SUPREME COURT
OF THE UNITED STATES

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        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   C O N T E N T S

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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: Why would you include

20 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   point 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   And I would add --

15   JUSTICE KAGAN: Well, let's --

16   MR. SHANMUGAM: -- one other

17   contextual point if I could make it very

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

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

20   Joint Appendix 410, Meta warns that statements

21   that include words like "may" are intended to

22   identify forward-looking statements.

23   JUSTICE KAGAN: So if I could give you

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

25   one of the hypotheticals that is in the briefs.

1   If I say to you a fire occurs at our

2   production plant, our ability to meet our

3   production and sales targets could be impaired,

4   all right, and, in fact, there had been a

5   significant fire at the production plant,

6   completely destroying it, where does that -- how

7   does that come 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

18   and it destroyed 50 percent of the production

19   capacity 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.

2   Now you can change 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

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

13   of 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 is --

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 & Analysis section, which

25   requires broad disclosures about known trends

1   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   I mean, is your position basically

 7   that: Don't worry about half-truths under 105

 8   because the basic problem is already going to be

 9   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   updating.

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

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 --

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 a 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.

7   Our view is that a statement of this

8   variety, as Justice Gorsuch just set out, is

9   ordinarily forward-looking, the condition does

10   not ordinarily contain an implied representation

11   about what took place in the past.

12   The Ninth Circuit went all the way in

13   the other direction and the Ninth Circuit said,

14   if a triggering event has taken place in the

15   past, the statement can be false or misleading

16   regardless of whether or not the risk has

17   materialized.

18   The circuits in the middle say that if

19   the risk is certain or virtually certain to

20   occur, a statement can be false or misleading in

21   that circumstance.

22   On these facts, we would not be liable

23   even under that test, which was essentially the

24   preexisting test in the Ninth Circuit before the

25   court relaxed it.

1   CHIEF JUSTICE ROBERTS: Thank you,

2   counsel.

3   Justice Thomas?

4   JUSTICE THOMAS: You said that the

5   risk factors are necessarily forward-looking.

6   Is that a regulatory or a statutory requirement?

7   MR. SHANMUGAM: So I think that the

8   regulation makes quite clear that what you are

9   warning about is factors that could render the

10   company's -- an investment in the company

11   speculative or risky. That is in the language

12   of Item 105 itself.

13   Now that having been said, there can

14   be circumstances in which a company could

15   include in an Item 105 disclosure something

16   about the past or present state of affairs. And

17   the government points to the fact that there was

18   a time when an earlier version of Item 105

19   required at least some disclosures of that

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

21   indicated in response to Justices Gorsuch and

22   Sotomayor, a company could choose to do that and

23   run the risk of being held liable.

24   My point is simply that if a company

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

1 cannot be liable for securities fraud based on

2 some categorical implied representation that the

3 specified event had never occurred in the past.

4   CHIEF JUSTICE ROBERTS: Justice Alito?

5   JUSTICE ALITO: Well, isn't it the

6 case that an evaluation of risks is always

7 forward-looking? Isn't it inherently

8 forward-looking? When you want to know about

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

10 risk is in the future, right?

11   MR. SHANMUGAM: It is, and that is

12 essentially what underlies our argument here. I

13 would submit that where I think the Ninth

14 Circuit sort of went off the rails a little bit

15 is that it seemed to conflate the risk of the

16 ultimate harm with the risk of the conditional

17 triggering event occurring.

18   JUSTICE ALITO: Well, I think the --

19 the intuition is that a statement that simply

20 blandly says that there's a possibility of a

21 risk can, in context, be extremely misleading if

22 there is a high probability of the risk

23 materializing. I think that is the intuition.

24   The fact that something has happened

25 in the past very often sheds light on the risk

1   of a recurrence. If you analyze the reason why

2   the thing happened in the past, you may realize

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

4   predictable that the same thing may happen in

5   the past. But the mere fact that something

6   happened in the past doesn't necessarily tell

7   you what the risk is going forward.

