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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a risk disclosure in the "Risk Factors" section of an SEC Form 10-K filing, as required by Item 105 of SEC Regulation S-K, is false or misleading when it does not disclose that the warned-of risk has materialized in the past, even if the past event presents no known risk of ongoing or future business harm.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Facebook, Inc., now known as Meta Platforms, Inc.; Mark Zuckerberg; Sheryl Sandberg; and David M. Wehner. Meta Platforms, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are Amalgamated Bank; Public Employees' Retirement System of Mississippi; and James Kacouris.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a), as amended, is reported at 87 F.4th 934. The opinions of the district court (Pet. App. 109a-127a, 128a-224a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2023. A petition for rehearing was denied on December 4, 2023 (Pet. App. 5a). The petition for a writ of certiorari was filed on March 4, 2024, and granted as to the first question presented on June 10, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. See App., *infra*, 1a-3a.

STATEMENT

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(b) of the Securities and Exchange Commission (SEC) do not require publicly traded companies to disclose all material information in their possession. Instead, those provisions require disclosure only when the omission of such information would render the company's affirmative statements to the market misleading. Pure omissions are thus not actionable under Section 10(b) and Rule 10b-5(b).

This case involves the latest stratagem by private plaintiffs to circumvent that familiar rule. Item 105 of SEC Regulation S-K requires publicly traded companies to include in their annual reports a section entitled "Risk Factors," which discusses the material factors that make an investment in the company's securities speculative or risky. As typically worded, a disclosure in the "Risk Factors" section states that, if some triggering event occurs, some consequence—usually harm to the business—could or may occur.

Despite the obviously forward-looking and probabilistic nature of such risk disclosures, private plaintiffs have increasingly brought securities actions alleging that the disclosures are misleading. The theory underlying those actions is that such a disclosure contains an implied assertion that the triggering event had never occurred in the past and that a previous event presents no present risk of harming the business. The question presented is whether

that theory of securities fraud is valid under Section 10(b) and Rule 10b-5(b).

Petitioners are Facebook, Inc., now known as Meta Platforms, Inc., which operates the social-media platform Facebook, and three of Meta's current or former executives; respondents are lead plaintiffs representing a putative class of Meta investors. In 2015, it became public that a political-consulting firm called Cambridge Analytica had improperly obtained data on millions of Facebook users and used the data to assist the presidential campaign of Senator Ted Cruz. Meta required that Cambridge Analytica delete the data, and Cambridge Analytica certified that it had. But Cambridge Analytica did not delete the data. Instead, Cambridge Analytica retained and used the data to assist Donald Trump's presidential campaign in 2016. In 2018, when Cambridge Analytica's continued use of the data became known, Meta's stock price fell.

Respondents filed suit against petitioners days later, alleging a number of theories of securities fraud. As is relevant here, respondents alleged that certain risk disclosures in Meta's 2016 annual 10-K filing were misleading. The challenged statements disclosed that security breaches, loss of user trust in Meta's products, and misuse of user data by third parties "could" or "may" result in harm to Meta's business. Respondents contended that the statements were misleading because the statements did not disclose Cambridge Analytica's misuse of Facebook user data.

The district court rejected that theory and dismissed respondents' claims, but the Ninth Circuit affirmed in part and reversed in part in a split decision. The court agreed with petitioners that the statements warning of the risks from security breaches and loss of user trust were not actionable. But the court reached a different conclusion as to the statements warning of the risk of the

misuse of user data by third parties. According to the court, those statements were misleading because they portrayed the possibility of data misuse as hypothetical when Meta knew that Cambridge Analytica had in fact previously misused Facebook user data. Judge Bumatay dissented in relevant part, concluding that no reasonable investor would interpret statements concerning the prospect of future business harm from data misuse as impliedly asserting that no data misuse had ever occurred.

The Ninth Circuit's decision is deeply flawed, and this Court should now reverse. Item 105 of Regulation S-K requires the disclosure of "risk"—that is, a possibility of *future* harm. The statements companies make in the "Risk Factors" section of their securities filings are thus inherently forward-looking; they typically signal that, if some triggering event were to occur, business harm "could" or "may" result. In light of the language of typical risk disclosures and their place in the broader context of a 10-K filing, no reasonable investor would read such a statement as impliedly asserting anything about whether the triggering event has occurred in the past or whether such an occurrence created a present risk of harm to the company. The Ninth Circuit's contrary rule would create disclosure obligations of the very sort this Court has rejected; lead to overwarning in SEC filings; and encourage lawsuits alleging fraud by hindsight. That rule cannot be correct, and the judgment below should be reversed.

A. Background

1. The Securities Exchange Act of 1934 makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device" in contravention of the rules prescribed by the SEC. 15 U.S.C. 78j(b). SEC Rule 10b-5(b) makes it unlawful for any person subject to the Exchange Act "[t]o

make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b).

From those sources of law, this Court has inferred a private right of action permitting parties to recover damages for securities fraud. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014). The elements of a private securities-fraud claim under Section 10(b) and Rule 10b-5(b) are a material misrepresentation or omission; scienter; a connection with the purchase or sale of a security; reliance; economic loss; and loss causation. *Ibid.*

As the Court recently reiterated, Section 10(b) and Rule 10b-5(b) "do not create an affirmative duty to disclose any and all material information." *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 264 (2024) (citation omitted). Of particular note here, "[p]ure omissions are not actionable under Rule 10b-5(b)." *Id.* at 266. Instead, the failure to disclose information can support a claim under Rule 10b-5(b) "only if the omission renders affirmative statements made misleading." *Id.* at 265. Whether an affirmative statement is misleading, in turn, is assessed from the "the perspective of a reasonable investor." *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 186-187 (2015). The inquiry is "objective" in nature and "depends on [the] context" in which the affirmative statement is made. *Id.* at 187, 190.

Because Section 10(b) and Rule 10b-5(b) do not create affirmative disclosure obligations, "companies can control what they have to disclose under [those provisions] by controlling what they say to the market." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 45 (2011). Accordingly, "[e]ven with respect to information that a reasonable investor might consider material," *ibid.*, disclosure is

not required unless it is necessary to render an affirmative statement not misleading, see *Macquarie*, 601 U.S. at 265.

2. The SEC requires publicly traded companies to file annual reports on SEC Form 10-K. See 15 U.S.C. 78m (a)(2); 17 C.F.R. 249.310. Those annual reports, also known as "10-K filings," are designed to "make information publicly available to investors on an ongoing basis to aid in their investment and voting decisions." 67 Fed. Reg. 58,480 (Sept. 16, 2002).

To accomplish that goal, many SEC regulations require a company to disclose in its 10-K filings various information about the company's *current* business operations. For example, a company must make disclosures about its "general development of the business" and "[a]ny material changes to a previously disclosed business strategy," and "any material pending legal proceedings" against the company. 17 C.F.R. 229.101(a), 229.103(a); SEC Form 10-K. A company must also disclose "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. 229.303(b)(2)(ii).

Before 2005, a company was not required to disclose in its 10-K filings the material *future* risks to investors from investing in the company's securities. Although a company would often include such risk disclosures as "cautionary statements" in order to qualify under the statutory safe harbor for forward-looking predictions or under the common-law "bespeaks caution" doctrine, see 15 U.S.C. 78u-5(c)(1)(A)(i); *Kolominsky* v. *Root, Inc.*, 100 F.4th 675, 688 (6th Cir. 2024), the disclosures were *required* only in the context of offerings, see 84 Fed. Reg. 12,688 (Apr. 2, 2019).

