No. 23-980

IN THE

Supreme Court of the United States

FACEBOOK, INC. ET AL.,

Petitioners,

v.

AMALGAMATED BANK, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court should grant certiorari to decide if risk disclosures are "false or misleading when they do not disclose that a risk has materialized in the past, *even if that past event presents no known risk of ongoing or future business harm*," Pet. i (emphasis added), when the Ninth Circuit never held that such a disclosure obligation exists and rejected petitioners' claim that no risk of business harm was present in this case.

2. Whether the Court should grant certiorari to decide if Rule 9(b) applies to loss causation allegations, Pet. i, when (i) the parties and the Ninth Circuit all agreed below that it does; (ii) no circuit holds otherwise; (iii) petitioners raised no real Rule 9(b) objection below or in their petition here; and (iv) the answer to the question makes no difference to the outcome of the case.

RULE 29.6 STATEMENT

Respondent Amalgamated Bank is wholly owned by Amalgamated Financial Corp., a publicly traded public benefit corporation. Respondent Public Employees' Retirement System of Mississippi is a public pension plan; no publicly held corporation holds 10 percent or more of its stock.

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INTRODUCTION

Facebook asks the Court to decide two questions that do not arise in this case, do not matter to the outcome, and are based on a serious mischaracterization of the decision below and the facts.

First, Facebook asks the Court to decide whether "risk disclosures [are] false or misleading when they do not disclose that a risk has materialized in the past, *even if that past event presents no known risk of ongoing or future business harm.*" Pet. i (emphasis added). But Facebook fails to disclose that the Ninth Circuit directly rejected the factual premise of this question. Facebook's only argument for how the unauthorized disclosure of 30 million users' private information supposedly posed no risk of business harm was that by the time Facebook made the challenged statements, the breach had been fully disclosed and the public had not reacted. *See* Petr. C.A. Br. 28.[1] The Ninth Circuit found this claim unsupported by the record, Pet. App. 26a, a holding Facebook does not challenge in this Court. "It would be imprudent" to grant certiorari to decide a question whose premise "does not hold." *DeVillier v. Texas*, No. 22-913, slip. op. at 6 (U.S., Apr. 16, 2024).

For the same reason, there is no circuit conflict. The Ninth Circuit applies the same rule as the other circuits Facebook cites: a statement is misleading if it treats a material risk as hypothetical when the risk has already materialized. The Ninth Circuit did not hold that companies must disclose events that pose no

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[1] *Available at* 2022 WL 3868103.

threat of business harm—such occurrences would not be material to a reasonable investor and the Ninth Circuit stressed that companies never have an obligation to disclose immaterial information. Pet. App. 19a, 22a. This includes, the court explained, information about an otherwise material adverse event (like a data breach) if the public already knows about it. *Id*. 22a, 26a.

Second, Facebook asks the Court to decide whether Rule 9(b)'s particularity requirement applies to the loss causation element of a securities fraud claim. However, Facebook admits that the Ninth Circuit agrees with Facebook's position, both in established circuit precedent and in the opinion below. Respondents have never argued otherwise either. Facebook cites no case in which this Court has ever granted certiorari to decide a question on whose answer all the parties and the lower court agree.

At best, what Facebook really seeks is review of the Ninth Circuit's application of that agreed-upon rule to the facts of this specific case. But, in fact, Facebook's objections have nothing to do with Rule 9(b). It gestures at the Rule only on the way to raising other arguments that are unrelated to any alleged lack of particularity in the Complaint. If that were not enough, the second Question Presented also is not the subject of a circuit conflict and has no recurring importance in practice.

Indeed, this Court has repeatedly turned away petitions raising the second Question Presented and recently denied another raising a version of the first. *See Amedisys, Inc. v. Pub. Empl. Ret. Sys. of Miss.*, No. 14-1200; *Gilead Sciences, Inc. v. St. Claire*, No. 08-1021; *Liu v. Credit Suisse First Boston Corp., Inc.*,

No. 06-467; *Alphabet Inc. v. Rhode Island*, No. 21-594. Facebook provides no reason for a different result here.

STATEMENT OF THE CASE

1. In July 2019, Facebook agreed to pay $5.1 billion in civil penalties to settle charges by the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) that it had misled Facebook users and investors over the privacy and security of user data on its platform. *See* Pet. 8a; 2-ER-315.[2]

The FTC charges related to Facebook's secret sharing of user data with companies ranging from Amazon to Tinder in exchange for advertising revenue or access to the other companies' user data. The FTC alleged that this reciprocal "whitelisting" policy was inconsistent with Facebook's repeated representations that its users could control whether their data is shared with third parties and was in violation of a consent decree Facebook had signed with the agency after it was caught misleading users about their privacy controls nearly a decade earlier. Pet. App. 8a-9a.

The SEC charges arose from the Cambridge Analytica scandal. In December 2015, *The Guardian* reported that a British data analytics company, Cambridge Analytica, was using a database created from "unwitting" Facebook users' data to help the presidential primary campaign of Senator Ted Cruz target voters for political advertisements. However,

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[2] __-ER-__ refers to the volume and page number of the Ninth Circuit Excerpt of Records.

the article also quoted the Cruz campaign as insisting that "all the information is acquired legally and ethically with permission of the users." Pet. App. 10a, 26a; 3-ER-194. And it quoted Alexander Kogan, the researcher responsible for collecting the Facebook data for Cambridge Analytica through an on-line personality quiz, as insisting that his company had "full permission to use the data and user contribution for any purpose." 3-ER-195. Facebook did not dispute either assertion, but instead stated only that it was "carefully investigating" the situation, that obtaining user data without consent would be a violation of Facebook's policies, and that the Company would "take swift action" against any third party found to have violated those policies. Pet. App. 11a.