8   Do you disagree with any of that?

9   MR. SHANMUGAM: Well, Justice Alito, I

10   think that that is the intuition that supports

11   the circuits that have adopted the so-called

12   virtual certainty rule, the notion that if you

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

14   harm is certain or almost certain to

15   materialize, that there comes a point at which

16   it feels as if the statement is misleading.

17   Now, here, precisely because we know

18   that no harm occurred from the initial misuse of

19   the data by Cambridge Analytica, this is an easy

20   case even under that standard.

21   JUSTICE ALITO: Well, what if --

22   MR. SHANMUGAM: But --

23   JUSTICE ALITO: All right. Let's take

24   the -- the hypothetical about the -- the risk of

25   a fire, and let's say that there was a fire, it

1   was a damaging fire, and an analysis of the

2   reason why the fire started was that all the

3   wiring in the plant is obsolete and eventually

4   has to be replaced, but it can't be replaced for

5   the next six months. So it shows there that

6   there's a -- a substantial risk of the

7   recurrence of a fire.

8   On the other hand, if there was a fire

9   and it was caused by the fact that the factory

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

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

12   really tell you much more about the probability

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

14   objects falling out of space.

15   So what do we do with that situation?

16   MR. SHANMUGAM: So I would say two

17   things about that situation.

18   The first is that if you have a

19   statement that simply says, you know, there may

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

21   don't think that that statement would be

22   misleading simply because there's a modest

23   difference in -- a modest increase in the

24   probability of that happening because of some

25   factor or another.

1   I think the circuits that have adopted

2   the certainty or virtual certainty standard have

3   done so precisely because all you're saying is

4   there's a possibility of this happening. If

5   there is a certainty of it happening, then the

6   statement starts to feel misleading.

7   But the other thing I would say --

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

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

10   if/then statements. If something occurs, then

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

12   reputation.

13   What you're really warning about in

14   that circumstance, I would submit, is the

15   ultimate harm to business or reputation. So, if

16   you're applying a standard like the virtual

17   certainty standard, you know, I think the

18   argument that the other side is making is:

19   Well, if you had an episode of data misuse and

20   you were aware of it at the time, that, you

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

22   to be harm to your business, then that statement

23   is misleading.

24   JUSTICE ALITO: Thank you.

25   MR. SHANMUGAM: And the problem is

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

2   CHIEF JUSTICE ROBERTS: Justice

3   Sotomayor? No?

4   Justice Kagan?

5   JUSTICE KAGAN: So this is very much

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

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

8   this statement, Facebook actually does have

9   various kinds of statements about what has

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

11   Cambridge Analytica, but it does talk about

12   other things. It says there have been hacking

13   incidents in the past. Hacking is a real

14   problem, and we've experienced it.

15   And, you know, if you had left that

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

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

18   think that our statement says that there aren't

19   hacking incidents in the past? All right?

20   So you put in a bunch of stuff that

21   nobody could accuse you of just take -- you

22   know, omitting because who could think that?

23   But now say that there's an

24   extraordinary release of confidential data, and

25   let's make it even more extraordinary in this

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

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

 3   really wasn't so bad.

 4   But, you know, just imagine that --

 5   that every user of Facebook had all their

 6   confidential data released in some way to a

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

 8   So, really, quite an extraordinary mishap.

 9   And just as Justice Alito says, the

10   reason why people want to know about that in

11   assessing risks going forward is because it says

12   something about the company's vulnerabilities.

13   It might say something about operational

14   problems of the company. It might say something

15   about management issues at the company, like:

16   How does a company allow that to happen? I

17   better go find out.

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

19   here? Whatever anything else requires, what --

20   you know, what -- whatever other requirements

21   there are, this requirement, which talks about

22   -- which is supposed to give people an

23   understanding of future risks, an investor needs

24   to know that, doesn't she?

25   MR. SHANMUGAM: Yeah. So I would say

 1   two things in response to that, Justice Kagan.