In 2005, the SEC extended the risk-disclosure requirements to 10-K filings. 70 Fed. Reg. 44,830 (Aug. 3, 2005). Under a rule known as Item 105 of Regulation S-K, a company's 10-K filing must now include a section captioned "Risk Factors" that discusses "the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. 229.105(a). The discussion "must be organized logically with relevant headings," and each risk factor must "be set forth under a subcaption that adequately describes the risk." *Ibid.* Under each subcaption, the company must "explain how each risk affects the registrant or the securities being offered." 17 C.F.R. 229.105(b). Item 105 encourages companies to discuss relevant risks "[c]oncisely" and "in plain English." *Ibid.*[1]

B. Facts And Procedural History

1. Petitioner Facebook, Inc., now known as Meta Platforms, Inc., is a technology company that operates the Facebook social-media platform. Facebook enables users to connect with each other, share news and personal updates, and "like" and comment on each other's posts. Users can also download third-party applications integrated into Facebook for a variety of purposes, including to play games and connect further with their friends. Users can share information, such as their age, gender, location, interests, the posts they "like," and the people they have "friended," with other users and also with third-party applications. Pet. App. 6a, 8a; J.A. 3, 22, 23, 202-203, 414-415.

[1] At the time of the disclosures in this case, the risk-disclosure rule was located at 17 C.F.R. 229.503(c). In 2019, the SEC moved the rule to its current location of 17 C.F.R. 229.105. See 84 Fed. Reg. 12,688-12,689.

2. In 2013, Aleksandr Kogan, a professor at Cambridge University and co-founder of a company called Global Science Research, developed a third-party application called This Is Your Digital Life, which featured a personality quiz. Approximately 270,000 Facebook users downloaded Kogan's application and took the quiz. To do so, those users consented to share their data, as well as certain data about their Facebook friends to the extent their friends' settings permitted such sharing. Through this mechanism, Kogan and Global Science Research obtained the data of millions of Facebook users. Kogan used the data to create "personality scores" designed to predict political voting behavior. Pet. App. 10a-11a, 133a; J.A. 38-40, 72-74, 81-82, 202-203, 204.

In December 2015, a British newspaper, the Guardian, reported that Kogan had sold the data he collected to the political-consulting firm Cambridge Analytica. That sale violated Meta's policy prohibiting the transfer of Facebook user data to third parties. The article claimed that Cambridge Analytica used the personality scores to create psychological profiles of American voters, which it then deployed in support of the 2016 presidential campaign of Texas Senator Ted Cruz. An opinion piece in the New York Times picked up on the Guardian's article a few days later. Pet. App. 10a-11a, 190a; J.A. 340-341, 616-630.

Shortly after the Guardian article, Meta removed This Is Your Digital Life from Facebook. Pet. App. 134a. It also demanded and received written certifications from Kogan, Global Science Research, Cambridge Analytica, and Cambridge Analytica's parent company that they had deleted the Facebook user data from their systems. The news that Cambridge Analytica had obtained Facebook user data and exploited it for the Cruz campaign had no effect on Meta's stock price. Pet. App. 14a, 45a; J.A. 105-107, 202-203, 213-215, 295-297, 591.

On March 17, 2018, the Guardian and the New York Times reported that Cambridge Analytica had lied to Meta. Contrary to its written certification, Cambridge Analytica had retained the user data and used the data to support Donald Trump's 2016 presidential campaign. Meta immediately removed Kogan, Cambridge Analytica, and other related parties from Facebook and launched a further investigation. Meta's stock price declined by 18% between Monday, March 19, and Tuesday, March 27. Pet. App. 14a, 15a, 134a; J.A. 13-14, 203-204, 366-367, 634-641.

3. On March 20, 2018, two days after the news reports concerning Cambridge Analytica, a class-action complaint was filed against Meta and others in the United States District Court for the Northern District of California. D. Ct. Dkt. 1. Respondents Amalgamated Bank and the Public Employees' Retirement System of Mississippi were appointed lead plaintiffs; respondent James Kacouris filed a separate action that was consolidated with the lead action. See D. Ct. Dkt. 56. Respondents then filed a consolidated complaint, which asserted claims against Meta and three of its executives, petitioners Mark Zuckerberg, Sheryl Sandberg, and David Wehner, under Sections 10(b), 20(a), and 20A of the Exchange Act and SEC Rule 10b-5. See J.A. 1-409. Respondents sought to proceed on behalf of a class of investors who purchased Meta stock between February 3, 2017, and July 25, 2018. J.A. 2.

Respondents' operative complaint alleges a variety of theories of securities fraud related to Meta's privacy and data-protection practices. As is relevant here, respondents alleged that petitioners' statements in the "Risk Factors" section of Meta's 2016 10-K filing, dated February 2, 2017, were misleading in light of Cambridge Analytica's actions. See Pet. App. 18a; J.A. 281-282, 410-549. Respondents focused on the following subsection of the "Risk Factors" section:

> ***Security breaches and improper access to or disclosure of our data or user data, or other hacking and phishing attacks on our systems, could harm our reputation and adversely affect our business***
>
> Our industry is prone to cyber-attacks by third parties seeking unauthorized access to our data or users' data. Any failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data could result in the loss or misuse of such data, which could harm our business and reputation and diminish our competitive position. In addition, computer malware, viruses, social engineering (predominantly spear phishing attacks), and general hacking have become more prevalent in our industry, have occurred on our systems in the past, and will occur on our systems in the future. * * * Although we have developed systems and processes to protect our data and user data, to prevent data loss, and to prevent or detect security breaches, we cannot assure you that such measures will provide absolute security.
>
> In addition, some of our developers or other partners, such as those that help us measure the effectiveness of ads, may receive or store information provided by us or by our users through mobile or web applications integrated with Facebook. We provide limited information to such third parties based on the scope of services provided to us. However, if these third parties or developers fail to adopt or adhere to adequate data security practices, or in the event of a breach of their networks, our data or our users' data may be improperly accessed, used, or disclosed.

J.A. 439-440. Elsewhere in the 10-K filing, Meta explained that the word "may" and "similar expressions" were "intended to identify forward-looking statements"

that are based on "current expectations and projections about future events." *Id.* at 410.

Respondents' claims focused on the statement in the boldface heading and the ensuing statements that improper access to user data could harm Meta's business; that Meta's data-protection systems and processes cannot provide absolute security; and that third parties could misuse user data if obtained. See Pet. App. 21a. Respondents also challenged separate statements in the "Risk Factors" section that Meta's business might suffer "[i]f people do not perceive [Meta's] products to be useful, reliable, and trustworthy." J.A. 424; see Pet. App. 21a.

Respondents contended that those statements were misleading because they framed the risk of data misuse as merely hypothetical despite Cambridge Analytica's actual misuse of Facebook user data. See Pet. App. 187a. According to respondents, petitioners should have disclosed that Cambridge Analytica had used the misappropriated data to support the Cruz campaign in 2015 and continued to use the data to support the Trump campaign in 2016, after having certified that it had deleted the data. See *id.* at 117a; D. Ct. Dkt. 153, at 17-20.

4. The district court granted petitioners' motions to dismiss. Pet. App. 109a-127a, 128a-224a.

With respect to Cambridge Analytica's misuse of user data in support of the Cruz campaign, the district court concluded that most of the challenged statements warned of "reputation, business, or competitive harm, *not* improper access to or the disclosure of user data." Pet. App. 189a. Those statements were not misleading, the court explained, because Cambridge Analytica's previous use of the data was not harming Facebook's reputation, business, or competitive position at the time of Facebook's 2016 10-K filing. See *ibid.* As to Facebook's warning about the risk of "improper use or disclosure of user

data," the court noted that Cambridge Analytica's initial improper access and use of the data was already public knowledge by the time of the filing. *Id.* at 189a-190a. "Investors therefore had all of the information they needed to evaluate" the statement and "would not have been misled." *Id.* at 190a.

