# SUPREME COURT
# OF THE UNITED STATES



IN THE SUPREME COURT OF THE UNITED STATES

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FACEBOOK, INC., ET AL.,                  )

               Petitioners,       )

          v.                      ) No. 23-980

AMALGAMATED BANK, ET AL.,                )

               Respondents.       )

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Pages:  1 through 112

Place:  Washington, D.C.

Date:  November 6, 2024

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10                   Washington, D.C.

11                Wednesday, November 6, 2024

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13        The above-entitled matter came on for

14   oral argument before the Supreme Court of the

15   United States at 10:03 a.m.

16

17   APPEARANCES:

18   KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on

19       behalf of the Petitioners.

20   KEVIN K. RUSSELL, ESQUIRE, Washington, D.C.; on behalf

21       of the Respondents.

22   KEVIN J. BARBER, Assistant to the Solicitor General,

23       Department of Justice, Washington, D.C.; for the

24       United States, as amicus curiae, supporting the

25       Respondents.

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1                   P R O C E E D I N G S

2                               (10:03 a.m.)

3              CHIEF JUSTICE ROBERTS:  We will hear

4     argument this morning in Case 23-980, Facebook

5     versus Amalgamated Bank.

6              Mr. Shanmugam.

7              ORAL ARGUMENT OF KANNON K. SHANMUGAM

8                ON BEHALF OF THE PETITIONERS

9              MR. SHANMUGAM:  Thank you, Mr. Chief

10    Justice, and may it please the Court:

11             The Ninth Circuit has adopted an

12    outlying rule that threatens to create a

13    sweeping regime of securities liability for

14    omissions.  The Ninth Circuit held that a risk

15    disclosure can be misleading simply because a

16    company does not disclose that the specified

17    triggering event for the risk had occurred in

18    the past.

19             That holding was incorrect.  A risk

20    disclosure warrants that a type of event may

21    cause harm in the future.  It usually makes no

22    representation that the event had never

23    previously occurred.

24             The Ninth Circuit's approach would

25    trigger serious concerns about over-disclosure

1    and fraud by hindsight, and this Court should

2    reject it.

3         Instead, the Court should adopt a

4    similar approach to the one it took for

5    statements of opinion in Omnicare.  There, the

6    Court held that statements of opinion were

7    ordinarily not actionable as false statements,

8    but the Court recognized that a statement of

9    opinion could be misleading based on an embedded

10   representation about how the speaker formed the

11   opinion.

12        So too here, depending on the content

13   of the statement, a forward-looking risk

14   disclosure can be misleading based on an

15   embedded premise about the current state of

16   affairs.  But just as a statement that the road

17   may be flooded if it rains cannot be misleading

18   simply because it rained yesterday, a typical

19   risk disclosure cannot be misleading simply

20   because the triggering event had occurred in the

21   past.

22        Under the correct approach, this case

23   is an easy one.  Meta's warnings that business

24   harm could result in the event of data misuse

25   did not imply that Meta had never previously

1    suffered such misuse.  But, in any event, the

2    initial misuse of the data had been publicly

3    reported by the time Meta made the statements at

4    issue, and Respondents have abandoned any claim

5    based on the continued misuse of the data.  And

6    far from being virtually certain to cause a risk

7    of harm to Meta's business, the initial misuse

8    of the data did not result in any harm when it

9    was publicly reported.

10            Under any approach other than the

11   Ninth Circuit's, Petitioners are entitled to

12   prevail.  The judgment of the court of appeals

13   should be reversed.

14            I welcome the Court's questions.

15            JUSTICE THOMAS:  But the -- this is --

16   this case isn't about harm at this stage, is it?

17            MR. SHANMUGAM:  So the risk disclosure

18   in this case, Justice Thomas, warned about harm,

19   harm to Meta's business or reputation.

20            JUSTICE THOMAS:  But I thought the --

21   the district court only focused on falsity or

22   misleading -- whether or not this was false or

23   misleading.

24            MR. SHANMUGAM:  Oh, that is correct.

25   So this is not about injury to the plaintiffs or

1       any of the other elements.  This is about the

2       element of falsity.

3               Our point is simply that when you look

4       at what this risk disclosure is warning about,

5       it is warning about harm to business or

6       reputation.

7               JUSTICE THOMAS:  Well, but the problem

8       is that the -- a reasonable person could look at

9       the statement and assume that because it only

10      talks about future probabilities of -- of this

11      harm or this event occurring, that it never

12      occurred.  It's not -- and there, you also have

13      another 105 statement in which you do discuss

14      past events.

15              So why wouldn't one be able to read

16      this and assume that it never happened?

17              MR. SHANMUGAM:  Sure.  So a couple

18      points in response to that, Justice Thomas.

19              The first is that we don't think that

20      a reasonable person would draw that inference

21      from a statement of this variety.  Where a

22      statement says, if something occurs, harm may

23      follow from that, I don't think it's a necessary

24      premise of that statement that the event has

25      never occurred.  And yet, that is the

1     implication of Respondents' and the government's

2     position, subject only to the caveat that if the

3     omitted information is immaterial, which is, of

4     course, a separate element, it would not

5     qualify.

6            Now I do want to say one other thing

7     in response to your question, which is that the

8     context matters.  This Court has made clear,

9     most recently in Omnicare, that when you apply

10    the reasonable investor standard, you assume

11    that the reasonable investor is aware of the

12    context, the regulatory framework, and so forth.

13            As we explain in our brief, these Item

14    105 disclosures serve a very specific purpose.

15    They warn about the types of risks that a

16    particular company will face in the future so

17    that investors are on notice of the types of

18    issues that the company might face.

19            JUSTICE THOMAS:  But why would you

20    include in your 105 a past statement?

21            MR. SHANMUGAM:  So I think Item 105

22    disclosures can include references to past

23    events, and, of course, where those references

24    are incorrect, you can have a claim for the

25    statement being false or misleading.

1           But, to the extent that my friends on

2      the other side and particularly the government

3      points to the fact that there are certain

4      examples given of breaches that have taken place

5      in the past, we don't think that any negative

6      inference can be drawn from that about the

7      particular type of episode that occurred here.

8           We think that those disclosures

9      connote breadth.  They convey that there are

10     many types of ways in which parties can access

11     data improperly.  And, again, the whole point of

12     this disclosure is to put investors on notice

13     that this may happen in the future.

14          JUSTICE KAGAN:  Well, let's --

15          MR. SHANMUGAM:  And I would add one

16     other contextual point if I could make it very

17     quickly, which is that it's important to keep in

18     mind that at the very beginning of the 10-K, at

19     Joint Appendix 410, Meta warns that statements

20     that include words like "may" are intended to

21     identify forward-looking statements.

22          JUSTICE KAGAN:  So if I could give you

23     a hypothetical, and it's a modified version of

24     one of the hypotheticals that is in the briefs.

25     If I say to you a fire occurs at our production

1    plant, our ability to meet our production and

2    sales targets could be impaired, all right?

3    And, in fact, there had been a significant fire

4    at the production plant, completely destroying

5    it.

6              Where does that -- how does that come

7    out on your view?

8              MR. SHANMUGAM:  So I think, if there

9    were no longer a production plant by virtue of

10    the fire, that you would be contravening an

11    implied premise of the statement, which is that

12    the production --

13              JUSTICE KAGAN:  So that's what I

14    understood your brief to say, so I'm not --

15              MR. SHANMUGAM:  Yes.

16              JUSTICE KAGAN:  -- surprised by that.

17    So what if instead there was a fire and it

18    destroyed 50 percent of the production capacity

19    of the plant?

20              MR. SHANMUGAM:  So I would say no

21    misrepresentation in that instance, and let me

22    explain why.  I think that the difference is

23    that there is no implied representation that

24    there have not been fires at the plant in the

25    past.  I think the only implied representation

 1    is that there is a plant.  Now you can change

 2    the language --

 3              JUSTICE KAGAN:  Well, I -- I think

 4    that that -- that's not really the way we

 5    communicate.  I mean, if you think of the

 6    typical investor and you say in the first

 7    version of the hypothetical, yes, the typical

 8    investor would think it's kind of misleading for

 9    you to make this statement that's framed

10    entirely in a hypothetical if, in fact, there's

11    no more plant and no more production capacity,

12    so too the reasonable investor is going to say,

13    well, if there's been such substantial damage to

14    a plant that production capacity is operating at

15    50 percent or 30 percent or 10 percent, you

16    know, that too is going to be of interest to the

17    investor for the exact same reason.

18              And I guess what that suggests to me

19    is that this inquiry is more contextual than

20    your position allows for.

21              MR. SHANMUGAM:  Well, I think, as I

22    indicated at the outset, that our position is

23    the one that is sensitive to context.  The

24    wording of the statement really matters because,

25    after all, as the Court indicated in the opinion

1    in Omnicare, when you're engaged in this

2    analysis, you are looking closely, if necessary,

3    at both the language of the statement and the

4    context.

5              I -- and I recognize that your

6    hypothetical gets very close to the actual edge

7    case because you could posit an example where

8    the factory has been so greatly damaged that it

9    is as if the factory doesn't exist.

10              JUSTICE KAGAN:  Well, it was meant to

11    be a hard hypothetical.

12              MR. SHANMUGAM:  Well, I --

13              JUSTICE KAGAN:  I grant you that.  But

14    I think you could come up with a lot of those,

15    where there's not an embedded statement of the

16    kind that you're saying is necessary.  It's

17    like, you know, we said there's a plant and

18    there's not a plant.  It's not a black-and-white

19    thing in that, but -- but it is clearly

20    misleading.

21              And -- and when we think about these

22    questions, we're not looking only to lies,

23    right, or to, you know, complete false

24    statements.  We're also looking to misleading

25    statements or misleading omissions as the case

1       may be.

2              And this seems -- you know, the

3       hypothetical is meant to suggest that there are

4       a range of ways in which these forward-looking

5       statements can be misleading as to things that

6       have occurred in the past.

7              MR. SHANMUGAM:  And I actually

8       completely agree with that, and I think that our

9       approach takes account of that context.  It does

10      require scrutiny of the statement.

11             I would submit that the other side's

12      approach does not.  And -- and let me at least

13      describe what I understand the other side's

14      approach to be, and Mr. Russell and Mr. Barber

15      can explain if I'm incorrect about this.

16             I understand their position to be that

17      whenever you have an if/then statement of this

18      variety, which is a pretty paradigmatic form of

19      statement in a risk disclosure, that the "if"

20      carries with it an implied representation that

21      the specified triggering event has not

22      previously occurred, subject only to the caveat

23      that it has to be material.

24             Now let me explain why I think that

25      can't be right with a tangible example.  If you

1    take a look at Meta's 10-K and the risk

2    disclosures in that 10-K, which are voluminous,

3    on page 441, the risk disclosure states that:

4    Unfavorable media coverage could negatively

5    affect our business.  And that is the equivalent

6    of an if/then statement:  If we suffer

7    unfavorable media coverage, that could

8    negatively affect our business.

9              I don't think anyone would infer from

10   that that Meta has never previously suffered

11   unfavorable media coverage.  And if you read the

12   entirety of the risk disclosures, it's sort of

13   replete with examples like that.

14             JUSTICE JACKSON:  But, Mr. Shanmugam,

15   I -- I guess what concerns me a little bit is I

16   don't know if your position is appreciating the

17   fact that past occurrences, past triggering

18   events, can still lead to future harm and that

19   what is misleading is the suggestion, when you

20   make your statement completely futuristic, that

21   no such future harm is going to occur.

22             So let me give you an example that I

23   hope will clarify this.  So suppose a realtor is

24   speaking to a potential buyer about a house --

25   and I think there was some house examples in

1    your briefing -- and he says:  If crime goes up

2    in this area, homeowners insurance could become

3    more expensive.

4            The triggering event would be crime,

5    and the harm would be more expensive homeowners

6    insurance.  Both of those things in the

7    futuristic statement are happening in the

8    future.

9            Wouldn't it be misleading to make this

10   statement if a string of burglaries had actually

11   happened that month?  The homeowner has no way

12   of knowing that.  The realtor knows that.  And,

13   at the time the statement is made, homeowners

14   insurance has actually already shot up two times

15   higher than before.

16           What I'm suggesting is it's misleading

17   because the homeowner is making a determination

18   of the risk of buying this property and paying a

19   certain amount of homeowners insurance.  And,

20   when you say your statement totally

21   futuristically, as though that has -- the

22   burglaries never happened, they're

23   miscalculating.  They're being misled into

24   making that calculation.

25           MR. SHANMUGAM:  Justice Jackson, I

 1    would make three points in response to that.

 2            The first is that I don't think that

 3    that statement would be misleading because I

 4    think you have to parse carefully the language

 5    of the statement.  And I think, if somebody

 6    says, if crime goes up, some consequence could

 7    occur, I think the natural implication of that

 8    is if crime goes up from where it is now.

 9            But that having been said, I want to

10    acknowledge, I think --

11            JUSTICE JACKSON:  But, I mean, isn't

12    the whole point -- the whole point of these risk

13    disclosure statements, as I think you admitted,

14    is that the person who is hearing them is trying

15    to determine whether there's going to be a

16    future harm to their business investment, right?

17            I mean, isn't that what they're doing?

18            MR. SHANMUGAM:  I would slightly

19    disagree with that.  I think the point of these

20    risk disclosures, as the SEC itself has made

21    clear, is to warn prospectively about the types

22    of risks that a company would face.

23            And a perverse consequence of the

24    other side's approach here is that a company

25    could effectively penalize --

1           JUSTICE JACKSON:  But why?  Why -- but

2    can I just ask you why?  Why are you warning

3    about the types of risks?  Isn't it because the

4    investor is trying to determine that if any of

5    those risks happen, it's going to be a problem

6    for the investment?

7           MR. SHANMUGAM:  Yes, but a company is

8    not ordinarily making any warranty about the

9    probability of the risk occurring.  And the way

10   in which these statements are framed really

11   bears that out.

12          Now I do want to acknowledge something

13   that I think is underlying your hypothetical and

14   was also underlying Justice Kagan's

15   hypothetical.

16          In many of these cases, the omitted

17   information is something that an investor might

18   like to know.  I think we would acknowledge that

19   in these hypotheticals, the omitted information

20   may be material.

21          But the problem with the other side's

22   approach is that it really conflates materiality

23   with falsity, and while both of those elements

24   start from a reasonable investor, they measure

25   very different things.

1               Materiality focuses on the omitted

2      information, whether it is something that in

3      this Court's words would be important to an

4      investor's decision about whether or not to

5      invest.

6               I think the falsity or material -- or

7      misleadingness inquiry focuses on the statement

8      itself:  What does the statement connote --

9               JUSTICE KAVANAUGH:  What -- what other

10     disclosure requirements are out there about past

11     events that are relevant to assessing this?

12              MR. SHANMUGAM:  Well, there are many,

13     many.  And I do think that this Court can write

14     an opinion that sort of draws a square around

15     Item 105 disclosures because, while those are

16     intended to be forward-looking, to warn about

17     types of risks, you have Item 101, which

18     requires a description of the business, you have

19     Item 106, which is a very specific and recent

20     item included in Regulation S-K to warn about

21     cybersecurity events, and you also have Item

22     303, which this Court is well familiar with from

23     the Macquarie case last spring, which is the

24     Management Discussion and Analysis section,

25     which requires broad disclosures about known

1    trends and uncertainties.

2              And I would further add --

3              JUSTICE KAVANAUGH:  So, on the

4    50 percent hypothetical, if the 50 -- 50 percent

5    of the plant capacity's been destroyed in the

6    past, is there a -- a disclosure requirement

7    that could encompass that that's separate from

8    the one before us?

9              MR. SHANMUGAM:  I think it could be

10   relevant to, for instance, the description of

11   the business, if the company talks about its

12   facilities there.  And a company also has a

13   requirement to update, under Form 8-K, when

14   there have been material changes to the

15   company's business.

16              There are a panoply of these

17   requirements, but we rely on them really simply

18   to make the point that if the SEC ever judges

19   that there needs to be explicit disclosures

20   about a particular type of past or present

21   event, the SEC has the power to promulgate all

22   necessary and appropriate disclosure

23   requirements.

24              CHIEF JUSTICE ROBERTS:  That's what

25   I --

1          JUSTICE ALITO:  Mr. Shanmugam --

2          CHIEF JUSTICE ROBERTS:  -- I'm having

3    a little trouble with the question I think

4    you're -- you're actually addressing in terms of

5    the relationship between 105 and the rest of it.

6          But, I mean, is your position

7    basically that:  Don't worry about half-truths

8    under 105 because the basic problem is already

9    going to be disclosed under other provisions?

10         MR. SHANMUGAM:  That isn't our

11   submission, Mr. Chief Justice.  We certainly

12   acknowledge that there can be circumstances in

13   which even Item 105 disclosures can be

14   misleading.

15         And we agree on many of the

16   hypotheticals that Respondents and the

17   government set out in their briefs, primarily

18   because those are statements that contain

19   implied representations of one sort or another.

20         I simply want to make the point that I

21   think the great risk of accepting Respondents'

22   and the government's approach and upholding the

23   Ninth Circuit's decision, which, again, is an

24   outlier in that it requires disclosure of

25   previous occurrences of the triggering event

1    without any assessment of how likely the risk is

2    to occur, I think the great danger is that it

3    would really convert these disclosures, which,

4    again, identify types of risks that companies

5    face, into disclosures of laundry lists of past

6    occurrences, which companies would presumably --

7              JUSTICE SOTOMAYOR:  Counselor --

8              MR. SHANMUGAM:  -- have to keep

9    updated.

10             JUSTICE SOTOMAYOR:  -- you keep

11   accusing the Ninth Circuit of an absolute rule,

12   but I'm hearing your absolute rule.  Your

13   absolute rule is -- or categorical rule, you say

14   it in your brief at page 19:  "Risk disclosures

15   under 105 make no implied representation about a

16   company's past experiences."

17             Later, you say:  "Forward-looking risk

18   disclosures do not make any implied assertion

19   about previous events and the present risk of

20   harm they create."

21             So you're -- you want a different

22   categorical rule.  You say it's contextual, but

23   the only context you're looking at is whether

24   there's a misrepresentation, not a misleading

25   representation.  I think that's the question

1      that Justice Kagan was asking you.

2                If you take it out -- you're -- you're

3      shaking your head yes.  You're saying it has to

4      be an explicit or implicit misrepresentation.

5      But there's no such thing as having a misleading

6      represent -- misrepresentation with risk

7      disclosures.  Isn't that what you're arguing?

8                MR. SHANMUGAM:  So, Justice Sotomayor,

9      I think no litigant before this Court likes to

10     be accused of having a categorical rule, but let

11     me explain to you --

12               JUSTICE SOTOMAYOR:  No, but you're

13     smiling because I think that's what you want.

14               MR. SHANMUGAM:  No.  I don't -- I -- I

15     think we want a rule that goes like this:  I

16     think, when you have a bare if/then statement

17     like the statements at issue here, which

18     essentially boil down to the proposition, if

19     there is an episode of data misuse, Facebook may

20     suffer harm to its business or reputation, then,

21     in that circumstance, there is no implied

22     representation without more about whether or not

23     data misuse has occurred in the past.  It is no

24     different from the adverse publicity example

25     from the 10-K or any number of other examples.

1    But --

2              JUSTICE SOTOMAYOR:  Could I stop you

3    there?

4              MR. SHANMUGAM:  Yes.

5              JUSTICE SOTOMAYOR:  All right.  Let's

6    go to these statements, okay?  I'm going to

7    start with the one that says, if third parties

8    or developers fail to adopt adequate data

9    security practices, something could happen in

10   the future.

11             But that misleading statement is

12   omitting the critical information that Meta had

13   failed to implement adequate practices to

14   prevent third parties from misusing its data.

15   It had already happened.  A third party had

16   disclosed it, failed to disclose how many

17   millions of -- of user information?

18             MR. SHANMUGAM:  It's alleged to be

19   around 30 million --

20             JUSTICE SOTOMAYOR:  And failed --

21             MR. SHANMUGAM:  -- which was in the

22   Guardian article.

23             JUSTICE SOTOMAYOR:  -- and failed to

24   destroy those records, as it represented it had.

25   So why isn't that a misleading statement?

1          MR. SHANMUGAM:  So several points in

2    response to that, Justice Sotomayor, and I think

3    it's telling that when you look at Respondents'

4    and the government's brief, they don't even

5    really try to identify the statements that are

6    at issue here.  They just want to talk about why

7    the omitted information matters.

8          Let's leave that aside.  I'm happy to

9    join issue on the statements here.  The

10   statement you're referring to, which is at the

11   bottom of page 10 of our opening brief, is

12   identified as Statement 24 in the complaint.

13         I don't think that the claim --

14         JUSTICE SOTOMAYOR:  I don't want to

15   look at the statements -- I've read the

16   statement the way it was stated.  Let's go back

17   to my point.  Why isn't it misleading that there

18   were no mechanisms by the third party, as you

19   state, if they have inadequate mechanisms, X is

20   going to happen?  We know there isn't any

21   because Facebook didn't put any in.

22         MR. SHANMUGAM:  So I actually don't

23   think that that is the claim the plaintiffs have

24   been pursuing.  I think that their claim is that

25   the app developer here did not develop

1      sufficient safeguards.

2              JUSTICE SOTOMAYOR:  Why isn't that

3      misleading?

4              MR. SHANMUGAM:  I think the reason

5      that that is not misleading is because there is

6      no representation here about what has taken

7      place in the past.  That statement, no less than

8      the other statements on which they rely, is

9      forward-looking.

10             JUSTICE SOTOMAYOR:  Just as --

11             MR. SHANMUGAM:  Now it differs in one

12     respect in that it doesn't identify specifically

13     harm to business or reputation, but the

14     fundamental problem with plaintiffs' theory as

15     to this statement is that the episode of data

16     misuse that they're complaining about was in the

17     public domain at the time.  So their claim has

18     to be --

19             JUSTICE SOTOMAYOR:  That has to go --

20             MR. SHANMUGAM:  -- something more than

21     that.

22             JUSTICE SOTOMAYOR:  -- to materiality.

23     That's a different issue.  That's not what we

24     granted cert on.

25             MR. SHANMUGAM:  Well, they can't

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 1        possibly pursue a claim in a case where the

 2        alleged omitted information was in the public

 3        domain, whether you locate that in the

 4        materiality element or somewhere else.  And

 5        that's precisely why their claim has to be that

 6        our statement had to contain something more than

 7        simply a disclosure about the data misuse that

 8        was already in the public domain.

 9             And my question for the other side is:

10        What is the something more that they think this

11        statement should have contained that was not

12        already in the public domain at that time?

13             JUSTICE GORSUCH:  Mr. Shanmugam, I

14        just want to see if I've got it, okay, where

15        you're coming from at least, okay?  A highly

16        reticulated regulatory system, Item 105 is about

17        risk factors and it's necessarily

18        forward-looking.  Companies typically do if/then

19        statements.  That's generally okay, you would

20        say, like opinions.  Got it.  Omnicare.  Unless

21        there's some sort of affirmative representation

22        about a fact in the world that's wrong.

23             Is that the gist of your view?

24             MR. SHANMUGAM:  It is.  And to pick up

25        on Justice Sotomayor's --
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1            JUSTICE GORSUCH:  And -- and let me --

2    let me just continue before you pivot back to

3    Justice Sotomayor, which I want you to do too,

4    but the -- to take Justice Kagan's hypothetical,

5    which we're all concerned about, right, the

6    50 percent, would that be in your view possibly

7    required by other provisions like Item 101,

8    which requires information material to an

9    understanding of the general development of the

10   business?

11            MR. SHANMUGAM:  Yes.

12            JUSTICE GORSUCH:  And --

13            MR. SHANMUGAM:  It could be already

14   required.  And if it isn't --

15            JUSTICE GORSUCH:  And --

16            MR. SHANMUGAM:  -- the SEC could --

17            JUSTICE GORSUCH:  And Item 303, which

18   requires a disclosure of known trends or

19   uncertainties that have had or that are

20   reasonably likely to have material impact?

21            MR. SHANMUGAM:  Yes, it -- it could be

22   required by Item 303 as well.

23            JUSTICE GORSUCH:  And 106 as well,

24   which is specific to cybersecurity problems?

25            MR. SHANMUGAM:  Yes, but doesn't, I

        1    think, by everyone's admission sweep as broadly

        2    as to cover what took place here.

        3              JUSTICE GORSUCH:  But we don't have

        4    any of those provisions before us.  This is a

        5    105.

        6              MR. SHANMUGAM:  It is.  And I do think

        7    that the Court could write an opinion that makes

        8    clear that the context here is a limiting factor

        9    on the rule, which is to say that precisely

        10   because Item 105 disclosures are

        11   forward-looking, a reasonable investor, familiar

        12   with that regulatory framework, would understand

        13   that, as Meta warned here, these statements make

        14   no representations about the past.

        15             And I do think -- and the reason I

        16   wanted to pivot to Justice Sotomayor --

        17             JUSTICE GORSUCH:  Pivot -- pivot away.

        18             MR. SHANMUGAM:  -- was just to add the

        19   important caveat that you can change this

        20   statement pretty easily to render it misleading.

        21   If the statement had said Meta has never

        22   experienced an episode of data misuse involving

        23   its users, but if it did, it would do harm to

        24   Meta's business or reputation, of course, in

        25   that context, the statement would be false or

1 misleading if there had been an episode in the

2 past.

3          And I do want to say that the Court

4 took this case to resolve a circuit conflict

5 here, and there are basically sort of three

6 options.  Our view is that a statement of this

7 variety, as Justice Gorsuch just set out, is

8 ordinarily forward-looking, the condition does

9 not ordinarily contain an implied representation

10 about what took place in the past.

11          The Ninth Circuit went all the way in

12 the other direction and the Ninth Circuit said,

13 if a triggering event has taken place in the

14 past, the statement can be false or misleading

15 regardless of whether or not the risk has

16 materialized.  The circuits in the middle say

17 that if the risk is certain or virtually certain

18 to occur, a statement can be false or misleading

19 in that circumstance.  On these facts, we would

20 not be liable even under that test, which was

21 essentially the preexisting test in the Ninth

22 Circuit before the court relaxed it.

23          CHIEF JUSTICE ROBERTS:  Thank you,

24 counsel.