 2   The first is that, again, with regard

 3   to the examples that were given, I think we

 4   would acknowledge that there could be a case in

 5   which you might draw a negative inference from

 6   something that a company said about what took

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

 8   analysis that depends on the nature of the

 9   statements.

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

11   that the examples that were being given were

12   precisely that. They were examples of the types

13   of efforts improperly to obtain Facebook user

14   data that had occurred in the past. And a

15   reasonable investor, I would submit, would not

16   have been misled by that to believe that no

17   third party had ever gained access to user data

18   or misused that data through other means.

19   But, second, to respond to the second

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

21   situations in which omitted information would

22   really be of interest to a reasonable investor.

23   That goes to materiality.

24   And yet, it is a fundamental principle

25   that this Court has articulated in cases like

 1   Matrixx and Macquarie that that is not enough at

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

 3   pure omissions liability. There is pure

 4   omissions liability under other provisions of

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

 6   course, enforceable by private investors.

 7   And what is the problem that this

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

 9   Ninth Circuit? It would be the problem of

10   creating a regime where a company would be

11   penalized for disclosing about the very risk

12   that eventually materializes.

13   JUSTICE KAGAN: Thank you.

14   JUSTICE GORSUCH: Just to --

15   CHIEF JUSTICE ROBERTS: Yeah.

16   JUSTICE GORSUCH: Thank you, Chief.

17   Mr. Shanmugam, so you would agree,

18   though, an if/then statement can be misleading

19   and materially possibly so if it understates the

20   risk going forward, the probability of it?

21   MR. SHANMUGAM: I think only under the

22   virtual certainty standard --

23   JUSTICE GORSUCH: Yeah.

24   MR. SHANMUGAM: -- but not under the

25   standard --

1   JUSTICE GORSUCH: Do you object to

2   that?

3   MR. SHANMUGAM: -- we are advancing.

4   JUSTICE GORSUCH: I -- I -- I got

5   that.

6   MR. SHANMUGAM: I think, under that

7   standard --

8   JUSTICE GORSUCH: Do we need to decide

9   the difference between what you're advocating

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

11   the virtual certainty standard? Is that

12   necessary to a decision here?

13   MR. SHANMUGAM: I think that this

14   Court could write an opinion that says simply

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

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

17   and 25A of the Petition Appendix, cannot be

18   correct, that it cannot be sufficient to render

19   a statement misleading simply that the pre --

20   the specified triggering event has previously

21   occurred in the past, without an assessment of

22   the risk of harm.

23   The other side comes back and says:

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

25   that it would fall outside that rule. But our

1   submission is that's not what the Ninth Circuit

2   was really doing here. The Ninth Circuit was

3   just saying: If you have a previous occurrence,

4   the falsity requirement is satisfied.

5   The Court could leave for another day

6   the delta between our proposed test and the

7   virtual certainty test because I think the

8   virtual certainty test creates an exception in

9   circumstances where, again, the risk of harm is

10   certain or virtually certain to materialize.

11   Defendants often prevail under that standard.

12   We certainly think this Court should

13   ideally provide guidance and resolve the circuit

14   conflict here definitively. But, if the Court

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

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

17   these facts.

18   JUSTICE GORSUCH: Thank you.

19   CHIEF JUSTICE ROBERTS: Justice

20   Kavanaugh?

21   JUSTICE KAVANAUGH: A couple

22   questions. On the risk factors, as I understand

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

24   of the event occurring, correct?

25   MR. SHANMUGAM: And companies

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

2   unlikely that an episode of data misuse is going

3   to materialize, then all of these things would

4   be put into play. Perhaps not surprisingly,

5   companies don't make warranties of that variety.

6   JUSTICE KAVANAUGH: Because, if they

7   did that and, as Justice Gorsuch said, they

8   understated the risks, then they would be --

9   MR. SHANMUGAM: Correct. In Justice

10   Alito's hypothetical, if you included language

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

12   going to have a problem if you have information

13   that goes to that probability.