The district court also rejected respondents' claims based on Cambridge Analytica's subsequent use of the data in support of the Trump campaign. Pet. App. 117a; D. Ct. Dkt. 153, at 17-20. The court concluded that respondents had failed to plead that anyone responsible for the challenged statements "knew that Cambridge Analytica was using the misappropriated data *after* Facebook obtained [the] certifications." Pet. App. 123a.

5. On appeal, respondents abandoned their claims related to use of the data in support of the Trump campaign, stating that they "do not press any 'continued-misuse' theory regarding the risk statements." Resp. C.A. Reply Br. 3 n.1. Respondents thus proceeded solely on the theory that the risk statements were misleading in light of Cambridge Analytica's initial use of the data in support of the Cruz campaign—a use that had been publicly reported. See Pet. 11-12 & n.2; Cert. Reply Br. 6.

Analyzing that theory, a divided panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-40a.

a. The Ninth Circuit affirmed the dismissal of the "statements regarding the risk of security breaches and the risk of the public not perceiving Facebook's products to be 'useful, reliable, and trustworthy.'" Pet. App. 29a. Those statements were not misleading, the court reasoned, because they "do not relate to the misuse of Facebook user data by Cambridge Analytica, and the shareholders [did] not allege that those risks had materialized at the time of the 2016 10-K." *Ibid.*

As is relevant here, however, the Ninth Circuit reversed with respect to the statements concerning the risk of the misuse of user data by third parties. Pet. App. 29a. The court held that those statements were misleading because Meta "represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired." *Id.* at 24a. According to the court, "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." *Ibid.* The court found it irrelevant that Meta "did not yet know the extent of the reputational harm it would suffer as a result of the breach." *Id.* at 24a-25a. The court concluded that "the fact of the breach itself, rather than the anticipation of reputational or financial harm," is what "caused [the] anticipatory statements to be materially misleading." *Id.* at 25a.

b. Judge Bumatay dissented in relevant part. Pet. App. 41a-53a. He interpreted Meta's risk statements to "warn about harm to its 'reputation' and 'business' that *may* come to light if the public or the government learns about improper access to its data." *Id.* at 44a. In Judge Bumatay's view, the statements "do not represent that [Meta] was free from significant breaches at the time of the filing." *Ibid.*

A "reasonable" investor who thought otherwise, Judge Bumatay concluded, "wasn't acting so reasonably." Pet. App. 44a-45a. As Judge Bumatay pointed out, in the same subsection as the challenged statements, Facebook "expressly advised that it experienced previous attempts to swipe its data and that it would continue to face such threats." *Id.* at 45a. "[M]uch about the Cambridge Analytica scandal was already public," he added, meaning that the "same facts [respondents] use to claim [Meta] deceived the public" were already widely disclosed. *Ibid.*

Judge Bumatay proceeded to reject the majority's "surprisingly broad" view that "it's irrelevant that [Meta] did not know whether its reputation was * * * harmed at the time of the 10-K filing." Pet. App. 45a-46a (citation omitted). To the contrary, "[s]tating that harm *could* result from a breach is not falsified by some 'unknown' possibility of harm from a breach." *Ibid.* Because "[t]he statements advise that improper access to data *could* harm [Meta's] reputation and business," and because respondents did "not sufficiently allege[] that [Meta] knew its reputation and business were *already* harmed at the time of the filing of the 10-K," Judge Bumatay concluded that the statements were not misleading. *Id.* at 45a.

6. Meta filed a petition for panel rehearing and rehearing en banc. Pet. App. 5a. The panel denied the petition for panel rehearing over Judge Bumatay's dissent but issued an amended opinion with changes not relevant here. See *id.* at 1a-53a.[2] The court subsequently granted petitioners' motion to stay the mandate pending the resolution of proceedings before this Court.

SUMMARY OF ARGUMENT

A risk disclosure under Item 105 of SEC Regulation S-K is not false or misleading for purposes of Section 10(b) and Rule 10b-5(b) merely because a company does not disclose whether the specified triggering event had occurred in the past or whether such an occurrence created a present risk of harm to the company. Meta's risk disclosures in its 2016 10-K filing were thus not misleading merely because they omitted that Cambridge Analytica had previously misused Facebook user data. The Ninth Circuit's contrary approach to risk disclosures under Item 105 is erroneous, and its judgment should be reversed.

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[2] For convenience, this brief cites only the amended opinion.

A. A failure to disclose information is actionable under Section 10(b) and Rule 10b-5(b) only if the omission renders an affirmative statement misleading. Whether a statement is misleading is assessed using an objective standard, judged from the perspective of a reasonable investor.

With respect to ordinary risk disclosures under Item 105, a reasonable investor would understand them to be forward-looking and probabilistic in nature. Item 105 requires the disclosure of "risk"—the possibility, but not certainty, of a loss. Risk disclosures thus inherently refer to harms that *could* materialize in the future. Risk disclosures usually warn of a risk of harm that "could" or "may" occur from some triggering event—language indicating the speaker is conveying only that there is some possibility of the risk occurring in the future.

A reasonable investor would not interpret such forward-looking, probabilistic statements as implicitly certifying that the triggering event identified had never occurred in the past and that the company faced no present risk of harm from such an occurrence. That is especially true when, in contrast to Item 105, other items in Regulation S-K expressly require the disclosure of information about previous or ongoing events.

That is not to say that a risk disclosure under Item 105 can never be false or misleading. A risk disclosure may be false or misleading where the statement necessarily depends on the veracity of some embedded fact or opinion, or the nature of the risk is misstated. But the mere fact that a risk disclosure does not state whether the triggering event had occurred in the past or whether the company faced some present risk of harm from such an occurrence does not render the statement misleading.

B. Under the foregoing approach, Meta's statements about the risk of data misuse in the "Risk Factors" section

of its 2016 10-K filing were not false or misleading. Those statements warned investors that the company's reputation and business "could" or "may" be adversely affected by the misuse of user data. A reasonable investor would understand from the language and context of those statements that Meta was making only forward-looking disclosures about how future events might affect Meta's business. A reasonable investor would not read those statements to imply that Meta had never previously experienced improper use of its data or that such improper use created no present risk to the company's reputation or business. In fact, Meta expressly warned investors that risks similar to the ones warned of here have materialized and will continue to do so, and major news sources had publicly reported that Cambridge Analytica had previously misused Facebook user data.

C. In the decision below, the Ninth Circuit held that a company's risk disclosures are materially misleading when they fail to inform investors that the triggering event for a warned-of risk had occurred in the past, even where that occurrence caused no reputational or financial harm. That standard is plainly incorrect.

1. The Ninth Circuit's standard glosses over the actual statements public companies are making in the "Risk Factors" section of their securities filings. Meta's statements are a classic example. By disclosing that data breaches "could" or "may" harm Meta's business and reputation, Meta did not implicitly represent that the company had not experienced data misuse in the past; it merely conveyed that the warned-of harm could occur in the future. The Ninth Circuit's standard blurs the distinction between nonactionable pure omissions and actionable omissions that render affirmative statements misleading.

2. The Ninth Circuit's standard would also result in bloated risk disclosures that conflict with the provisions of

Item 105, make disclosures less useful to investors, and burden public companies. In order to avoid liability, companies would be incentivized to disclose all previous occurrences of each triggering event identified in each risk disclosure. That result would undermine Item 105's direction that companies state risks "concisely." It would also make risk disclosures less useful tools for investors, who would be swamped with extraneous information. And it would ultimately harm public companies, turning the process of drafting forward-looking risk disclosures into an exercise in clairvoyance.