In private, Facebook almost immediately confirmed that Kogan and Cambridge Analytica had, in fact, obtained the private information of more than 30 million Facebook users without their permission, in stark violation of Facebook policies. Pet. App. 11a. Facebook quietly asked Kogan and Cambridge Analytica to delete the data. *Ibid*. Both initially said they had. But when asked to confirm in writing that they had destroyed not only derivative data but also the raw user data, Cambridge Analytica's CEO refused to do so. *Id*. 11a-12a.

For the next two years, Facebook kept its findings to itself and took no public action against Cambridge Analytica or Kogan. Instead, Facebook worked closely with Cambridge Analytica to place millions of dollars in political ads into Facebook users' feeds on behalf of the Trump general election campaign. 2-ER-225-27, 243-44. At the same time, Facebook actively misled the public about its investigation. In February

2017, Facebook responded to reporters' questions by referring them to Cambridge Analytica's statement that it "does not use data from Facebook." 2-ER-262. A month later, a Facebook spokesperson told reporters that "[o]ur investigation to date has not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work on the [Brexit] and Trump campaigns," omitting that Facebook had confirmed massive wrongdoing in connection with Cambridge Analytica's work for the Cruz campaign. 2-ER-266. And all the while, Facebook's top leadership continued to misleadingly assure users that "no one is going to get your data that shouldn't have it" and "you're controlling who you share with." Pet. App. 13a, 49a.

Facebook's deception extended to its public filings with the SEC as well. Long after confirming the breach, Facebook's SEC filings repeatedly described the prospect of third-party access and misuse of private user data as a merely hypothetical risk that could harm the Company if it materialized. For example, Facebook stated that it provided third parties access to some user information and that "*if* these third parties or developers fail to adopt or adhere to adequate data security practices . . . our users' data *may be* improperly accessed, used, or disclosed. Pet. App. 43a (emphasis added). Facebook also represented the prospect of "improper access" and the resulting business harm as mere hypothetical risks. Pet. App. 12a (quoting 2016 Form 10-K as stating that "[a]ny failure to prevent or mitigate . . . improper access to or disclosure of our data or user data . . . could result in the loss or misuse of such data, which could harm [Facebook's] business and reputation and diminish our competitive position.").

The public finally learned the truth in the Spring of 2018. On March 12 of that year, with investigative reporters closing in, Facebook published a preemptive article on its investor relations website acknowledging it had known of the breach since 2015. Pet. App. 14a. Facebook offered no explanation for why it had kept its findings secret for more than two years, why it had not publicly suspended Kogan or Cambridge Analytica from its platform, or why it had not taken any action to inform affected users. 2-ER-286. Instead, the post stated that Facebook had "demanded certification from Kogan and all parties he had given data to that the information had been destroyed," which, it said, Kogan and Cambridge Analytica had provided (failing to note that Cambridge Analytica had refused to confirm the destruction of the raw data in writing). 2-ER-285.

The public reacted with shock and fury. Many expressed dismay that Facebook had been aware of the breach for years but failed to disclose it to the public or affected users. Pet. App. 15a. Many users joined the "#deleteFacebook" campaign urging people to leave the platform. 2-ER-289-90. Government officials both here and in Europe called for investigations. *Id*. 14a.

Meanwhile, in June 2018, Facebook's whitelisting practices were also revealed, providing an already jaded public yet another example of the truth previously disclosed through the Cambridge Analytica scandal: Facebook's repeated promises that users controlled access to their private data were false. Pet. App. 16a.

The full extent of consumer reaction, and how that reaction would affect Facebook's business, was

unknown at the time. But it was clear the damage would be significant. Facebook's stock price fell dramatically in March 2018, right after the Cambridge Analytica revelations. It fell again when Facebook's July 2018 earnings call revealed the extent to which user engagement and revenue growth had fallen, and the ballooning privacy-related expenses the Company incurred in the aftermath of the two scandals. *Id*. 15a, 17a.

In July 2019, the SEC filed suit against Facebook, charging that the Company misled investors by treating the prospect of such data misuse as a merely hypothetical risk in its SEC filings and by reinforcing the deception by telling the public that its investigation had "not uncovered anything that suggests wrongdoing." 2-ER-316 (quoting SEC complaint).

2. Respondents filed suit to recover damages for a class of injured investors, asserting claims under Sections 10(b), 20(a), and 20A of the Securities Exchange Act of 1934. As relevant here, they alleged that Facebook and several of its high-ranking officials made false and misleading "user control" statements to the public and misleading "risk statements" in their SEC filings. The district court dismissed. Pet. App. 18a. As pertinent here, the court held that the risk statements were not false or misleading and that respondents failed to prove loss causation for their user-control-statement claims. Pet. App. 125a, 189a-91a.

3. A panel consisting of judges McKeown, Bybee, and Bumatay reversed in relevant part.

a. The court first held Facebook's risk statements were misleading because they "represented the risk of

improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired." Pet. App. 24a. The court rejected Facebook's attempt to read the statements as warning only of business harm, not wrongful disclosure. *See ibid*. (finding that a "reasonable investor reading the 10-K would have understood the risk of a third party accessing and utilizing Facebook user data improperly to be merely conjectural"*)*. The court held that it was also no defense that Facebook's refusal to confirm the event had forestalled the business harm that would later result when the truth was revealed. Falsely implying that the breach had not occurred was misleading "even if the magnitude of the ensuing harm was still unknown." Pet. App. 24a-25a.