14   JUSTICE KAVANAUGH: Right.

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

16   acknowledging, could adopt a regulation that

17   says what it currently says about risk factors

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

19   identifying possible future events that could

20   create harm, you also need to identify if those

21   events have occurred in the past?

22   MR. SHANMUGAM: And what's funny about

23   this, Justice Kavanaugh --

24   JUSTICE KAVANAUGH: Is that a "yes"?

25   MR. SHANMUGAM: Yes.

 1   JUSTICE KAVANAUGH: Yeah.

 2   MR. SHANMUGAM: And the SEC did not do

 3   that when it promulgated Item 106 just last

 4   year. It did not include episodes of data

 5   misuse in what had to be disclosed. And,

 6   indeed, the SEC shied away from requiring

 7   elaborate disclosures about previous occurrences

 8   precisely because companies complained about the

 9   burden that that would impose.

10   JUSTICE KAVANAUGH: Thank you.

11   CHIEF JUSTICE ROBERTS: Justice

12   Barrett?

13   JUSTICE BARRETT: So, Mr. Shanmugam,

14   you said that this is about context and about

15   the regulatory context, but it seems to me,

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

17   gotten and the ones written in the briefs, that

18   it's about more than just the regulatory context

19   but also about the context of the business, the

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

21   not easily susceptible to a categorical rule.

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

23   Gorsuch was asking you to kind of articulate

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

25   see why we would adopt the virtual certainty

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

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

3   rule that maybe the SEC might want to adopt,

4   that sort of thing, but it's hard for me to see

5   why we would do that.

6   Assume that I think the Ninth

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

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

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

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

11   hardest hypotheticals are the ones where the

12   risks are either unusual or devastating, like a

13   50 percent loss of a factory because of a fire

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

15   those are things that are unusual and hard.

16   You know, nobody would think that a

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

18   breaches or that data breaches hadn't happened

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

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

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

22   to recur and they're things you associate with

23   the business and they're described at a

24   relatively high level of generality, it seems to

25   me that those kinds of statements, well, maybe

1   those do seem like they're general statements

2   just about the category of risk that a

3   particular kind of business faces, but if they

4   are more unusual, kind of either/or binary

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

6   those really seem like they're misleading.

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

8   articulate a rule that handles anything more

9   than the case in front of us?

10   MR. SHANMUGAM: Sure.

11   JUSTICE BARRETT: Maybe I shouldn't.

12   MR. SHANMUGAM: Well, Justice Barrett,

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

14   that I think there are circumstances in which a

15   reasonable investor may have an intuition that

16   something has taken place in the past. The

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

18   that category. Nobody would think that a

19   company as big as Meta had never suffered

20   unfavorable publicity. And I would submit that

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

22   I think most people would assume that there have

23   been episodes of that variety in the past.

24   I think what you may be reacting to

25   here is the sense that sometimes there are

1 events that seem so significant that it feels as

2 if there ought to be an obligation to disclose

3 them, and maybe the unusual events fall into

4 that category because those are perhaps likely

5 to be events that are really, really

6 significant.

7   Our point is simply that that goes to

8 materiality first and foremost. And, again, I

9 think part of the problem with the other side's

10 approach is that it really conflates these

11 elements that are meant to be different. The

12 language of Rule 10b-5 itself makes clear that

13 an omission has to be both material on its own

14 terms and necessary in order to avoid rendering

15 a statement not misleading.

16   JUSTICE BARRETT: Well, I think some

17 of the hypotheticals that you're getting show

18 that not everybody shares that intuition, that

19 materiality is the only thing at stake, that it

20 can also be misleading. Depending on how

21 specific the risk is, you know, people probably

22 have different intuitions that fall along a

23 spectrum.

24   So what -- if -- if I'm resisting, I

25 feel like you're still advocating for your

 1   categorical rule.