3. What is more, the Ninth Circuit's standard would invite plaintiffs to respond to unexpected stock drops by scouring the company's risk disclosures from the last few years, finding one that mentions a similar risk in the abstract without disclosing the specified triggering event, and claiming fraud. But the securities laws do not allow pleading fraud by hindsight. And permitting lawsuits such as this one to proceed would have enormous consequences for public companies, which often cannot afford to gamble with the potential for ruinous liability. The Ninth Circuit's theory of falsity also precludes resort to statutory and common-law safe harbors.

D. Unlike the Ninth Circuit, some courts of appeals have adopted the position that a risk disclosure can be misleading when the company knows that the warned-of risk is almost certain to materialize from a recent occurrence of the specified triggering event. Although that approach is more plausible than the Ninth Circuit's approach, it is still mistaken, because it fails to recognize the inherently forward-looking nature of Item 105 risk disclosures.

Even under those circuits' approach, however, petitioners would still prevail. Because respondents have

abandoned their theory that Meta had knowledge of Cambridge Analytica's continued misuse of user data in support of the Trump campaign, respondents must show that Cambridge Analytica's misuse of user data in support of the Cruz campaign in 2015 was almost certain to harm the company after the relevant statements were made in February 2017. But the latter misuse was already publicly reported and did not result in any material business harm at the time it was revealed. Meta had no reason to believe that business harm was going to manifest from the 2015 misuse at some unknown time after February 2017. Respondents thus did not and cannot plausibly plead falsity under the alternative, but mistaken, approach adopted by some other courts of appeals.

ARGUMENT

RISK DISCLOSURES UNDER ITEM 105 OF REGULATION S-K 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

A typical risk disclosure under Item 105 of Regulation S-K identifies a triggering event that could or may cause a consequence—usually, harm to the company's business. There is no dispute that such a disclosure would be literally false only if the risk warned of were not in fact a risk. And such a disclosure would not be misleading simply because it failed to disclose a previous occurrence of the triggering event: no reasonable investor would interpret a forward-looking, probabilistic risk disclosure as implicitly suggesting that the triggering event had never occurred and was creating no present risk of harm.

Applied here, that approach demonstrates that Meta's risk disclosures concerning the misuse of user data by third parties were not misleading. No reasonable investor

would infer from Meta's risk disclosures that Meta had never experienced data misuse in the past and that Meta faced no present risk of harm from data misuse. The Ninth Circuit's contrary conclusion rested on an implausible understanding of forward-looking risk disclosures and would lead to deleterious consequences for investors and public companies alike. Petitioners would also prevail under the erroneous view adopted by some other courts of appeals, under which a risk disclosure can be misleading where the company knows that the warned-of risk is certain, or almost certain, to occur. The Ninth Circuit's judgment should thus be reversed.

A. Risk Disclosures Under Item 105 Make No Implied Representations About A Company's Past Experiences

Whether an omission renders a statement false or misleading depends on how a reasonable investor would understand the statement in the context in which it was made. A standard risk disclosure under Item 105 is a forward-looking, probabilistic statement that conveys information about events that could occur in the future and how such events might affect the company were they to occur. No reasonable investor would interpret such a statement as impliedly asserting that the triggering event had never occurred in the past and that no such occurrence created a present risk of harm.

1. Section 10(b) makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security[,] * * * any manipulative or deceptive device or contrivance in contravention of" SEC rules. 15 U.S.C. 78j(b). Rule 10b-5 implements Section 10(b) and, as is relevant here, prohibits a company from "omit[ting] to state a material fact necessary in order to

make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b).

By their plain text, Section 10(b) and Rule 10b–5(b) "do not create an affirmative duty to disclose any and all material information." *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 264 (2024) (citation omitted). Instead, an omission can support a claim under those provisions "only if [it] renders affirmative statements made misleading." *Id.* at 265. That is true "[e]ven with respect to information that a reasonable investor might consider material." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 45 (2011).

Whether an omission renders an affirmative statement misleading, in turn, "depends on the perspective of a reasonable investor." *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 186-187 (2015). "[L]ike the [inquiry] into materiality," the inquiry is "objective" in nature and depends "on the circumstances" in which the statement is made and "our everyday ways of speaking and thinking." *Id.* at 183, 186-188. That approach can be traced to the common law, under which the misleading nature of a statement for purposes of the tort of fraudulent misrepresentation was "determined according to the effect [it] would produce, under the circumstances, upon the ordinary mind." W. Page Keeton et al., *Prosser and Keeton on Torts* § 106, at 736 (5th ed. 1984); cf. *Omnicare*, 575 U.S. at 191 & n.9 (relying on the common law of misrepresentation to determine whether a statement was false).

As this Court has explained, the circumstances relevant to determining whether a reasonable investor would find a statement misleading for purposes of federal securities law are "all its surrounding text, including hedges, disclaimers, and apparently conflicting information," as

well as "the customs and practices of the relevant industry." *Omnicare*, 575 U.S. at 190. A reasonable investor would also consider the "background regulatory structure" and the "existing federal securities disclosure apparatus." *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1432 (3d Cir. 1997) (Alito, J.).

2. A reasonable investor reading a risk disclosure required by Item 105 would understand the statement to advise only about the possibility of a risk that may affect the company in the future. The reasonable investor would not interpret such a statement as implicitly asserting that the triggering event identified had not occurred in the past and that no such occurrence created a present risk of harm to the company. Put simply, forward-looking risk disclosures do not make any implied assertion about previous events and the present risk of harm they created.

a. A typical risk disclosure under Item 105 is inherently forward-looking and probabilistic. Item 105 requires companies, "[w]here appropriate, [to] provide under the caption 'Risk Factors' a discussion of the material factors that make an investment in the registrant * * * speculative or risky." 17 C.F.R. 229.105(a). By referring to "risks," the regulation is meant to cover events that might occur in the future, not those that have occurred in the past. "Risk" is the "uncertainty of a result, happening, or loss," *Black's Law Dictionary* 1442 (9th ed. 2009); the "possibility" or "chance" of a loss, *American Heritage Dictionary of the English Language* 1557 (3d ed. 1996); or the "contingency" of a loss, *Webster's Third New International Dictionary* 1961 (2002). Those definitions are consistent with how the Restatement of Torts uses the concept of "risk" in a variety of contexts. See, *e.g.*, Restatement (Second) of Torts §§ 281, 471, at 4, 520 (1965). The risk disclosures required under Item 105 thus concern harms that could befall a business in the future.

A risk disclosure under Item 105 is usually worded in a way that warns of the *possibility* of future harm. For example, a company may warn that, "if X happens," the company "could" or "may" suffer harm to its business. Such a statement is conditional in nature: the statement describes a consequence that could result if a triggering event were to occur. See *Chicago Manual of Style* § 5.228, at 296-297 (17th ed. 2017). When used in this fashion, the words "could" and "may" are forward-looking in nature; they indicate the possibility that a future occurrence of the identified event will cause the risk to materialize into a real-world consequence. See *Webster's Third New International Dictionary* 517, 1396 (2002) (defining "could" and "may"); *Black's Law Dictionary* 1068 (9th ed. 2009) (defining "may"); Bryan A. Garner, *Modern English Usage* 139-140 (4th ed. 2016).