The court acknowledged Facebook's argument, embraced by the dissent, that the Company reasonably believed no harm of *any* magnitude was forthcoming because the misappropriation had been fully disclosed to the public in the original 2015 articles and the public had failed to react. Pet. App. 26.[3] The court did not dispute that if that were true, there would be no liability. *See id*. 22a, 26a. But rejecting Facebook's view of the facts, the court found that "the extent of Cambridge Analytica's misconduct was *not* yet public when Facebook filed its 2016 10-K." Pet. App. 26a (emphasis added). While the 2015

[3] Facebook further argued that it reasonably believed there was no risk of Cambridge Analytica continuing to use the previously acquired data because it had told Facebook it had deleted the data. *But see* Pet. App. 11a-12a (noting Cambridge Analytica's refusal to confirm in writing that it had deleted both derivative *and* raw user data).

article included allegations of misconduct, those allegations were denied by those directly involved and Facebook simply said it would look into the matter and take "swift action" if it found wrongdoing, something it never publicly did until years after its misleading SEC filings. *Ibid*.

b. The court also reversed the district court's loss-causation holding.

The Ninth Circuit explained that loss causation can be established by showing that the "share price fell significantly after the truth" concealed by a misstatement "became known." Pet. App 32a (citation omitted). Here, Facebook's stock price fell dramatically in March 2018 after the Cambridge Analytica scandal revealed Facebook's assurances of user control were false. *Id*. 34a. The court rejected Facebook's claim that the revelations were not corrective because the truth had already been revealed by the original 2015 articles. "As previously discussed, the March 2018 revelation about Cambridge Analytica was the first time Facebook investors were alerted that Facebook users did not have complete control over their own data." *Ibid*.

The court further held that the Complaint adequately established loss-causation through the July 2018 price drop. Although the drop occurred later, the court recognized that in some cases, it may be "reasonable for the public to fail to appreciate the significance" of an adverse event fully until provided additional information about how the event affects the company. Pet. App. 37a (citing *In re Gilead Sci. Sec. Litig*., 536 F.3d 1049, 1054, 1057-58 (9th Cir. 2008), cert. denied, 556 U.S. 1182 (2009)). Here, the second drop occurred because "Facebook's earnings

report revealed new information to the market" that allowed investors to reassess their initial estimate of how the scandals would affect the Company's value. Specifically, the July earnings call revealed "dramatically lowered user engagement, substantially decreased advertising revenue and earnings, and reduced growth expectations going forward on account of the Cambridge Analytica and whitelisting scandals." Pet. App. 38a (cleaned up).

c. Judge Bumatay concurred in part and dissented in part. He believed that the risk-statements were not materially false because, in his view, a "careful reading" of the specific statements showed that Facebook did not "represent that Facebook was free from significant breaches at the time of filing," only that it was not suffering business harm as a result of any such breach. Pet. App. 44a.

The dissent agreed, however, that the user-control-statement claims should be reinstated. Respondents had "adequately shown that these statements were misleading based on the allegation that Facebook 'whitelisted' third parties." *Id*. 49a. Moreover, respondents had sufficiently alleged loss causation arising from the July price drop. *Id*. 51a. The dissent agreed that the drop occurring a few months after the initial corrective disclosure was not disqualifying—"sometimes it takes time for the full scope of a loss from a misrepresentation to materialize." *Id*. 50a. In this case, it was "plausible that the whitelisting revelation made on June 18 caused user disengagement and advertising revenue to diminish, which contributed to the lower earnings announced on July 25 and the immediate stock drop." *Id*. 51a. "At the very least," he concluded,

"Shareholders deserve some discovery to prove their theory of loss causation." *Ibid*.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant Review.

The first Question Presented does not warrant review because it is founded on a mischaracterization of what the Ninth Circuit held and the facts of this case. The court's actual holding does not conflict with any decision of this Court or the law of any circuit. No further review is required.

A. The Ninth Circuit Did Not Hold That Companies Must Disclose Past Events That Pose No Risk Of Business Harm.

Facebook's request for review fails at its premise: the Ninth Circuit did *not* hold that Facebook was required to disclose the Cambridge Analytica data breach even though it "present[ed] no known risk of ongoing or future business harm." Pet. i.

The Ninth Circuit held that implying a material data breach had not occurred, when it had, was misleading. Had Facebook flatly denied the incident happened, no one would doubt that the denial was false. Facebook does not dispute the general proposition that treating a materialized risk as merely hypothetical misleadingly implies that the risk has not yet transpired.

Instead, Facebook argued below that it did not have to disclose the event because it had no reason to believe the breach would lead to business harm given that the public allegedly already knew about it and did not care. *See* Petr. C.A. Br. 28-29. The Ninth

Circuit did not respond by saying this was irrelevant and that Facebook would be liable even if the public already knew the truth. To the contrary, in a portion of the opinion that Facebook fails to acknowledge, the court recognized that if Facebook was right, then its risk statements would be misleading, but not *materially* misleading, and therefore Facebook would have had no obligation to disclose the incident. *See* Pet. App. 26a.

In that passage, the Ninth Circuit evaluated Facebook's claim of no impending harm as a truth-on-the-market defense. Pet. App. 26a (citing *Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996)). Under this doctrine, "if the market has already become aware of the allegedly concealed information, the allegedly false information or material omission would already be reflected in the stock's price and the market will not be misled." Pet. App. 22a (quoting *Provenz*, 102 F.3d at 1493) (cleaned up). In other words, although a statement may have been false, if the market was already aware of the truth, the defendant's statement would not be *materially* false. *See Provenz*, 102 F.3d at 1492; *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 481 (2013).