 2   MR. SHANMUGAM: Well -- but, all

 3   right, so let me offer the important caveat,

 4   which is where I started the argument, which is

 5   the caveat that we really drew from this Court's

 6   opinion in Omnicare, which is that implied

 7   representations, I think, can take care of many

 8   of these circumstances. And we acknowledge in

 9   our reply brief that, for instance, a statement

10   can have an implied representation about the

11   current state of affairs. Take the final exam

12   example. If I fail one of my finals this

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

14   think, there, there's an implied representation

15   that you're talking about your finals this

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

17   statement is then false or misleading.

18   It is because there is an implied

19   representation that we think is absent from a

20   statement of this variety. And I think the

21   Court can write an opinion that is mindful of

22   the language of this statement but recognizing

23   that the reason that there's a circuit conflict

24   is that companies use this form of formulation

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

1   Court is deciding it for a category of types of

2   statements, but, if the wording changes, the

3   analysis is going to be different.

4   CHIEF JUSTICE ROBERTS: Justice

5   Jackson?

6   JUSTICE JACKSON: So I have two

7   questions that are kind of similar. I think

8   that what is bugging me about your view is that

9   you seem to suggest that the only implied

10   misrepresentation or implied representation that

11   matters is a statement that falsely suggests

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

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

14   But I'm wondering whether there isn't

15   also a statement about what needs to happen in

16   the future from the investor's perspective so

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

18   happens, it could damage Facebook's business,

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

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

21   looking out for signs of this kind of data

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

23   focused on that aspect of, you know, the

24   research as I try to figure out this investment.

25   You're sort of throwing him off the

1   scent of the fact that what he really needs to

2   do is figure out what harms are going to arise

3   from the data breach that has already occurred.

4   This is similar to Justice Kagan's point about

5   how an investor uses the information. They're

6   looking for vulnerabilities in the company, et

7   cetera.

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

9   about the suggestion that the only

10   representation that's being made in a futuristic

11   statement is one that relates to the past as

12   opposed to a possible statement about the future

13   in the way that I've described.

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

15   about that, Justice Jackson.

16   The first is that I think it's

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

18   things that Item 105 requires is that the risk

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

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

21   reasonably likely to arise.

22   And so I actually think, if you had,

23   for instance, the example of our factory being

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

25   probably not have to disclose.

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1                    JUSTICE JACKSON:  No, no, but it's
2       already occurred.  In -- in the --
3                    MR. SHANMUGAM:  Right.
4                    JUSTICE JACKSON:  -- in all the
5       hypotheticals that I'm talking about --
6                    MR. SHANMUGAM:  Right.
7                    JUSTICE JACKSON:  -- it's a hundred
8       percent, let's say, that this is -- that there's
9       going to be harm from this because it's
10      happened.
11                   MR. SHANMUGAM:  And in some sense, my
12      point is that precisely because it has to be
13      material, I think a reasonable investor would
14      think this is something that is a very real
15      risk, it may have happened in the past, it could
16      happen in the future.  And -- and I think that
17      that is an important --
18                   JUSTICE JACKSON:  No, I guess my
19      question is, why aren't you making a statement
20      with your purely futuristic formulation that
21      leads the reasonable investor to believe that no
22      harm of this nature is going to happen right --
23      right now, right now?
24                   MR. SHANMUGAM:  Right.  Well --
25                   JUSTICE JACKSON:  I have to wait --
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1   that the -- so, in my -- in my real estate

2   example, the person is -- when the -- when the

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

4   insurance rates might go up, the investor says,

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

6   reports because, you know, if this were to

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

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

9   has already gone up, crime has already gone up,

10   and that, really, tomorrow the insurance rates

11   are going to go up.

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

13   misled him into thinking that he has to wait for

14   a future triggering event as opposed to he has

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

16   will already happen as a result of the past

17   triggering event.

18   MR. SHANMUGAM: Yes. And I think we

19   would draw a line between a circumstance in

20   which the harm has currently materialized, in

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

22   will exist in the future, and a circumstance in

23   which there is simply a present risk of harm,

24   whether from a past event or a future event.