25          Justice Thomas?

1          JUSTICE THOMAS:  You said that the

2     risk factors are necessarily forward-looking.

3     Is that a regulatory or a statutory requirement?

4          MR. SHANMUGAM:  So I think that the

5     regulation makes quite clear that what you are

6     warning about is factors that could render the

7     company's -- an investment in the company

8     speculative or risky.  That is in the language

9     of Item 105 itself.

10          Now that having been said, there can

11     be circumstances in which a company could

12     include in an Item 105 disclosure something

13     about the past or present state of affairs.  And

14     the government points to the fact that there was

15     a time when an earlier version of Item 105

16     required at least some disclosures of that

17     variety.  That's all well and good.  As I

18     indicated in response to Justices Gorsuch and

19     Sotomayor, a company could choose to do that and

20     run the risk of being held liable.

21          My point is simply that if a company

22     does not do that in the statement at issue, it

23     cannot be liable for securities fraud based on

24     some categorical implied representation that the

25     specified event had never occurred in the past.

1          CHIEF JUSTICE ROBERTS:  Justice Alito?

2          JUSTICE ALITO:  Well, isn't it the

3   case that an evaluation of risks is always

4   forward-looking?  Isn't it inherently

5   forward-looking?  When you want to know about

6   what risk you face, you want to know what your

7   risk is in the future, right?

8          MR. SHANMUGAM:  It is, and that is

9   essentially what underlies our argument here.  I

10  would submit that where I think the Ninth

11  Circuit sort of went off the rails a little bit

12  is that it seemed to conflate the risk of the

13  ultimate harm with the risk of the conditional

14  triggering event occurring.

15          JUSTICE ALITO:  Well, I think the --

16  the intuition is that a statement that simply

17  blandly says that there's a possibility of a

18  risk can, in context, be extremely misleading if

19  there is a high probability of the risk

20  materializing.  I think that is the intuition.

21          The fact that something has happened

22  in the past very often sheds light on the risk

23  of a recurrence.  If you analyze the reason why

24  the thing happened in the past, you may realize

25  that this reason persists and, therefore, it's

1    predictable that the same thing may happen in

2    the past.  But the mere fact that something

3    happened in the past doesn't necessarily tell

4    you what the risk is going forward.

5         Do you disagree with any of that?

6         MR. SHANMUGAM:  Well, Justice Alito, I

7    think that that is the intuition that supports

8    the circuits that have adopted the so-called

9    virtual certainty rule, the notion that if you

10   warn that a risk is possible, but, in fact, the

11   harm is certain or almost certain to

12   materialize, that there comes a point at which

13   it feels as if the statement is misleading.

14        Now, here, precisely because we know

15   that no harm occurred from the initial misuse of

16   the data by Cambridge Analytica, this is an easy

17   case even under that standard.  But --

18        JUSTICE ALITO:  Well, what if -- all

19   right.  Let's take the -- the hypothetical about

20   the -- the risk of a fire, and let's say that

21   there was a fire, it was a damaging fire, and an

22   analysis of the reason why the fire started was

23   that all the wiring in the plant is obsolete and

24   eventually has to be replaced, but it can't be

25   replaced for the next six months.  So it shows

1       there that there's a -- a substantial risk of

2       the recurrence of a fire.

3               On the other hand, if there was a fire

4       and it was caused by the fact that the factory

5       was hit by a piece of space junk that fell out

6       of the sky, the fact that that happened doesn't

7       really tell you much more about the probability

8       that you're going to have another fire based on

9       objects falling out of space.

10              So what do we do with that situation?

11              MR. SHANMUGAM:  So I would say two

12      things about that situation.

13              The first is that if you have a

14      statement that simply says, you know, there may

15      be a risk of a fire occurring at our facility, I

16      don't think that that statement would be

17      misleading simply because there's a modest

18      difference in -- a modest increase in the

19      probability of that happening because of some

20      factor or another.

21              I think the circuits that have adopted

22      the certainty or virtual certainty standard have

23      done so precisely because all you're saying is

24      there's a possibility of this happening.  If

25      there is a certainty of it happening, then the

1    statement starts to feel misleading.

2         But the other thing I would say --

3    and, again, I think this is very important -- is

4    that here, we're talking about these sorts of

5    if/then statements.  If something occurs, then

6    there may be harm to the company's business or

7    reputation.

8         What you're really warning about in

9    that circumstance, I would submit, is the

10   ultimate harm to business or reputation.

11        So, if you're applying a standard like

12   the virtual certainty standard, you know, I

13   think the argument that the other side is making

14   is:  Well, if you had an episode of data misuse

15   and you were aware of it at the time, that, you

16   know, if it is highly likely that there is going

17   to be harm to your business, then that statement

18   is misleading.

19             JUSTICE ALITO:  Thank you.

20             MR. SHANMUGAM:  And the problem is

21   that that doesn't work out on these facts.

22             CHIEF JUSTICE ROBERTS:  Justice

23   Sotomayor?

24             Justice Kagan?

25             JUSTICE KAGAN:  So this is very much

1    meant to follow up on Justice Alito's questions.

2              My -- my -- my first note is that in

3    this statement, Facebook actually does have

4    various kinds of statements about what has

5    happened in the past.  It doesn't talk about

6    Cambridge Analytica, but it does talk about

7    other things.  It says there have been hacking

8    incidents in the past.  Hacking is a real

9    problem, and we've experienced it.

10             And, you know, if you had left that

11   out, I think that you would have every right to

12   stand up there and say:  Like, who could really

13   think that our statement says that there aren't

14   hacking incidents in the past?  All right?

15             So you put in a bunch of stuff that

16   nobody could accuse you of just take -- you

17   know, omitting because who could think that?

18             But now say that there's an

19   extraordinary release of confidential data, and

20   let's make it even more extraordinary in this

21   case because, if we make it this case, you know,

22   you'll tell me this was known already and it

23   really wasn't so bad.

24             But, you know, just imagine that --

25   that every user of Facebook had all their

1      confidential data released in some way to a

2      third party, who then put it on the open market.

3      So, really, quite an extraordinary mishap.

4              And just as Justice Alito says, the

5      reason why people want to know about that in

6      assessing risks going forward is because it says

7      something about the company's vulnerabilities.

8      It might say something about operational

9      problems of the company.  It might say something

10     about management issues at the company, like:

11     How does a company allow that to happen?  I

12     better go find out.

13             So -- so why wouldn't that be required

14     here?  Whatever anything else requires, what --

15     you know, what -- whatever other requirements

16     there are, this requirement, which talks about

17     -- which is supposed to give people an

18     understanding of future risks, an investor needs

19     to know that, doesn't she?

20             MR. SHANMUGAM:  Yeah.  So I would say

21     two things in response to that, Justice Kagan.

22             The first is that, again, with regard

23     to the examples that were given, I think we

24     would acknowledge that there could be a case in

25     which you might draw a negative inference from

1    something that a company said about what took

2    place in the past.  Again, it's a contextual

3    analysis that depends on the nature of the

4    statements.

5         But, here, I think it's quite clear

6    that the examples that were being given were

7    precisely that.  They were examples of the types

8    of efforts improperly to obtain Facebook user

9    data that had occurred in the past.  And a

10   reasonable investor, I would submit, would not

11   have been misled by that to believe that no

12   third party had ever gained access to user data

13   or misused that data through other means.

14        But, second, to respond to the second

15   half of your question, of course, there could be

16   situations in which omitted information would

17   really be of interest to a reasonable investor.

18   That goes to materiality.

19        And yet, it is a fundamental principle

20   that this Court has articulated in cases like

21   Matrixx and Macquarie that that is not enough at

22   least for 10-B liability, where there cannot be

23   pure omissions liability.  There is pure

24   omissions liability under other provisions of

25   the securities laws but not 10-B, which is, of

 1    course, enforceable by private investors.

 2              And what is the problem that this

 3    Court would be creating if it went as far as the

 4    Ninth Circuit?  It would be the problem of

 5    creating a regime where a company would be

 6    penalized for disclosing about the very risk

 7    that eventually materializes.

 8              JUSTICE KAGAN:  Thank you.

 9              JUSTICE GORSUCH:  Just to --

10              CHIEF JUSTICE ROBERTS:  Yeah.

11              JUSTICE GORSUCH:  Thank you, Chief.

12              Mr. Shanmugam, so you would agree,

13    though, an if/then statement can be misleading

14    and materially possibly so if it understates the

15    risk going forward and the probability of it?

16              MR. SHANMUGAM:  I think only under the

17    virtual certainty standard --

18              JUSTICE GORSUCH:  Yeah.

19              MR. SHANMUGAM:  -- but not under the

20    standard --

21              JUSTICE GORSUCH:  Do you object to

22    that?

23              MR. SHANMUGAM:  -- we are advancing.

24              JUSTICE GORSUCH:  I -- I -- I got

25    that.

 1                    MR. SHANMUGAM:  I think, under that

 2      standard --

 3                    JUSTICE GORSUCH:  Do we need to decide

 4      the difference between what you're advocating

 5      and the virtual certainty -- what you're calling

 6      the virtual certainty standard?  Is that

 7      necessary to a decision here?

 8                    MR. SHANMUGAM:  I think that this

 9      Court could write an opinion that says simply

10      that the Ninth Circuit's rule, as we understand

11      it and as the Ninth Circuit set out at pages 24A

12      and 25A of the Petition Appendix, cannot be

13      correct, that it cannot be sufficient to render

14      a statement misleading simply that the pre --

15      the specified triggering event has previously

16      occurred in the past, without an assessment of

17      the risk of harm.

18                    The other side comes back and says:

19      Well, it's implicit that if it's immaterial,

20      that it would fall outside that rule.  But our

21      submission is that's not what the Ninth Circuit

22      was really doing here.  The Ninth Circuit was

23      just saying:  If you have a previous occurrence,

24      the falsity requirement is satisfied.

25                    The Court could leave for another day

1    the delta between our proposed test and the

2    virtual certainty test because I think the

3    virtual certainty test creates an exception in

4    circumstances where, again, the risk of harm is

5    certain or virtually certain to materialize.

6    Defendants often prevail under that standard.

7              We certainly think this Court should

8    ideally provide guidance and resolve the circuit

9    conflict here definitively.  But, if the Court

10   wanted to say, we're not going to decide between

11   those two standards, it just doesn't matter on

12   these facts.

13             JUSTICE GORSUCH:  Thank you.

14             CHIEF JUSTICE ROBERTS:  Justice

15   Kavanaugh?

16             JUSTICE KAVANAUGH:  A couple

17   questions.  On the risk factors, as I understand

18   it, you don't have to identify the probability

19   of the event occurring, correct?

20             MR. SHANMUGAM:  And companies

21   typically don't.  If a company said it is highly

22   unlikely that an episode of data misuse is going

23   to materialize, then all of these things would

24   be put into play.  Perhaps not surprisingly,

25   companies don't make warranties that broad.

1           JUSTICE KAVANAUGH:  Because, if they

2      did that and, as Justice Gorsuch said, they

3      understated the risks, then they would be --

4           MR. SHANMUGAM:  Correct.  In Justice

5      Alito's hypothetical, if you included language

6      that goes to how probable it is, then you're

7      going to have a problem if you have information

8      that goes to that probability.

9           JUSTICE KAVANAUGH:  Right.

10           And, second, the SEC, I think you're

11      acknowledging, could adopt a regulation that

12      says what it currently says about risk factors

13      and added:  And, by the way, if you're

14      identifying possible future events that could

15      create harm, you also need to identify if those

16      events have occurred in the past?

17           MR. SHANMUGAM:  And what's funny about

18      this, Justice Kavanaugh --

19           JUSTICE KAVANAUGH:  Is that a "yes"?

20           MR. SHANMUGAM:  Yes.  And the SEC did

21      not do that when it promulgated Item 106 just

22      last year.  It did not include episodes of data

23      misuse in what had to be disclosed.

24           And, indeed, the SEC shied away from

25      requiring elaborate disclosures about previous

1        occurrences precisely because companies

2        complained about the burden that that would

3        impose.

4               JUSTICE KAVANAUGH:  Thank you.

5               CHIEF JUSTICE ROBERTS:  Justice

6        Barrett?

7               JUSTICE BARRETT:  So, Mr. Shanmugam,

8        you said that this is about context and about

9        the regulatory context, but it seems to me,

10       based on a lot of the hypotheticals that you've

11       gotten and the ones written in the briefs, that

12       it's about more than just the regulatory context

13       but also about the context of the business, the

14       nature of the risk, et cetera, which makes it

15       not easily susceptible to a categorical rule.

16              Let's just say -- you know, Justice

17       Gorsuch was asking you to kind of articulate

18       where the line might be.  It's hard for me to

19       see why we would adopt the virtual certainty

20       test when it's nobody's first choice.  And it

21       seems like the kind of bright -- bright-line

22       rule that maybe the SEC might want to adopt,

23       that sort of thing, but it's -- it's hard for me

24       to see why we would do that.

25              Assume that I think the Ninth

          1    Circuit's rule goes too far and I think your

          2    rule goes too far.  It seems to me very hard to

          3    articulate what the line is.  And -- and -- and

          4    maybe I can put it this way.  It seems like the

          5    hardest hypotheticals are the ones where the

          6    risks are either unusual or devastating, like a

          7    50 percent loss of a factory because of a fire

          8    or getting hit by space junk.  Those are --

          9    those are things that are unusual and hard.

         10          You know, nobody would think that a

         11    social media company wouldn't be at risk of data

         12    breaches or that data breaches hadn't happened

         13    in the past.  Or, if you're a food supply chain,

         14    you know, E. coli outbreaks in spinach, you

         15    know, that sort of thing.  If things are going

         16    to recur and they're things you associate with

         17    the business and they're described at a

         18    relatively high level of generality, it seems to

         19    me that those kinds of statements, well, maybe

         20    those do seem like they're general statements

         21    just about the category of risk that a

         22    particular kind of business faces, but if they

         23    are more unusual, kind of either/or binary

         24    choices, make or break the business, well, then

         25    those really seem like they're misleading.

1          So, if I see it that way, how do I

2     articulate a rule that handles anything more

3     than the case in front of us?

4               MR. SHANMUGAM:  Sure.

5               JUSTICE BARRETT:  Maybe I shouldn't.

6               MR. SHANMUGAM:  Well, Justice Barrett,

7     I think what I would say is that I would grant

8     that I think there are circumstances in which a

9     reasonable investor may have an intuition that

10    something has taken place in the past.  The

11    example that I gave earlier, I think, falls into

12    that category.  Nobody would think that a

13    company as big as Meta had never suffered

14    unfavorable publicity.  And I would submit that

15    if we're talking about data misuse and the like,

16    I think most people would assume that there have

17    been episodes of that variety in the past.

18          I think what you may be reacting to

19    here is the sense that sometimes there are

20    events that seem so significant that it feels as

21    if there ought to be an obligation to disclose

22    them, and maybe the unusual events fall into

23    that category because those are perhaps likely

24    to be events that are really, really

25    significant.

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 1              Our point is simply that that goes to
 2      materiality first and foremost.  And, again, I
 3      think part of the problem with the other side's
 4      approach is that it really conflates these
 5      elements that are meant to be different.  The
 6      language of Rule 10b-5 itself makes clear that
 7      an omission has to be both material on its own
 8      terms and necessary in order to avoid rendering
 9      a statement not misleading.
10              JUSTICE BARRETT:  Well, I think some
11      of the hypotheticals that you're getting show
12      that not everybody shares that intuition, that
13      materiality is the only thing at stake, that it
14      can also be misleading.  Depending on how
15      specific the risk is, you know, people probably
16      have different intuitions that fall along a
17      spectrum.
18              So what -- if -- if I'm resisting, I
19      feel like you're still advocating for your
20      categorical rule.
21              MR. SHANMUGAM:  Well -- but, all
22      right, so let me offer the important caveat,
23      which is where I started the argument, which is
24      the caveat that we really drew from this Court's
25      opinion in Omnicare, which is that implied
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 1     representations, I think, can take care of many

 2     of these circumstances.  And we acknowledge in

 3     our reply brief that, for instance, a statement

 4     can have an implied representation about the

 5     current state of affairs.  Take the final exam

 6     example.  If I fail one of my finals this

 7     semester, I may have to retake a class.  I

 8     think, there, there's an implied representation

 9     that you're talking about your finals this

10     semester, and if you failed one of them, that

11     statement is then false or misleading.

12             It is because there is an implied

13     representation that we think is absent from a

14     statement of this variety.  And I think the

15     Court can write an opinion that is mindful of

16     the language of this statement but recognizing

17     that the reason there's a circuit conflict is

18     that companies use this form of formulation

19     quite frequently.  And so, in some sense, the

20     Court is deciding it for a category of types of

21     statements, but, if the wording changes, the

22     analysis is going to be different.

23             CHIEF JUSTICE ROBERTS:  Justice

24     Jackson?

25             JUSTICE JACKSON:  So I have two

1       questions that are kind of similar.  I think

2       that what is bugging me about your view is that

3       you seem to suggest that the only implied

4       misrepresentation or implied representation that

5       matters is a statement that falsely suggests

6       that something didn't happen in the past when it

7       actually did.  You've said that many times.

8                But I'm wondering whether there isn't

9       also a statement about what needs to happen in

10      the future from the investor's perspective so

11      that when you say, if this kind of data breach

12      happens, it could damage Facebook's business,

13      the investor thinks, okay, so if I invest in

14      this business now, I'm going to have to start

15      looking out for signs of this kind of data

16      breach happening in the future, I'm going to be

17      focused on that aspect of, you know, the

18      research as I try to figure out this investment.

19               You're sort of throwing him off the

20      scent of the fact that what he really needs to

21      do is figure out what harms are going to arise

22      from the data breach that has already occurred.

23      This is similar to Justice Kagan's point about

24      how an investor uses the information.  They're

25      looking for vulnerabilities in the company, et

1    cetera.

2           And so I'm just -- I'm just nervous

3    about the suggestion that the only

4    representation that's being made in a futuristic

5    statement is one that relates to the past as

6    opposed to a possible statement about the future

7    in the way that I've described.

8           MR. SHANMUGAM:  So I'd make two points

9    about that, Justice Jackson.

10          The first is that I think it's

11   important to look at Item 105, and one of the

12   things that Item 105 requires is that the risk

13   that you're disclosing be a material risk; in

14   other words, it's got to be something that is

15   reasonably likely to arise.

16          And so I actually think, if you had,

17   for instance, the example of our factory being

18   hit by a meteor, that's something that you would

19   probably not have to disclose.

20          JUSTICE JACKSON:  No, no, but it's

21   already occurred.  In -- in the --

22          MR. SHANMUGAM:  Right.

23          JUSTICE JACKSON:  -- in all the

24   hypotheticals that I'm talking about --

25          MR. SHANMUGAM:  Right.

1                JUSTICE JACKSON:  -- it's a

2      hundred percent, let's say, that this is -- that

3      there's going to be harm from this because it's

4      happened.

5                MR. SHANMUGAM:  And in some sense, my

6      point is that precisely because it has to be

7      material, I think a reasonable investor would

8      think this is something that is a very real

9      risk, it may have happened in the past, it could

10     happen in the future.

11               And -- and I think that that is an

12     important --

13               JUSTICE JACKSON:  No, I guess my

14     question is, why aren't you making a statement

15     with your purely futuristic formulation that

16     leads the reasonable investor to believe that no

17     harm of this nature is going to happen right --

18     right now, right now?

19               MR. SHANMUGAM:  Right.  Well --

20               JUSTICE JACKSON:  I have to wait --

21     that the -- so, in my -- in my real estate

22     example, the person is -- when the -- when the

23     real estate agent says, if crime goes up, home

24     insurance rates might go up, the investor says,

25     okay, I'm going to start looking at crime

1       reports because, you know, if this were to

2       happen in the future, then, fine, this risk will

3       materialize.  What he doesn't know is that crime

4       has already gone up, crime has already gone up,

5       and that, really, tomorrow the insurance rates

6       are going to go up.

7              And what I'm suggesting is that you've

8       misled him into thinking that he has to wait for

9       a future triggering event as opposed to he has

10      to do what he needs to to mitigate the harm that

11      will already happen as a result of the past

12      triggering event.

13             MR. SHANMUGAM:  Yes.  And I think we

14      would draw a line between a circumstance in

15      which the harm has currently materialized, in

16      other words, the harm is ongoing and, therefore,

17      will exist in the future, and a circumstance in

18      which there is simply a present risk of harm,

19      whether from a past event or a future event.

20             I think, if there is merely a risk,

21      there would be no liability because that risk is

22      precisely what you're warning of, and you're not

23      making any warranty about whether the triggering

24      event has occurred in the past.

25             And the last thing I would say is that

1      I really do think it's a question for my friends

2      on the other side what they think the statements

3      here should have said because it seems clear

4      that they think it should have said something

5      more than that there was the initial episode of

6      misuse, which was already in the public domain.

7      And I think that the answer to that question

8      will point up just how expansive and broad the

9      implied representation, really, the warranty,

10     is --

11              JUSTICE JACKSON:  Thank you.

12              MR. SHANMUGAM:  -- that they think

13     every statement includes.

14              CHIEF JUSTICE ROBERTS:  Thank you,

15     counsel.

16              Mr. Russell.

17              ORAL ARGUMENT OF KEVIN K. RUSSELL

18                ON BEHALF OF THE RESPONDENTS

19              MR. RUSSELL:  Mr. Chief Justice, and

20     may it please the Court:

21              I'd like to start by making clear our

22     position.  First, as to the actual question

23     presented, we agree that a risk disclosure is

24     not misleading because it omits disclosure of an

25     event that is immaterial because it risks no

 1    business harm.  The Ninth Circuit did not hold

 2    otherwise.

 3              Second, we agree that in addition to

 4    proving materiality, plaintiffs must also show

 5    that the risk statement implies that the omitted

 6    event did not occur.  We don't claim that every

 7    risk statement includes that implication.  Our

 8    position is simply that they can and frequently

 9    do, and that ultimately depends on the facts and

10    context of each case.

11              Third, for that reason, the Court

12    should reject Facebook's categorical rule that

13    Item 105 statements are always agnostic about

14    whether the risk has transpired in the past.

15    Facebook admits that if a student tells his

16    parents that there's a risk he may fail an exam

17    when he's already done so, that is misleading

18    because it implies it's impossible that he won't

19    when that isn't true.  The same is true of many

20    risk factor statements, including the ones at

21    issue in this case.

22              Stating that there -- describing an

23    improper disclosure of user data as a

24    hypothetical risk implied that it was possible

25    it wouldn't occur.  And that wasn't possible

1    because it already had.

2          This does not mean that issuers must

3    disclose every material occurrence of a risk.

4    They simply must say enough to remove the false

5    impression that the omitted event has not yet

6    materialized, something they generally can do,

7    as Facebook did here with respect to hacking, by

8    simply acknowledging that the risk has

9    materialized in the past.

10          Finally, the Ninth Circuit did not

11   adopt any contrary categorical rule.  The Court

12   did not discuss whether these particular

13   statements were agnostic about the past because

14   Facebook never argued that they were.  It

15   elected instead to argue only that the warned-of

16   risks had not transpired because it viewed the

17   warned-of risks as speaking only to hacking

18   events and business harm.

19          Because Facebook does not challenge

20   the Ninth Circuit's fact-bound rejection of

21   those claims in this Court, this Court should

22   provide any necessary guidance for future cases

23   in the course of affirming the judgment.

24          I welcome the Court's questions.

25          JUSTICE THOMAS:  Mr. Russell, what

1     else should Facebook have provided in the 105

2     statement to comply with 10b?

3           MR. RUSSELL:  So I think that they

4     could have said what they said and then said

5     something like:  Such improper disclosure or

6     misuse of user data has occurred in the past,

7     including recently on a substantial scale.  I

8     think that would have removed any misimpression

9     that an event like what happened in Cambridge

10    Analytica hadn't occurred.

11          And the reason that it is reasonable

12    for somebody to think that this statement

13    implies that it hadn't occurred is because an

14    investor -- a reasonable investor hearing a

15    company describe factors that are relevant,

16    factors that make the investment risky would

17    expect that if something like this had happened,

18    30 million users' private data released,

19    eventually causing a hundred billion dollar

20    reduction in the market capitalization of the

21    company, that the company who is intent on

22    telling the whole truth about the factors that

23    make the investment risky would not speak about

24    such things --

25          JUSTICE GORSUCH:  Mr. Russell --

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 1              CHIEF JUSTICE ROBERTS:  Counsel --
 2              MR. RUSSELL:  -- in hypothetical
 3     terms.
 4              JUSTICE GORSUCH:  I'm sorry, Chief.
 5              CHIEF JUSTICE ROBERTS:  Oh, yeah.
 6     Your basic submission is that a probabilistic
 7     statement about something carries the inference
 8     that -- that something has not occurred.
 9              MR. RUSSELL:  No.  Our -- our position
10     is that it can.  It doesn't always.
11              CHIEF JUSTICE ROBERTS:  Okay.  Well,
12     it -- it can.
13              MR. RUSSELL:  Yes.
14              CHIEF JUSTICE ROBERTS:  But, I mean,
15     with respect to certainly some but maybe most, a
16     probabilistic statement will do the exact
17     opposite.  For example, if you're leaving my
18     house and I say, you might slip on the steps,
19     you wouldn't say, well, that's never happened
20     before.
21              MR. RUSSELL:  That's right.
22              CHIEF JUSTICE ROBERTS:  Your -- your
23     inference would be that has happened and that's
24     why I'm giving you the warning.
25              And it seems to me, if you're saying
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 1      it -- it can go one way in some cases, it can go

 2      another way in the other cases, that's a real

 3      expansion of the disclosure obligation.  In

 4      other words, it's not something that is narrow

 5      because, whether it's happened or not, you --

 6      you -- you -- you have to disclose it.

 7                  MR. RUSSELL:  No.  That's not our --

 8                  CHIEF JUSTICE ROBERTS:  Well,

 9      exactly -- well, who -- how are we supposed to

10      parse whether it's slipping on my steps or, you

11      know, what you say is the actionable in this

12      case?