Turning to the facts as alleged, the court acknowledged that the 2015 *Guardian* article included *allegations* suggesting Cambridge Analytica had acquired user data without consent. Pet. App. 26a. But the same article reported that both Kogan and the campaign using the data insisted that users *had* consented to the use. *Ibid*. The article also quoted Facebook as saying only that it would look into the allegations and take "swift action," if it found

wrongdoing. *Ibid*. At the time it made its risk-factor statements, however, Facebook had not publicly revealed the results of its investigation or taken any public action against those involved. *Ibid*. Instead, even after the 2016 10-K was filed, Facebook actively misled the public about the results of its investigation, "represent[ing] that no misconduct had been discovered." *Ibid*.; *see also id*. 13a.

Accordingly, the Ninth Circuit held that the factual premise of Facebook's defense, and this petition, was false: "the extent of Cambridge Analytica's misconduct was *not* yet public when Facebook filed its 2016 10-K." Pet. App. 26a (emphasis added); *compare* Pet. 2 ("Facebook faced no known threat of business harm from those past events, which were widely reported with no effect on Facebook's stock price") *with* Pet. App. 34a ("[T]he 2015 and 2016 articles . . . did not reveal that Cambridge Analytica had misused Facebook users' data.").[4]

By entertaining Facebook's argument, the Ninth Circuit made clear that it was *not* holding that companies have a duty to disclose past events that "present no known risk of ongoing or future business harm." Pet. i. Instead, it held that a company cannot

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[4] Facebook presented no other theory about why the Cambridge Analytica breach "present[ed] no known risk of ongoing or future business harm." Pet. i. Facebook sensibly did not argue that it believed the breach presented no business risk because it was confident it could hide the truth indefinitely. In fact, the breach was a ticking time bomb that would inevitably blow up in the Company's face once it became public, as ultimately happened.

treat an adverse event as a hypothetical risk when the risk *is* material and has already materialized.[5]

B. There Is No Circuit Conflict.

The Ninth Circuit's actual holding does not conflict with the law of any circuit.

1. The Circuits Uniformly Hold That Treating A Material Risk As A Hypothetical Prospect Is Misleading If The Risk Has Already Materialized.

The Ninth Circuit's decision is consistent with the uniform law of the circuits, even on Facebook's description of the case law. Each of the circuits Facebook cites recognizes that it is misleading for a company to portray a material risk to its business as a merely hypothetical prospect when the risk (a) has already materialized, or (b) has not yet materialized but is virtually certain to occur. *See Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021); *Set Capital LLC v. Credit Suisse Group AG*, 996 F.3d 64, 85 (2d Cir. 2021); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 242 (3d Cir. 2017); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009); *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236,

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[5] Facebook separately argued below that it was not required to disclose the data breach because it had written its particular risk statements in a way that made business harm the only warned-of risk and because it believed it had prevented any business harm by getting Cambridge Analytica and Kogan to delete the misappropriated user data. Petr. C.A. Br. 31. The Ninth Circuit rejected that reading of the statements, *see* Pet. App. 24a, and Facebook does not reprise that case-specific, fact-bound argument here.

1255-56 (10th Cir. 2022); *In re Harman Intern. Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104 (D.C. Cir. 2015).

Facebook cites cases dismissing claims because various business harms had not yet occurred. *See* Pet. 19-20. But that is because the warned-of risk in those cases *was* a particular form of business harm; none of the cases suggests that a company may treat a material adverse event—be it a data breach, an E. coli outbreak at a baby food factory, or FDA denial of a drug application—as a hypothetical risk when the event has already occurred, just because the incident has yet to inflict follow-on business harm because the company has kept the public in the dark.

For example, in *Karth*, the plaintiff claimed a company engaged in securities fraud when it "characterized the risk of a supply interruption as hypothetical [while] that disruption was actively occurring." 6 F.4th at 138. The First Circuit held that the statement was not materially misleading because the warned-of risk was a supply disruption and "the facts alleged do not indicate that a supply interruption was happening or was even close to a 'near certainty.'" *Id.* at 138.

Likewise, the Third Circuit found no liability in *Globus Medical* because the risk "actually warned of [was] the risk of adverse effects on sales—not simply the loss of independent distributors generally," and all the complaint alleged was that the company had lost one distributor serving portions of Mississippi and Louisiana. 869 F.3d at 242.

In the Tenth Circuit, the plaintiffs in *Pluralsight* alleged that "the risk factors 'misled investors by stating Pluralsight might have trouble hiring and ramping sales representatives, while omitting the

company was already months and dozens of representatives behind, severely threatening billings growth.'" 45 F.4th at 1255. The Tenth Circuit dismissed because this warned-of risk had neither occurred nor was virtually certain to materialize. *See id*. at 1256 ("[E]ven if Pluralsight had already fallen behind its sales ramp capacity plan by February 2019, that problem could still be remedied at the time Pluralsight disclosed the risk to investors.").

In this case, the Ninth Circuit held that the relevant warned-of risk was the prospect of "third parties improperly accessing and using Facebook users' data." Pet. App. 23a; *supra* 13 n.4. That prospect was more than a "near certainty"; it had already occurred. *Ibid*.

To be sure, an adverse event's potential for business harm is an important *materiality* consideration. *Cf.* Pet. 24 (arguing that requiring companies to disclose events that pose no business risk "is inconsistent with the SEC's directive that public companies need only disclose 'factors that make an investment . . . speculative or risky' if those factors would be '*material*' to investors") (quoting 17 C.F.R. § 229.105(a) (emphasis added by petitioner)); Law Profs. Amicus Br. 5-6 (same). If the event risks no business harm, a defendant can argue that a reasonable investor would not find it material. But when the event *is* material—as the unauthorized release of 30 million users' private information surely is—every circuit that has addressed the question would hold that treating the risk as hypothetical when it has already materialized is misleading.