25   I think, if there is merely a risk,

1   there would be no liability because that risk is

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

3   making any warranty about whether the triggering

4   event has occurred in the past.

5   And the last thing I would say is that

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

7   on the other side what they think the statement

8   here should have said because it seems clear

9   that they think it should have said something

10   more than that there was the initial episode of

11   misuse, which was already in the public domain.

12   And I think that the answer to that question

13   will point up just how expansive and broad the

14   implied representation, really, the warranty,

15   is --

16   JUSTICE JACKSON: Thank you.

17   MR. SHANMUGAM: -- that they think

18   every statement includes.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   counsel.

21   Mr. Russell.

22   ORAL ARGUMENT OF KEVIN K. RUSSELL

23   ON BEHALF OF THE RESPONDENTS

24   MR. RUSSELL: Mr. Chief Justice, and

25   may it please the Court:

1   I'd like to start by making clear our

2   position. First, as to the actual question

3   presented, we agree that a risk disclosure is

4   not misleading because it omits disclosure of an

5   event that is immaterial because it risks no

6   business harm. The Ninth Circuit did not hold

7   otherwise.

8   Second, we agree that in addition to

9   proving materiality, plaintiffs must also show

10   that the risk statement implies that the omitted

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

12   risk statement includes that implication. Our

13   position is simply that they can and frequently

14   do, and that ultimately depends on the facts and

15   context of each case.

16   Third, for that reason, the Court

17   should reject Facebook's categorical rule that

18   Item 105 statements are always agnostic about

19   whether the risk has transpired in the past.

20   Facebook admits that if a student tells his

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

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

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

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

25   risk factor statements, including the ones at

1   issue in this case stating that the --

2   describing an improper disclosure of user data

3   as a hypothetical risk implied that it was

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

5   possible because it already had.

6   This does not mean that issuers must

7   disclose every material occurrence of a risk.

8   They simply must say enough to remove the false

9   impression that the omitted event has not yet

10   materialized, something they generally can do,

11   as Facebook did here with respect to hacking, by

12   simply acknowledging that the risk has

13   materialized in the past.

14   Finally, the Ninth Circuit did not

15   adopt any contrary categorical rule. The Court

16   did not discuss whether these particular

17   statements were agnostic about the past because

18   Facebook never argued that they were. It

19   elected instead to argue only that the warned-of

20   risks had not transpired because it viewed the

21   warned-of risks as speaking only to hacking

22   events and business harm.

23   Because Facebook does not challenge

24   the Ninth Circuit's fact-bound rejection of

25   those claims in this Court, this Court should

1   provide any necessary guidance for future cases

2   in the course of affirming the judgment.

3   I welcome the Court's questions.

4   JUSTICE THOMAS: Mr. Russell, what

5   else should Facebook have provided in the 105

6   statement to comply with 10b?

7   MR. RUSSELL: So I think that they

8   could have said what they said and then said

9   something like: Such improper disclosure or

10   misuse of user data has occurred in the past,

11   including recently on a substantial scale. I

12   think that would have removed any misimpression

13   that an event like what happened in Cambridge

14   Analytica hadn't occurred.

15   And the reason that it is reasonable

16   for somebody to think that this statement

17   implies that it hadn't occurred is because an

18   investor -- a reasonable investor hearing a

19   company describe factors that are relevant,

20   factors that make the investment risky would

21   expect that if something like this had happened,

22   30 million users' private data released,

23   eventually causing a hundred billion dollar

24   reduction in the market capitalization of the

25   company, that the company who is intent on

1   telling the whole truth about the factors that

2   make the investment risky would not speak about

3   such things --

4   JUSTICE GORSUCH: Mr. Russell --

5   CHIEF JUSTICE ROBERTS: Counsel --

6   MR. RUSSELL: -- in hypothetical

7   terms.