13                  MR. RUSSELL:  I think you simply have

14      to do what the Court says you have to do in

15      omission cases in Omnicare, which is you always

16      have to ask:  How would a reasonable person

17      understand the implications of this sentence?

18                  And frequently -- and if it is a case

19      where somebody would understand that the

20      warned-of risk is something that happens all the

21      time or you'd only be talking about it if it

22      happened in the past.

23                  If it's an event like adverse

24      publicity that everybody knows has happened in

25      the past, nobody's going to understand the

1    statement to be implying that it hadn't

2    happened.

3            JUSTICE GORSUCH:  So -- so, Mr.

4    Russell --

5            CHIEF JUSTICE ROBERTS:  So --

6            JUSTICE GORSUCH:  I'm sorry, Chief.

7            CHIEF JUSTICE ROBERTS:  I was just

8    going to follow up.

9            MR. RUSSELL:  Mm-hmm.

10            CHIEF JUSTICE ROBERTS:  So, basically,

11    if you have this and it's -- the suit is -- is

12    brought, you say:  Well, it -- it either -- the

13    inference it either has happened in the past or

14    it hasn't happened in the past and we're going

15    to go to trial to decide that, it seems to me

16    that's kind of a blank check.

17            MR. RUSSELL:  No, you treat it the way

18    you do every omissions case.  You can enter

19    summary judgment or enter a motion to dismiss if

20    no reasonable juror could find that this

21    statement implied that the event hadn't happened

22    in the past.

23            In this case, there are at least four

24    reasons why it would be reasonable for a jury to

25    decide that this particular set of statements

1     did.

2            The first is the structure, which it

3     is the received wisdom of many courts in many

4     contexts over many years, "can" and "often" does

5     imply that speaking of something in a

6     hypothetical term implies that it hasn't

7     happened.

8            But the context of this case

9     reinforces that here -- because, here, we are

10    not talking about something like adverse

11    publicity, which people would know happens all

12    the time.

13           JUSTICE GORSUCH:  Well, Mr. Russell,

14    on that, so -- so I just want to make sure,

15    there -- there seems to be a -- a point of

16    agreement not only on the question actually

17    presented but that forward-looking risk factor

18    statements don't generally imply anything.

19    There has to be some implied representation

20    about a past fact for you to get in the door.

21           Is that right?  Is that common ground?

22           MR. RUSSELL:  I don't know that I

23    would agree on the generally.  I think we do

24    agree that it's context-dependent, and sometimes

25    it does, sometimes it doesn't.

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 1                    JUSTICE GORSUCH:  But it depends upon
 2      an implied representation that there is nothing
 3      -- no problem in the past?
 4                    MR. RUSSELL:  Yes.
 5                    JUSTICE GORSUCH:  Okay.  We agree on
 6      that.
 7                    MR. RUSSELL:  Yes.
 8                    JUSTICE GORSUCH:  Everybody seems
 9      to -- you guys agree on that at least.
10                    What about the statement we have here?
11      I -- I want some help with that because it -- I
12      wonder whether we're in the -- the world of a
13      meteorite or -- or Justice Alito's falling
14      debris or whether we're in the Chief Justice's
15      world of slip and fall on my front porch.
16                    Defendant represented that our
17      industry is prone to cyber attacks.  It says
18      that hacking has become more prevalent in our
19      industry, and it says we cannot assure you that
20      the measures we have will provide absolute
21      security.
22                    Why isn't this -- given those kinds of
23      warnings, where is the implied representation
24      that Meta has never had a significant data
25      breach?
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1           MR. RUSSELL:  Because Meta itself

2    insisted vehemently below and in public when

3    this was finally disclosed in 2018 that this was

4    not a hacking event.  This was not a

5    cybersecurity event.

6           And the risk disclosures discussed

7    separately the risk of misappropriation of user

8    data by developers, and in that context, it

9    doesn't say any of the things that you just

10   read.

11          JUSTICE GORSUCH:  Yeah.  Well, that's

12   the next paragraph, and it -- it -- it does say

13   that we provide limited information.  However,

14   if they fail to adopt or adhere to adequate data

15   security practices or in the event of a breach

16   of their networks, you're going to have a

17   problem.

18          So, again, where is the implied

19   representation that -- that this hasn't happened

20   in the past?  Isn't this exactly the sort of

21   thing that a reasonable investor does know can

22   happen to large companies with --

23          MR. RUSSELL:  I don't -- I

24   respectfully disagree.

25          JUSTICE GORSUCH:  I mean, the federal

1    government -- I mean, I -- I think China

2    probably has all of our FBI files.  You know, I

3    mean, data breaches are part of our -- our lives

4    these days.

5            MR. RUSSELL:  But this wasn't a data

6    breach.  And this is really important.  That was

7    a principal argument that Facebook made below,

8    that these statements only warned about data

9    breaches, and the Ninth Circuit rejected that

10   reading.

11           And the reason for that is because,

12   unlike a hacking event -- and I don't know what

13   China does -- here, Facebook allowed a

14   third-party developer -- it just gave them the

15   data.

16           And that doesn't happen, Justice

17   Barrett, all the time.  Actually, at the --

18   before the disclosures in this case, reasonable

19   investors would have thought that it never

20   happened and particularly on this scale.

21           And for -- Facebook had faced

22   allegations of this in December of 2015, and it

23   didn't respond by saying:  Yeah, that happened

24   and we took care of it.  It said:  We have to

25   conduct an investigation, and if we do, we will

1    take swift action.

2            And by the time they issued this

3    report in 2016, they hadn't said boo about this.

4    And so, in that context, I think it is very

5    reasonable for investors to understand that by

6    treating it as simply something that may happen

7    in the future, they are confirming that their --

8    what their silence had already conveyed, which

9    is that the -- that we didn't substantiate the

10   allegations in the 2015 article.

11           JUSTICE BARRETT:  So you're saying

12   that it is unusual because it wasn't -- you're

13   saying it wasn't a data breach.  It was

14   Facebook, Meta just handing over the data.

15           You're saying it falls more in the

16   category of a factory half burning to the

17   ground, something that we wouldn't necessarily

18   expect because you would have trusted Meta not

19   to hand it over.  Is that what you're saying?

20           MR. RUSSELL:  That's right.  And

21   that's why users were so angry when they found

22   about this.

23           JUSTICE KAGAN:  And it's handing over

24   the data without any real controls, isn't that

25   right?  Isn't that the allegation?

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 1               MR. RUSSELL:  Right, that this

 2    evidence -- this episode showed not only that

 3    they had given this away in this one instance

 4    but that they didn't have the capability to keep

 5    their promises to users that users can control

 6    who has access to their private data.

 7               JUSTICE BARRETT:  Mr. Russell, can I

 8    just ask you one other question?  You know,

 9    Justice Gorsuch and -- and the Chief too were

10    kind of trying to pin you down on exactly what

11    you think about these if/then statements or

12    these statements of risk, and you agreed that

13    sometimes they might be purely forward-looking,

14    right?

15               MR. RUSSELL:  Yes.

16               JUSTICE BARRETT:  And you said:  But

17    they can contain implied representations.

18               And -- and I think Mr. Shanmugam's

19    position is that ordinarily they don't.  And is

20    yours that they ordinarily do?

21               MR. RUSSELL:  I think that may be a

22    fair representation.  That is the received

23    wisdom from all these courts in all these cases

24    in all these contexts.

25               But, at the end of the day -- and I'm
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1    not sure that it's helpful or necessary to say

2    whether they ordinarily do or they ordinarily

3    don't.  At the end of the day, each case has to

4    be considered on its facts.

5             JUSTICE KAVANAUGH:  Well, doesn't that

6    raise what for me is a kind of separation of

7    powers or due process concern?  The SEC knows

8    how to write regulations that require disclosure

9    of past events.  As we've discussed, they have

10    those kinds of regulations.

11             And what happens here is this

12    regulation does not explicitly require that, and

13    then the question is:  Okay, why not let the SEC

14    do that if they want to?  And then we have this

15    regulation.  And you say sometimes it does,

16    sometimes it doesn't, in response to Justice

17    Barrett and the Chief, and you said it can

18    sometimes contain an implied representation.

19             If you're the regulated party, you

20    don't have fair notice, one could say, of what

21    you're required to do.  It's guesswork about

22    when you're required to disclose.  And you're

23    going to, therefore -- another problem that they

24    raise -- and I just want you to respond to all

25    this -- that you're going to just over-disclose

1       then, and that's going to defeat the whole

2       purpose of it.

3               So I guess the starting point is, why

4       not let the SEC do this if they want to?  Isn't

5       there a notice problem when you do it this way?

6       And doesn't that, in turn, lead to

7       over-disclosures, which undermines the whole

8       kind of theory here?

9               MR. RUSSELL:  So I think the premise

10      of the question and a major premise of the other

11      side's argument is that Item 105 is directed at

12      disclosing only things that might happen in the

13      future.  And that's just wrong, right?  The text

14      of the stat -- of the regulation says --

15              JUSTICE KAVANAUGH:  But you -- I'm

16      sorry to interrupt, but I just want to get this

17      one point out and you can keep going.  A lot of

18      SEC regulations do specifically require

19      disclosure of things in the past, correct?

20              MR. RUSSELL:  Correct.

21              JUSTICE KAVANAUGH:  And --

22              MR. RUSSELL:  And they also require --

23              JUSTICE KAVANAUGH:   -- and this

24      doesn't explicitly do that.  Keep going, though.

25      I'm sorry to interrupt.

1             MR. RUSSELL:  That a lot of

2    regulations require things that -- to be

3    disclosed about the past and the future.  Most

4    of them do both.  And so I don't think you can

5    draw any inference about what this regulation is

6    intended to do just from that fact.

7             But you can look at the regulatory

8    language, which requires disclosure of factors

9    that make the investment risky.  And the fact

10   that there's been a recent misappropriation of

11   30 million users' private data that is a ticking

12   time bomb that's going to cause a hundred

13   billion dollars in damages to the company down

14   the line is a factor that makes investment in

15   the company risky.

16            JUSTICE ALITO:  Well, that's a --

17            MR. RUSSELL:  More --

18            JUSTICE ALITO:  -- that is -- that is

19   an argument that seemed to me different from --

20   seems to me different from the one that I

21   thought was presented by the question.

22            So there can be a situation in which

23   an event has happened in the past, a big data

24   breach, and the company knows that this thing

25   that happened in the past is going to have a

 1    continuing effect, that it does not have to be a

 2    recurrence of a similar event.  We're talking

 3    about the damage from the past event which

 4    continues to have an effect.

 5              That's different from the situation in

 6    which something happened in the past, it's a

 7    discrete event, it's over, but there's concern

 8    that there's a real risk that it's going to

 9    happen in the future.

10              MR. RUSSELL:  I think that's right.  I

11    think --

12              JUSTICE ALITO:  Well, I thought we

13    were -- we took the case to decide the second

14    question, not this first question that you've --

15    that -- and that may be the one that fits best

16    with the facts of the case, but I see those two

17    things as quite different.

18              MR. RUSSELL:  Well, but I was trying

19    to make the more generic point, that simply that

20    Item 105 is not limited to requiring disclosures

21    about things that may happen in the future.  And

22    you can get that from the regulatory language.

23    You get it from the fact that Facebook itself

24    disclosed facts, including the prior occurrence

25    of hacking, and it does so and with respect to a

67

1    bunch of other things.

2         My point is simply that nobody who

3    reads these things, I think, will think that a

4    risk factor statement that expressly discusses

5    past events, that is intended to inform people

6    about factors that make the investment risky,

7    which can occur in past events, who know that

8    the prior versions of the regulation instructed

9    people that gave examples of past events is

10   going to think this is only talking about the

11   future.

12        JUSTICE ALITO:  Let me give you these

13   two situations.  This is what most troubles me

14   about your -- your argument, although, as I -- I

15   tried to bring out in questioning Mr. Shanmugam,

16   I see problems with his as well.

17        Suppose a company -- let's go back to

18   the fire example.  Suppose a company does an

19   internal -- has an inspector come in.  The

20   inspector examines the factory and says your

21   wiring has -- has got to be replaced, but it

22   can't be done in less than six months and that

23   there is an X percentage chance that there's

24   going to be a fire in your factory in the next

25   year.

1              Do they have to disclose -- if -- and

2       they say in their -- in the 10 -- in answering

3       the 10-K, if there is a fire, there may be a

4       significant disruption of our operations.  Do

5       they have to disclose that internal report and

6       say we know that there is an X percent chance

7       that a fire is going to occur?

8              MR. RUSSELL:  So I think possibly yes,

9       but this is actually the real virtual certainty

10      rule.  So this is where something is misleading

11      not because it's already happened in the past

12      but because you are not disclosing something

13      that's virtually certain to happen in the

14      future.

15              JUSTICE ALITO:  Well, it's not

16      virtually certain.  There's a certain

17      percentage.  Let's say it's a 15 percent chance.

18              MR. RUSSELL:  Well, I think, if the

19      statement is understood to imply that there

20      hasn't been a fire in the past, that's our case,

21      that is our claim here, and that that would be

22      misleading without regard --

23              JUSTICE ALITO:  Well, the statement --

24              MR. RUSSELL:  -- to the probability of

25      occurrence.

69

1                JUSTICE ALITO:  -- the statement is,

2      if there is a fire, there will be a substantial

3      disruption of our operations.

4                MR. RUSSELL:  I think, if there has

5      been a fire, that --

6                JUSTICE ALITO:  It doesn't say if

7      there has been.  If there is a fire.

8                MR. RUSSELL:  No, I understand.

9                JUSTICE ALITO:  Okay.

10                MR. RUSSELL:  I understand that, but a

11     reasonable investor, I think, could read that as

12     saying, you know, we wouldn't be talking about

13     fires in hypothetical terms if there had

14     recently been one that calls into question the

15     safety of the entire facility.

16                JUSTICE ALITO:  If it calls into

17     question the safety of the facility, if the --

18     the X is high enough, if the probability of it

19     happening is high enough, but if -- if there was

20     a fire in the past because of a meteorite, I

21     mean, that doesn't say anything about the

22     probability -- it doesn't increase the

23     infinitesimal probability -- infinitesimally low

24     probability of it happening in the future.

25                MR. RUSSELL:  I think I agree with

1      that.  I think that event would probably be

2      deemed immaterial to investors because it

3      doesn't auger harm to the business going

4      forward.

5                  JUSTICE ALITO:  All right.  Well, I'll

6      just --

7                  MR. RUSSELL:  That's the opposite of

8      this case.

9                  JUSTICE ALITO:  -- tell you where this

10     is going and I'll let you go.  Unless there's a

11     requirement to say -- to -- to quantify in some

12     way the nature of the risk, whether in numerical

13     terms or in descriptive terms, there's a very

14     high risk, there's a high risk, a moderate risk,

15     whatever, then I don't see the basis -- I see

16     that to be inconsistent with the idea that the

17     occurrence of an event in the future which

18     highlights the potential for the materialization

19     of the risk in the future has to be disclosed.

20     I don't really see a difference between those

21     two.

22                 MR. RUSSELL:  Well, I don't think that

23     a company is entitled to mislead people about

24     something that occurred in the past that, under

25     Basic, would be a material event just because it

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 1      has an assessment that it's not going to happen

 2      again.  It's up to the investors to make that

 3      judgment themselves, to value the company based

 4      on their own assessment once they are put on

 5      notice that this is actually something that

 6      happened in the past.

 7                  JUSTICE ALITO:  Thank you.

 8                  JUSTICE JACKSON:  So is that why

 9      you're sticking with -- with that -- it has to

10      be a statement that is -- that would cause a

11      listener to infer a fact about the past is

12      untrue?  I mean, I'm sort of with Justice Alito

13      in trying to understand the probability of risk

14      and whether a statement can also be misleading

15      if it would lead to an inference that the risk

16      of future harm is zero or very low when the

17      speaker knows it to be much greater than that.

18                  Why isn't that another kind of

19      misleadingness that we should be thinking about

20      or that the SEC was thinking about?

21                  MR. RUSSELL:  I -- I don't dispute

22      that that is another kind of harm and another

23      way in which a statement could be misleading.

24      I'm simply saying this case is not about that.

25                  Our theory of liability is that this
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 1    monumentally important event happened in the

 2    past and Facebook misled people into thinking

 3    that it hadn't.

 4              JUSTICE JACKSON:  Okay.

 5              CHIEF JUSTICE ROBERTS:  Justice --

 6              JUSTICE SOTOMAYOR:  I'm very confused.

 7    I thought, when -- Justice Alito put in his two

 8    hypotheticals or asked which of these two

 9    situations, something happened and it has

10    continuing risk, or something happened, no risk,

11    but it might happen -- something like it might

12    happen in the future.

13              This situation presents both, doesn't

14    it?

15              MR. RUSSELL:  I'm sorry, I may have

16    misunderstood the hypothetical then.  I do think

17    --

18              JUSTICE SOTOMAYOR:  That's what I

19    thought he --

20              MR. RUSSELL:  -- I do think the -- the

21    reason it was so devastating to be misled about

22    this occurrence is both, that people were going

23    to be really mad when they find out about it,

24    which is what happened when they did, and that

25    it --
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73

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 1                    JUSTICE SOTOMAYOR:  It happened and --
 2                    MR. RUSSELL:  -- reveals other risks
 3       about Facebook's inability to control outside
 4       developers' access to third-party -- or to
 5       private user data.  But the ultimate question
 6       here, I think, is simply whether there is a
 7       categorical rule that these statements are never
 8       or always contain that kind of implication.  I
 9       think everybody agrees that that's not the case.
10       It's always case-dependent, and it's always
11       fact-specific.
12                    And so then I think what's left for
13       the Court in this case is to ask, did the Ninth
14       Circuit held something different?  And --
15                    JUSTICE SOTOMAYOR:  Thank you,
16       counsel.
17                    MR. RUSSELL:  -- are you going to
18       decide the facts of this particular case on
19       whether these particular statements are
20       misleading?  I'm happy to talk about why they're
21       not.  We haven't focused on that question
22       because we took the Court to take the case to
23       decide the general legal question.
24                    CHIEF JUSTICE ROBERTS:  Thank you.
25                    Justice Thomas?
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1           JUSTICE THOMAS:  This case, as Mr.

2    Shanmugam indicated, is about falsity.  And so

3    at what point do we analyze that?  The event

4    took place in -- the misuse, in 2015.

5           MR. RUSSELL:  Yeah.

6           JUSTICE THOMAS:  And so -- and the

7    statement was when?

8           MR. RUSSELL:  The statement was in the

9    2016 annual report.

10          JUSTICE THOMAS:  So the -- do we just

11   look at that period to determine whether or not

12   the statement is false?

13          MR. RUSSELL:  I --

14          JUSTICE THOMAS:  Because you made a

15   big -- you made a big issue of the materiality

16   part, which is -- and the harm, that later on

17   they find out when there's full disclosure that

18   you've got a hundred billion dollar loss, 30

19   million people's data has been -- have been --

20   has been disclosed, et cetera.

21          So at what point do we analyze the

22   falsity?

23          MR. RUSSELL:  I think at the point

24   that they made the statement.  And so the -- we

25   acknowledge that if the event had happened so

1    long ago that it was wasn't material, there

2    would be no liability.  But, here --

3              JUSTICE THOMAS:  But we're not talking

4    about materiality at this point, right?

5              MR. RUSSELL:  Well, I think it would

6    be false if they were to imply -- there --

7    there's an interrelationship between these two.

8    Somebody reading a statement that is intended to

9    put you on notice of risks to the business,

10   would make the investment risky, is not going to

11   read the statement as implying anything about

12   immaterial events, right?  And so, if the event

13   --

14             JUSTICE THOMAS:  So how do you know in

15   2016 whether or not it was going to have the

16   downstream -- the later effect of a hundred

17   billion dollars in market cap drop -- loss?

18             MR. RUSSELL:  So I think two things

19   about that.  One is I do think what actually

20   happened is probative at the least of what was

21   foreseeable at the time.

22             And I think Facebook acknowledged in

23   its warning statements that misuse of this kind

24   could seriously damage the business.  And it's

25   only intuitive that it would because user data

1      is the lifeblood of the company, and if somebody

2      gives away your user data that you think is

3      private, people are going to be really angry

4      about that, as they were.

5              JUSTICE THOMAS:  I understand all of

6      that, but for -- when -- when we're analyzing

7      this for falsity, none of that comes into play.

8              MR. RUSSELL:  Only to the extent, I

9      think, that you would not understand a statement

10     to imply the non-occurrence of an immaterial

11     event, right?  And so, once you understand that

12     this is a material event, I agree that how

13     material it is doesn't go to falsity.

14             JUSTICE THOMAS:  And --

15             MR. RUSSELL:  The question is did this

16     happen or not.

17             JUSTICE THOMAS:  Yeah.  And, finally,

18     what role does the fact that this is at the

19     motion to dismiss stage play in our analysis?

20             MR. RUSSELL:  So the question here, I

21     think, is not what's the best reading of these

22     particular statements.  It is whether we have

23     plausibly alleged that a reasonable jury can

24     conclude that these statements falsely implied

25     that the omitted event had not occurred.

 1               That's the question that Facebook is

 2     going to have plenty of opportunity later in the

 3     case to argue to -- at summary judgment or to a

 4     jury that these statements -- what these -- a

 5     reasonable person understood these statements to

 6     make -- to -- to -- to imply.

 7               But, in Omnicare, this Court correctly

 8     acknowledged that what statements imply is a

 9     question that is principally of fact for the

10     fact finder.  And it necessarily makes these

11     kind of cases a little bit messy.  It doesn't

12     provide the -- the clarity that some issuers

13     might like.

14               CHIEF JUSTICE ROBERTS:  Justice Alito?

15               Justice Sotomayor, anything further?

16               Justice Gorsuch, anything?

17               JUSTICE KAVANAUGH:  I just want to

18     clarify, in response to Justice Sotomayor and

19     Justice Alito, exactly what you think that the

20     question is before us.

21               I thought the question was, in a

22     situation where you disclose the risk of an

23     event occurring in the future that could cause

24     harm, is it false not to disclose that the

25     event -- is that statement false because you

 1      don't disclose that that same event had happened

 2      in the past even though the harm from that event

 3      in the past is over?

 4             MR. RUSSELL:  That is the question

 5      presented on -- on that question, which has --

 6      which is very different than what we've been

 7      talking about all morning.  We agree that the

 8      answer is no.  If --

 9             JUSTICE KAVANAUGH:  Okay.

10             MR. RUSSELL:  -- you know, it is not

11      misleading to omit the occurrence of an event

12      that is immaterial because it risks no business

13      harm.  And in this case, that is not this case.

14             JUSTICE KAVANAUGH:  Okay.  I'll read

15      the transcript on that.

16             Okay.  And then the second thing, on

17      Justice Thomas's point, I mean, getting past the

18      motion, just to put the real world into this for

19      a second, getting past the motion to dismiss is

20      kind of -- it's the game, right?

21             MR. RUSSELL:  I don't think so.  A lot

22      of these cases go to summary judgment, and we've

23      collected a number of cases in which --

24             JUSTICE KAVANAUGH:  Well, it's a big

25      -- it's a big part of the decision.

1           MR. RUSSELL:  It is.  It is big and it

2      is important.

3           JUSTICE KAVANAUGH:  So it's just --

4      I'm just stating this.  It's not just, oh, it

5      can all be resolved at summary judgment.

6      There's a huge -- there's a huge issue at stake

7      just getting past the motion to dismiss in a lot

8      of these cases.  I think everyone --

9           MR. RUSSELL:  No, I acknowledge that,

10     but I think, at the end of the day, the question

11     here is whether these statements are capable of

12     implying that an event like this hasn't occurred

13     in the past, and if the answer is they are, then

14     I don't think any amount of policy argument in

15     the world will justify saying that they aren't.

16          And if this Court adopts a categorical

17     rule that's saying statements of this kind are

18     agnostic as a categorical rule about what

19     happened in the past, then I think you are

20     effectively saying that some statements that

21     actually are misleading are not, that they're

22     not actionable.  And that, we respectfully

23     suggest, is the office of a safe harbor, which

24     Congress authorized the SEC, not the courts, to

25     develop.

1          JUSTICE KAVANAUGH:  Okay.  Thank you

2     for your answers.  Appreciate it.

3          CHIEF JUSTICE ROBERTS:  Justice

4     Barrett?

5          Justice Jackson?

6          JUSTICE JACKSON:  Just to quickly

7     clarify your response to Justice Kavanaugh.  So

8     it's your view that this past event did present

9     a risk of future business harm?

10          MR. RUSSELL:  Yes.

11          JUSTICE JACKSON:  Is that right?

12          MR. RUSSELL:  That is right.

13          JUSTICE JACKSON:  And so that's why

14     you think their question presented doesn't

15     accurately capture what was going on, because

16     they sort of suggest that it doesn't?

17          MR. RUSSELL:  Right.  And the only

18     reason that Facebook has ever given why the

19     misappropriation of 30 million users' private

20     data didn't risk business harm, didn't risk

21     people being really mad when it finally came

22     out, is their claim that the public learned the

23     truth in 2015 and didn't care.

24          JUSTICE JACKSON:  Thank you.

25          MR. RUSSELL:  And -- okay.

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 1              CHIEF JUSTICE ROBERTS:  Thank you,

 2     counsel.

 3              Mr. Barber.

 4           ORAL ARGUMENT OF KEVIN J. BARBER

 5        FOR THE UNITED STATES, AS AMICUS CURIAE,

 6              SUPPORTING THE RESPONDENTS

 7              MR. BARBER:  Mr. Chief Justice, and

 8     may it please the Court:

 9              Petitioners ask this Court to immunize

10     from fraud liability risk-factor statements that

11     misleadingly depict a risk as hypothetical when

12     it has already materialized.  That argument is

13     flawed as a matter of law and common sense.

14              Indeed, Petitioners now appear to

15     recognize that a risk statement can implicitly

16     misrepresent the past.  That is exactly what

17     Facebook's statements did here.

18              There's been some discussion about the

19     question presented and the extent to which it

20     accurately captures what the court of appeals

21     held.  We agree with Respondents that it does

22     not.  Given the obvious importance of the

23     Cambridge Analytica matter to Facebook's

24     business, which depended so heavily on user

25     data, the court of appeals had no occasion to
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 1    hold that the nondisclosure of an unimportant

 2    event renders a risk statement misleading.