A reasonable investor would recognize the forward-looking nature of that language. As the Court explained in *Omnicare* in the context of statements of opinion, the reasonable investor "recognizes the import of words like 'I think' or 'I believe,' and grasps that they convey some lack of certainty as to the statement's content." 575 U.S. at 187. "[T]hat may be especially so when the phrases appear in a registration statement," the Court added, "which the reasonable investor expects has been carefully wordsmithed to comply with the law." *Id.* at 188. So too with forward-looking risk disclosures in a 10-K filing using words such as "could" or "may": the reasonable investor would recognize that such statements are designed to "warn an investor of what harms *may* come to their investment" in the future, not to "educate investors on what harms are currently affecting the company." *Bondali* v. *Yum! Brands, Inc.*, 620 Fed. Appx. 483, 491 (6th Cir. 2015).

Other SEC rules confirm that understanding of risk disclosures under Item 105. In contrast to Item 105, many of the other rules mandating disclosures in public securities filings require companies to provide investors with specific information about what has happened to the company in the past and what is happening to the company in the present. For example, Item 101 requires the disclosure of "information material to an understanding of the general development of the business," including material changes to previous business strategies and significant bankruptcies, mergers, and the acquisition or loss of assets. 17 C.F.R. 229.101(a)(1); see J.A. 414-423. Item 103 requires the disclosure of "any material pending legal proceedings" involving the company. 17 C.F.R. 229.103 (a); see J.A. 485-488. And Item 303 requires disclosure of "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on a company's financial performance. 17 C.F.R. 229.303(b)(2)(ii); see J.A. 499-547.

Item 106, adopted by the SEC just last year, is particularly illustrative. See 17 C.F.R. 229.106; 88 Fed. Reg. 51,896 (Aug. 4, 2023). It requires disclosure of "the registrant's processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats." 17 C.F.R. 229.106(b). Notably, Item 106 requires discussion of "whether any risks from cybersecurity threats, *including as a result of any previous cybersecurity incidents*, have materially affected or are reasonably likely to materially affect the registrant." *Ibid.* (emphasis added). When the SEC wants to require disclosure of past or present materializations of a risk, then, it knows how to do so. Cf. *Corner Post, Inc.* v. *Board of Governors of Federal Reserve System*, 144 S. Ct. 2440, 2453-2454 (2024). Item 105, by contrast, says nothing about disclosing previous events.

b. No reasonable investor would be misled by a risk disclosure under Item 105 merely because the statement does not disclose that the specified triggering event had occurred in the past or that such an occurrence created a present risk of harm. Instead, a reasonable investor would understand that Item 105 requires disclosures of "risk": that is, the potential harm that could arise from some future event. A reasonable investor would also recognize that, unlike other SEC regulations, Item 105 does not mandate the disclosure of previous events.

In addition, a reasonable investor would understand from the language used in risk disclosures that the company was not attempting to convey any information about the past. If anything, a reasonable investor might make the opposite inference: namely, that the company knew to warn of the relevant risk precisely because the triggering event *had* occurred in the past. After all, the SEC "discourage[s]" the disclosure of risks that "could apply generically to any registrant or any offering," 17 C.F.R. 229.105(a), meaning that a company should have some particularized reason for making a given risk disclosure.

As a result, risk disclosures are not misleading merely because they do not identify previous occurrences of the triggering event or the present risk of harm posed by any such occurrences. The fact that the event occurred in the past and poses some present risk of harm does not "conflict with what a reasonable investor would take from the statement itself." *Omnicare*, 575 U.S. at 189.

3. That said, it is not the case that forward-looking, probabilistic risk disclosures under Item 105 can never be false or misleading.

For example, a risk disclosure could be false or misleading based on a fact necessarily embedded in the disclosure. Consider the following risk disclosure: "The failure of our company's data-protection software may result

in third parties obtaining protected data." If the company does not in fact have data-protection software, the statement would be misleading. A risk disclosure could also be false or misleading based on an embedded opinion: if the company stated that it believed the risk of its data-protection software failing was low, the statement would be false if the company did not believe the risk was low. Cf. *Omnicare*, 575 U.S. at 184, 189-190.

A risk disclosure could also be misleading if it misstates the nature of the risk. For example, warning about the risk that use of a company's drug could cause "stress fractures" could be misleading when, in reality, the drug carried a risk of complete bone breaks requiring surgical intervention. Cf. *Merck Sharp & Dohme Corp.* v. *Albrecht*, 587 U.S. 299, 305-306 (2019).

A risk disclosure is not misleading, however, merely because the company does not disclose previous occurrences of similar triggering events and any present risk created by such occurrences. Consider again the disclosure about the failure of a company's data-protection software. Assuming the company does in fact have data-protection software, a reasonable investor might care to know that the software had failed in the past. But the risk disclosure—that failures may lead to third-party data access—remains true and accurate. A company has no duty to disclose those previous failures merely because a reasonable investor might find them material. See *Matrixx*, 563 U.S. at 45.

In short, a typical risk disclosure under Item 105 does not make any implied assertion about previous events and the present risk of harm they created. Instead, it conveys only that some triggering event in the future may cause a negative consequence.

B. A Reasonable Investor Would Not Find The Risk Disclosures At Issue Here Misleading

This case involves prototypical examples of the types of forward-looking statements companies make in the "Risk Factors" section of a 10-K filing. Meta's statements in its 2016 10-K filing were not false or misleading merely because they omitted the fact that Cambridge Analytica had misused Facebook user data in the past. To the contrary, those statements were solely forward-looking and probabilistic disclosures about how future misuse of user data might harm Meta's business.

1. As required by Item 105, the "Risk Factors" section of Meta's 2016 10-K filing warned of a wide variety of factors that "may have a material adverse effect on [its] business, financial condition, and results of operations." J.A. 423. As is relevant here, Meta included a subsection with the heading that "[s]ecurity breaches and improper access to or disclosure of our data or user data, or other hacking and phishing attacks on our systems, could harm our reputation and adversely affect our business." J.A. 439. Meta then provided three paragraphs of explanation about those risks.

In relevant part, Meta warned that "[a]ny failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data could result in the loss or misuse of such data, which could harm our business and reputation and diminish our competitive position." J.A. 439. Meta also disclosed that it provides "limited information" to "third parties based on the scope of services provided to us," J.A. 440, and it warned that, "if these third parties or developers fail to adopt or adhere to adequate data security practices, * * * our data or our users' data may be improperly accessed, used, or disclosed," *ibid.*

A reasonable investor would understand 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. As explained above, risk disclosures made under Item 105 are inherently forward-looking. See pp. 21-23, *supra*. The probabilistic nature of the language that Meta used reinforced the prospective nature of its warnings. And the very first section in Meta's 10-K filing, titled "Note About Forward-Looking Statements," expressly explained to investors that the word "may" and "similar expressions" were "intended to identify forward-looking statements." J.A. 410. Any reasonable investor reading Meta's risk statements would interpret them to mean exactly what they say: if Facebook user data were to be misused in the future, certain harms could occur.

2. The fact that Meta made its risk disclosures without stating that Cambridge Analytica had misused Facebook user data in connection with the Cruz campaign did not render those statements misleading. A reasonable investor reading those statements in the context in which they were made would not assume that Meta meant to assert that it had *never* experienced improper access to or disclosure of its data, or that such previous misuse could not harm the company's business or reputation in the future. As Judge Bumatay put it in his dissent, if a "reasonable investor" thought that Meta's risk disclosures "represent[ed] that [it] was free from significant breaches at the time of the filing," then "that 'reasonable' investor wasn't acting so reasonably." Pet. App. 44a-45a.

