet. App. 24a.

C. The decision below is incorrect.

There is no "general duty on the part of a company to provide the public with all material information." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997). That is true even for material information that "a reasonable investor would very much like to know." *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993). Absent an affirmative duty to disclose, a public company is required only to ensure that its particular statements are not false and misleading. See *Matrixx Initiatives*, 563 U.S. at 44-45. "[W]hether a statement is misleading depends on the perspective of a reasonable investor" who "understands a statement . . . in its full context." *Omnicare*, 575 U.S. at 186, 190 (internal quotation marks omitted).

Item 105 did not require Facebook to disclose information about past events or to notify the public about every incident that could conceivably harm the company. Instead, Item 105 required Facebook to concisely discuss—not quantify or attempt to predict—"material factors" that might make investment in the company "risky" to investors. 17 C.F.R. 229.105. Facebook complied with Item 105. It disclosed that, if unauthorized access or use of its users' data occurred, such an incident could harm its business by undermining its reputation with its customers. That forward-looking statement, accurately identifying a risk investors should consider when investing in the company, cannot support a securities fraud claim in this case.

And even if a risk disclosure could in theory mislead a reasonable investor as to past events, such a claim could not arise where the company had no reason to believe that a past event was likely to cause the warned-of harm to its business.

1. Forward-looking statements about risks facing a company in the future cannot support a claim based on past events. In both ordinary English and the securities laws, there is an obvious difference between forward-looking statements and representations about the past or present. See generally *Slayton* v. *American Express Co.*, 604 F.3d 758, 765 (2d Cir. 2010) (discussing the PSLRA "statutory safe-harbor for forward-looking statements"). Recognizing this, reasonable investors do not rely on statements about the future to understand a company's past or present operations.

Risk disclosures necessarily address the future. "Risk" is the "possibility of loss, injury, disadvantage, or destruction." *Bondali*, 620 Fed. Appx. at 491 (quoting Webster's Third New Int'l Dictionary 1961 (1986)). Saying there is a risk your house might flood says nothing one way or the other about whether your house has flooded in the past. For that reason, a public company's disclosures about *future* risks in compliance with Item 105 do not mislead reasonable investors about the occurrence (or not) of events in the *past*. Cf. *Goldman Sachs Grp., Inc.* v. *Arkansas Teacher Ret. Sys.*, 594 U.S. 113, 123 (2021) (explaining that a "mismatch between the contents of the misrepresentation and the corrective disclosure" causes an "inference" of price impact "to break down").

That is precisely the reasoning adopted by the Sixth Circuit. As that court has explained, "[r]isk disclosures . . . are inherently *prospective* in nature. They

warn an investor of what harms *may* come to their investment. They are not meant to educate investors on what harms are currently affecting the company." *Bondali*, 620 Fed. Appx. at 491. That simple proposition resolves this case.

2. Even if companies could face liability for failing to disclose past events in their risk disclosures, such a claim would, at a minimum, require an allegation that the company knew that the specific harm identified in the risk disclosure was imminent. See *Williams*, 869 F.3d at 243. Plaintiffs' allegations do not clear that hurdle, and their claims accordingly would have been correctly dismissed in any other circuit.

As Judge Bumatay explained in dissent, Facebook's risk disclosures "warn[ed] about harm to Facebook's 'business' and 'reputation.'" Pet. App. 44a. They did "not represent that Facebook was free from significant breaches at the time of the filing." *Ibid.* That approach is not surprising: Tech companies like Facebook likely investigate and resolve a number of incidents involving improper data access or use each year—virtually all of which presumably pose no larger threat to the company. A reasonable investor reviewing the company's data-related risk disclosures thus would not expect the company to divulge every incident of past data misuse. And disclosing that voluminous information would undermine the point of providing investors with targeted and "concise" assessments of risk in the first place. See 17 C.F.R. 229.105.

Importantly, none of the facts known to Facebook when it issued the disclosure suggested that any specific incident of data misuse risked harm to Facebook's "business" or "reputation." On the contrary, Facebook had already taken action to resolve the incident at issue in this case, including by obtaining a certification that

the misused data had been destroyed. Pet. App. 11a. There was thus no basis to conclude that Facebook's statement—that such an incident *could* cause reputational damage and harm to its business—was anything but true.