 3         That's why Petitioners have raised the

 4    broader argument that a risk statement

 5    categorically implies nothing about the past.

 6    This Court rejected a very similar argument in

 7    the Omnicare case, and it should take the same

 8    course here.

 9         I welcome the Court's questions.

10         JUSTICE THOMAS:  Mr. Shanmugam said

11    that you have the burden of or should have the

12    burden of saying exactly what else they should

13    have said to meet the requirements of 105 and

14    10b.

15         MR. BARBER:  I don't think that's

16    Respondents' burden, but I do think that

17    Respondents gave a good answer to that question,

18    which is Facebook should have said at least that

19    they had experienced a significant episode of

20    misappropriation of user data.  That would have

21    avoided the misleading impression left by the

22    statements that they did make here.

23         JUSTICE THOMAS:  Was it considered

24    significant in 2016 when they filed -- filed the

25    statement, the 105 statement?

         1              MR. BARBER:  Yes, I think it certainly

         2     was considered significant based on the actions

         3     that Facebook took, e-mailing Cambridge

         4     Analytica quite quickly after determining that

         5     its policies had been violated, directing them

         6     to delete the data.

         7              I think Facebook was at least on the

         8     allegations of this complaint highly aware of

         9     the great risk to its business that was posed by

        10     this episode.

        11              CHIEF JUSTICE ROBERTS:  Do you -- do

        12     you agree with Mr. Russell that a probabilistic

        13     statement sometimes implies that the event

        14     hadn't occurred and sometimes implied that the

        15     event had occurred?

        16              MR. BARBER:  I do.  And I think, to

        17     the Chief Justice's question earlier, I agree

        18     with Respondents that these kinds of matters are

        19     not susceptible to bright-line rules.  That goes

        20     for falsity.  That goes for materiality.

        21              And it would be foreign to the common

        22     law of fraud and this Court's securities law

        23     jurisprudence to impose the kind of

        24     bright-line -- I don't want to call it

        25     categorical -- but bright-line rule that

 1    Petitioners seem to be advancing.  It depends on

 2    the particular statement, the particular kind of

 3    risk under discussion.

 4           CHIEF JUSTICE ROBERTS:  Well, in such

 5    a complicated scenario of that sort, sometimes

 6    it's yes, sometimes it's no.  It depends on the

 7    particular context.  That does seem something

 8    that it would be nice for your -- or something

 9    that your client, the Securities and Exchange

10    Commission, might want to exercise its expertise

11    with respect to it.

12           Instead, it, I think, was suggested

13    earlier that this is a good case where we, the

14    Court, can provide a lot of guidance on how you

15    should apply these things.  Are you concerned

16    about that, that we may not do as good a job as

17    the SEC?

18           MR. BARBER:  I think, as long as you

19    confine yourself to what Respondents have

20    suggested the Court hold, which is a statement

21    like this is misleading on this theory only

22    insofar as it implicitly misrepresents that the

23    relevant event has not already occurred, and

24    then the past event that did occur has to be

25    material, if the Court so held, I think that

1      would be fine.

2            The SEC could always say more about

3      this, provide more guidance, but that would be

4      true in any kind of case involving a half-truth.

5            JUSTICE ALITO:  Well, under what

6      circumstances does a statement that is framed

7      like this, if X event occurs, then our business

8      will be hurt, under what circumstances does a

9      statement that is framed like that imply that

10     the event is not going to happen?

11           MR. BARBER:  So, when the relevant

12     risk is something that any reasonable person

13     would expect to have occurred and would have

14     expected the company to confront in the past,

15     then you wouldn't have that kind of implication.

16           JUSTICE ALITO:  Well, it's -- so it's

17     a -- it isn't a false implication if the risk of

18     the thing happening in the past is more than

19     some quantity, it's more than X, the risk has to

20     be more than X in order for that -- a statement

21     like that to be misleading?

22           MR. BARBER:  Are you positing that

23     that's what the statement itself says?

24           JUSTICE ALITO:  I'm positing that the

25     statement says exactly what I said it says.  It

1      says that if -- if there is a fire in the plant,

2      our operations will be disrupted.  It's framed

3      like that.

4                Under what circumstances is that

5      misleading?

6                MR. BARBER:  I think that would be

7      misleading if the company, the manufacturer, had

8      recently suffered a significant fire that, you

9      know, it would be implicitly interpreted as in

10     conflict with the representation that the issuer

11     was making.

12               JUSTICE ALITO:  Okay.  Well, I don't

13     want to dwell on things that fall out of the

14     sky, but what about the situation where the fire

15     is caused by something that's utterly freakish?

16     Something fell -- a meteor -- a meteorite fell

17     out of the sky or some crazy person, who was

18     hearing voices, decided that that person was

19     going to go throw a Molotov cocktail in the

20     window of this plant.

21               MR. BARBER:  I don't know if the

22     source of the fire in particular matters.  If

23     the company is warning a risk of fire may affect

24     our business negatively and then a devastating

25     fire had just affected the business and had

1      these serious implications for the business's

2      ability to compete going forward, I think that

3      could well be --

4               JUSTICE ALITO:  So --

5               MR. BARBER:  -- misleading.

6               JUSTICE ALITO:  So even -- even in

7      those situations, it's caused by a meteorite or

8      it's caused by the crazy Molotov cocktail

9      thrower, you would say you've got to disclose

10     that because a reasonable investor would want to

11     know?

12               MR. BARBER:  A reasonable investor --

13               JUSTICE ALITO:  Maybe because the

14     investor would think the place is haunted or

15     it's cursed because this happened in the past.

16               JUSTICE KAGAN:  Well, isn't what the

17     reasonable investor would want to know in that

18     situation -- and I agree these are two different

19     situations, but in that situation, what the

20     reasonable investor would want to know is that

21     there wasn't any plant.  No matter, you know,

22     what had caused the fact there wasn't any plant,

23     there wasn't any plant so there wasn't going to

24     be any output so there wasn't going to be any

25     business.

1          JUSTICE ALITO:  Well, that's -- I

2    mean, what I'm talking about is not -- it's not

3    -- it doesn't wipe out the plant.  It causes a

4    certain amount of damage, and then it's brought

5    under control.

6          JUSTICE KAGAN:  No, so still what the

7    reasonable investor would want to know is -- we

8    enjoy this sometimes.

9          (Laughter.)

10          CHIEF JUSTICE ROBERTS:  Only

11    sometimes.

12          JUSTICE KAGAN:  Is that, you know,

13    50 percent of the capacity had been wiped out,

14    right?

15          MR. BARBER:  Right.

16          JUSTICE KAGAN:  Now, there are other

17    cases where what the reasonable investor would

18    want to know is, oh, my gosh, there appear to be

19    -- there appears to be insufficient, inadequate

20    management, operational controls, such that the

21    same thing could happen again.

22          And -- and -- so those are two

23    different hypotheticals, but I imagine your view

24    would be on either event, if -- if -- you know,

25    a reasonable investor might want to know that,

1     and the -- and the hypothetical statement might

2     suggest the contrary of what is true.

3              MR. BARBER:  Right.  My only point is

4     that if you have a statement like our business

5     is at risk of fire, and if that happens, our

6     business would be negatively affected in all

7     these ways, that can reasonably leave the --

8     leave the implicit representation that the

9     business had not just suffered a significant

10    fire.

11             JUSTICE GORSUCH:  Mr. Barber, on

12    that --

13             MR. BARBER:  Yes.

14             JUSTICE GORSUCH:  -- if -- it does

15    seem to me we're talking about two totally

16    different things, risks in the future and

17    damages from the past.  And if we're talking

18    about damages from the past, how is that a risk

19    factor that's clearly covered by 105 as opposed

20    to something that should be disclosed, perhaps,

21    in 101 or 303, first of all?

22             And, second of all, if you want to

23    cram in risks from past events into 105, why

24    would we do that given the adoption of 106,

25    which addresses these kinds of very problems and

1      doesn't require that?

2                MR. BARBER:  So a few things on that,

3      Justice Gorsuch.  We agree with Respondents that

4      Item 105 is not limited in its text to the

5      disclosure of future events and future risks.

6      Facebook's own practices, as you can see in the

7      10-K at issue here, are consistent with that.

8      The entire 10-K is reproduced in volume 2 of the

9      Joint Appendix.  And literally every section of

10     it, or I think almost every section, includes

11     discussion of some past event, some present

12     condition.  So Item 105 is not limited to those

13     kinds of future-looking disclosures.

14               Item 106 did emphasize for issuers --

15     and this was promulgated well after the events

16     in this case and after the 10-K was filed here

17     -- it emphasized that issuers do sometimes have

18     to disclose past cybersecurity incidents.  That

19     doesn't mean that there's never any obligation

20     to discuss past events under Item 105 when

21     necessary to avoid a misleading impression in

22     the statements that are made here.

23               JUSTICE GORSUCH:  What do you say to

24     the 101 and 30 -- 303?

25               MR. BARBER:  I think the kind of

 1    disclosure that needed to happen here was much

 2    more at home in the risk factors section than in

 3    those sections.  So 303 is about the management

 4    and discussion -- management discussion and --

 5            JUSTICE GORSUCH:  Known trends and

 6    uncertainties that have had, have had, a

 7    material unfavorable impact.  That would seem to

 8    me a heartland case for some destruction of your

 9    -- some portion of your facility, whether due to

10    fire or meteorites or both.

11            And 101, information material to an

12    understanding of the general development of the

13    business.

14            MR. BARBER:  Yes, I'm not saying that

15    the information would be inappropriate in those

16    sections.  I just think it's very telling that

17    if you look, for example at Facebook's first

18    10-K after the news really came out in March

19    2018, they discuss the Cambridge Analytica

20    episode in multiple locations of that 10-K.  It

21    was all in the risk factors section.  I think it

22    was predominantly in the risk factors section.

23    So this is where investors do look for this kind

24    of information.  So I think that's an important

25    fact.

1                 Another great example is in the actual

2       10-K that was filed, if you look at page 464 of

3       the Joint Appendix, they specifically disclosed

4       having discovered a bug in one of their

5       algorithms in late 2015, which is exactly the

6       time when they discovered the Cambridge

7       Analytica matter.

8                 CHIEF JUSTICE ROBERTS:  Thank you,

9       counsel.

10                Justice Thomas?

11                Justice Sotomayor?

12                JUSTICE SOTOMAYOR:  I'm listening to

13      Justice Gorsuch go through 101 and 103, and they

14      seem even less precise than what Justice

15      Kavanaugh was seeking for the SG to do.  It

16      seems like both are asking for the SEC to

17      anticipate every potential risk for any type of

18      company and then spell out what they have to

19      say.

20                You can't do that.  So point out to

21      what in 105 -- what in the language of 105,

22      suggests that it covers this?

23                MR. BARBER:  Sure.  So Item 105 speaks

24      to material factors that render an investment in

25      the offering or the registrant risky or

1      speculative.  So I think it's perfectly natural

2      to say that not only the potential future

3      occurrence of incidents like cyber -- Cambridge

4      Analytica would be such a material factor but

5      also --

6                  JUSTICE SOTOMAYOR:  It wasn't a

7      cyberattack, as Respondents said.

8                  MR. BARBER:  Correct.

9                  JUSTICE SOTOMAYOR:  This was misuse by

10     -- by a user who was given permission.

11                 MR. BARBER:  Correct.

12                 JUSTICE SOTOMAYOR:  By Meta.  Okay.

13     Go ahead.

14                 MR. BARBER:  Correct.  So I think this

15     kind of event is comfortably encompassed by the

16     language of Item 105.  We're not saying they had

17     to get into the specifics of Cambridge

18     Analytica, but they at least had to acknowledge

19     that events of this nature had previously

20     occurred in order to avoid leaving the kind of

21     misleading impression that was left here.

22                 And I don't think, as Your Honor was

23     suggesting, there's no basis in this Court's

24     case law for the idea that the SEC has to

25     specifically lay out the particular kind of

1    half-truths that a disclosure may make to the

2    investing public in order for those to be

3    actionable under Rule 10b-5.

4              JUSTICE SOTOMAYOR:  Or exactly what --

5    won't curb this --

6              MR. BARBER:  Right.  The fact that

7    this, the elements of this cause of action

8    require what a reasonable investor would think,

9    that is enough of a protection.  So I don't

10   think there's any kind of fair notice issue

11   here.

12             JUSTICE SOTOMAYOR:  And in terms of

13   this question, you say it fits, and I agree with

14   you, under 105 because of what could -- they

15   knew they had a 30 million user misuse.  They

16   knew that it had not been erased by the company.

17   And when they sought Cambridge's assurances that

18   they had destroyed the data, they were told

19   nothing.  So they knew there was a risk to their

20   reputation at that point.

21             MR. BARBER:  Yes.  The way we know

22   that this belonged under Item 105 is that the

23   very risk statement that was rendered misleading

24   by the omission of this information was made in

25   the risk factors section of the 10-K.

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1              JUSTICE SOTOMAYOR:  Thank you.
2              CHIEF JUSTICE ROBERTS:  Justice Kagan?
3              JUSTICE KAGAN:  I thought that Justice
4     Alito, one of the questions he was interested
5     in, and if not I will just say I'm interested in
6     it, is how do we know when it is that you have
7     to put in these past events?
8              And you and Mr. Russell have said
9     don't -- you know, you don't have to put in
10    anything that's not material.
11             MR. BARBER:  Correct.
12             JUSTICE KAGAN:  But as to things that
13    are material, you don't seem to be imposing any
14    higher bar.  In other words, that seems to be
15    your only dividing line, is it material or is it
16    not?
17             And I guess maybe this goes back to
18    Justice Barrett's question too.  Is there some
19    higher standard that we might use in this area
20    to prevent a mass of cases that are perhaps less
21    viable, less meritorious than this one might be
22    thought?
23             MR. BARBER:  Yes, but I think that bar
24    is what we've been discussing, which is the need
25    to show not just that the omitted fact is
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 1    material, but that the omission rendered the

 2    affirmative statement that's made misleading

 3    because the statement implicitly misrepresents

 4    that the event never occurred.

 5         I think that's a requirement with real

 6    teeth because, if you have a statement, say,

 7    that is phrased in very general terms like, our

 8    business may struggle with users trusting us in

 9    the year ahead, that may harm our business

10    because we depend on ad revenue, that kind of

11    general statement is much less likely to lead a

12    reasonable invest -- investor to think anything

13    in particular about the past occurrence of

14    misappropriation of user data.

15         But the problem with the statements

16    here is that they were reasonably specific, and

17    they were talking about a specific category of

18    risk, which invites the reasonable investor to

19    think no significant episode of that kind of

20    risk has already materialized.

21         So I think it's -- I think it's a real

22    limit on our position, and I think the Court

23    could well make that clear, that you have to

24    look at the generality of the statement.  If the

25    statement does acknowledge that events of this

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1     kind have occurred, even if you don't get into
2     the specifics of the relevant event, it's going
3     to avoid the kind of misleading impression that
4     could otherwise be left.  So it's not just
5     materiality.
6              JUSTICE KAGAN:  Thank you.
7              CHIEF JUSTICE ROBERTS:  Justice
8     Gorsuch?
9              JUSTICE GORSUCH:  Sorry to prolong
10    this, but to what extent does that incentivize
11    companies to just be more general in their
12    disclosures?
13             I mean, you said, if they raise it at
14    the level of generality, it's less likely to be
15    misleading, so you're going to have more -- more
16    useless disclosures, potentially, out -- out of
17    this.
18             Is the SEC concerned about that?  I
19    mean, you know, our -- our -- our ad revenue
20    might be harmed if our reputation is at risk
21    from anything we do.
22             MR. BARBER:  I don't think that that's
23    a major concern for us just because this has
24    been the law, for example, in the Ninth Circuit
25    since at least 2008, the Berson case.  We
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1    haven't seen this kind of danger arise.  That's

2    Facebook's home circuit.  And they provided a

3    lot of very helpful, detailed risk-factor

4    statements in the relevant 10-K at issue here.

5            JUSTICE GORSUCH:  Now -- and now they

6    may not.

7            MR. BARBER:  Well, that's -- that is

8    the kind of issue that I think the SEC is well

9    equipped to deal with.

10           If that, you know, were to result from

11   affirming the court of appeals' judgment, then

12   the SEC could look at that.  It's tinkered with

13   Item 105 before to change the standard for what

14   needs to be disclosed, and it could well do so

15   again.  Yes.

16           CHIEF JUSTICE ROBERTS:  Justice

17   Kavanaugh?

18           JUSTICE KAVANAUGH:  You said there's

19   no fair notice issue here.  I guess -- I guess

20   I'm not really seeing that, because all the

21   hypotheticals have illustrated a lot of

22   uncertainty about when a company would be

23   required to disclose and why not.

24           But that blends back into the question

25   I raised earlier and the Chief raised, which is:

1        Why can't the SEC just write a reg?  It's very

2        simple, I think, to add to 105 something like:

3        When the company discloses the risk of a future

4        event that could cause harm, also disclose any

5        past occurrences of that event.

6                    MR. BARBER:  I think --

7                    JUSTICE KAVANAUGH:  Why -- could the

8        SEC do that?

9                    MR. BARBER:  -- the SEC could always

10       be clearer in this regard, and maybe it could

11       someday, but I don't think the SEC feels that it

12       hasn't already written the regs.

13                   JUSTICE KAVANAUGH:  Well, why -- I

14       mean, why does the judiciary have to walk the

15       plank on this and -- and answer that question

16       when the SEC could do it with all the

17       uncertainty and all the hypotheticals that have

18       arisen, which, in turn, at least as I see it,

19       just speaking for myself, raises a lot of

20       questions for companies about what they have to

21       disclose and what they don't?

22                   And they're, of course, going

23       forward -- going -- looking backward, they're

24       going to be stuck with liability.  Going

25       forward, they're just going to disclose

1      everything --

2              MR. BARBERT:  Right.

3              JUSTICE KAVANAUGH:  -- which defeats

4      the whole -- well, at least as I understand it,

5      the whole purpose.  So --

6              MR. BARBER:  Right.

7              JUSTICE KAVANAUGH:  -- attack any one

8      of those premises or -- or -- that you want.

9              MR. BARBER:  So, Justice Kavanaugh, a

10     few things on that.

11             I think one of the signs of a weak

12     policy argument is that you could make it in

13     either direction equally.  You could equally

14     argue that issuers will be disincentivized --

15     kind of what Justice Gorsuch was getting at --

16     they would be disincentivized to make risk

17     disclosures because of fear of liability.

18             The likeliest scenario here is that

19     risk disclosures would remain about the same

20     length.  Issuers would just be a little bit more

21     careful about disclosing past materializations

22     of the risk.

23             I think the SEC did write the

24     regulations that it needed to write here,

25     writing Item 105, writing Rule 10b-5, writing

 1      Rule 12b-20, saying that:  Not only do you have

 2      to disclose the things that are directly

 3      required to be disclosed by Regulation S-K, but

 4      you also have to disclose whatever else is

 5      necessary to avoid those statements being

 6      misleading.

 7              That is enough.  This Court -- this is

 8      a bread-and-butter half-truth case.  In

 9      half-truth cases, this Court and other courts

10      don't constantly ask:  Has the SEC or has the

11      regulator directly said that this kind of

12      falsity is -- is required or is -- is

13      prohibited?

14              And to that point as well --

15              JUSTICE KAVANAUGH:  But I guess the

16      problem there -- last question, sorry.

17              But the -- there's not one reasonable

18      person -- reasonable people are going to have

19      different views about what -- whether the lack

20      of disclosure of the past event occurring makes

21      the current statement misleading.  I mean,

22      you're going to get wildly different answers, as

23      you've heard from the questions from the nine of

24      us.  So that's -- that's the concern.

25              MR. BARBER:  I appreciate that.  I

1      think I would go back to the Omnicare case again

2      and just say, in that case, the Court said:

3      Whenever you have a provision that prohibits

4      half-truths, not just outright lies, you're

5      going to have some uncertainty.  It's not going

6      to be completely cut and dry.

7                   That was a case involving a provision

8      that's strict liability, Section 11 of the

9      Securities Act.  Here, we have a provision that

10     requires scienter.  The PSLRA requires strong

11     pleading, strong inference of scienter.  So

12     that's another protection against limitless

13     liability of the kind Petitioners fear.

14                  JUSTICE KAVANAUGH:  Okay.  Thank you

15     very much.

16                  MR. BARBER:  Thank you.

17                  CHIEF JUSTICE ROBERTS:  Justice

18     Barrett?

19                  JUSTICE BARRETT:  Mr. Barber, I think

20     I heard you tell Justice Gorsuch that your

21     position is -- has been the settled law.  Did I

22     hear you correctly?

23                  MR. BARBER:  Yes.  In the Ninth

24     Circuit, it has for many years, I think --

25                  JUSTICE BARRETT:  Outside of the Ninth

     1      Circuit?  I mean, what I'm getting at is I'm

     2      wondering how your position differs from the

     3      virtual certainty test that several other

     4      circuits apply.  Is it different?

     5             MR. BARBER:  Well, so I think that the

     6      problem with that, Justice Barrett, is that the

     7      other circuits don't apply the virtual certainty

     8      rule in the way that Petitioners say they do.

     9             What the other circuits say -- what

    10      most circuits say is:  A risk statement can be

    11      false or misleading if either, A, the risk has

    12      already materialized, which is our case, or, B,

    13      the risk hasn't materialized, but it's virtually

    14      certain to do so.

    15             And that's fine.  I don't think

    16      anybody has a quarrel with that at least for

    17      purposes of this case.

    18             What Petitioners are saying is that

    19      the virtual certainty rule says:  Even in that

    20      Category A, this kind of case, the statement is

    21      only misleading if the undisclosed past event is

    22      virtually certain to harm the business.

    23             That's wrong.  I don't think any

    24      circuit applies that rule.

    25             There's one case from the Tenth

 1      Circuit that if you look at the end of the

 2      relevant section of the court's opinion, the

 3      Indiana Public Retirement case, the court does

 4      seem to apply it that way, and we think that's

 5      wrong.  But, even above that, in that opinion,

 6      the court describes the rule correctly, the way

 7      I just described it.

 8              The problem with the virtual certainty

 9      rule as Petitioners imagine it is that it would

10      distort the materiality standard because it's

11      never been thought that the omission of a

12      particular fact is only actionable if it's

13      virtually certain to harm the business.

14              The standard under this Court's cases

15      is:  Would a reasonable person view the

16      information as significantly altering the total

17      mix of information bearing on the investment

18      decision?

19              JUSTICE BARRETT:  Does the

20      government's position differ from the virtual

21      certainty rule as it already exists?  I mean as

22      it exists?  You're -- you're saying that Mr.

23      Shanmugam has mischaracterized what the virtual

24      certainty rule requires.

25              But, as the law actually exists, as

1    you described it, does the SEC's position differ

2    from that?  Would we be shifting the law if

3    we -- if we go your way, do -- do -- do those

4    circuits now have it wrong?

5              MR. BARBER:  I don't think we have a

6    firm position on that for purposes of this case

7    because, again, we're not in that second

8    category of cases where we're just dealing with

9    a potential future event and the likelihood of

10   it.

11             Given the fact that, as has been

12   discussed, Item 105 doesn't require specific

13   quantification of the risk, you don't need to

14   say, like, 70 percent or whatever, then

15   probably, in most cases, to show that that is

16   false based on the understatement of the risk,

17   you would probably have to show something like a

18   virtual certainty to actually make that

19   actionable.

20             JUSTICE BARRETT:  Okay.  Thank you.

21             CHIEF JUSTICE ROBERTS:  Justice

22   Jackson?

23             JUSTICE JACKSON:  So I think what's a

24   little tough for your position is that I don't

25   know that this is a bread-and-butter half-truth

1      case, as you've said, because I would think that

2      a bread-and-butter half-truth case exists

3      against the backdrop of a duty to disclose the

4      information.

5              And what Petitioner says is there is

6      no standalone obligation to talk about past

7      events, and it's not rendered misleading if we

8      have this purely futuristic statement.

9              So it seems to me to be different than

10     the standard half-truth.  And the way I'm

11     thinking that it might still trigger liability

12     is that it becomes potentially misleading in a

13     continuing harm scenario, the kind that Justice

14     Alito keeps pointing to, that you didn't have to

15     say originally that you -- that this past thing

16     happened, but if the past thing happens and

17     before the harm completely materializes, before

18     the harm completely happens, you have to make a

19     disclosure statement that maybe there's

20     something misleading about making your statement

21     purely futuristically in that situation because

22     it leads investors to underestimate the risk or

23     the potential for the future harm.

24             MR. BARBER:  So, Justice Jackson, a

25     couple of things on that.

1             I -- I disagree that you only have a

2      half-truth if you're under some kind of

3      regulatory disclosure requirement.  Half-truth

4      claims are not limited to that particular

5      context.

6             The reason why we're in that situation

7      here is that if a company isn't subject to a

8      disclosure requirement like Item 105, then they

9      don't have much incentive to go around the

10     markets telling people how risky their

11     investments might be in the company.  So I think

12     that's important.

13            But I also do disagree at a second

14     level that Item 105 just doesn't ever require

15     disclosure of past events, because what it

16     requires disclosure of is material factors that

17     render investment in the company risky or

18     speculative.  And that can readily encompass

19     past events, present conditions, and potential

20     future events.

21            JUSTICE JACKSON:  Thank you.

22            CHIEF JUSTICE ROBERTS:  Thank you,

23     counsel.

24            MR. BARBER:  Thank you.

25            CHIEF JUSTICE ROBERTS:  Mr. Shanmugam,

 1     rebuttal?

 2              REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

 3                  ON BEHALF OF THE PETITIONERS

 4              MR. SHANMUGAM:  Thank you, Mr. Chief

 5     Justice.  Four points:

 6              First, let me start with Respondents'

 7     and the government's test.  Mr. Russell said

 8     that under their test, risk disclosures can and

 9     frequently do imply something about the past.

10     But as Justice Kagan asked, the devil is in the

11     details.  How do you determine when risk

12     disclosures fall on that side of the line?