The context in which Meta's risk disclosures were made confirms that conclusion. The relevant subsection of the "Risk Factors" section of Meta's 2016 10-K filing begins by informing investors that Facebook's "industry is prone to cyber-attacks by third parties seeking unauthorized access to our data or users' data." J.A. 439. It

then explains that "computer malware, viruses, social engineering * * * and general hacking have become prevalent in our industry, *have occurred on our systems in the past*, and *will occur on our systems in the future*." *Ibid.* (emphases added). It is in this context that Meta warned investors of the potential risks that could materialize if its data were to be misused. Meta thus expressly told investors that unauthorized attempts to obtain user data had occurred and will continue to occur.

The notion that Meta's statements were misleading is even more implausible in light of public reporting about Cambridge Analytica when Meta made the statements in February 2017. The misuse of Facebook user data by Cambridge Analytica and the Cruz campaign was publicly reported in 2015. See Pet. App. 220a; J.A. 616-624. Specifically, it was publicly reported that Cambridge Analytica and the Cruz campaign were using "psychological data" based on "tens of millions of Facebook users" whose data were "harvested largely without their permission." J.A. 616. The data were reported to include "demographic data—names, locations, birthdays, genders—as well as [users'] Facebook 'likes,'" and were reportedly collected from "each person's unwitting friends." J.A. 620. That use of "surreptitious, commodified Facebook data" reportedly occurred "despite earlier concerns and red flags from potential survey-takers." J.A. 616, 618. Even though the public knew of the initial data misuse, Meta experienced no drop in stock price or other material business harm. See Pet. App. 45a; J.A. 366-367.

In short, no reasonable investor would have been misled by Meta's risk disclosures. Those disclosures made no express or implied representations about previous events that could cause harm to its business. At most, those statements conveyed the possibility that, if user data were to be misappropriated in the future, business harm could

result. Those statements were undeniably accurate, and a reasonable investor would not have been misled about the existence of previous instances of data misuse, particularly in light of the public reporting about Cambridge Analytica and the Cruz campaign.

C. The Ninth Circuit's Approach Is Erroneous

In the decision below, the Ninth Circuit held that a company's risk disclosures are materially misleading when they fail to inform investors that the triggering event for a warned-of risk has occurred in the past, even where that occurrence caused no "reputational or financial harm." Pet. App. 25a. That approach lacks any sound basis in Rule 10b-5(b) or this Court's precedents interpreting it. And it would have harmful practical consequences for investors and public companies alike, by effectively mandating overdisclosure of previous events and spurring meritless fraud-by-hindsight litigation. This Court should reject the Ninth Circuit's flawed approach.

1. The Ninth Circuit's Approach Ignores The Actual Statements Made In The Securities Filing

The Ninth Circuit concluded that, by disclosing that data misuse posed a risk to Meta's business and reputation, Meta implicitly represented that the company had not experienced data misuse in the past. That conclusion ignores the statements Meta actually made and waters down this Court's standard for misleading statements.

a. The plain language of Rule 10b-5(b) makes liability dependent on the actual "statements made" by a speaker. 17 C.F.R. 240.10b-5(b). The Private Securities Litigation Reform Act (PSLRA) underscores the need to focus on the language of the statements, requiring plaintiffs to plead with particularity "each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. 78u-4(b)(1)(B). As

Judge Bumatay explained, none of Meta's statements here "represent[ed] that [Meta] was free from significant breaches at the time of the filing." Pet. App. 44a (dissenting opinion). The Ninth Circuit majority, however, reasoned that a risk disclosure warning that harm "could" or "may" result from the occurrence of a triggering event implies to a reasonable investor that the risk is "purely hypothetical," "merely conjectural," and has not "already transpired" in the past. *Id.* at 23a-24a.

That strains the English language beyond recognition. As already explained, the words "could" and "may" do not imply the non-occurrence of previous events, particularly in the context of risk disclosures under Item 105. See p. 22, *supra*. Instead, they convey the possibility that the warned-of harm will occur in the future.

A recent example proves the point. Last year, Costco warned in its 10-K filing that "disruptions due to fires, tornadoes, hurricanes, earthquakes, pandemics or other extreme weather conditions or catastrophic events * * * may result in delays in the production and delivery of merchandise to [its] warehouses, which could adversely affect sales and the satisfaction of [its] members." Costco Wholesale Corp., Form 10-K, at 10 (Oct. 10, 2023) <tinyurl.com/CostcoFY2210-K>. Any reasonable investor would understand Costco's statement to convey that natural disasters and pandemics could lead to supply-chain delays and warehouse shortages in the future, without implying that no such events had occurred in the past. No sensible investor would read the conditional language to suggest that natural disasters had never caused business disruptions.

The effect of the Ninth Circuit's approach is thus to rewrite standard, forward-looking risk disclosures as general disclaimers that the triggering event identified has ever occurred in the past, without regard to the warned-

of risk of harm. That approach defies the plain language of Rule 10b-5(b) by ignoring the actual "statements made" by the company in favor of creative inferences from their conditional nature.

b. The Ninth Circuit's approach also blurs the line that this Court highlighted just months ago in *Macquarie*, *supra*, between nonactionable pure omissions and omissions that render an affirmative statement misleading (and thus actionable). The Ninth Circuit reasoned that forward-looking "could" or "may" disclosures silently imply the absence of any previous incidents concerning the risk, which turns every pure omission of historical fact into a hook to argue that the omission "create[d] an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]." Pet. App. 25a (citation omitted). Under the Ninth Circuit's rule, plaintiffs can simply repackage pure-omissions claims as claims premised not on the actual "statements made," 17 C.F.R. 240.10b-5(b), but instead on free-floating "impression[s]" about omitted facts, Pet. App. 25a.

That approach elides the distinction, recognized in *Macquarie*, between nonactionable omissions and actionable misleading statements. The Court should emphasize here, once again, that "[Section] 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *Macquarie*, 601 U.S. at 264 (citation omitted). Regardless of whether a reasonable investor would prefer to know more information about a company's previous experiences, additional statements about that information are not "necessary in order to make the statements made" in Item 105 risk disclosures not "misleading." 17 C.F.R. 240.10b-5(b).

2. The Ninth Circuit's Approach Would Incentivize Overdisclosure In Securities Filings

Adoption of the Ninth Circuit's approach would create incentives for a company to include, in each risk disclosure, a compendium of every instance of the triggering event having occurred in the past, without regard to the usefulness of that information to investors. The predictable result would be bloated risk disclosures that are less useful to investors and burdensome to public companies. Unsurprisingly, Item 105 does not support that outcome.

a. By its plain terms, Item 105 directs companies to describe "[c]oncisely" only the "material factors" that could make the company's securities speculative or risky. 17 C.F.R. 229.105(a), (b). The emphasis on brevity is no accident. The SEC spent years refining Item 105 to promote "organized and concise risk factor disclosure" and to discourage "the disclosure of information that is not material." 85 Fed. Reg. 63,744-63,745 (Oct. 8, 2020).[3] A primary goal of those efforts was to make risk disclosures "more tailored to the particular facts and circumstances of each registrant" and to "shorten the length of the risk factor discussion, to the benefit of both investors and registrants." *Id.* at 64,744.

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[3] See SEC Staff, *Report on Review of Disclosure Requirements in Regulation S-K* (2013) (recommending that the SEC seek "input from market participants" to identify "ways to streamline and simplify disclosure requirements to reduce the costs and burdens on public companies" and "ways to enhance the presentation and communication of information"); 81 Fed. Reg. 23,956 (Apr. 22, 2016) (requesting comments on whether "lengthy risk factor disclosures hinder an investor's ability to understand the most significant risks"); 84 Fed. Reg. 44,375 (Aug. 23, 2019) (proposing amendments "intended to address the lengthy and generic nature of the risk factor disclosure presented by many registrants").