2. No Circuit Holds That Risk Factor Statements Are Categorically Immune To The General Rule.

Facebook claims that the Sixth Circuit makes an exception to the consensus rule when the statement is made in the risk-factor section of an SEC filing. Pet. 18-19. This Court has already denied a petition asking it to adopt that position, asserting the same alleged circuit conflict. *See Alphabet Inc. v. Rhode Island*, No. 21-594. There is no reason for a different result here.

The only Sixth Circuit authority Facebook cites is the unpublished decision in *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483 (6th Cir. 2015). That opinion offered general musings on the specific context of risk-factor statements but ultimately concluded that "[w]hile there may be circumstances under which a risk disclosure might support Section 10(b) liability, this is not that case." *Id*. at 491. The panel explained that "the plaintiffs have not alleged facts showing any investment risk had already materialized" because "eight batches of chicken testing positive for drug and antibiotic residues is hardly a companywide food safety epidemic." *Ibid*.

Accordingly, the actual holding in *Bondali* is entirely consistent with the law described above—the defendant did not mislead investors because the small number of affected chickens did not rise to the level of a *material* adverse event.

Nor does *Bondali*'s broader dicta on risk statements establish Facebook's categorical rule as law of the Sixth Circuit. The decision is unpublished and no precedential Sixth Circuit decision has ever endorsed *Bondali*'s risk-factor musings. Indeed, no

Sixth Circuit decision (published or not) has ever cited *Bondali* for *any* proposition in the near decade since it was written. The only district courts in the circuit to have considered the relevant portion of *Bondali* have either refused to follow it as non-binding, distinguished it, or both. *See Weiner v. Tivity Health, Inc.*, 365 F. Supp. 3d 900, 909-10 (M.D. Tenn. 2019) (noting that "*Bondali* is unpublished and therefore not binding precedent or binding authority") (citing, *e.g.*, *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 796 n.4 (6th Cir. 2015)); *ibid*. (finding risk-factor statements misleading while noting that "the court in *Bondali* explicitly recognized that 'there may be circumstances under which [such] a risk disclosure might support Section 10(b) liability'") (citing 620 Fed. Appx. at 491); *Norfolk Cnty. Ret. Sys. v. Cmty. Health Sys., Inc.*, 2016 WL 4098584, at *13-*14 (M.D. Tenn. 2016) (same).

Finally, even if the decision were precedential, there is no basis to think that the *Bondali* panel would have decided this case any differently. As noted, the panel held open that risk-factors statements could be actionable in appropriate circumstances and dismissed the claims before it because the allegedly adverse event was minor. Here, the Cambridge Analytica breach was a massive failure that did not immediately harm the Company only because Facebook kept the truth from the public. If that is not a circumstance in which "a risk disclosure might support Section 10(b) liability," it is hard to imagine what would be. *Bondali*, 620. Fed. Appx. at 491.

C. The First Question Presented Is Not Recurringly Important, And This Is A Poor Vehicle For Deciding It.

Facebook's claims that the first Question Presented is important, and that this case presents a vehicle to resolve it, likewise depend on the petition's mischaracterization of the decision below and the facts of this case. *See* Pet. 23-24, 25-26. The problem Facebook hypothesizes not only does not arise in this case; it has not arisen in any other case Facebook cites, no doubt because courts recognize that events that pose no risk of harm to a business are not material to investors and therefore need not be disclosed.

This is also a bad case for providing any clarification to this area of the law because the Question Presented garbles falsity, scienter, and materiality. *See* Pet. i (asking whether a statement is "false or misleading" if it misleads about a past event that poses "no *known* risk of ongoing or future business harm" and is therefore immaterial) (emphasis added). Facebook is forced to miscast its scienter and materiality objections as falsity problems because the Ninth Circuit did not reach its scienter objections and rejected the only materiality argument the Company raised on appeal for fact-bound reasons. *See* Pet. App. 26a, 191a; Petr. C.A. Br. 33-35. But that is no reason for this Court to entertain Facebook's incorrect framing.

Finally, the case presents a poor case for considering *Bondali*'s supposed categorical protection for risk-factor statements because Facebook did not advance that position in its brief to the panel and the Ninth Circuit did not address it. *See* Petr. C.A. Br.

25-33.[6] "Ordinarily, the Court does not decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (cleaned up, citation omitted).

D. The Decision Below Is Correct.

The petition should further be denied because the Ninth Circuit's decision is correct.

To the extent Facebook is simply arguing that its statements would not have been materially misleading if the public already knew the truth about the breach, the Ninth Circuit agreed. Facebook's argument fails because its truth-on-the-market defense has no merit, for the reasons the Ninth Circuit gave and which Facebook does not acknowledge or rebut.

Facebook suggests that none of this matters because risk statements are categorically incapable of misleading investors about already-materialized risks. That is wrong as well. Facebook offers no support for its factual claim that investors never view risk-factor statements as conveying information about past events. *See* Pet. 26. In fact, there is no reason to believe that investors read risk statements differently depending on whether they are discussed in one section of an SEC filing or another, or in a press release or conference call. Whether a statement is materially misleading is a "fact specific" inquiry that is not susceptible to broad, categorical pronouncements. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 43 (2011); *see also Omnicare,*

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[6] Facebook discussed *Bondali* for the first time in its petition for rehearing, but did not ask the Ninth Circuit to embrace *Bondali*'s supposed categorical rule. *See* Pet. Reh. 15.

Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 187-88 (2015) (rejecting categorical rule that statements of opinion cannot mislead about historical facts); *Basic Inc. v. Levinson*, 485 U.S. 224, 236 (1988) ("We therefore find no valid justification for artificially excluding from the definition of materiality information concerning merger discussions.").

Although Congress or the SEC could perhaps adopt a special carveout for risk disclosures, neither has done so. To the contrary, the SEC has specifically warned that risk disclosures regarding cybersecurity can be materially misleading when they treat data breaches as hypothetical risks even though a serious breach has already occurred. *See* Interpretation, Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8166, 8169-70 (Feb. 26, 2018) ("In meeting their disclosure obligations, companies may need to disclose previous or ongoing cybersecurity incidents or other past events in order to place discussions of these risks in the appropriate context."); *id*. at 8170 (explaining that when a company has suffered "a material cybersecurity incident," it "likely would not be sufficient for the company to disclose that there is a risk" of such an incident and the company "may need to discuss the occurrence of that cybersecurity incident and its consequences" to "effectively communicate cybersecurity risks to investors").

Finally, to the extent Facebook suggests a legal rule under which a company can always treat a transpired adverse event as a hypothetical risk so long as the follow-on harm to the business has not yet occurred or its scope may be unclear, there is no merit

to that suggestion either. Denying—explicitly or implicitly—that there has been an E. coli outbreak at a baby food factory is false and misleading so long as the event has occurred. Whether the truth is material, and therefore must be disclosed, depends on whether there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Basic*, 563 U.S. at 231-32 (cleaned up). Investors may reasonably think that adverse events are material when they pose a real *risk* to the company's bottom line, even if the extent of that harm is not entirely clear or has not yet been inflicted.

II. The Second Question Presented Does Not Warrant Review.

Facebook also asks the Court to decide whether "Federal Rule 8 or Rule 9(b) suppl[ies] the proper pleading standard for loss causation in a private securities-fraud action[.]" Pet. i. That question also does not warrant review.

Rule 8 requires only a "short and plain statement" of the claim. Fed. R. Civ. P. 8(a)(2). In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court held that loss causation allegations do not satisfy Rule 8 by asserting that a company's stock price was artificially inflated at the time of purchase. 544 U.S. at 342, 346. The Court also noted that other rules or statutory provisions might impose "special further requirements in respect to the pleading of proximate causation or economic loss." *Id*. at 347.

One potential source of additional pleading requirements is Rule 9(b), which provides that "[i]n

alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Courts widely hold that a complaint satisfies this particularity requirement by pleading the "'who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).[7]

The question, then, is whether loss causation allegations must be pleaded with greater particularity than normal. There is no considered circuit conflict on that question, and this Court has repeatedly denied petitions asking this Court to answer it. *See Amedisys, Inc. v. Pub. Empl. Ret. Sys. of Miss.*, No. 14-1200; *Gilead Sci., Inc. v. St. Claire*, No. 08-1021; *Liu v. Credit Suisse First Boston Corp., Inc.*, No. 06-467. Even if the question warranted review in some case, it is hard to imagine a worse case for resolving it than this one.

A. This Case Is A Surpassingly Bad Vehicle For Addressing The Second Question Presented.

Facebook acknowledges that the Ninth Circuit, both in this case and in prior decisions, agrees with Facebook's answer to the second Question Presented. *See* Pet. 31. Respondents likewise acknowledged below that their loss causation allegations were

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[7] *See also, e.g.*, *United States ex rel. Martin v. Hathaway*, 63 F.4th 1043, 1047 (6th Cir. 2023); *Vexol, S.A. de C.V. v. Berry Plastics Corp.*, 882 F.3d 633, 637 (7th Cir. 2018); *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 10 (1st Cir. 2016); *Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003).

subject to Rule 9(b)'s particularity requirement. *See* Resp. C.A. Reply Br. 28 ("The question is whether the Complaint's [loss causation] explanation is plausible and pleaded with particularity."). Facebook cites no case in which the Court has granted certiorari to decide a question on whose answer the lower court and all the parties agree.

But it gets worse. Before the Ninth Circuit, Facebook never argued that the Complaint should be dismissed for failure to plead loss causation with particularity. Indeed, the loss causation section of its Ninth Circuit brief mentioned Rule 9(b) only twice in passing and addressed particularity not at all. See Petr. C.A. Br. 45-62.

Instead, Facebook raised a series of unrelated objections that it reprises here with two fig-leaf references to Rule 9(b) thrown in for cover. *See* Pet. 33, 34. For example, Facebook argues that the Ninth Circuit's "double-drop theory of loss causation" is supposedly precluded by "*Basic*'s efficient-markets hypothesis," with no explanation of what Rule 9(b)'s particularity requirement has to do with that objection. Pet. 34. Facebook likewise challenges loss-causation for the whitelisting statements, not because the Complaint lacked particularity but because the allegations purportedly "cannot be squared" with an alleged "black-letter rule that a securities fraud plaintiff must tie his losses to the revelation of a defendant's alleged fraud" rather than the "purported impact of that fraud." Pet. 35 (citing *Dura*, not Rule 9(b)); *see also* Pet. 36 (arguing that both rulings are "at odds with 'the traditional elements of causation and loss,'" not with any pleading requirement).