13              From Respondents' and the government's

14     brief, it seemed like their answer was the

15     materiality requirement.  If omitted information

16     is important to a reasonable investor, then the

17     risk disclosure contains an implication about

18     that.

19              But there are a couple of problems

20     with that.  The first is the one that we

21     discussed in my opening argument, which is that

22     that conflates and collapses the elements of

23     falsity and materiality.  And, second,

24     materiality really doesn't provide a great deal

25     of protection because it is a relatively low

 1    bar.  And so I think, as it stands, that rule

 2    would be a categorical rule by any other name.

 3           Now, Mr. Russell also suggested in

 4    points of his argument that it's really all

 5    about the intuition as to whether or not the

 6    event is of the sort that has occurred in the

 7    past.  And so bad publicity would presumably

 8    fall on the side of the line of something a

 9    reasonable investor would understand has

10    occurred in the past.  And Justice Alito's

11    meteor strike or Molotov cocktail would not.

12           I would submit that we would prevail

13    under such a standard because a reasonable

14    investor would think that Facebook had suffered

15    episodes of data misuse in the past.  But I

16    think the problem with an intuition-based test

17    is it's not really an administrable standard,

18    and it's not an objective one.  And I would

19    submit that it's a very difficult one for a

20    defendant to prevail on, on a motion to dismiss.

21           Most of the cases in the circuit

22    conflict have come up on and been resolved on a

23    motion to dismiss.  And remember that we're not

24    just dealing with the ordinary Twombly/Iqbal

25    standard here.  We're dealing with the

 1    heightened pleading standard of the PSLRA under

 2    which both the statements themselves and the

 3    reasons why the statements are misleading must

 4    be pleaded specifically.

 5              Second, the wording of the statements

 6    here.  Mr. Russell said that what we should have

 7    said was such improper data misuse has occurred

 8    in the past, including recently on a substantial

 9    scale.  The problem with that formulation is

10    that all of that was in the public domain.

11              This Court can judge that for itself.

12    The articles that were in the public domain

13    before the 10-K are at Joint Appendix 616 to

14    630.  It was public that millions of users' data

15    were in play as a result of what took place

16    here.

17              And to the extent that Mr. Russell

18    relies on the $100 billion alleged drop in the

19    stock price, that took place after the continued

20    misuse became public, but it is clear that that

21    continued misuse is no longer in the case.  It

22    was waived below.  And that was for good reason

23    because the district court said that no

24    responsible person at Meta was aware of that

25    continued misuse at the time of the 10-K in

 1    early 2017.

 2            What should this Court do here?  Well,

 3    I think that this Court should write an opinion

 4    that simply says that statements like this one

 5    and others like it contain no implied

 6    representation that the previous triggering

 7    event had never occurred.  And this Court should

 8    rely on the context of Item 105, where I would

 9    note parenthetically the SEC requires

10    disclosures to be concise, not voluminous.

11            And the Court can make clear, as it

12    did in Omnicare, that the answer naturally

13    depends on the wording or the context in which

14    this statement was made.  So if you have a

15    defendant that says something about the

16    probability of the event occurring or said

17    something like if this event were ever to incur,

18    thereby implying that it had not occurred in the

19    past, the outcome could be different.

20            Finally, just a word about the

21    implications of this case.  The effect of

22    accepting either Respondents' or the

23    government's position would be to hold a company

24    liable for securities fraud precisely because it

25    warned of the specific risk at issue, presumably

1    on the theory that a company failed to catalogue

2    all of the prior episodes of the event

3    occurring.

4            That would create a regime that is

5    effectively a regime of omissions liability,

6    because what you would be saying is that if a

7    company warns about a genus of risk, it is on

8    the hook for any previous episode that has not

9    been disclosed.  That would place an onerous

10   obligation on companies not only to disclose

11   initially but continually to update its risk

12   disclosures in its quarterly reports.  And it

13   would penalize companies for doing the right

14   thing and what Item 105 requires, which is to

15   identify risks that may affect the company's

16   business.

17           The Ninth Circuit's formulation of

18   this standard here cannot stand, and for that

19   reason, we would submit its judgment should be

20   reversed.

21           Thank you.

22           CHIEF JUSTICE ROBERTS:  Thank you,

23   counsel.  The case is submitted.

24           (Whereupon, at 11:47 a.m., the case

25   was submitted.)

billion [5] 53:19 65:13 74: 18 75:17 110:18
binary [1] 42:23
bit [4] 13:15 30:11 77:11 100:20
black-and-white [1] 11:18
blandly [1] 30:17
blank [1] 56:16
blends [1] 98:24
boil [1] 21:18
bomb [1] 65:12
boo [1] 61:3
both [10] 11:3 14:6 16:23 44:7 65:4 72:13,22 91:10 92:16 110:2
bottom [1] 23:11
breach [8] 46:11,16,22 58: 25 59:15 60:6 61:13 65:24
breaches [5] 8:4 42:12,12 60:3,9
bread-and-butter [3] 101: 8 105:25 106:2
breadth [1] 8:9
break [1] 42:24
brief [7] 7:13 9:14 20:14 23: 4,11 45:3 108:14
briefing [1] 14:1
briefs [3] 8:24 19:17 41:11
bright [1] 41:21
bright-line [4] 41:21 83:19, 24,25
bring [1] 67:15
broad [3] 17:25 39:25 50:8
broader [1] 82:4
broadly [1] 27:1
brought [2] 56:12 88:4
bug [1] 92:4
bugging [1] 46:2
bunch [2] 34:15 67:1
burden [4] 41:2 82:11,12, 16
burglaries [2] 14:10,22
burning [1] 61:16
business [46] 4:23 5:7,19 6:5 13:5,8 15:16 17:18 18: 11,15 21:20 24:13 26:10 27:24 33:6,10,17 41:13 42: 17,22,24 46:12,14 51:1 52: 18 70:3 75:9,24 78:12 80: 9,20 81:24 83:9 85:7 86: 24,25 87:25 89:4,6,9 91:13 96:8,9 103:22 104:13 112: 16
business's [1] 87:1
buyer [1] 13:24
buying [1] 14:18

—————— C ——————
calculation [1] 14:24
call [1] 83:24
calling [1] 38:5
calls [2] 69:14,16
Cambridge [9] 31:16 34:6 53:9 81:23 83:3 91:19 92:

6 93:3,17
Cambridge's [1] 94:17
came [3] 1:13 80:21 91:18
cannot [8] 4:17,19 29:23 36:22 38:12,13 58:19 112: 18
cap [1] 75:17
capability [1] 62:4
capable [1] 79:11
capacity [4] 9:18 10:11,14 88:13
capacity's [1] 18:5
capitalization [1] 53:20
capture [1] 80:15
captures [1] 81:20
care [3] 45:1 60:24 80:23
careful [1] 100:21
carefully [1] 15:4
carries [2] 12:20 54:7
Case [60] 3:4 4:22 5:16,18 11:7,25 17:23 25:1 28:4 30:3 31:17 34:21,21 35:24 43:3 51:10,21 55:12,18 56: 18,23 57:8 60:18 63:3 66: 13,16 68:20 70:8 71:24 73: 9,13,18,22 74:1 77:3 78:13, 13 82:7 84:13 85:4 90:16 91:8 93:24 97:25 101:8 102:1,2,7 103:12,17,20,25 104:3 105:6 106:1,2 110: 21 111:21 112:23,24
case-dependent [1] 73:10
cases [18] 16:16 36:20 52: 22 55:1,2,15 62:23 77:11 78:22,23 79:8 88:17 95:20 101:9 104:14 105:8,15 109:21
catalogue [1] 112:1
categorical [13] 20:13,22 21:10 29:24 41:15 44:20 51:12 52:11 73:7 79:16,18 83:25 109:2
categorically [1] 82:5
category [8] 42:21 43:12, 23 45:20 61:16 96:17 103: 20 105:8
cause [7] 3:21 5:6 65:12 71:10 77:23 94:7 99:4
caused [5] 32:4 86:15 87:7, 8,22
causes [1] 88:3
causing [1] 53:19
caveat [5] 7:2 12:22 27:19 44:22,24
cert [1] 24:24
certain [16] 5:6 8:3 14:19 28:17,17 31:11,11 39:5,5 68:13,16,16 88:4 103:14, 22 104:13
certainly [4] 19:11 39:7 54: 15 83:1
certainty [19] 31:9 32:22, 22,25 33:12 37:17 38:5,6 39:2,3 41:19 68:9 103:3,7,

19 104:8,21,24 105:18
cetera [3] 41:14 47:1 74:20
chain [1] 42:13
challenge [1] 52:19
chance [3] 67:23 68:6,17
change [3] 10:1 27:19 98: 13
changes [2] 18:14 45:21
check [1] 56:16
CHIEF [50] 3:3,9 18:24 19: 2,11 28:23 30:1 33:22 37: 10,11 39:14 41:5 45:23 50: 14,19 54:1,4,5,11,14,22 55: 8 56:5,6,7,10 58:14 62:9 63:17 72:5 73:24 77:14 80: 3 81:1,7 83:11,17 84:4 88: 10 92:8 95:2 97:7 98:16, 25 102:17 105:21 107:22, 25 108:4 112:22
China [2] 60:1,13
choice [1] 41:20
choices [1] 42:24
choose [1] 29:19
Circuit [25] 3:11,14 20:11 28:4,11,12,22 30:11 37:4 38:11,21,22 39:8 45:17 51: 1 52:10 60:9 73:14 97:24 98:2 102:24 103:1,24 104: 1 109:21
Circuit's [7] 3:24 5:11 19: 23 38:10 42:1 52:20 112: 17
circuits [8] 28:16 31:8 32: 21 103:4,7,9,10 105:4
circumstance [5] 21:21 28:19 33:9 49:14,17
circumstances [8] 19:12 29:11 39:4 43:8 45:2 85:6, 8 86:4
claim [11] 5:4 7:24 23:13, 23,24 24:17 25:1,5 51:6 68:21 80:22
claims [2] 52:21 107:4
clarify [3] 13:23 77:18 80:7
clarity [1] 77:12
class [1] 45:7
clear [11] 7:8 15:21 27:8 29: 5 36:5 44:6 50:3,21 96:23 110:20 111:11
clearer [1] 99:10
clearly [2] 11:19 89:19
client [1] 84:9
close [1] 11:6
closely [1] 11:2
cocktail [3] 86:19 87:8 109: 11
coli [1] 42:14
collapses [1] 108:22
collected [1] 78:23
come [4] 9:6 11:14 67:19 109:22
comes [3] 31:12 38:18 76: 7
comfortably [1] 93:15

coming [1] 25:15
Commission [1] 84:10
common [3] 57:21 81:13 83:21
communicate [1] 10:5
companies [12] 20:4,6 25: 18 39:20,25 41:1 45:18 59: 22 97:11 99:20 112:10,13
company [45] 3:16 7:16,18 15:22,24 16:7 18:11,12 29: 7,11,19,21 35:9,10,11 36:1 37:5 39:21 42:11 43:13 46: 25 53:15,21,21 65:13,15, 24 67:17,18 70:23 71:3 76: 1 85:14 86:7,23 92:18 94: 16 98:22 99:3 107:7,11,17 111:23 112:1,7
company's [6] 18:15 20: 16 29:7 33:6 35:7 112:15
compete [1] 87:2
complained [1] 41:2
complaining [1] 24:16
complaint [2] 23:12 83:8
complete [1] 11:23
completely [6] 9:4 12:8 13: 20 102:6 106:17,18
complicated [1] 84:5
comply [1] 53:2
concern [4] 63:7 66:7 97: 23 101:24
concerned [3] 26:5 84:15 97:18
concerns [2] 3:25 13:15
concise [1] 111:10
conclude [1] 76:24
condition [2] 28:8 90:12
conditional [1] 30:13
conditions [1] 107:19
conduct [1] 60:25
confidential [2] 34:19 35: 1
confine [1] 84:19
confirming [1] 61:7
conflate [1] 30:12
conflates [3] 16:22 44:4 108:22
conflict [5] 28:4 39:9 45:17 86:10 109:22
confront [1] 85:14
confused [1] 72:6
Congress [1] 79:24
connote [2] 8:9 17:8
consequence [2] 15:6,23
considered [3] 63:4 82:23 83:2
consistent [1] 90:7
constantly [1] 101:10
contain [7] 19:18 25:6 28:9 62:17 63:18 73:8 111:5
contained [1] 25:11
contains [1] 108:17
content [1] 4:12
context [21] 7:8,12 10:23 11:4 12:9 20:23 27:8,25

30:18 41:8,9,12,13 51:10 57:8 59:8 61:4 84:7 107:5 111:8,13
context-dependent [1] 57:24
contexts [2] 57:4 62:24
contextual [4] 8:16 10:19 20:22 36:2
continually [1] 112:11
continue [1] 26:2
continued [4] 5:5 110:19, 21,25
continues [1] 66:4
continuing [3] 66:1 72:10 106:13
contrary [2] 52:11 89:2
contravening [1] 9:10
control [3] 62:5 73:3 88:5
controls [2] 61:24 88:20
convert [1] 20:3
convey [1] 8:9
conveyed [1] 61:8
correct [11] 4:22 5:24 38: 13 39:19 40:4 64:19,20 93: 8,11,14 95:11
correctly [3] 77:7 102:22 104:6
counsel [8] 28:24 50:15 54: 1 73:16 81:2 92:9 107:23 112:23
Counselor [1] 20:7
couple [4] 6:17 39:16 106: 25 108:19
course [8] 7:4,23 27:24 36: 15 37:1 52:23 82:8 99:22
COURT [56] 1:1,14 3:10 4: 1,3,6,8 5:12,21 7:8 10:25 17:13,22 21:9 27:7 28:3, 22 36:20 37:3 38:9,25 39: 7,9 45:15,20 50:20 51:11 52:11,21,21 55:14 73:13, 22 77:7 79:16 81:8,9,20,25 82:6 84:14,20,25 96:22 98: 11 101:7,9 102:2 104:3,6 110:11,23 111:2,3,7,11
Court's [9] 5:14 17:3 44:24 52:24 82:9 83:22 93:23 104:2,14
courts [4] 57:3 62:23 79:24 101:9
cover [1] 27:2
coverage [3] 13:4,7,11
covered [1] 89:19
covers [1] 92:22
cram [1] 89:23
crazy [2] 86:17 87:8
create [4] 3:12 20:20 40:15 112:4
creates [1] 39:3
creating [2] 37:3,5
crime [8] 14:1,4 15:6,8 48: 23,25 49:3,4
critical [1] 22:12
curb [1] 94:5

91:9

**fact** [26] **8**:3 **9**:3 **10**:10 **13**:
17 **25**:22 **29**:14 **30**:21 **31**:2,
10 **32**:4,6 **46**:20 **57**:20 **65**:
6,9 **66**:23 **71**:11 **76**:18 **77**:
9,10 **87**:22 **91**:25 **94**:6 **95**:
25 **104**:12 **105**:11
**fact-bound** [1] **52**:20
**fact-specific** [1] **73**:11
**factor** [8] **27**:8 **32**:20 **51**:20
**57**:17 **65**:14 **67**:4 **89**:19 **93**:
4
**factors** [16] **25**:17 **29**:2,6
**39**:17 **40**:12 **53**:15,16,22
**65**:8 **67**:6 **91**:2,21,22 **92**:
24 **94**:25 **107**:16
**factory** [8] **11**:8,9 **32**:4 **42**:7
**47**:17 **61**:16 **67**:20,24
**facts** [8] **28**:19 **33**:21 **39**:12
**51**:9 **63**:4 **66**:16,24 **73**:18
**fail** [4] **22**:8 **45**:6 **51**:16 **59**:
14
**failed** [6] **22**:13,16,20,23 **45**:
10 **112**:1
**fair** [4] **62**:22 **63**:20 **94**:10
**98**:19
**fall** [7] **38**:20 **43**:22 **44**:16
**58**:15 **86**:13 **108**:12 **109**:8
**falling** [2] **32**:9 **58**:13
**falls** [2] **43**:11 **61**:15
**false** [16] **4**:7 **5**:22 **7**:25 **11**:
23 **27**:25 **28**:14,18 **45**:11
**52**:4 **74**:12 **75**:6 **77**:24,25
**85**:17 **103**:11 **105**:16
**falsely** [2] **46**:5 **76**:24
**falsity** [12] **5**:21 **6**:2 **16**:23
**17**:6 **38**:24 **74**:2,22 **76**:7,
13 **83**:20 **101**:12 **108**:23
**familiar** [2] **17**:22 **27**:11
**far** [4] **5**:6 **37**:3 **42**:1,2
**FBI** [1] **60**:2
**fear** [2] **100**:17 **102**:13
**federal** [1] **59**:25
**feel** [2] **33**:1 **44**:19
**feels** [3] **31**:13 **43**:20 **99**:11
**fell** [3] **32**:5 **86**:16,16
**few** [2] **90**:2 **100**:10
**figure** [2] **46**:18,21
**filed** [4] **82**:24,24 **90**:16 **92**:
2
**files** [1] **60**:2
**final** [1] **45**:5
**Finally** [5] **52**:10 **59**:3 **76**:
17 **80**:21 **111**:20
**finals** [2] **45**:6,9
**find** [4] **35**:12 **56**:20 **72**:23
**74**:17
**finder** [1] **77**:10
**fine** [3] **49**:2 **85**:1 **103**:15
**fire** [31] **8**:25 **9**:3,10,17 **31**:
20,21,21,22 **32**:2,3,8,15 **42**:
7 **67**:18,24 **68**:3,7,20 **69**:2,
5,7,20 **86**:1,8,14,22,23,25
**89**:5,10 **91**:10

**fires** [2] **9**:24 **69**:13
**firm** [1] **105**:6
**first** [16] **6**:19 **10**:6 **15**:2 **32**:
13 **34**:2 **35**:22 **41**:20 **44**:2
**47**:10 **50**:22 **57**:2 **66**:14 **89**:
21 **91**:17 **108**:6,20
**fits** [2] **66**:15 **94**:13
**flawed** [1] **81**:13
**flooded** [1] **4**:17
**focused** [3] **5**:21 **46**:17 **73**:
21
**focuses** [2] **17**:1,7
**follow** [3] **6**:23 **34**:1 **56**:8
**food** [1] **42**:13
**foreign** [1] **83**:21
**foremost** [1] **44**:2
**foreseeable** [1] **75**:21
**form** [3] **12**:18 **18**:13 **45**:18
**formed** [1] **4**:10
**formulation** [4] **45**:18 **48**:
15 **110**:9 **112**:17
**forth** [1] **7**:12
**forward** [7] **31**:4 **35**:6 **37**:
15 **70**:4 **87**:2 **99**:23,25
**forward-looking** [14] **4**:13
**8**:21 **12**:4 **17**:16 **20**:17 **24**:
9 **25**:18 **27**:11 **28**:8 **29**:2
**30**:4,5 **57**:17 **62**:13
**found** [1] **61**:21
**four** [2] **56**:23 **108**:5
**framed** [5] **10**:9 **16**:10 **85**:6,
9 **86**:2
**framework** [2] **7**:12 **27**:12
**fraud** [5] **4**:1 **29**:23 **81**:10
**83**:22 **111**:24
**freakish** [1] **86**:15
**frequently** [4] **45**:19 **51**:8
**55**:18 **108**:9
**friends** [2] **8**:1 **50**:1
**front** [2] **43**:3 **58**:15
**full** [1] **74**:17
**fundamental** [2] **24**:14 **36**:
19
**funny** [1] **40**:17
**further** [2] **18**:2 **77**:15
**future** [43] **3**:21 **6**:10 **7**:16 **8**:
13 **13**:18,21 **14**:8 **15**:16 **22**:
10 **30**:7 **35**:18 **40**:14 **46**:10,
16 **47**:6 **48**:10 **49**:2,9,17,19
**52**:22 **61**:7 **64**:13 **65**:3 **66**:
9,21 **67**:11 **68**:14 **69**:24 **70**:
17,19 **71**:16 **72**:12 **77**:23
**80**:9 **89**:16 **90**:5,5 **93**:2 **99**:
3 **105**:9 **106**:23 **107**:20
**future-looking** [1] **90**:13
**futuristic** [5] **13**:20 **14**:7 **47**:
4 **48**:15 **106**:8
**futuristically** [2] **14**:21
**106**:21

**G**

**gained** [1] **36**:12
**game** [1] **78**:20
**gave** [4] **43**:11 **60**:14 **67**:9

82:17
**General** [8] **1**:22 **26**:9 **42**:
20 **73**:23 **91**:12 **96**:7,11 **97**:
11
**generality** [3] **42**:18 **96**:24
**97**:14
**generally** [4] **25**:19 **52**:6
**57**:18,23
**generic** [1] **66**:19
**genus** [1] **112**:7
**gets** [1] **11**:6
**getting** [7] **42**:8 **44**:11 **78**:
17,19 **79**:7 **100**:15 **103**:1
**gist** [1] **25**:23
**give** [4] **8**:22 **13**:22 **35**:17
**67**:12
**given** [10] **8**:4 **35**:23 **36**:6
**58**:22 **62**:3 **80**:18 **81**:22 **89**:
24 **93**:10 **105**:11
**gives** [1] **76**:2
**giving** [1] **54**:24
**GORSUCH** [42] **25**:13 **26**:1,
12,15,17,23 **27**:3,17 **28**:7
**29**:18 **37**:9,11,18,21,24 **38**:
3 **39**:13 **40**:2 **41**:17 **53**:25
**54**:4 **56**:3,6 **57**:13 **58**:1,5,8
**59**:11,25 **62**:9 **77**:16 **89**:11,
14 **90**:3,23 **91**:5 **92**:13 **97**:
8,9 **98**:5 **100**:15 **102**:20
**gosh** [1] **88**:18
**got** [7] **25**:14,20 **37**:24 **47**:
14 **67**:21 **74**:18 **87**:9
**gotten** [1] **41**:11
**government** [4] **8**:2 **19**:17
**29**:14 **60**:1
**government's** [7] **7**:1 **19**:
22 **23**:4 **104**:20 **108**:7,13
**111**:23
**grant** [2] **11**:13 **43**:7
**granted** [1] **24**:24
**great** [5] **19**:21 **20**:2 **83**:9
**92**:1 **108**:24
**greater** [1] **71**:17
**greatly** [1] **11**:8
**ground** [2] **57**:21 **61**:17
**Guardian** [1] **22**:22
**guess** [8] **10**:18 **13**:15 **48**:
13 **64**:3 **95**:17 **98**:19,19
**101**:15
**guesswork** [1] **63**:21
**guidance** [4] **39**:8 **52**:22
**84**:14 **85**:3
**guys** [1] **58**:9

**H**

**hacking** [9] **34**:7,8,14 **52**:7,
17 **58**:18 **59**:4 **60**:12 **66**:25
**half** [2] **36**:15 **61**:16
**half-truth** [8] **85**:4 **101**:8,9
**105**:25 **106**:2,10 **107**:2,3
**half-truths** [3] **19**:7 **94**:1
**102**:4
**hand** [2] **32**:3 **61**:19
**handing** [2] **61**:14,23

**handles** [1] **43**:2
**happen** [26] **8**:13 **16**:5 **22**:9
**23**:20 **31**:1 **35**:11 **46**:6,9
**48**:10,17 **49**:2,11 **59**:22 **60**:
16 **61**:6 **64**:12 **66**:9,21 **68**:
13 **71**:1 **72**:11,12 **76**:16 **85**:
10 **88**:21 **91**:1
**happened** [43] **6**:16 **14**:11,
22 **22**:15 **30**:21,24 **31**:3 **32**:
6 **34**:5 **42**:12 **48**:4,9 **53**:9,
17 **54**:19,23 **55**:5,22,24 **56**:
2,13,14,21 **57**:7 **59**:19 **60**:
20,23 **65**:23,25 **66**:6 **68**:11
**71**:6 **72**:1,9,10,24 **73**:1 **74**:
25 **75**:20 **78**:1 **79**:19 **87**:15
**106**:16
**happening** [8] **14**:7 **32**:19,
24,25 **46**:16 **69**:19,24 **85**:
18
**happens** [7] **46**:12 **55**:20
**57**:11 **63**:11 **89**:5 **106**:16,
18
**happy** [2] **23**:8 **73**:20
**harbor** [1] **79**:23
**hard** [5] **11**:11 **41**:18,23 **42**:
2,9
**hardest** [1] **42**:5
**harm** [52] **3**:21 **4**:24 **5**:7,8,
16,18,19 **6**:5,11,22 **13**:18,
21 **14**:5 **15**:16 **20**:20 **21**:20
**24**:13 **27**:23 **30**:13 **31**:11,
15 **33**:6,10,17 **38**:17 **39**:4
**40**:15 **48**:3,17 **49**:10,15,16,
18 **51**:1 **52**:18 **70**:3 **71**:16,
22 **74**:16 **77**:24 **78**:2,13 **80**:
9,20 **96**:9 **99**:4 **103**:22 **104**:
13 **106**:13,17,18,23
**harmed** [1] **97**:20
**harms** [1] **46**:21
**haunted** [1] **87**:14
**head** [1] **21**:3
**hear** [2] **3**:3 **102**:22
**heard** [2] **101**:23 **102**:20
**hearing** [4] **15**:14 **20**:12 **53**:
14 **86**:18
**heartland** [1] **91**:8
**heavily** [1] **81**:24
**heightened** [1] **110**:1
**held** [6] **3**:14 **4**:6 **29**:20 **73**:
14 **81**:21 **84**:25
**help** [1] **58**:11
**helpful** [2] **63**:1 **98**:3
**high** [6] **30**:19 **42**:18 **69**:18,
19 **70**:14,14
**higher** [3] **14**:15 **95**:14,19
**highlights** [1] **70**:18
**highly** [4] **25**:15 **33**:16 **39**:
21 **83**:8
**hindsight** [1] **4**:1
**hit** [3] **32**:5 **42**:8 **47**:18
**hold** [4] **51**:1 **82**:1 **84**:20
**111**:23
**holding** [1] **3**:19
**home** [3] **48**:23 **91**:2 **98**:2