The Ninth Circuit's approach would fundamentally undermine those efforts. A familiar tactic in modern securities litigation is the filing of "event-driven litigation," in which 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." Chamber Cert. Br. 6; see, *e.g.*, Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1339-1342 (2022); cf. *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*, 594 U.S. 113, 119-120 (2021). In order to prevent such suits based on omissions from a company's risk disclosures, a company would need to disclose all previous occurrences—or at least all recent ones—of the triggering event identified in each risk disclosure. That is true regardless of whether the previous event actually caused harm or whether the company believes that the event poses a present risk of harm. After all, under the Ninth Circuit's approach, it is "the fact of the [triggering event] itself, rather than the anticipation of reputation or financial harm," that renders a risk disclosure misleading. Pet. App. 25a.

The Ninth Circuit's approach would cause risk disclosures to balloon in length because of "the fear of litigation for failing to disclose risks if events turn negative." 85 Fed. Reg. 63,743. That result would run counter to the SEC's direction in Item 105 for companies to state risks "[c]oncisely," see 17 C.F.R. 229.105(b), and it would undermine the years of work by the SEC to shorten and simplify securities filings.

b. The end result would be to make risk disclosures a less useful tool for investors. Risk disclosures that chronicle previous occurrences of the specified triggering event, especially without regard to any "anticipation of reputational or financial harm," Pet. App. 25a, would overwhelm investors with extraneous information and make it

harder for them to discern information that might be helpful in making an investment decision. Investors stand to gain little if companies flood the market with information where the primary purpose of the disclosure is to deflect potential lawsuits rather than provide genuinely useful information to the market.

This Court has recognized the fact that increased disclosure can often be counterproductive. When establishing a standard for materiality under Section 10(b) and Rule 10b-5, the Court has acknowledged that "certain information concerning corporate developments could well be of dubious significance." *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (internal quotation marks and citation omitted). The Court has thus taken care "not to set too low a standard of materiality," which could "lead management simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Ibid.* (internal quotation marks and citation omitted).

The SEC, too, has recognized that unhelpful dynamic. For example, in 2013, the SEC Chair observed that, "[w]hen disclosure gets to be 'too much' or strays from its core purpose, it could lead to what some have called 'information overload'—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." Mary Jo White, Speech to the National Association of Corporate Directors Leadership Conference: The Path Forward on Disclosure (Oct. 15, 2013) <tinyurl.com/White2013speech>. Indeed, the philosophy that *more* disclosure is not necessarily *better* disclosure underpins the SEC's recent efforts to rein in the length of risk disclosures. See p. 32, *supra*. The Ninth Circuit's approach

effectively mandates overdisclosure despite this Court's and the SEC's warnings to the contrary.

Ironically, a company's disclosure of a previous event it considers immaterial could itself mislead investors by suggesting that the event carries more significance than it does. Under the Ninth Circuit's approach, even if a company deemed the possibility of business harm from an event vanishingly small, it would nevertheless have a strong incentive to disclose it on the off chance that the event later proved more serious than anticipated. Any benefits from that regime are dwarfed by its costs—costs the SEC itself has recognized.

c. The Ninth Circuit's approach would also harm public companies. Compliance with the Ninth Circuit's standard would require companies to provide a laundry list of events dating back some unknown span of time in case one of those events later leads to business harm. That standard would be unworkable, turning the drafting process into a guessing game for public companies. It could also lead companies to disclose information that is not required under any affirmative disclosure rule—for instance, a one-time discussion with regulators that never resulted in any enforcement action. The "Risk Factors" section mandated by Item 105 is not meant to be a catch-all requiring disclosure of previous events that the SEC has not elsewhere required to be disclosed.

3. The Ninth Circuit's Approach Would Encourage Abusive Fraud-By-Hindsight Lawsuits

By attaching significance to previous occurrences of the triggering event identified in a risk disclosure, even when those occurrences posed no evident risk of harm at the time of disclosure, the Ninth Circuit's approach invites the very sort of "abusive litigation" Congress has acted to reduce. See *Tellabs, Inc.* v. *Makor Issues &*

Rights, Ltd., 551 U.S. 308, 313 (2007). That approach would transform the "Risk Factors" section of SEC filings into a minefield for public companies and a goldmine for plaintiffs.

a. The Ninth Circuit's approach allows a claim to proceed if, despite presenting no "anticipation of reputational or financial harm" at the time of disclosure, a previous occurrence of the triggering event identified in a risk disclosure later turns out to cause more serious harm than anticipated. Pet. App. 25a. As the Chamber of Commerce has explained (Cert. Br. 6), that approach would exacerbate the recent trend toward event-driven litigation. Anytime an unexpected stock drop hits, all an enterprising plaintiff would need do is scour the company's risk disclosures from the last few years, find one that mentions a similar risk without disclosing the relevant triggering event, and claim fraud.

This case epitomizes the problem. The news media reported Cambridge Analytica's misuse of data for the Cruz campaign in 2015, with no effect on Meta's stock price. See p. 8, *supra*. In 2016, when Meta published its 10-K filing for fiscal year 2015, Meta made the exact same risk disclosures as the ones here. Facebook, Inc., Form 10-K, at 12-13 (Jan. 28, 2016) <tinyurl.com/2015Facebook-10K>. No one alleged that the disclosures were false or misleading then, despite contemporaneous reporting about Cambridge Analytica. It was only in 2018—after Cambridge Analytica's data misuse turned out to be more extensive than originally thought, and after Meta's stock price dropped—that respondents alleged that Meta's disclosures fraudulently omitted the data misuse from 2015.

The Ninth Circuit's decision to allow this case to proceed contravenes Section 10(b) and Rule 10b-5, which do not demand "clairvoyance" of public companies or allow plaintiffs to plead "fraud by hindsight." *Denny* v. *Barber*,

576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.); see *Tellabs*, 551 U.S. at 320. It also perversely imposes liability by foresight. If Meta had said nothing about the risk that third-party data misuse posed to its reputation and business, respondents would have no claim; it would have been a case of pure omission. See *Macquarie*, 601 U.S. at 260. Here, however, Meta correctly identified and disclosed the relevant risk to investors, only to face a securities class action. J.A. 438-439. It makes little sense that Meta would be at greater risk of private liability from complying with Item 105 than from not disclosing the risk at all.

In addition, the economic consequences of the Ninth Circuit's approach are staggering. Public companies often cannot afford to gamble on the ruinous liability that securities class actions can impose, leading to extortionate settlements if early dismissal is denied. In 2023, 190 securities cases reached resolution, with 100 being dismissed before trial and 90 being settled. Edward Flores & Svetlana Starykh, NERA, *Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review* 13 fig.11 & n.10 (Jan. 23, 2024). The aggregate total of those settlements was $3.9 billion, and the average settlement (after controlling for a single $1 billion settlement) was $34 million. See *id.* at 18-19. The strong financial incentive for public companies to settle securities class actions, even for substantial amounts, underscores the need to weed out meritless claims as early as possible.

b. Turning risk disclosures into a font of liability also makes little sense in light of the safe harbors from liability available where companies make meaningful, forward-looking disclosures.

Even before the SEC required public companies to include risk disclosures in their 10-K filings, many companies issued similar disclosures to accompany other statements and thereby immunize them from liability under

the PSLRA's statutory safe harbor for forward-looking statements and the common-law "bespeaks caution" doctrine. The PSLRA's safe harbor provides that a company "shall not be liable" for making a statement that is "identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. 78u-5(c)(1)(A)(i). The bespeaks-caution doctrine similarly "shields companies * * * from liability when they make statements that are forward-looking and accompanied by meaningful cautionary language." *Kolominsky* v. *Root, Inc.*, 100 F.4th 675, 688-689 (6th Cir. 2024).