8   JUSTICE GORSUCH: I'm sorry, Chief.

9   CHIEF JUSTICE ROBERTS: Oh, yeah.

10   Your basic submission is that a probabilistic

11   statement about something carries the inference

12   that -- that something has not occurred.

13   MR. RUSSELL: No. Our -- our position

14   is that it can. It doesn't always.

15   CHIEF JUSTICE ROBERTS: Okay. Well,

16   it -- it can.

17   MR. RUSSELL: Yes.

18   CHIEF JUSTICE ROBERTS: But, I mean,

19   with respect to certainly some but maybe most, a

20   probabilistic statement will do the exact

21   opposite. For example, if you're leaving my

22   house and I say, you might slip on the steps,

23   you wouldn't say, well, that's never happened

24   before.

25   MR. RUSSELL: That's right.

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1           CHIEF JUSTICE ROBERTS:  Your -- your
2    inference would be that has happened and that's
3    why I'm giving you the warning.
4           And it seems to me, if you're saying
5    it -- it can go one way in some cases, it can go
6    another way in the other cases, it's a real
7    expansion of the disclosure obligation.  In
8    other words, it's not something that is narrow
9    because, whether it's happened or not, you --
10   you -- you -- you have to disclose it.
11          MR. RUSSELL:  No.  That's not our --
12          CHIEF JUSTICE ROBERTS:  Well,
13   exactly -- well, who -- how are we supposed to
14   parse whether it's slipping on my steps or, you
15   know, what you say is actionable in this case?
16          MR. RUSSELL:  I think you simply have
17   to do what the Court says you have to do in
18   omission cases in Omnicare, which is you always
19   have to ask how would a reasonable person
20   understand the implications of this sentence and
21   frequently -- and if it is a case where somebody
22   would understand that the warned-of risk is
23   something that happens all the time or you'd
24   only be talking about it if it happened in the
25   past.
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1   If it's an event like adverse

2   publicity that everybody knows has happened in

3   the past, nobody's going to understand the

4   statement to be implying that it hadn't

5   happened.

6   JUSTICE GORSUCH: So -- so, Mr.

7   Russell --

8   CHIEF JUSTICE ROBERTS: So --

9   JUSTICE GORSUCH: I'm sorry, Chief.

10   CHIEF JUSTICE ROBERTS: I was just

11   going to follow up.

12   MR. RUSSELL: Mm-hmm.

13   CHIEF JUSTICE ROBERTS: So, basically,

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

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

16   inference it either has happened in the past or

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

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

19   that's kind of a blank check.

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

21   you do every omissions case. You can enter

22   summary judgment or enter a motion to dismiss if

23   no reasonable juror could find that this

24   statement implied that the event hadn't happened

25   in the past.

1   In this case, there are at least four

2   reasons why it would be reasonable for a jury to

3   decide that this particular set of statements

4   did.

5   The first is the structure, which it

6   is the received wisdom of many courts in many

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

8   imply that speaking of something in a

9   hypothetical term implies that it hasn't

10   happened.

11   But the context of this case

12   reinforces that here because, here, we are not

13   talking about something like adverse publicity,

14   which people would know happens all the time.

15   JUSTICE GORSUCH: Well, Mr. Russell,

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

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

18   agreement not only on the question actually

19   presented but that forward-looking risk factor

20   statements don't generally imply anything.

21   There has to be some implied representation

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

23   Is -- is that right? Is that common ground?

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

25   would agree on the "generally." I think we do

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

 2   it does, sometimes it doesn't.

 3   JUSTICE GORSUCH: But it depends upon

 4   an implied representation that there is nothing

 5   -- no problem in the past?

 6   MR. RUSSELL: Yes.

 7   JUSTICE GORSUCH: Okay. We agree on

 8   that.

 9   MR. RUSSELL: Yes.

10   JUSTICE GORSUCH: Everybody seems

11   to -- you guys agree on that at least.