**homeowner** [2] **14**:11,17
**homeowners** [4] **14**:2,5,
13,19
**Honor** [1] **93**:22
**hook** [1] **112**:8
**hope** [1] **13**:23
**house** [3] **13**:24,25 **54**:18
**However** [1] **59**:13
**huge** [2] **79**:6,6
**hundred** [5] **48**:2 **53**:19 **65**:
12 **74**:18 **75**:16
**hurt** [1] **85**:8
**hypothetical** [19] **8**:23 **10**:
7,10 **11**:6,11 **12**:3 **16**:13,15
**18**:4 **26**:4 **31**:19 **40**:5 **51**:
24 **54**:2 **57**:6 **69**:13 **72**:16
**81**:11 **89**:1
**hypotheticals** [11] **8**:24 **16**:
19 **19**:16 **41**:10 **42**:5 **44**:11
**47**:24 **72**:8 **88**:23 **98**:21 **99**:
17

**I**

**idea** [2] **70**:16 **93**:24
**ideally** [1] **39**:8
**identified** [1] **23**:12
**identify** [7] **8**:21 **20**:4 **23**:5
**24**:12 **39**:18 **40**:15 **112**:15
**identifying** [1] **40**:14
**if/then** [7] **12**:17 **13**:6 **21**:16
**25**:11 **33**:5 **37**:13 **62**:11
**illustrated** [1] **98**:21
**imagine** [3] **34**:24 **88**:23
**104**:9
**immaterial** [7] **7**:3 **38**:19
**50**:25 **70**:2 **75**:12 **76**:10 **78**:
12
**immunize** [1] **81**:9
**impact** [2] **26**:20 **91**:7
**impaired** [1] **9**:2
**implement** [1] **22**:13
**implication** [7] **7**:1 **15**:7 **51**:
7 **73**:8 **85**:15,17 **108**:17
**implications** [3] **55**:17 **87**:
1 **111**:21
**implicit** [3] **21**:4 **38**:19 **89**:8
**implicitly** [4] **81**:15 **84**:22
**86**:9 **96**:3
**implied** [28] **9**:11,23,25 **12**:
20 **19**:19 **20**:15,18 **21**:21
**28**:9 **29**:24 **44**:25 **45**:4,8,
12 **46**:3,4 **50**:9 **51**:24 **56**:
21 **57**:19 **58**:2,23 **59**:18 **62**:
17 **63**:18 **76**:24 **83**:14 **111**:
5
**implies** [6] **51**:5,18 **53**:13
**57**:6 **82**:5 **83**:13
**imply** [10] **4**:25 **57**:5,18 **68**:
19 **75**:6 **76**:10 **77**:6,8 **85**:9
**108**:9
**implying** [4] **56**:1 **75**:11 **79**:
12 **111**:18
**importance** [1] **81**:22
**important** [13] **8**:17 **17**:3

| | | | | |
|---|---|---|---|---|
| **27:**19 **33:**3 **44:**22 **47:**11 **48:**12 **60:**6 **72:**1 **79:**2 **91:**24 **107:**12 **108:**16<br>**impose** [2] **41:**3 **83:**23<br>**imposing** [1] **95:**13<br>**impossible** [1] **51:**18<br>**impression** [5] **52:**5 **82:**21 **90:**21 **93:**21 **97:**3<br>**improper** [3] **51:**23 **53:**5 **110:**7<br>**improperly** [2] **8:**11 **36:**8<br>**inability** [1] **73:**3<br>**inadequate** [2] **23:**19 **88:**19<br>**inappropriate** [1] **91:**15<br>**INC** [1] **1:**3<br>**incentive** [1] **107:**9<br>**incentivize** [1] **97:**10<br>**incidents** [4] **34:**8,14 **90:**18 **93:**3<br>**include** [5] **7:**20,22 **8:**20 **29:**12 **40:**22<br>**included** [2] **17:**20 **40:**5<br>**includes** [3] **50:**13 **51:**7 **90:**10<br>**including** [4] **51:**20 **53:**7 **66:**24 **110:**8<br>**inconsistent** [1] **70:**16<br>**incorrect** [3] **3:**19 **7:**24 **12:**15<br>**increase** [2] **32:**18 **69:**22<br>**incur** [1] **111:**17<br>**indeed** [2] **40:**24 **81:**14<br>**Indiana** [1] **104:**3<br>**indicated** [4] **10:**22,25 **29:**18 **74:**2<br>**industry** [2] **58:**17,19<br>**infer** [2] **13:**9 **71:**11<br>**inference** [9] **6:**20 **8:**6 **35:**25 **54:**7,23 **56:**13 **65:**5 **71:**15 **102:**11<br>**infinitesimal** [1] **69:**23<br>**infinitesimally** [1] **69:**23<br>**inform** [1] **67:**5<br>**information** [21] **7:**3 **16:**17,19 **17:**2 **22:**12,17 **23:**7 **25:**2 **26:**8 **36:**16 **40:**7 **46:**24 **59:**13 **91:**11,15,24 **94:**24 **104:**16,17 **106:**4 **108:**15<br>**inherently** [1] **30:**4<br>**initial** [4] **5:**2,7 **31:**15 **50:**5<br>**initially** [1] **112:**11<br>**injury** [1] **5:**25<br>**inquiry** [2] **10:**19 **17:**7<br>**insisted** [1] **59:**2<br>**insofar** [1] **84:**22<br>**inspector** [2] **67:**19,20<br>**instance** [5] **9:**21 **18:**10 **45:**3 **47:**17 **62:**3<br>**Instead** [4] **4:**3 **9:**17 **52:**15 **84:**12<br>**instructed** [1] **67:**8<br>**insufficient** [1] **88:**19<br>**insurance** [6] **14:**2,6,14,19 | **48:**24 **49:**5<br>**intended** [5] **8:**20 **17:**16 **65:**6 **67:**5 **75:**8<br>**intent** [1] **53:**21<br>**interest** [2] **10:**16 **36:**17<br>**interested** [2] **95:**4,5<br>**internal** [2] **67:**19 **68:**5<br>**interpreted** [1] **86:**9<br>**interrelationship** [1] **75:**7<br>**interrupt** [2] **64:**16,25<br>**intuition** [6] **30:**16,20 **31:**7 **43:**9 **44:**12 **109:**5<br>**intuition-based** [1] **109:**16<br>**intuitions** [1] **44:**16<br>**intuitive** [1] **75:**25<br>**invest** [3] **17:**5 **46:**13 **96:**12<br>**investigation** [1] **60:**25<br>**investing** [1] **94:**2<br>**investment** [13] **15:**16 **16:**6 **29:**7 **46:**18 **53:**16,23 **65:**9,14 **67:**6 **75:**10 **92:**24 **104:**17 **107:**17<br>**investments** [1] **107:**11<br>**investor** [37] **7:**10,11 **10:**6,8,12,17 **16:**4,17,24 **27:**11 **35:**18 **36:**10,17 **43:**9 **46:**13,24 **48:**7,16,24 **53:**14,14 **59:**21 **69:**11 **87:**10,12,14,17,20 **88:**7,17,25 **94:**8 **96:**12,18 **108:**16 **109:**9,14<br>**investor's** [2] **17:**4 **46:**10<br>**investors** [9] **7:**17 **8:**12 **37:**1 **60:**19 **61:**5 **70:**2 **71:**2 **91:**23 **106:**22<br>**invites** [1] **96:**18<br>**involving** [3] **27:**22 **85:**4 **102:**7<br>**isn't** [24] **5:**16 **15:**11,17 **16:**3 **19:**10 **21:**7 **22:**25 **23:**17,20 **24:**2 **26:**14 **30:**2,4 **46:**8 **51:**19 **58:**22 **59:**20 **61:**24,25 **64:**4 **71:**18 **85:**17 **87:**16 **107:**7<br>**issue** [15] **5:**4 **21:**17 **23:**6,9 **24:**23 **29:**22 **51:**21 **74:**15 **79:**6 **90:**7 **94:**10 **98:**4,8,19 **111:**25<br>**issued** [1] **61:**2<br>**issuer** [1] **86:**10<br>**issuers** [6] **52:**2 **77:**12 **90:**14,17 **100:**14,20<br>**issues** [2] **7:**18 **35:**10<br>**Item** [36] **7:**13,21 **17:**15,17,19,20,21 **19:**13 **25:**16 **26:**7,17,22 **27:**10 **29:**9,12,15 **40:**21 **47:**11,12 **51:**13 **64:**11 **66:**20 **90:**4,12,14,20 **92:**23 **93:**16 **94:**22 **98:**13 **100:**25 **105:**12 **107:**8,14 **111:**8 **112:**14<br>**itself** [8] **15:**20 **17:**8 **29:**9 **44:**6 **59:**1 **66:**23 **85:**23 **110:**11 | **J**<br>**JACKSON** [24] **13:**14 **14:**25 **15:**11 **16:**1 **45:**24,25 **47:**9,20,23 **48:**1,13,20 **50:**11 **71:**8 **72:**4 **80:**5,6,11,13,24 **105:**22,23 **106:**24 **107:**21<br>**job** [1] **84:**16<br>**join** [1] **23:**9<br>**Joint** [4] **8:**19 **90:**9 **92:**3 **110:**13<br>**judge** [1] **110:**11<br>**judges** [1] **18:**18<br>**judgment** [9] **5:**12 **52:**23 **56:**19 **71:**3 **77:**3 **78:**22 **79:**5 **98:**11 **112:**19<br>**judiciary** [1] **99:**14<br>**junk** [2] **32:**5 **42:**8<br>**jurisprudence** [1] **83:**23<br>**juror** [1] **56:**20<br>**jury** [3] **56:**24 **76:**23 **77:**4<br>**Justice** [276] **1:**23 **3:**3,10 **5:**15,18,20 **6:**7,18 **7:**19 **8:**14,22 **9:**13,16 **10:**3 **11:**10,13 **13:**14 **14:**25 **15:**11 **16:**1,14 **17:**9 **18:**3,24 **19:**1,2,11 **20:**7,10 **21:**1,8,12 **22:**2,5,20,23 **23:**2,14 **24:**2,10,19,22 **25:**13,25 **26:**1,3,4,12,15,17,23 **27:**3,16,17 **28:**7,23,25 **29:**1 **30:**1,2,15 **31:**6,18 **33:**19,22,22,24,25 **34:**1 **35:**4,21 **37:**8,9,10,11,18,21,24 **38:**3 **39:**13,14,14,16 **40:**1,2,4,9,18,19 **41:**4,5,5,7,16 **43:**5,6 **44:**10 **45:**23,23,25 **46:**23 **47:**9,20,23 **48:**1,13,20 **50:**11,14,19 **52:**25 **53:**25 **54:**1,4,5,11,14,22 **55:**8 **56:**3,5,6,7,10 **57:**13 **58:**1,5,8,13 **59:**11,25 **60:**16 **61:**11,23 **62:**7,9,16 **63:**5,16 **64:**15,21,23 **65:**16,18 **66:**12 **67:**12 **68:**15,23 **69:**1,6,9,16 **70:**5,9 **71:**7,8,12 **72:**4,5,5,6,7,18 **73:**1,15,24,25 **74:**1,6,10,14 **75:**3,14 **76:**5,14,17 **77:**14,14,15,16,17,18,19 **78:**9,14,17,24 **79:**3 **80:**1,3,3,5,6,7,11,13,24 **81:**1,7 **82:**10,23 **83:**11 **84:**4 **85:**5,16,24 **86:**12 **87:**4,6,13,16 **88:**1,6,10,12,16 **89:**11,14 **90:**3,23 **91:**5 **92:**8,10,11,12,13,14 **93:**6,9,12 **94:**4,12 **95:**1,2,2,3,3,12,18 **97:**6,7,7,9 **98:**5,16,16,18 **99:**7,13 **100:**3,7,9,15 **101:**15 **102:**14,17,17,19,20,25 **103:**6 **104:**19 **105:**20,21,21,23 **106:**13,24 **107:**21,22,25 **108:**5,10 **109:**10 **112:**22<br>**Justice's** [2] **58:**14 **83:**17<br>**Justices** [1] **29:**18<br>**justify** [1] **79:**15 | **K**<br>**KAGAN** [22] **8:**14,22 **9:**13,16 **10:**3 **11:**10,13 **21:**1 **33:**24,25 **35:**21 **37:**8 **61:**23 **87:**16 **88:**6,12,16 **95:**2,3,12 **97:**6 **108:**10<br>**Kagan's** [3] **16:**14 **26:**4 **46:**23<br>**KANNON** [5] **1:**18 **2:**3,13 **3:**7 **108:**2<br>**KAVANAUGH** [30] **17:**9 **18:**3 **39:**15,16 **40:**1,9,18,19 **41:**4 **63:**5 **64:**15,21,23 **77:**17 **78:**9,14,24 **79:**3 **80:**1,7 **92:**15 **98:**17,18 **99:**7,13 **100:**3,7,9 **101:**15 **102:**14<br>**keep** [6] **8:**17 **20:**8,10 **62:**4 **64:**17,24<br>**keeps** [1] **106:**14<br>**KEVIN** [6] **1:**20,22 **2:**6,9 **50:**17 **81:**4<br>**kind** [42] **10:**8 **11:**16 **41:**17,21 **42:**22,23 **46:**1,11,15 **56:**16 **62:**10 **63:**6 **64:**8 **71:**18,22 **73:**8 **75:**23 **77:**11 **78:**20 **79:**17 **83:**23 **84:**2 **85:**4,15 **90:**25 **91:**23 **93:**15,20,25 **94:**10 **96:**10,19 **97:**1,3 **98:**1,8 **100:**15 **101:**11 **102:**13 **103:**20 **106:**13 **107:**2<br>**kinds** [7] **34:**4 **42:**19 **58:**22 **63:**10 **83:**18 **89:**25 **90:**13<br>**knowing** [1] **14:**12<br>**known** [4] **17:**25 **26:**18 **34:**22 **91:**5<br>**knows** [5] **14:**12 **55:**24 **63:**7 **65:**24 **71:**17<br><br>**L**<br>**lack** [1] **101:**19<br>**language** [11] **10:**2 **11:**3 **15:**4 **29:**8 **40:**5 **44:**6 **45:**16 **65:**8 **66:**22 **92:**21 **93:**16<br>**large** [1] **59:**22<br>**last** [4] **17:**23 **40:**22 **49:**25 **101:**16<br>**late** [1] **92:**5<br>**Later** [4] **20:**17 **74:**16 **75:**16 **77:**2<br>**Laughter** [1] **88:**9<br>**laundry** [1] **20:**5<br>**law** [8] **81:**13 **83:**22,22 **93:**24 **97:**24 **102:**21 **104:**25 **105:**2<br>**laws** [1] **36:**25<br>**lay** [1] **93:**25<br>**lead** [4] **13:**18 **64:**6 **71:**15 **96:**11<br>**leads** [2] **48:**16 **106:**22<br>**learned** [1] **80:**22<br>**least** [14] **12:**12 **25:**15 **29:**16 **36:**22 **56:**23 **58:**9 **75:**20 **82:**18 **83:**7 **93:**18 **97:**25 **99:** | 18 **100:**4 **103:**16<br>**leave** [4] **23:**8 **38:**25 **89:**7,8<br>**leaving** [2] **54:**17 **93:**20<br>**left** [5] **34:**10 **73:**12 **82:**21 **93:**21 **97:**4<br>**legal** [1] **73:**23<br>**length** [1] **100:**20<br>**less** [7] **24:**7 **67:**22 **92:**14 **95:**20,21 **96:**11 **97:**14<br>**level** [3] **42:**18 **97:**14 **107:**14<br>**liability** [14] **3:**13 **36:**22,23,24 **49:**21 **71:**25 **75:**2 **81:**10 **99:**24 **100:**17 **102:**8,13 **106:**11 **112:**5<br>**liable** [4] **28:**20 **29:**20,23 **111:**24<br>**lies** [2] **11:**22 **102:**4<br>**lifeblood** [1] **76:**1<br>**light** [1] **30:**22<br>**likeliest** [1] **100:**18<br>**likelihood** [1] **105:**9<br>**likely** [7] **20:**1 **26:**20 **33:**16 **43:**23 **47:**15 **96:**11 **97:**14<br>**likes** [1] **21:**9<br>**limit** [1] **96:**22<br>**limited** [5] **59:**13 **66:**20 **90:**4,12 **107:**4<br>**limiting** [1] **27:**8<br>**limitless** [1] **102:**12<br>**line** [7] **41:**18 **42:**3 **49:**14 **65:**14 **95:**15 **108:**12 **109:**8<br>**listener** [1] **71:**11<br>**listening** [1] **92:**12<br>**lists** [1] **20:**5<br>**literally** [1] **90:**9<br>**litigant** [1] **21:**9<br>**little** [6] **13:**15 **19:**3 **30:**11 **77:**11 **100:**20 **105:**24<br>**lives** [1] **60:**3<br>**locate** [1] **25:**3<br>**locations** [1] **91:**20<br>**long** [2] **75:**1 **84:**18<br>**longer** [2] **9:**9 **110:**21<br>**look** [14] **6:**3,8 **13:**1 **23:**3,15 **47:**11 **65:**7 **74:**11 **91:**17,23 **92:**2 **96:**24 **98:**12 **104:**1<br>**looking** [8] **11:**2,22,24 **20:**23 **46:**15,25 **48:**25 **99:**23<br>**loss** [3] **42:**7 **74:**18 **75:**17<br>**lot** [10] **11:**14 **41:**10 **64:**17 **65:**1 **78:**21 **79:**7 **84:**14 **98:**3,21 **99:**19<br>**low** [3] **69:**23 **71:**16 **108:**25<br><br>**M**<br>**Macquarie** [2] **17:**23 **36:**21<br>**mad** [2] **72:**23 **80:**21<br>**made** [13] **5:**3 **7:**8 **14:**13 **15:**20 **47:**4 **60:**7 **74:**14,15,24 **90:**22 **94:**24 **96:**2 **111:**14<br>**major** [2] **64:**10 **97:**23<br>**Management** [5] **17:**24 **35:**10 **88:**20 **91:**3,4 |

Official - Subject to Final Review

**manufacturer** [1] **86:**7
**many** [13] **8:**10 **16:**16 **17:**12,
13 **19:**15 **22:**16 **45:**1 **46:**7
**51:**19 **57:**3,3,4 **102:**24
**March** [1] **91:**18
**market** [3] **35:**2 **53:**20 **75:**
17
**markets** [1] **107:**10
**mass** [1] **95:**20
**material** [24] **12:**23 **16:**20
**17:**6 **18:**14 **26:**8,20 **44:**7
**47:**13 **48:**7 **52:**3 **70:**25 **75:**
1 **76:**12,13 **84:**25 **91:**7,11
**92:**24 **93:**4 **95:**10,13,15 **96:**
1 **107:**16
**materiality** [16] **16:**22 **17:**1
**24:**22 **25:**4 **36:**18 **44:**2,13
**51:**4 **74:**15 **75:**4 **83:**20 **97:**
5 **104:**10 **108:**15,23,24
**materialization** [1] **70:**18
**materializations** [1] **100:**
21
**materialize** [4] **31:**12 **39:**5,
23 **49:**3
**materialized** [8] **28:**16 **49:**
15 **52:**6,9 **81:**12 **96:**20 **103:**
12,13
**materializes** [2] **37:**7 **106:**
17
**materializing** [1] **30:**20
**materially** [1] **37:**14
**Matrixx** [1] **36:**21
**matter** [6] **1:**13 **39:**11 **81:**13,
23 **87:**21 **92:**7
**matters** [6] **7:**8 **10:**24 **23:**7
**46:**5 **83:**18 **86:**22
**mean** [20] **10:**5 **15:**11,17 **19:**
6 **52:**2 **54:**14 **59:**25 **60:**1,3
**69:**21 **71:**12 **78:**17 **88:**2 **90:**
19 **97:**13,19 **99:**14 **101:**21
**103:**1 **104:**21
**means** [1] **36:**13
**meant** [4] **11:**10 **12:**3 **34:**1
**44:**5
**measure** [1] **16:**24
**measures** [1] **58:**20
**mechanisms** [2] **23:**18,19
**media** [4] **13:**4,7,11 **42:**11
**meet** [2] **9:**1 **82:**13
**mere** [1] **31:**2
**merely** [1] **49:**20
**meritorious** [1] **95:**21
**messy** [1] **77:**11
**Meta** [14] **4:**25 **5:**3 **8:**19 **13:**
10 **22:**12 **27:**13,21 **43:**13
**58:**24 **59:**1 **61:**14,18 **93:**12
**110:**24
**Meta's** [5] **4:**23 **5:**7,19 **13:**1
**27:**24
**meteor** [3] **47:**18 **86:**16
**109:**11
**meteorite** [4] **58:**13 **69:**20
**86:**16 **87:**7
**meteorites** [1] **91:**10

**middle** [1] **28:**16
**might** [22] **7:**18 **16:**17 **35:**8,
9,25 **41:**18,22 **48:**24 **54:**18
**62:**13 **64:**12 **72:**11,11 **77:**
13 **84:**10 **88:**25 **89:**1 **95:**19,
21 **97:**20 **106:**11 **107:**11
**million** [6] **22:**19 **53:**18 **65:**
11 **74:**19 **80:**19 **94:**15
**millions** [2] **22:**17 **110:**14
**mind** [1] **8:**18
**mindful** [1] **45:**15
**misappropriation** [5] **59:**
7 **65:**10 **80:**19 **82:**20 **96:**14
**miscalculating** [1] **14:**23
**mischaracterized** [1] **104:**
23
**mishap** [1] **35:**3
**misimpression** [1] **53:**8
**mislead** [1] **70:**23
**misleading** [70] **3:**15 **4:**9,
14,17,19 **5:**22,23 **7:**25 **10:**8
**11:**20,24,25 **12:**5 **13:**19 **14:**
9,16 **15:**3 **19:**14 **20:**24 **21:**
5 **22:**11,25 **23:**17 **24:**3,5
**27:**20 **28:**1,14,18 **30:**18 **31:**
13 **32:**17 **33:**1,18 **37:**13 **38:**
14 **42:**25 **44:**9,14 **45:**11 **50:**
24 **51:**17 **68:**10,22 **71:**14,
23 **73:**20 **78:**11 **79:**21 **82:**2,
21 **84:**21 **85:**21 **86:**5,7 **87:**
5 **90:**21 **93:**21 **94:**23 **96:**2
**97:**3,15 **101:**6,21 **103:**11,
21 **106:**7,12,20 **110:**3
**misleadingly** [1] **81:**11
**misleadingness** [2] **17:**7
**71:**19
**misled** [5] **14:**23 **36:**11 **49:**
8 **72:**2,21
**misrepresent** [1] **81:**16
**misrepresentation** [5] **9:**
21 **20:**24 **21:**4,6 **46:**4
**misrepresents** [2] **84:**22
**96:**3
**misunderstood** [1] **72:**16
**misuse** [26] **4:**24 **5:**1,2,5,7
**21:**19,23 **24:**16 **25:**7 **27:**22
**31:**15 **33:**14 **39:**22 **40:**23
**43:**15 **50:**6 **53:**6 **74:**4 **75:**
23 **93:**9 **94:**15 **109:**15 **110:**
7,20,21,25
**misused** [1] **36:**13
**misusing** [1] **22:**14
**mitigate** [1] **49:**10
**mix** [1] **104:**17
**Mm-hmm** [1] **56:**9
**moderate** [1] **70:**14
**modest** [2] **32:**17,18
**modified** [1] **8:**23
**Molotov** [3] **86:**19 **87:**8
**109:**11
**month** [1] **14:**11
**months** [2] **31:**25 **67:**22
**monumentally** [1] **72:**1
**morning** [2] **3:**4 **78:**7

**most** [8] **7:**9 **43:**16 **54:**15
**65:**3 **67:**13 **103:**10 **105:**15
**109:**21
**motion** [7] **56:**19 **76:**19 **78:**
18,19 **79:**7 **109:**20,23
**much** [7] **32:**7 **33:**25 **71:**17
**91:**1 **96:**11 **102:**15 **107:**9
**multiple** [1] **91:**20
**must** [4] **51:**4 **52:**2,4 **110:**3
**myself** [1] **99:**19

# N

**name** [1] **109:**2
**narrow** [1] **55:**4
**natural** [2] **15:**7 **93:**1
**naturally** [1] **111:**12
**nature** [5] **36:**3 **41:**14 **48:**17
**70:**12 **93:**19
**necessarily** [5] **25:**17 **29:**2
**31:**3 **61:**17 **77:**10
**necessary** [10] **6:**23 **11:**2,
16 **18:**22 **38:**7 **44:**8 **52:**22
**63:**1 **90:**21 **101:**5
**need** [4] **38:**3 **40:**15 **95:**24
**105:**13
**needed** [2] **91:**1 **100:**24
**needs** [6] **18:**19 **35:**18 **46:**9,
20 **49:**10 **98:**14
**negative** [2] **8:**5 **35:**25
**negatively** [4] **13:**4,8 **86:**24
**89:**6
**nervous** [1] **47:**2
**networks** [1] **59:**16
**never** [19] **3:**22 **4:**25 **6:**11,
16,25 **13:**10 **14:**22 **27:**21
**29:**25 **43:**13 **52:**14 **54:**19
**58:**24 **60:**19 **73:**7 **90:**19 **96:**
4 **104:**11 **111:**7
**news** [1] **91:**18
**next** [3] **31:**25 **59:**12 **67:**24
**nice** [1] **84:**8
**nine** [1] **101:**23
**Ninth** [25] **3:**11,14,24 **5:**11
**19:**23 **20:**11 **28:**11,12,21
**30:**10 **37:**4 **38:**10,11,21,22
**41:**25 **51:**1 **52:**10,20 **60:**9
**73:**13 **97:**24 **102:**23,25
**112:**17
**nobody** [4] **34:**16 **42:**10 **43:**
12 **67:**2
**nobody's** [2] **41:**20 **55:**25
**non-occurrence** [1] **76:**10
**nondisclosure** [1] **82:**1
**none** [1] **76:**7
**note** [2] **34:**2 **111:**9
**nothing** [3] **58:**2 **82:**5 **94:**
19
**notice** [8] **7:**17 **8:**12 **63:**20
**64:**5 **71:**5 **75:**9 **94:**10 **98:**
19
**notion** [1] **31:**9
**November** [1] **1:**11
**number** [2] **21:**25 **78:**23
**numerical** [1] **70:**12