The majority below apparently did not disagree with any of that, but nonetheless allowed plaintiffs' claim to proceed. In doing so, the Ninth Circuit has gone further than any court in the country. That decision cannot be squared with basic principles of securities law, and this Court should grant review in this case and reverse.

D. The Ninth Circuit's approach to risk-disclosure claims warrants this Court's review.

1. The Ninth Circuit's decision is certain to harm companies and investors. The only way for a company to comply with the Ninth Circuit's rule is to disclose every incident that conceivably *could* lead to a warned-of harm. For example, if a company's risk disclosure states that IT-system failures could cause lost sales, it must disclose each prior occasion on which its system has gone down for a few hours. And if a company discloses the risk that emerging competitors may erode its market share, it must reveal its sensitive intelligence about what those competitors are currently doing—even if the company does not know whether competitors' efforts will be successful. In either case, the company would otherwise run the risk of a securities plaintiff arguing—like the plaintiffs here—that it misled investors by failing to reveal incidents that *could* harm the company. Pet. App. 24a.

That regime will obviously impose heavy compliance burdens on public companies. In fact, companies around the country are already being forced to undertake onerous steps in reaction to the Ninth Circuit's

extreme rule. See Virginia Milstead & Mark Foster, *Beware of Potential Securities Litigation Over Risk-Factor Disclosures*, Reuters (Jan. 24, 2024), https://tinyurl.com/2m5txp5d (warning companies about potential liability "[i]n the wake of some recent decisions from the 9th U.S. Circuit Court of Appeals"). The changes businesses will be compelled to make if the Ninth Circuit's decision is left in place will also harm investors, burying them in a mountain of extraneous and unhelpful information. See *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 234 (1988) (noting the risk of flooding investors with "essentially useless information that a reasonable investor would not consider significant"); Commissioner Troy A. Paredes, *Remarks at the SEC Speaks in 2013*, Sec. & Exch. Comm'n (Feb. 22, 2013), https://tinyurl.com/3ctffk82 (expressing "concern . . . that investors will have so much information available to them that they will sometimes be unable to distinguish what is important from what is not").

The decision below also conflicts with the SEC's approach to risk disclosures. The SEC has repeatedly emphasized that risk disclosures should be short and digestible for investors, see 85 Fed. Reg. at 63,745-63,746—a directive entirely at odds with the Ninth Circuit's kitchen-sink approach to disclosure. And the SEC has never required companies to quantify risks or predict the likelihood they will occur, meaning that disclosure of past events is not required under a theory that they make similar future events more likely to occur. Finally, the SEC recently issued a rule requiring companies to make additional, contemporaneous disclosures regarding material cybersecurity incidents (but not other categories of risk). See 88 Fed. Reg. 51,896 (Aug. 4, 2023). That rule acknowledges that there are tradeoffs associated with onerous disclosure

obligations, and that too much disclosure can harm investors and companies alike. The Ninth Circuit's rule could effectively supersede the SEC's approach when it comes to cybersecurity incidents that relate to risks discussed in companies' risk disclosures.

2. Although a pending case before this Court also involves securities fraud claims premised on SEC-required disclosures, see *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, No. 22-1165, the Court's decision in that case will not make review of this one any less necessary. *Macquarie Infrastructure* presents the question whether a company's failure to make a disclosure required by a different SEC regulation—a pure omission-based claim—can support liability under Section 10b-5 of the Exchange Act. That question will not resolve risk-disclosure cases like this one, which, as noted above, generally do not contend that companies failed to make statements required under Item 105—just that the statements they *did* make were misleading. As a result, no court of appeals is likely to change its view on the question presented here based on how the Court rules in *Macquarie Infrastructure*.

Nor will the importance of this issue to litigants diminish in the wake of *Macquarie Infrastructure.* If the company defendants win, the viability of risk-disclosure claims will be even more important: Event-driven securities fraud suits often allege both pure-omission claims and risk-disclosure claims, so plaintiffs losing one such tool will just rely more heavily on the other. But even if the plaintiffs win, the question presented in this case will remain important. Because modern risk disclosures are so extensive, there are many situations where a plaintiff will not be able to pursue a pure-omission claim—for instance, when pressing a claim related to cybersecurity, which is frequently discussed as

a risk to modern companies. As a result, no matter what the Court decides in *Macquarie Infrastructure*, risk-disclosure liability will often be outcome-determinative, and could mean the difference between obtaining a swift dismissal and being forced into years of expensive discovery or an unwarranted settlement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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