The Ninth Circuit's approach renders those doctrines inapplicable to most forward-looking risk disclosures. That is because the Ninth Circuit hitched the availability of those protective doctrines to its theory of falsity, holding that the PSLRA safe harbor is unavailable for forward-looking risk statements where the company knows of a risk of harm from a previous occurrence of the specified triggering event but fails to disclose it. See Pet. App. 28a; accord *Rombach* v. *Chang*, 355 F.3d 164, 173 (2d Cir. 2004). Congress enacted the PSLRA's safe harbor to encourage companies to offer forward-looking projections without having to fear a lawsuit every time the projection proves wrong. The Ninth Circuit's approach reintroduces the very evil Congress sought to correct, and it will disincentivize companies from making forward-looking projections—to the detriment of investors and public companies alike.

D. Petitioners Would Prevail Even Under The Mistaken View That A Risk Disclosure Can Be Misleading When The Company Knows That The Warned-Of Risk Is Almost Certain To Materialize

Unlike the Ninth Circuit in the decision below, some courts of appeals have held that a forward-looking, probabilistic risk disclosure under Item 105 can be misleading if the company knows that the warned-of risk is almost certain to materialize. In those courts, the question is not whether the specified triggering event has ever occurred in the past, but instead whether a previous occurrence of the triggering event is "virtually certain to result in the warned of harm to [the company's] business." *Indiana Public Retirement System* v. *Pluralsight, Inc.*, 45 F.4th 1236, 1256 (10th Cir. 2022); see, *e.g.*, *Karth* v. *Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 139 (1st Cir. 2021); *Set Capital LLC* v. *Credit Suisse Group AG*, 996 F.3d 64, 85-86 (2d Cir. 2021). Those courts thus interpret forward-looking, probabilistic risk disclosures as implicitly certifying that the company is unaware of any previous occurrences of the triggering event that are almost certain to cause the warned-of harm to the company's business.

That approach, while ultimately flawed, certainly has more to recommend it than the Ninth Circuit's approach. The "virtual certainty" standard is arguably more aligned with the actual wording of typical risk disclosures, because it recognizes that those statements do not imply that the triggering event had never occurred in the past. See p. 24, *supra*. And because the "virtual certainty" standard would not require a company to disclose all recent instances of the triggering event for a warned-of risk having occurred, it would avoid the worst of the practical problems created by the Ninth Circuit's standard. See pp. 32-35, *supra*.

Still, the "virtual certainty" standard is flawed for two principal reasons. *First*, a reasonable investor would not infer "anything regarding the current state of a corporation's compliance, safety, or other operations from a statement intended to educate the investor on *future* harms." *Bondali*, 620 Fed. Appx. at 491. Instead, the reasonable investor would understand the company's statement to mean what it says: that, if the triggering event were to occur in the future, business harm could result. See pp. 21-25, *supra*.

Second, the "virtual certainty" standard improperly conflates the elements of falsity and scienter. Whether a statement is misleading depends on how a reasonable investor would read the language of a particular statement in the context in which it is made. A factual statement that gives the reasonable investor an incorrect impression of the true state of affairs is misleading whether or not the speaker knows the true state of affairs. The "virtual certainty" standard improperly blends the element of falsity with the element of scienter by making falsity depend in part on the state of the speaker's knowledge.

Ultimately, however, any disagreement between the courts of appeals that have adopted the "virtual certainty" standard and the Ninth Circuit is of no moment here, because petitioners would prevail in this case even under the "virtual certainty" standard. As the case comes to the Court, respondents' only remaining theory of liability involves Cambridge Analytica's use of Facebook user data to support the Cruz campaign in 2015. Earlier in the litigation, respondents also argued that Meta's risk disclosures were misleading because petitioners knew that Cambridge Analytica had secretly continued to use the misappropriated data in support of the Trump campaign in 2016, despite certifying that it had deleted the data. See p. 11, *supra*. The district court, however, dismissed that

theory on the ground that respondents had failed sufficiently to allege that anyone responsible for the statements knew of Cambridge Analytica's *ongoing* misuse of the data—after giving respondents multiple chances to amend their complaint to do so. See Pet. App. 123a. On appeal, respondents expressly abandoned that theory. See Resp. C.A. Reply Br. 3 n.1; p. 12, *supra*.

As a result, the only way that Meta's risk disclosures could be misleading under the "virtual certainty" standard is if Meta knew that Cambridge Analytica's misuse of Facebook user data in 2015 in support of the Cruz campaign was virtually certain to cause business harm after February 2017, when Meta made its 2016 10-K filing. But Cambridge Analytica's use of the data in support of the Cruz campaign had been publicly known since late 2015, and Meta experienced no drop in stock price or other material business harm after the news broke. See p. 8, *supra*. The complaint contains no allegations supporting an inference that any harm from that misuse was virtually certain to materialize more than a year later, much less that Meta knew about any such harm. Even under the approach adopted by those other courts of appeals, therefore, petitioners would still prevail.[4]

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[4] At one point in its analysis, the Ninth Circuit suggested that, when Meta made its 2016 10-K filing, it knew that Cambridge Analytica's actions would cause future business harm, even if it did not know the "magnitude of the ensuing harm." Pet. App. 24a-25a. But as the Ninth Circuit ultimately explained, the basis for its holding that the statements were misleading was "the fact of the [data] breach itself, rather than the anticipation of reputational or financial harm." *Id.* at 25a. In addition, the court's passing suggestion seemed to encompass Meta's knowledge with respect to not only the Cruz campaign's use of the data in 2015 but also the Trump campaign's use in 2016. To the extent the Ninth Circuit considered that later misuse, it was erroneous in light of respondents' abandonment of their ongoing-

* * * * *

No reasonable investor would interpret a typical risk disclosure under Item 105 as implicitly suggesting that the specified triggering event had never previously occurred and that no such previous occurrence presented a risk of harm to the company. Such forward-looking, probabilistic disclosures convey only information about risks posed by future events. The Ninth Circuit's contrary approach contravenes the language of Section 10(b) and Rule 10b-5(b), and it harms investors and public companies by incentivizing overdisclosure and spurring meritless litigation. The Court should reject the Ninth Circuit's approach and hold that no reasonable investor would have been misled by Meta's risk disclosures merely because they did not disclose Cambridge Analytica's previous misuse of Facebook user data. That result is warranted under both the correct approach articulated by petitioners here and under the alternative, but mistaken, view adopted by some other courts of appeals. Either way, the Ninth Circuit's decision cannot stand.

misuse theory on appeal (and also their failure to plead scienter with respect to that misuse). See p. 12, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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1. 15 U.S.C. 78j provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[1] So in original. Probably should be followed by a comma.

2. 17 C.F.R. 240.10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

3. 17 C.F.R. 229.105 provides:

(a) Where appropriate, provide under the caption "Risk Factors" a discussion of the material factors that make an investment in the registrant or offering speculative or risky. This discussion must be organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk. The presentation of risks that could apply generically to any registrant or any offering is discouraged, but to the extent generic risk factors are presented, disclose them at the end of the risk factor section under the caption "General Risk Factors."

(b) Concisely explain how each risk affects the registrant or the securities being offered. If the discussion is longer than 15 pages, include in the forepart of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky. If the risk factor discussion is included in a registration statement, it must immediately follow the summary section required by § 229.503 (Item 503 of Regulation S-K). If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you

may omit from the prospectus in an effective registration statement based on Rule 430A (§ 230.430A of this chapter). The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.