# O

**object** [1] **37:**21
**objective** [1] **109:**18
**objects** [1] **32:**9
**obligation** [5] **43:**21 **55:**3
**90:**19 **106:**6 **112:**10
**obsolete** [1] **31:**23
**obtain** [1] **36:**8
**obvious** [1] **81:**22
**occasion** [1] **81:**25
**occur** [9] **13:**21 **15:**7 **20:**2
**28:**18 **51:**6,25 **67:**7 **68:**7
**84:**24
**occurred** [36] **3:**17,23 **4:**20
**6:**12,25 **8:**7 **12:**6,22 **21:**23
**29:**25 **31:**15 **36:**9 **38:**16 **40:**
16 **46:**22 **47:**21 **49:**24 **53:**6,
10,13 **54:**8 **70:**24 **76:**25 **79:**
12 **83:**14,15 **84:**23 **85:**13
**93:**20 **96:**4 **97:**1 **109:**6,10
**110:**7 **111:**7,18
**occurrence** [9] **38:**23 **52:**3
**66:**24 **68:**25 **70:**17 **72:**22
**78:**11 **93:**3 **96:**13
**occurrences** [5] **13:**17 **19:**
25 **20:**6 **41:**1 **99:**5
**occurring** [9] **6:**11 **16:**9 **30:**
14 **32:**15 **39:**19 **77:**23 **101:**
20 **111:**16 **112:**3
**occurs** [4] **6:**22 **8:**25 **33:**5
**85:**7
**offer** [1] **44:**22
**offering** [1] **92:**25
**office** [1] **79:**23
**often** [3] **30:**22 **39:**6 **57:**4
**okay** [20] **22:**6 **25:**14,15,19
**46:**13 **48:**25 **54:**11 **58:**5 **63:**
13 **69:**9 **72:**4 **78:**9,14,16
**80:**1,25 **86:**12 **93:**12 **102:**
14 **105:**20
**omission** [5] **44:**7 **55:**15
**94:**24 **96:**1 **104:**11
**omissions** [6] **3:**14 **11:**25
**36:**23,24 **56:**18 **112:**5
**omit** [1] **78:**11
**omits** [1] **50:**24
**omitted** [12] **7:**3 **16:**16,19
**17:**1 **23:**7 **25:**2 **36:**16 **51:**5
**52:**5 **76:**25 **95:**25 **108:**15
**omitting** [2] **22:**12 **34:**17
**Omnicare** [10] **4:**5 **7:**9 **11:**1
**25:**20 **44:**25 **55:**15 **77:**7 **82:**
7 **102:**1 **111:**12
**once** [2] **71:**4 **76:**11
**one** [35] **4:**4,23 **6:**15 **7:**6 **8:**
15,24 **10:**23 **18:**8 **19:**19 **22:**
7 **24:**11 **45:**6,10 **47:**5,11
**55:**1 **62:**3,8 **63:**20 **64:**17
**65:**20 **66:**15 **69:**14 **75:**19
**92:**4 **95:**4,21 **100:**7,11 **101:**
17 **103:**25 **108:**20 **109:**18,
19 **111:**4
**onerous** [1] **112:**9

**ones** [3] **41:**11 **42:**5 **51:**20
**ongoing** [1] **49:**16
**only** [32] **5:**21 **6:**9 **7:**2 **9:**25
**11:**22 **12:**22 **20:**23 **37:**16
**44:**13 **46:**3 **47:**3 **52:**15,17
**55:**21 **57:**16 **60:**8 **62:**2 **64:**
12 **67:**10 **75:**25 **76:**8 **80:**17
**84:**21 **88:**10 **89:**3 **93:**2 **95:**
15 **101:**1 **103:**21 **104:**12
**107:**1 **112:**10
**open** [1] **35:**2
**opening** [2] **23:**11 **108:**21
**operating** [1] **10:**14
**operational** [2] **35:**8 **88:**20
**operations** [3] **68:**4 **69:**3
**86:**2
**opinion** [13] **4:**5,6,9,11 **10:**
25 **17:**14 **27:**7 **38:**9 **44:**25
**45:**15 **104:**2,5 **111:**3
**opinions** [1] **25:**20
**opportunity** [1] **77:**2
**opposed** [3] **47:**6 **49:**9 **89:**
19
**opposite** [2] **54:**17 **70:**7
**options** [1] **28:**6
**oral** [7] **1:**14 **2:**2,5,8 **3:**7 **50:**
17 **81:**4
**order** [4] **44:**8 **85:**20 **93:**20
**94:**2
**ordinarily** [8] **4:**7 **16:**8 **28:**8,
9 **62:**19,20 **63:**2,2
**ordinary** [1] **109:**24
**originally** [1] **106:**15
**other** [41] **5:**10 **6:**1 **7:**6 **8:**2,
16 **12:**11,13 **15:**24 **16:**21
**17:**9 **19:**9 **21:**25 **24:**8 **25:**9
**26:**7 **28:**12 **32:**3 **33:**2,13
**34:**7 **35:**15 **36:**13,24 **38:**18
**44:**3 **47:**14 **49:**16 **50:**2 **55:**
2,4 **62:**8 **64:**10 **67:**1 **73:**2
**88:**16 **95:**14 **101:**9 **103:**3,7,
9 **109:**2
**others** [1] **111:**5
**otherwise** [2] **51:**2 **97:**4
**ought** [1] **43:**21
**out** [30] **9:**7 **16:**11 **17:**10 **19:**
17 **21:**2 **28:**7 **32:**5,9 **33:**21
**34:**11 **35:**12 **38:**11 **46:**15,
18,21 **64:**17 **67:**15 **72:**23
**74:**17 **80:**22 **86:**13,17 **88:**3,
13 **91:**18 **92:**18,20 **93:**25
**97:**16,16
**outbreaks** [1] **42:**14
**outcome** [1] **111:**19
**outlier** [1] **19:**24
**outlying** [1] **3:**12
**output** [1] **87:**24
**outright** [1] **102:**4
**outset** [1] **10:**22
**outside** [3] **38:**20 **73:**3 **102:**
25
**over** [6] **57:**4 **61:**14,19,23
**66:**7 **78:**3
**over-disclose** [1] **63:**25

**over-disclosure** [1] **3**:25
**over-disclosures** [1] **64**:7
**own** [3] **44**:7 **71**:4 **90**:6

**P**

**PAGE** [5] **2**:2 **13**:3 **20**:14
**23**:11 **92**:2
**pages** [1] **38**:11
**panoply** [1] **18**:16
**paradigmatic** [1] **12**:18
**paragraph** [1] **59**:12
**parenthetically** [1] **111**:9
**parents** [1] **51**:16
**parse** [2] **15**:4 **55**:10
**part** [4] **44**:3 **60**:3 **74**:16 **78**:
25
**particular** [17] **7**:16 **8**:7 **18**:
20 **42**:22 **52**:12 **56**:25 **73**:
18,19 **76**:22 **84**:2,2,7 **86**:22
**93**:25 **96**:13 **104**:12 **107**:4
**particularly** [2] **8**:2 **60**:20
**parties** [3] **8**:10 **22**:7,14
**party** [5] **22**:15 **23**:18 **35**:2
**36**:12 **63**:19
**past** [109] **3**:18 **4**:21 **6**:14 **7**:
20,22 **8**:5 **9**:25 **12**:6 **13**:17,
17 **17**:10 **18**:6,20 **20**:5,16
**21**:23 **24**:7 **27**:14 **28**:2,10,
14 **29**:13,25 **30**:22,24 **31**:2,
3 **34**:5,8,14 **36**:2,9 **38**:16
**40**:16 **42**:13 **43**:10,17 **46**:6
**47**:5 **48**:9 **49**:11,19,24 **51**:
14 **52**:9,13 **53**:6 **55**:22,25
**56**:13,14,22 **57**:20 **58**:3 **59**:
20 **63**:9 **64**:19 **65**:3,23,25
**66**:3,6 **67**:5,7,9 **68**:11,20
**69**:20 **70**:24 **71**:6,11 **72**:2
**78**:2,3,17,19 **79**:7,13,19 **80**:
8 **81**:16 **82**:5 **84**:24 **85**:14,
18 **87**:15 **89**:17,18,23 **90**:
11,18,20 **95**:7 **96**:13 **99**:5
**100**:21 **101**:20 **103**:21 **106**:
6,15,16 **107**:15,19 **108**:9
**109**:7,10,15 **110**:8 **111**:19
**paying** [1] **14**:18
**penalize** [2] **15**:25 **112**:13
**penalized** [1] **37**:6
**people** [14] **35**:5,17 **43**:16
**44**:15 **57**:11 **67**:5,9 **70**:23
**72**:2,22 **76**:3 **80**:21 **101**:18
**107**:10
**people's** [1] **74**:19
**percent** [13] **9**:18 **10**:15,15,
15 **18**:4,4 **26**:6 **42**:7 **48**:2
**68**:6,17 **88**:13 **105**:14
**percentage** [2] **67**:23 **68**:
17
**perfectly** [1] **93**:1
**Perhaps** [4] **39**:24 **43**:23
**89**:20 **95**:20
**period** [1] **74**:11
**permission** [1] **93**:10
**persists** [1] **30**:25
**person** [12] **6**:8,20 **15**:14

**48**:22 **55**:16 **77**:5 **85**:12 **86**:
17,18 **101**:18 **104**:15 **110**:
24
**perspective** [1] **46**:10
**perverse** [1] **15**:23
**Petition** [1] **38**:12
**Petitioner** [1] **106**:5
**Petitioners** [15] **1**:4,19 **2**:4,
14 **3**:8 **5**:11 **81**:9,14 **82**:3
**84**:1 **102**:13 **103**:8,18 **104**:
9 **108**:3
**phrased** [1] **96**:7
**pick** [1] **25**:24
**piece** [1] **32**:5
**pin** [1] **62**:10
**pivot** [4] **26**:2 **27**:16,17,17
**place** [12] **8**:4 **24**:7 **27**:2 **28**:
10,13 **36**:2 **43**:10 **74**:4 **87**:
14 **110**:15,19 **112**:9
**plaintiffs** [3] **5**:25 **23**:23 **51**:
4
**plaintiffs'** [1] **24**:14
**plank** [1] **99**:15
**plant** [18] **9**:1,4,9,19,24 **10**:
1,11,14 **11**:17,18 **18**:5 **31**:
23 **86**:1,20 **87**:21,22,23 **88**:
3
**plausibly** [1] **76**:23
**play** [4] **39**:24 **76**:7,19 **110**:
15
**pleaded** [1] **110**:4
**pleading** [2] **102**:11 **110**:1
**please** [3] **3**:10 **50**:20 **81**:8
**plenty** [1] **77**:2
**point** [29] **6**:3 **8**:11,16 **15**:12,
12,19 **18**:18 **19**:20 **23**:17
**29**:21 **31**:12 **44**:1 **46**:23 **48**:
6 **50**:8 **57**:15 **64**:3,17 **66**:
19 **67**:2 **74**:3,21,23 **75**:4
**78**:17 **89**:3 **92**:20 **94**:20
**101**:14
**pointing** [1] **106**:14
**points** [8] **6**:18 **8**:3 **15**:1 **23**:
1 **29**:14 **47**:8 **108**:5 **109**:4
**policies** [1] **83**:5
**policy** [2] **79**:14 **100**:12
**porch** [1] **58**:15
**portion** [1] **91**:9
**posed** [1] **83**:9
**posit** [1] **11**:7
**positing** [2] **85**:22,24
**position** [18] **7**:2 **10**:20,22
**12**:16 **13**:16 **19**:6 **50**:22 **51**:
8 **54**:9 **62**:19 **96**:22 **102**:21
**103**:2 **104**:20 **105**:1,6,24
**111**:23
**possibility** [2] **30**:17 **32**:24
**possible** [5] **31**:10 **40**:14
**47**:6 **51**:24,25
**possibly** [4] **25**:1 **26**:6 **37**:
14 **68**:8
**potential** [7] **13**:24 **70**:18
**92**:17 **93**:2 **105**:9 **106**:23
**107**:19

**potentially** [2] **97**:16 **106**:
12
**power** [1] **18**:21
**powers** [1] **63**:7
**practices** [4] **22**:9,13 **59**:
15 **90**:6
**pre** [1] **38**:14
**precise** [1] **92**:14
**precisely** [9] **25**:5 **27**:9 **31**:
14 **32**:23 **36**:7 **41**:1 **48**:6
**49**:22 **111**:24
**predictable** [1] **31**:1
**predominantly** [1] **91**:22
**preexisting** [1] **28**:21
**premise** [5] **4**:15 **6**:24 **9**:11
**64**:9,10
**premises** [1] **100**:8
**present** [7] **18**:20 **20**:19 **29**:
13 **49**:18 **80**:8 **90**:11 **107**:
19
**presented** [6] **50**:23 **57**:17
**65**:21 **78**:5 **80**:14 **81**:19
**presents** [1] **72**:13
**presumably** [3] **20**:6 **109**:7
**111**:25
**pretty** [2] **12**:18 **27**:20
**prevail** [4] **5**:12 **39**:6 **109**:
12,20
**prevalent** [1] **58**:18
**prevent** [2] **22**:14 **95**:20
**previous** [6] **19**:25 **20**:19
**38**:23 **40**:25 **111**:6 **112**:8
**previously** [6] **3**:23 **4**:25
**12**:22 **13**:10 **38**:15 **93**:19
**price** [1] **110**:19
**primarily** [1] **19**:17
**principal** [1] **60**:7
**principally** [1] **77**:9
**principle** [1] **36**:19
**prior** [3] **66**:24 **67**:8 **112**:2
**private** [7] **37**:1 **53**:18 **62**:6
**65**:11 **73**:5 **76**:3 **80**:19
**probabilistic** [3] **54**:6,16
**83**:12
**probabilities** [1] **6**:10
**probability** [14] **16**:9 **30**:19
**32**:7,19 **37**:15 **39**:18 **40**:8
**68**:24 **69**:18,22,23,24 **71**:
13 **111**:16
**probable** [1] **40**:6
**probably** [6] **44**:15 **47**:19
**60**:2 **70**:1 **105**:15,17
**probative** [1] **75**:20
**problem** [21] **6**:7 **16**:5,21
**19**:8 **24**:14 **33**:20 **34**:9 **37**:
2,4 **40**:7 **44**:3 **58**:3 **59**:17
**63**:23 **64**:5 **96**:15 **101**:16
**103**:6 **104**:8 **109**:16 **110**:9
**problems** [5] **26**:24 **35**:9
**67**:16 **89**:25 **108**:19
**process** [1] **63**:7
**production** [8] **8**:25 **9**:1,4,
9,12,18 **10**:11,14
**prohibited** [1] **101**:13

**prohibits** [1] **102**:3
**prolong** [1] **97**:9
**promises** [1] **62**:5
**promulgate** [1] **18**:21
**promulgated** [2] **40**:21 **90**:
15
**prone** [1] **58**:17
**property** [1] **14**:18
**proposed** [1] **39**:1
**proposition** [1] **21**:18
**prospectively** [1] **15**:21
**protection** [3] **94**:9 **102**:12
**108**:25
**provide** [8] **39**:8 **52**:22 **58**:
20 **59**:13 **77**:12 **84**:14 **85**:3
**108**:24
**provided** [2] **53**:1 **98**:2
**proving** [1] **51**:4
**provision** [3] **102**:3,7,9
**provisions** [4] **19**:9 **26**:7
**27**:4 **36**:24
**PSLRA** [2] **102**:10 **110**:1
**public** [13] **24**:17 **25**:2,8,12
**50**:6 **59**:2 **80**:22 **94**:2 **104**:
3 **110**:10,12,14,20
**publicity** [5] **21**:24 **43**:14
**55**:24 **57**:11 **109**:7
**publicly** [2] **5**:2,9
**pure** [2] **36**:23,23
**purely** [4] **48**:15 **62**:13 **106**:
8,21
**purpose** [3] **7**:14 **64**:2 **100**:
5
**purposes** [2] **103**:17 **105**:6
**pursue** [1] **25**:1
**pursuing** [1] **23**:24
**put** [12] **8**:12 **23**:21 **34**:15
**35**:2 **39**:24 **42**:4 **71**:4 **72**:7
**75**:9 **78**:18 **95**:7,9

**Q**

**qualify** [1] **7**:5
**quantification** [1] **105**:13
**quantify** [1] **70**:11
**quantity** [1] **85**:19
**quarrel** [1] **103**:16
**quarterly** [1] **112**:12
**question** [39] **7**:7 **19**:3 **20**:
25 **25**:9 **36**:15 **48**:14 **50**:1,
7,22 **57**:16 **62**:8 **63**:13 **64**:
10 **65**:21 **66**:14,14 **69**:14,
17 **73**:5,21,23 **76**:15,20 **77**:
1,9,20,21 **78**:4,5 **79**:10 **80**:
14 **81**:19 **82**:17 **83**:17 **94**:
13 **95**:18 **98**:24 **99**:15 **101**:
16
**questioning** [1] **67**:15
**questions** [10] **5**:14 **11**:22
**34**:1 **39**:17 **46**:1 **52**:24 **82**:
9 **95**:4 **99**:20 **101**:23
**quickly** [3] **8**:17 **80**:6 **83**:4
**quite** [6] **29**:5 **35**:3 **36**:5 **45**:
19 **66**:17 **83**:4

**R**

**rails** [1] **30**:11
**rained** [1] **4**:18
**rains** [1] **4**:17
**raise** [3] **63**:6,24 **97**:13
**raised** [3] **82**:3 **98**:25,25
**raises** [1] **99**:19
**range** [1] **12**:4
**rates** [2] **48**:24 **49**:5
**reacting** [1] **43**:18
**read** [7] **6**:15 **13**:11 **23**:15
**59**:10 **69**:11 **75**:11 **78**:14
**readily** [1] **107**:18
**reading** [3] **60**:10 **75**:8 **76**:
21
**reads** [1] **67**:3
**real** [11] **34**:8 **48**:8,21,23 **55**:
2 **61**:24 **66**:8 **68**:9 **78**:18
**96**:5,21
**realize** [1] **30**:24
**really** [33] **10**:4,24 **16**:10,22
**18**:17 **20**:3 **23**:5 **32**:7 **33**:8
**34**:12,23 **35**:3 **36**:17 **38**:22
**42**:25 **43**:24,24 **44**:4,24 **46**:
20 **49**:5 **50**:1,9 **60**:6 **70**:20
**72**:23 **76**:3 **80**:21 **91**:18 **98**:
20 **108**:24 **109**:4,17
**realtor** [2] **13**:23 **14**:12
**reason** [16] **10**:17 **24**:4 **27**:
15 **30**:23,25 **31**:22 **35**:5 **45**:
17 **51**:11 **53**:11 **60**:11 **72**:
21 **80**:18 **107**:6 **110**:22
**112**:19
**reasonable** [40] **6**:8,20 **7**:
10,11 **10**:12 **16**:24 **27**:11
**36**:10,17 **43**:9 **48**:7,16 **53**:
11,14 **55**:16 **56**:20,24 **59**:
21 **60**:18 **61**:5 **69**:11 **76**:23
**77**:5 **85**:12 **87**:10,12,17,20
**88**:7,17,25 **94**:8 **96**:12,18
**101**:17,18 **104**:15 **108**:16
**109**:9,13
**reasonably** [4] **26**:20 **47**:
15 **89**:7 **96**:16
**reasons** [2] **56**:24 **110**:3
**REBUTTAL** [3] **2**:12 **108**:1,
2
**received** [2] **57**:3 **62**:22
**recent** [2] **17**:19 **65**:10
**recently** [5] **7**:9 **53**:7 **69**:14
**86**:8 **110**:8
**recognize** [2] **11**:5 **81**:15
**recognized** [1] **4**:8
**recognizing** [1] **45**:16
**records** [1] **22**:24
**recur** [1] **42**:16
**recurrence** [3] **30**:23 **32**:2
**66**:2
**reduction** [1] **53**:20
**references** [2] **7**:22,23
**referring** [1] **23**:10
**reg** [1] **99**:1
**regard** [3] **35**:22 **68**:22 **99**:

10

**regardless** [1] **28**:15
**regime** [4] **3**:13 **37**:5 **112**:4, 5
**registrant** [1] **92**:25
**regs** [1] **99**:12
**regulated** [1] **63**:19
**Regulation** [9] **17**:20 **29**:5 **40**:11 **63**:12,15 **64**:14 **65**:5 **67**:8 **101**:3
**regulations** [5] **63**:8,10 **64**:18 **65**:2 **100**:24
**regulator** [1] **101**:11
**regulatory** [9] **7**:12 **25**:16 **27**:12 **29**:3 **41**:9,12 **65**:7 **66**:22 **107**:3
**reinforces** [1] **57**:9
**reject** [2] **4**:2 **51**:12
**rejected** [2] **60**:9 **82**:6
**rejection** [1] **52**:20
**relates** [1] **47**:5
**relationship** [1] **19**:5
**relatively** [2] **42**:18 **108**:25
**relaxed** [1] **28**:22
**release** [1] **34**:19
**released** [2] **35**:1 **53**:18
**relevant** [8] **17**:11 **18**:10 **53**:15 **84**:23 **85**:11 **97**:2 **98**:4 **104**:2
**relies** [1] **110**:18
**rely** [3] **18**:17 **24**:8 **111**:8
**remain** [1] **100**:19
**remember** [1] **109**:23
**remove** [1] **52**:4
**removed** [1] **53**:8
**render** [5] **27**:20 **29**:6 **38**:13 **92**:24 **107**:17
**rendered** [3] **94**:23 **96**:1 **106**:7
**rendering** [1] **44**:8
**renders** [1] **82**:2
**replaced** [3] **31**:24,25 **67**:21
**replete** [1] **13**:13
**reply** [1] **45**:3
**report** [3] **61**:3 **68**:5 **74**:9
**reported** [2] **5**:3,9
**reports** [2] **49**:1 **112**:12
**represent** [1] **21**:6
**representation** [27] **3**:22 **4**:10 **9**:23,25 **12**:20 **20**:15,25 **21**:22 **24**:6 **25**:21 **28**:9 **29**:24 **45**:4,8,13 **46**:4 **47**:4 **50**:9 **57**:19 **58**:2,23 **59**:19 **62**:22 **63**:18 **86**:10 **89**:8 **111**:6
**representations** [4] **19**:19 **27**:14 **45**:1 **62**:17
**represented** [2] **22**:24 **58**:16
**reproduced** [1] **90**:8
**reputation** [9] **5**:19 **6**:6 **21**:20 **24**:13 **27**:24 **33**:7,10 **94**:20 **97**:20
**require** [10] **12**:10 **63**:8,12

**64**:18,22 **65**:2 **90**:1 **94**:8 **105**:12 **107**:14
**required** [10] **26**:7,14,22 **29**:16 **35**:13 **63**:21,22 **98**:23 **101**:3,12
**requirement** [10] **18**:6,13 **29**:3 **35**:16 **38**:24 **70**:11 **96**:5 **107**:3,8 **108**:15
**requirements** [5] **17**:10 **18**:17,23 **35**:15 **82**:13
**requires** [14] **17**:18,25 **19**:24 **26**:8,18 **35**:14 **47**:12 **65**:8 **102**:10,10 **104**:24 **107**:16 **111**:9 **112**:14
**requiring** [2] **40**:25 **66**:20
**research** [1] **46**:18
**resisting** [1] **44**:18
**resolve** [2] **28**:4 **39**:8
**resolved** [2] **79**:5 **109**:22
**respect** [5] **24**:12 **52**:7 **54**:15 **66**:25 **84**:11
**respectfully** [2] **59**:24 **79**:22
**respond** [3] **36**:14 **60**:23 **63**:24
**Respondents** [15] **1**:7,21, 25 **2**:7,11 **5**:4 **19**:16 **50**:18 **81**:6,21 **82**:17 **83**:18 **84**:19 **90**:3 **93**:7
**Respondents'** [7] **7**:1 **19**:21 **23**:3 **82**:16 **108**:6,13 **111**:22
**response** [9] **6**:18 **7**:7 **15**:1 **23**:2 **29**:18 **35**:21 **63**:16 **77**:18 **80**:7
**responsible** [1] **110**:24
**rest** [1] **19**:5
**result** [5] **4**:24 **5**:8 **49**:11 **98**:10 **110**:15
**retake** [1] **45**:7
**reticulated** [1] **25**:16
**Retirement** [1] **104**:3
**reveals** [1] **73**:2
**revenue** [2] **96**:10 **97**:19
**reversed** [2] **5**:13 **112**:20
**risk** [123] **3**:14,17,19 **4**:13, 19 **5**:6,17 **6**:4 **12**:19 **13**:1,3, 12 **14**:18 **15**:12,20 **16**:9 **19**: 21 **20**:1,14,17,19 **21**:6 **25**: 17 **28**:15,17 **29**:2,20 **30**:6,7, 12,13,18,19,22 **31**:4,10,20 **32**:1,15 **37**:6,15 **38**:17 **39**: 4,17 **40**:12 **41**:14 **42**:11,21 **44**:15 **47**:12,13 **48**:9 **49**:2, 18,20,21 **50**:23 **51**:5,7,14, 16,20,24 **52**:3,8 **55**:20 **57**: 17 **59**:6,7 **62**:12 **66**:8 **67**:4 **70**:12,14,14,14,19 **71**:13, 15 **72**:10,10 **77**:22 **80**:9,20, 20 **81**:11,15 **82**:2,4 **83**:9 **84**:3 **85**:12,17,19 **86**:23 **89**: 5,18 **91**:2,21,22 **92**:17 **94**: 19,23,25 **96**:18,20 **97**:20 **99**:3 **100**:16,19,22 **103**:10,