At the same time, Facebook largely ignores the actual Question Presented, offering almost no argument about why Rule 9(b) applies to loss causation allegations in the first place. *See* Pet. 33-36. Accordingly, were the Court to grant the petition, it could not count on an adversarial presentation on the actual Question Presented or a meaningful discussion of the question from Facebook at all. There is every reason to suspect that Facebook would continue to treat the Question Presented as nothing more than a steppingstone to the arguments it really wants the Court to address but cannot claim meet the Court's cert. criteria.[8]

B. There Is No Circuit Split.

Even if this case presented a vehicle for deciding whether Rule 9(b) applies to loss causation allegations, there is no circuit conflict over the answer. Although the Fourth and Ninth Circuits have held that Rule 9(b) applies to loss causation,[9] no other circuit has squarely held the opposite. *Contra* Pet. 28 (claiming that in "the Fifth and Sixth Circuits, loss causation allegations need only satisfy Rule 8(a)(2)'s 'short and plain statement' requirement.").

For example, the Fifth Circuit's decision in *Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009), did not address the question. Instead, the court only decided whether a complaint satisfied Rule

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[8] Because Facebook's real complaints have nothing to do with Rule 9, this case presents the Court no vehicle to "provide guidance on what [the Rule 9(b)] standard requires." Pet. 31.

[9] *See Singer v. Reali*, 883 F.3d 425, 444-45 (4th Cir. 2018); Pet. App. 33a (citing *Or. Pub. Emps. Ret. Fund. v. Apollo Grp., Inc.*, 774 F.3d 598, 605 (9th Cir. 2014)).

8(a) as construed by this Court's then-recent decision in *Dura*. *See id*. at 255-267. The Fifth Circuit said nothing about whether Rule 9(b)'s particularity requirement *also* applies, no doubt because the defendants raised no Rule 9(b) argument.[10] Likewise, *Public Employees Retirement Systems of Mississippi v. Asys, Inc.*, 769 F.3d 313 (5th Cir. 2014), does not even cite Rule 9(b), much less hold it inapplicable. *See id*. at 320.

Nor did either decision *implicitly* hold that *only* Rule 8 applies by applying *Dura*'s interpretation of that rule to the case before it. *Dura* itself applies Rule 8 even while holding open that other rules (like Rule 9(b)) might also apply. *See* 544 U.S. at 346; *see also* Pet. 6 (Facebook making same assumption). The Fifth Circuit decisions left the question open as well.

Facebook's claim that the Sixth Circuit decided the Question Presented rests on a misleading quotation of a single sentence in a decision that did not involve the question. Facebook quotes *Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp*., 830 F.3d 376, 384 (6th Cir. 2016), as holding that "'[a]t the dismissal stage, it is sufficient that [allegations of loss causation] be plausible.'" Pet. 29 (quoting 830 F.3d at 384) (alterations in petition). But what the Sixth Circuit wrote was this: "At the dismissal stage, it is sufficient that OPERS's allegations be plausible—*no final determination of amount of loss or its cause is required*." 830 F.3d at 384 (emphasis added).

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[10] *See* Opening Br. of Def. US Unwired, Inc., 2007 WL 6878086 (never arguing complaint failed to satisfy Rule 9(b)); Individual Appellees' Br., 2007 WL 6878087 (same).

Facebook omits the italicized words, which make clear the court was simply making the point that plaintiffs need not conclusively establish the amount of the loss or its cause at the pleading stage, not that Rule 8 provides the only applicable pleading rule for loss causation allegations. In fact, the case did not concern pleading standards, but instead addressed substantive questions regarding the "viability of alternative theories of loss causation" such as "materialization of the risk." *Id*. at 385.[11]

C. The Question Is Not Important.

Facebook stresses that other circuits have noted the question whether Rule 9(b) applies to loss causation without resolving it. Pet. 29-31. But that just shows the question lacks practical importance in the securities context. Rule 9(b) has been on the books since shortly after the first federal securities statutes were enacted in the 1930s.[12] *Dura* was decided twenty years ago. The Rule 9(b) question remains unresolved in so many circuits so many years later because the difference in pleading standards is

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[11] The unpublished decision in *Plymouth County Retirement Association v. ViewRay*, 2022 WL 3972478 (6th Cir. 2022), did nothing to change the state of the law in the Circuit (an unpublished decision never can). The parties in that case again raised no question of whether Rule 9(b) applied to loss causation; so Facebook is forced to point to a sentence in the legal background section that had no bearing on the questions decided in the case. *See* Pet. 29; *ViewRay*, *supra*, at *3 (noting that the "district court reached only the falsity and scienter elements").

[12] Rule 9(b) was included in the original version of the Federal Rules of Civil Procedure promulgated in 1938. *See* William M. Richman, et al., *The Pleading of Fraud: Rhymes without Reason*, 60 S. Cal. L. Rev. 959, 965 (1987). The Securities Exchange Act was passed in 1934. *See* Pub. L. 73-291, 48 Stat. 891.

insufficiently important in practice to require an answer. *See, e.g.*, *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 239 n.6 (1st Cir. 2013) (finding no need to decide question because plaintiffs' "allegations are specific enough that the outcome would be the same under either standard"); *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 403 (2d Cir. 2015) (same); *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1153-54 (10th Cir. 2015) (same).

This case illustrates the point. As Facebook notes, the initial panel decision included unprompted language, stating that respondents needed only to satisfy Rule 8(a)'s requirement of a "short and plain statement." Pet. 31a (quoting Pet. App. 87a). When Facebook pointed out that circuit precedent holds that loss causation must be pleaded with particularity under Rule 9(b), the panel revised the opinion to conform to that precedent, without changing the result. *Ibid*. Further changes were unnecessary because the distinction made no difference here—as noted, Facebook made no Rule 9(b) argument to the panel and nothing in the opinion turns on particularity rules. Accordingly, although Judge Bumatay disagreed with other aspects of the majority opinion, even he did not believe the Complaint failed Rule 9(b)'s particularity standard for loss causation and did not object to the majority's revisions to the opinion. Pet. App. 5a, 50a-51a.