11,13 **105**:13,16 **106**:22 **108**:8,11,17 **111**:25 **112**:7, 11
**risk-factor** [2] **81**:10 **98**:3
**risks** [21] **7**:15 **15**:22 **16**:3,5 **17**:17 **20**:4 **30**:3 **35**:6,18 **40**:3 **42**:6 **50**:25 **52**:16,17 **73**:2 **75**:9 **78**:12 **89**:16,23 **90**:5 **112**:15
**risky** [10] **29**:8 **53**:16,23 **65**: 9,15 **67**:6 **75**:10 **92**:25 **107**: 10,17
**road** [1] **4**:16
**ROBERTS** [37] **3**:3 **18**:24 **19**:2 **28**:23 **30**:1 **33**:22 **37**: 10 **39**:14 **41**:5 **45**:23 **50**:14 **54**:1,5,11,14,22 **55**:8 **56**:5, 7,10 **72**:5 **73**:24 **77**:14 **80**: 3 **81**:1 **83**:11 **84**:4 **88**:10 **92**:8 **95**:2 **97**:7 **98**:16 **102**: 17 **105**:21 **107**:22,25 **112**: 22
**role** [1] **76**:18
**rule** [38] **3**:12 **20**:11,12,13, 13,22 **21**:10,15 **27**:9 **31**:9 **38**:10,20 **41**:15,22 **42**:1,2 **43**:2 **44**:6,20 **51**:12 **52**:11 **68**:10 **73**:7 **79**:17,18 **83**:25 **94**:3 **100**:25 **101**:1 **103**:8, 19,24 **104**:6,9,21,24 **109**:1, 2
**rules** [1] **83**:19
**run** [1] **29**:20
**RUSSELL** [75] **1**:20 **2**:6 **12**: 14 **50**:16,17,19 **52**:25 **53**:3, 25 **54**:2,9,13,21 **55**:7,13 **56**: 4,9,17 **57**:13,22 **58**:4,7 **59**: 1,23 **60**:5 **61**:20 **62**:1,7,15, 21 **64**:9,20,22 **65**:1,17 **66**: 10,18 **68**:8,18,24 **69**:4,8,10, 25 **70**:7,22 **71**:21 **72**:15,20 **73**:2,17 **74**:5,8,13,23 **75**:5, 18 **76**:8,15,20 **78**:4,10,21 **79**:1,9 **80**:10,12,17,25 **83**: 12 **95**:8 **108**:7 **109**:3 **110**:6, 17

---

## S

**S-K** [2] **17**:20 **101**:3
**safe** [1] **79**:23
**safeguards** [1] **24**:1
**safety** [2] **69**:15,17
**sales** [1] **9**:2
**same** [7] **10**:17 **31**:1 **51**:19 **78**:1 **82**:7 **88**:21 **100**:19
**satisfied** [1] **38**:24
**saying** [22] **11**:16 **21**:3 **32**: 23 **38**:23 **54**:25 **60**:23 **61**: 11,13,15,19 **69**:12 **71**:24 **79**:15,17,20 **82**:12 **91**:14 **93**:16 **101**:1 **103**:18 **104**: 22 **112**:6
**says** [29] **6**:22 **14**:1 **15**:6 **22**: 7 **30**:17 **32**:14 **34**:7,13 **35**:

4,6 **38**:9,18 **40**:12,12 **48**:23, 24 **55**:14 **58**:17,19 **64**:14 **67**:20 **85**:23,25,25 **86**:1 **103**:19 **106**:5 **111**:4,15
**scale** [3] **53**:7 **60**:20 **110**:9
**scenario** [3] **84**:5 **100**:18 **106**:13
**scent** [1] **46**:20
**scienter** [2] **102**:10,11
**scrutiny** [1] **12**:10
**SEC** [29] **15**:20 **18**:18,21 **26**: 16 **40**:10,20,24 **41**:22 **63**:7, 13 **64**:4,18 **71**:20 **79**:24 **84**: 17 **85**:2 **92**:16 **93**:24 **97**:18 **98**:8,12 **99**:1,8,9,11,16 **100**: 23 **101**:10 **111**:9
**SEC's** [1] **105**:1
**second** [12] **36**:14,14 **40**: 10 **51**:3 **66**:13 **78**:16,19 **89**: 22 **105**:7 **107**:13 **108**:23 **110**:5
**section** [9] **17**:24 **90**:9,10 **91**:2,21,22 **94**:25 **102**:8 **104**:2
**sections** [2] **91**:3,16
**securities** [7] **3**:13 **29**:23 **36**:25 **83**:22 **84**:9 **102**:9 **111**:24
**security** [3] **22**:9 **58**:21 **59**: 15
**see** [11] **25**:14 **41**:19,24 **43**: 1 **66**:16 **67**:16 **70**:15,15,20 **90**:6 **99**:18
**seeing** [1] **98**:20
**seeking** [1] **92**:15
**seem** [11] **42**:20,25 **43**:20 **46**:3 **84**:1,7 **89**:15 **91**:7 **92**: 14 **95**:13 **104**:4
**seemed** [3] **30**:12 **65**:19 **108**:14
**seems** [15] **12**:2 **41**:9,21 **42**: 2,4,18 **50**:3 **54**:25 **56**:15 **57**:15 **58**:8 **65**:20 **92**:16 **95**: 14 **106**:9
**seen** [1] **98**:1
**semester** [2] **45**:7,10
**sense** [4] **43**:19 **45**:19 **48**:5 **81**:13
**sensitive** [1] **10**:23
**sentence** [1] **55**:17
**separate** [2] **7**:4 **18**:7
**separately** [1] **59**:7
**separation** [1] **63**:6
**serious** [2] **3**:25 **87**:1
**seriously** [1] **75**:24
**serve** [1] **7**:14
**set** [4] **19**:17 **28**:7 **38**:11 **56**: 25
**settled** [1] **102**:21
**several** [2] **23**:1 **103**:3
**SG** [1] **92**:15
**shaking** [1] **21**:3
**SHANMUGAM** [80] **1**:18 **2**: 3,13 **3**:6,7,9 **5**:17,24 **6**:17

**7**:21 **8**:15 **9**:8,15,20 **10**:21 **11**:12 **12**:7 **13**:14 **14**:25 **15**: 18 **16**:7 **17**:12 **18**:9 **19**:1, 10 **20**:8 **21**:8,14 **22**:4,18,21 **23**:1,22 **24**:4,11,20,25 **25**: 13,24 **26**:11,13,16,21,25 **27**:6,18 **29**:4 **30**:8 **31**:6 **32**: 11 **33**:20 **35**:20 **37**:12,16, 19,23 **38**:1,8 **39**:20 **40**:4,17, 20 **41**:7 **43**:4,6 **44**:21 **47**:8, 22,25 **48**:5,19 **49**:13 **50**:12 **67**:15 **74**:2 **82**:10 **104**:23 **107**:25 **108**:2,4
**Shanmugam's** [1] **62**:18
**shares** [1] **44**:12
**sheds** [1] **30**:22
**shied** [1] **40**:24
**shifting** [1] **105**:2
**shot** [1] **14**:14
**shouldn't** [1] **43**:5
**show** [5] **44**:11 **51**:4 **95**:25 **105**:15,17
**showed** [1] **62**:2
**shows** [1] **31**:25
**side** [7] **8**:2 **25**:9 **33**:13 **38**: 18 **50**:2 **108**:12 **109**:8
**side's** [6] **12**:11,13 **15**:24 **16**:21 **44**:3 **64**:11
**significant** [11] **9**:3 **43**:20, 25 **58**:24 **68**:4 **82**:19,24 **83**: 2 **86**:8 **89**:9 **96**:19
**significantly** [1] **104**:16
**signs** [2] **46**:15 **100**:11
**silence** [1] **61**:8
**similar** [5] **4**:4 **46**:1,23 **66**:2 **82**:6
**simple** [1] **99**:2
**simply** [25] **3**:15 **4**:18,19 **6**: 3 **18**:17 **19**:20 **25**:7 **29**:21 **30**:16 **32**:14,17 **38**:9,14 **44**: 1 **49**:18 **51**:8 **52**:4,8 **55**:13 **61**:6 **66**:19 **67**:2 **71**:24 **73**: 6 **111**:4
**since** [1] **97**:25
**situation** [11] **32**:10,12 **65**: 22 **66**:5 **72**:13 **77**:22 **86**:14 **87**:18,19 **106**:21 **107**:6
**situations** [5] **36**:16 **67**:13 **72**:9 **87**:7,19
**six** [2] **31**:25 **67**:22
**sky** [3] **32**:6 **86**:14,17
**slightly** [1] **15**:18
**slip** [2] **54**:18 **58**:15
**slipping** [1] **55**:10
**smiling** [1] **21**:13
**so-called** [1] **31**:8
**social** [1] **42**:11
**Solicitor** [1] **1**:22
**somebody** [5] **15**:5 **53**:12 **55**:19 **75**:8 **76**:1
**someday** [1] **99**:11
**sometimes** [14] **43**:19 **57**: 24,25 **62**:13 **63**:15,16,18 **83**:13,14 **84**:5,6 **88**:8,11

90:17
**somewhere** [1] **25**:4
**sorry** [7] **54**:4 **56**:6 **64**:16,
25 **72**:15 **97**:9 **101**:16
**sort** [14] **13**:12 **17**:14 **19**:19
**25**:21 **28**:5 **30**:11 **41**:23 **42**:
15 **46**:19 **59**:20 **71**:12 **80**:
16 **84**:5 **109**:6
**sorts** [1] **33**:4
**SOTOMAYOR** [32] **20**:7,10
**21**:8,12 **22**:2,5,20,23 **23**:2,
14 **24**:2,10,19,22 **26**:3 **27**:
16 **29**:19 **33**:23 **72**:6,18 **73**:
1,15 **77**:15,18 **92**:11,12 **93**:
6,9,12 **94**:4,12 **95**:1
**Sotomayor's** [1] **25**:25
**sought** [1] **94**:17
**source** [1] **86**:22
**space** [3] **32**:5,9 **42**:8
**speaker** [2] **4**:10 **71**:17
**speaking** [4] **13**:24 **52**:17
**57**:5 **99**:19
**speaks** [1] **92**:23
**specific** [8] **7**:14 **17**:19 **26**:
24 **44**:15 **96**:16,17 **105**:12
**111**:25
**specifically** [5] **24**:12 **64**:
18 **92**:3 **93**:25 **110**:4
**specifics** [2] **93**:17 **97**:2
**specified** [4] **3**:16 **12**:21
**29**:25 **38**:15
**spectrum** [1] **44**:17
**speculative** [3] **29**:8 **93**:1
**107**:18
**spell** [1] **92**:18
**spinach** [1] **42**:14
**spring** [1] **17**:23
**square** [1] **17**:14
**stage** [2] **5**:16 **76**:19
**stake** [2] **44**:13 **79**:6
**stand** [2] **34**:12 **112**:18
**standalone** [1] **106**:6
**standard** [20] **7**:10 **31**:17
**32**:22 **33**:11,12 **37**:17,20
**38**:2,6 **39**:6 **95**:19 **98**:13
**104**:10,14 **106**:10 **109**:13,
17,25 **110**:1 **112**:18
**standards** [1] **39**:11
**stands** [1] **109**:1
**start** [6] **16**:24 **22**:7 **46**:14
**48**:25 **50**:21 **108**:6
**started** [2] **31**:22 **44**:23
**starting** [1] **64**:3
**starts** [1] **33**:1
**stat** [1] **64**:14
**state** [4] **4**:15 **23**:19 **29**:13
**45**:5
**stated** [1] **23**:16
**statement** [119] **4**:8,13,16
**6**:9,13,21,22,24 **7**:20,25 **9**:
11 **10**:9,24 **11**:3,15 **12**:10,
17,19 **13**:6,20 **14**:7,10,13,
20 **15**:3,5 **17**:7,8 **21**:16 **22**:
11,25 **23**:10,12,16 **24**:7,15

**25**:6,11 **27**:20,21,25 **28**:6,
14,18 **29**:22 **30**:16 **31**:13
**32**:14,16 **33**:1,17 **34**:3,13
**37**:13 **38**:14 **44**:9 **45**:3,11,
14,16 **46**:5,9 **47**:5,6 **48**:14
**50**:13 **51**:5,7 **53**:2,12 **54**:7,
16 **56**:1,21 **58**:10 **67**:4 **68**:
19,23 **69**:1 **71**:10,14,23 **74**:
7,8,12,24 **75**:8,11 **76**:9 **77**:
25 **81**:15 **82**:2,4,25,25 **83**:
13 **84**:2,20 **85**:6,9,20,23,25
**89**:1,4 **94**:23 **96**:2,3,6,11,
24,25 **101**:21 **103**:10,20
**106**:8,19,20 **111**:14
**statements** [57] **4**:5,6,7 **5**:
3 **8**:19,21 **11**:24,25 **12**:5
**15**:13 **16**:10 **19**:18 **21**:17
**22**:6 **23**:5,9,15 **24**:8 **25**:19
**27**:13 **33**:5 **34**:4 **36**:4 **42**:
19,20 **45**:21 **50**:2 **51**:13,20
**52**:13 **56**:25 **57**:18 **60**:8 **62**:
11,12 **73**:7,19 **75**:23 **76**:22,
24 **77**:4,5,8 **79**:11,17,20 **81**:
10,17 **82**:22 **90**:22 **96**:15
**98**:4 **101**:5 **110**:2,3,5 **111**:
4
**STATES** [6] **1**:1,15,24 **2**:10
**13**:3 **81**:5
**Stating** [2] **51**:22 **79**:4
**statutory** [1] **29**:3
**steps** [2] **54**:18 **55**:10
**sticking** [1] **71**:9
**still** [4] **13**:18 **44**:19 **88**:6
**106**:11
**stock** [1] **110**:19
**stop** [1] **22**:2
**strict** [1] **102**:8
**strike** [1] **109**:11
**string** [1] **14**:10
**strong** [2] **102**:10,11
**structure** [1] **57**:2
**struggle** [1] **96**:8
**stuck** [1] **99**:24
**student** [1] **51**:15
**stuff** [1] **34**:15
**subject** [3] **7**:2 **12**:22 **107**:7
**submission** [3] **19**:11 **38**:
21 **54**:6
**submit** [8] **12**:11 **30**:10 **33**:
9 **36**:10 **43**:14 **109**:12,19
**112**:19
**submitted** [2] **112**:23,25
**substantial** [5] **10**:13 **32**:1
**53**:7 **69**:2 **110**:8
**substantiate** [1] **61**:9
**suffer** [2] **13**:6 **21**:20
**suffered** [6] **5**:1 **13**:10 **43**:
13 **86**:8 **89**:9 **109**:14
**sufficient** [2] **24**:1 **38**:13
**suggest** [5] **12**:3 **46**:3 **79**:
23 **80**:16 **89**:2
**suggested** [3] **84**:12,20
**109**:3
**suggesting** [3] **14**:16 **49**:7

93:23
**suggestion** [2] **13**:19 **47**:3
**suggests** [3] **10**:18 **46**:5
**92**:22
**suit** [1] **56**:11
**summary** [4] **56**:19 **77**:3
**78**:22 **79**:5
**supply** [1] **42**:13
**supporting** [3] **1**:24 **2**:11
**81**:6
**supports** [1] **31**:7
**suppose** [3] **13**:23 **67**:17,
18
**supposed** [2] **35**:17 **55**:9
**SUPREME** [2] **1**:1,14
**surprised** [1] **9**:16
**surprisingly** [1] **39**:24
**susceptible** [2] **41**:15 **83**:
19
**sweep** [1] **27**:1
**sweeping** [1] **3**:13
**swift** [1] **61**:1
**system** [1] **25**:16

## T

**talks** [3] **6**:10 **18**:11 **35**:16
**tangible** [1] **12**:25
**targets** [1] **9**:2
**teeth** [1] **96**:6
**tells** [1] **51**:15
**Tenth** [1] **103**:25
**term** [1] **57**:6
**terms** [8] **19**:4 **44**:8 **54**:3 **69**:
13 **70**:13,13 **94**:12 **96**:7
**test** [10] **28**:20,21 **39**:1,2,3
**41**:20 **103**:3 **108**:7,8 **109**:
16
**text** [2] **64**:13 **90**:4
**themselves** [2] **71**:3 **110**:2
**theory** [5] **24**:14 **64**:8 **71**:25
**84**:21 **112**:1
**there's** [38] **10**:10,13 **11**:15,
17,18 **15**:15 **20**:24 **21**:5 **25**:
21 **30**:17 **32**:1,17,24 **34**:18
**45**:8,17 **48**:3 **51**:16 **65**:10
**66**:7,8 **67**:23 **68**:16 **70**:10,
13,14 **74**:17 **75**:7 **79**:6,6
**81**:18 **90**:19 **93**:23 **94**:10
**98**:18 **101**:17 **103**:25 **106**:
19
**thereby** [1] **111**:18
**therefore** [3] **30**:25 **49**:16
**63**:23
**thinking** [5] **49**:8 **71**:19,20
**72**:2 **106**:11
**thinks** [1] **46**:13
**third** [7] **22**:7,14,15 **23**:18
**35**:2 **36**:12 **51**:11
**third-party** [2] **60**:14 **73**:4
**THOMAS** [22] **5**:15,18,20 **6**:
7,18 **7**:19 **28**:25 **29**:1 **52**:
25 **73**:25 **74**:1,6,10,14 **75**:3,
14 **76**:5,14,17 **82**:10,23 **92**:
10

**Thomas's** [1] **78**:17
**though** [4] **14**:21 **37**:13 **64**:
24 **78**:2
**threatens** [1] **3**:12
**three** [2] **15**:1 **28**:5
**throw** [1] **86**:19
**thrower** [1] **87**:9
**throwing** [1] **46**:19
**ticking** [1] **65**:11
**tinkered** [1] **98**:12
**tomorrow** [1] **49**:5
**took** [12] **4**:4 **27**:2 **28**:4,10
**36**:1 **60**:24 **66**:13 **73**:22 **74**:
4 **83**:3 **110**:15,19
**total** [1] **104**:16
**totally** [2] **14**:20 **89**:15
**tough** [1] **105**:24
**transcript** [1] **78**:15
**transpired** [2] **51**:14 **52**:16
**treat** [1] **56**:17
**treating** [1] **61**:6
**trends** [3] **18**:1 **26**:18 **91**:5
**trial** [1] **56**:15
**tried** [1] **67**:15
**trigger** [2] **3**:25 **106**:11
**triggering** [13] **3**:17 **4**:20
**12**:21 **13**:17 **14**:4 **19**:25 **28**:
13 **30**:14 **38**:15 **49**:9,12,23
**111**:6
**trouble** [1] **19**:3
**troubles** [1] **67**:13
**true** [4] **51**:19,19 **85**:4 **89**:2
**trusted** [1] **61**:18
**trusting** [1] **96**:8
**truth** [2] **53**:22 **80**:23
**try** [2] **23**:5 **46**:18
**trying** [5] **15**:14 **16**:4 **62**:10
**66**:18 **71**:13
**turn** [2] **64**:6 **99**:18
**two** [16] **14**:14 **32**:11 **35**:21
**39**:11 **45**:25 **47**:8 **66**:16 **67**:
13 **70**:21 **72**:7,8 **75**:7,18
**87**:18 **88**:22 **89**:15
**Twombly/Iqbal** [1] **109**:24
**type** [4] **3**:20 **8**:7 **18**:20 **92**:
17
**types** [9] **7**:15,17 **8**:10 **15**:
21 **16**:3 **17**:17 **20**:4 **36**:7
**45**:20
**typical** [3] **4**:18 **10**:6,7
**typically** [2] **25**:18 **39**:21

## U

**ultimate** [3] **30**:13 **33**:10
**73**:5
**ultimately** [1] **51**:9
**uncertainties** [3] **18**:1 **26**:
19 **91**:6
**uncertainty** [3] **98**:22 **99**:
17 **102**:5
**Under** [28] **4**:22 **5**:10 **18**:13
**19**:8,9 **20**:15 **28**:20 **31**:17
**36**:24 **37**:16,19 **38**:1 **39**:6
**70**:24 **84**:3 **85**:5,8 **86**:4 **88**:

5 **90**:20 **94**:3,14,22 **104**:14
**107**:2 **108**:8 **109**:13 **110**:1
**underestimate** [1] **106**:22
**underlies** [1] **30**:9
**underlying** [2] **16**:13,14
**undermines** [1] **64**:7
**understand** [17] **12**:13,16
**27**:12 **38**:10 **39**:17 **55**:17,
19,25 **61**:5 **69**:8,10 **71**:13
**76**:5,9,11 **100**:4 **109**:9
**understanding** [3] **26**:9
**35**:18 **91**:12
**understated** [1] **40**:3
**understatement** [1] **105**:
16
**understates** [1] **37**:14
**understood** [3] **9**:14 **68**:19
**77**:5
**undisclosed** [1] **103**:21
**Unfavorable** [5] **13**:4,7,11
**43**:14 **91**:7
**unimportant** [1] **82**:1
**UNITED** [5] **1**:1,15,24 **2**:10
**81**:5
**Unless** [2] **25**:20 **70**:10
**unlike** [1] **60**:12
**unlikely** [1] **39**:22
**untrue** [1] **71**:12
**unusual** [5] **42**:6,9,23 **43**:
22 **61**:12
**up** [17] **11**:14 **14**:1,14 **15**:6,
8 **25**:24 **34**:1,12 **48**:23,24
**49**:4,4,6 **50**:8 **56**:8 **71**:2
**109**:22
**update** [2] **18**:13 **112**:11
**updated** [1] **20**:9
**upholding** [1] **19**:22
**useless** [1] **97**:16
**user** [15] **22**:17 **34**:25 **36**:8,
12 **51**:23 **53**:6 **59**:7 **73**:5
**75**:25 **76**:2 **81**:24 **82**:20 **93**:
10 **94**:15 **96**:14
**users** [5] **27**:23 **61**:21 **62**:5,
5 **96**:8
**users'** [4] **53**:18 **65**:11 **80**:
19 **110**:14
**uses** [1] **46**:24
**utterly** [1] **86**:15

## V

**value** [1] **71**:3
**variety** [6] **6**:21 **12**:18 **28**:7
**29**:17 **43**:17 **45**:14
**various** [1] **34**:4
**vehemently** [1] **59**:2
**version** [3] **8**:23 **10**:7 **29**:15
**versions** [1] **67**:8
**versus** [1] **3**:5
**viable** [1] **95**:21
**view** [8] **9**:7 **25**:23 **26**:6 **28**:
6 **46**:2 **80**:8 **88**:23 **104**:15
**viewed** [1] **52**:16
**views** [1] **101**:19
**violated** [1] **83**:5

**virtual** [17] **31**:9 **32**:22 **33**:
12 **37**:17 **38**:5,6 **39**:2,3 **41**:
19 **68**:9 **103**:3,7,19 **104**:8,
20,23 **105**:18
**virtually** [8] **5**:6 **28**:17 **39**:5
**68**:13,16 **103**:13,22 **104**:13
**virtue** [1] **9**:9
**voices** [1] **86**:18
**volume** [1] **90**:8
**voluminous** [2] **13**:2 **111**:
10
**vulnerabilities** [2] **35**:7 **46**:
25

## W

**wait** [2] **48**:20 **49**:8
**waived** [1] **110**:22
**walk** [1] **99**:14
**wanted** [2] **27**:16 **39**:10
**warn** [5] **7**:15 **15**:21 **17**:16,
20 **31**:10
**warned** [4] **5**:18 **27**:13 **60**:8
**111**:25
**warned-of** [3] **52**:15,17 **55**:
20
**warning** [9] **6**:4,5 **16**:2 **29**:
6 **33**:8 **49**:22 **54**:24 **75**:23
**86**:23
**warnings** [2] **4**:23 **58**:23
**warns** [2] **8**:19 **112**:7
**warranties** [1] **39**:25
**warrants** [1] **3**:20
**warranty** [3] **16**:8 **49**:23 **50**:
9
**Washington** [4] **1**:10,18,
20,23
**way** [22] **10**:4 **14**:11 **16**:9 **23**:
16 **28**:11 **35**:1 **40**:13 **42**:4
**43**:1 **47**:7 **55**:1,2 **56**:17 **64**:
5 **70**:12 **71**:23 **94**:21 **103**:8
**104**:4,6 **105**:3 **106**:10
**ways** [3] **8**:10 **12**:4 **89**:7
**weak** [1] **100**:11
**Wednesday** [1] **1**:11
**welcome** [3] **5**:14 **52**:24 **82**:
9
**Whatever** [5] **35**:14,15 **70**:
15 **101**:4 **105**:14
**whenever** [2] **12**:17 **102**:3
**Whereupon** [1] **112**:24
**whether** [29] **5**:22 **15**:15 **17**:
2,4 **20**:23 **21**:22 **25**:3 **28**:
15 **46**:8 **49**:19,23 **51**:14 **52**:
12 **55**:5,10 **58**:12,14 **63**:2
**70**:12 **71**:14 **73**:6,19 **74**:11
**75**:15 **76**:22 **79**:11 **91**:9
**101**:19 **109**:5
**whole** [8] **8**:11 **15**:12,12 **53**:
22 **64**:1,7 **100**:4,5
**wildly** [1] **101**:22
**will** [17] **3**:3 **7**:16 **13**:23 **49**:2,
11,17 **50**:8 **54**:16 **58**:20 **60**:
25 **67**:3 **69**:2 **79**:15 **85**:8
**86**:2 **95**:5 **100**:14

**window** [1] **86**:20
**wipe** [1] **88**:3
**wiped** [1] **88**:13
**wiring** [2] **31**:23 **67**:21
**wisdom** [2] **57**:3 **62**:23
**without** [5] **20**:1 **21**:22 **38**:
16 **61**:24 **68**:22
**wonder** [1] **58**:12
**wondering** [2] **46**:8 **103**:2
**word** [1] **111**:20
**wording** [4] **10**:24 **45**:21
**110**:5 **111**:13
**words** [6] **8**:20 **17**:3 **47**:14
**49**:16 **55**:4 **95**:14
**work** [1] **33**:21
**world** [5] **25**:22 **58**:12,15
**78**:18 **79**:15
**worry** [1] **19**:7
**write** [9] **17**:13 **27**:7 **38**:9
**45**:15 **63**:8 **99**:1 **100**:23,24
**111**:3
**writing** [3] **100**:25,25,25
**written** [2] **41**:11 **99**:12

## Y

**year** [3] **40**:22 **67**:25 **96**:9
**years** [2] **57**:4 **102**:24
**yesterday** [1] **4**:18
**yourself** [1] **84**:19

## Z

**zero** [1] **71**:16

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