D. The Ninth Circuit Did Not Err In Applying Rule 9(b) To This Case.

Finally, Facebook's objections to the decision below on the merits are unconvincing.

1. Facebook ultimately agrees with the panel's answer to the second Question Presented. Even if the

panel's application of that standard to the specific facts of this case could warrant review (which it does not), there was no error here.

Rule 9(b) requires only that "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To this day, Facebook has never argued that respondents' loss causation allegations omitted any "who, what, when, where, or how" detail or otherwise lacked particularity. Instead, it argues that respondents' particularized allegations do not state a claim for loss causation. Pet. 33-36. But that is a question of substantive law, not pleading rules.

Facebook attempts to paper over the difference with conclusory assertions that the Ninth Circuit's understanding of the substantive law "cannot survive scrutiny under Rule 9(b)," Pet. 34, as if the Rule creates some kind of all-purpose obstacle to loss causation claims or requires special judicial skepticism of loss causation theories. In fact, Rule 9(b) raises the pleading bar in only one respect—the level of "particularity" required in a complaint. Fed. R. Civ. P. 9(b); *see Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993) (Rule 9(b) "impose[s] a *particularity requirement* in two specific instances") (emphasis added)). It does not, as Facebook sometimes implies (Pet. 33), establish a heightened *plausibility* standard. Plausibility is governed by *Twombly*'s interpretation of Rule 8 and by the Private Securities Litigation Reform Act, which enacted a heightened plausibility standard only for scienter. *See Universal Health Svcs., Inc. v. United States*, 579 U.S. 176, 195 n.6 (2016) (plaintiffs asserting fraud claims must

"plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b)"); *Grigsby v. BofI Holding, Inc.*, 979 F.3d 1198, 1206 (9th Cir. 2020) (same); 15 U.S.C. § 78u-4(b)(2)(A) (requiring allegations giving rise to a "strong inference of scienter" in securities cases).

2. Finally, in addition to having nothing to do with Rule 9(b), Facebook's objections have no merit.

a. Loss causation simply requires proof that the defendant's misrepresentation "caused a subsequent economic loss." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011); *see also Dura*, 544 U.S. at 344-45 (same). While such causation is often proven by showing a stock drop following a "corrective disclosure," loss causation "is a 'context-dependent' inquiry as there are an 'infinite variety' of ways for a tort to cause a loss." *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016) (citing *Assoc'd Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983)) (internal citation omitted).

Facebook cites no authority categorically precluding recovery for two stock drops caused by the same misstatement. Pet. 34-35. Nor is there anything illogical about that prospect. For example, news may leak on one day that a company overstated revenue and the company may then reveal the full amount of the overstatement a week later. Consistent with *Basic*'s efficient market hypothesis, the market will react to the initial news by devaluing the stock in accordance with the market's best estimate about real revenues. If that estimate turns out to be wrong, the market will react again when the actual figures are revealed because it has new and better information.

There is no question that the losses incurred by both stock drops would be caused by the false statement, which is all that loss causation requires.

Nothing about the Ninth Circuit's decision contradicts the efficient market presumption of *Basic*, which presumes markets generally integrate available information into a stock price, not that investors are clairvoyant. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 272 (2014). Were the law otherwise, companies would have an incentive to strategically correct their misstatements in stages to take advantage of Facebook's proposed categorical prohibition against double-drop recoveries.

In this case, the market reacted when it learned that Facebook's repeated claims about respecting user privacy were false through news of the Cambridge Analytica breach. Investors made their best estimates about how consumers and Facebook would respond and how those responses would affect the Company's value. But investors did not have "all the essential facts" with which to correctly assess Facebook's true market value absent the artificial inflation maintained by the false statements. *Contra* Pet. 35. When Facebook later provided additional information revealing that user disengagement had been greater than the market expected and detailing the full scope and cost of Facebook's response to regain user confidence, the market integrated that new, more-accurate information into the stock price.[13]

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[13] Facebook complains that the market was reacting to other news as well. Pet. 34. But respondents have fully acknowledged

b. Facebook also argues that its misleading concealment of its whitelisting practices caused investors no injury, pointing to the fact that the market did not immediately react when the practice was revealed. Pet. 35. But by that point, the market had already priced-in the news that Facebook's user-control promises were false, based on the Cambridge Analytica revelations. And, as Judge Bumatay explained, "it's plausible that the whitelisting revelation made on June 18 caused user engagement and advertising revenue to diminish, which contributed to the lower earnings announced on July 25 and the immediate stock drop." Pet. App. 51a.

Judge Bumatay and the majority both also stressed that this is just the beginning of the case and that the court's ruling did not mean that Facebook ultimately could be held liable for "billions of dollars in this case alone." Pet. 26; *see* Pet. App. 51a (Judge Bumatay noting that discovery may disprove loss causation); *Id*. 38a (majority opinion) (similar). The court simply, and correctly, held that the Complaint should not be dismissed at the outset and that, "at the very least, Shareholders deserve some discovery to prove their theory of loss causation." *Id*. 51a (Bumatay, J., concurring in part and dissenting in part); *see also id*. 38a (majority opinion) (same).

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that. They do not seek to recover the entirety of the market loss and recognize that they will have to disaggregate the portion of the drop attributable to Facebook's misleading statements from the portion attributable to other factors. *See id*. 38a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 29, 2024