12   What about the statement we have here?

13   I -- I want some help with that because it -- I

14   wonder whether we're in the -- the world of a

15   meteorite or -- or Justice Alito's falling

16   debris or whether we're in the Chief Justice's

17   world of slip-and-fall on my front porch.

18   Defendant represented that our

19   industry is prone to cyber attacks. It says

20   that hacking has become more prevalent in our

21   industry, and it says we cannot assure you that

22   the measures we have will provide absolute

23   security.

24   Why isn't this -- given those kinds of

25   warnings, where is the implied representation

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 1      that Meta has never had a significant data

 2      breach?

 3                  MR. RUSSELL:  Because Meta itself

 4      insisted vehemently below and in public when

 5      this was finally disclosed in 2018 that this was

 6      not a hacking event.  This was not a

 7      cybersecurity event.

 8                  And the risk disclosures discussed

 9      separately the risk of misappropriation of user

10      data by developers, and in that context, it

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

12      read.

13                  JUSTICE GORSUCH:  Yeah.  Well, that's

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

15      that we provide limited information.  However,

16      if they fail to adopt or adhere to adequate data

17      security practices or in the event of a breach

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

19      problem.

20                  So, again, where is the implied

21      representation that -- that this hasn't happened

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

23      thing that a reasonable investor does know can

24      happen to large companies with --

25                  MR. RUSSELL:  I don't -- I
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1   respectfully disagree.

2   JUSTICE GORSUCH: I mean, the federal

3   government -- I mean, I -- I think China

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

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

6   these days.

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

8   breach. And this is really important. That was

9   a principal argument that Facebook made below,

10   that these statements only warned about data

11   breaches, and the Ninth Circuit rejected that

12   reading, and the reason for that is because,

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

14   China does -- here, Facebook allowed a

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

16   data.

17   And that doesn't happen, Justice

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

19   before the disclosures in this case, reasonable

20   investors would have thought that it never

21   happened and particularly on this scale.

22   And for -- Facebook had faced

23   allegations of this in December of 2015, and it

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

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

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

2   take swift action. And by the time they issued

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

4   this.

5   And so, in that context, I think it is

6   very reasonable for investors to understand that

7   by treating it as simply something that may

8   happen in the future, they are confirming that

9   their -- what their silence had already

10   conveyed, which is that the -- that we didn't

11   substantiate the allegations in the 2015

12   article.

13   JUSTICE BARRETT: So you're saying

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

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

16   Facebook, Meta just handing over the data.

17   You're saying it falls more in the

18   category of a factory half burning to the

19   ground, something that we wouldn't necessarily

20   expect because you would have trusted Meta not

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

22   MR. RUSSELL: That's right. And

23   that's why users were so angry --

24   JUSTICE KAGAN: And it's handing over

25   the data --

1   MR. RUSSELL: -- when they found out

2   about this.

3   JUSTICE KAGAN: -- without any real

4   controls, isn't that right? Isn't that the

5   allegation?

6   MR. RUSSELL: Right, that this

7   evidence -- this episode showed not only that

8   they had given this away in this one instance

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

10   their promises to users that users can control

11   who has access to their private data.

12   JUSTICE BARRETT: Mr. Russell, can I

13   just ask you one other question? You know,

14   Justice Gorsuch and -- and the Chief too were

15   kind of trying to pin you down on exactly what

16   you think about these if/then statements or

17   these statements of risk, and you agreed that

18   sometimes they might be purely forward-looking,

19   right?

20   MR. RUSSELL: Yes.

21   JUSTICE BARRETT: And you said: But

22   they can contain implied representations.

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

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

25   yours that they ordinarily do?

1   MR. RUSSELL: I think that may be a

2   fair representation. That is the received

3   wisdom from all these courts in all these cases

4   in all these contexts.

5   But, at the end of the day -- and I'm

6   not sure that it's helpful or necessary to say

7   whether they ordinarily do or they ordinarily

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

9   be considered on its facts.

10   JUSTICE KAVANAUGH: Well, doesn't that

11   raise what for me is a kind of separation of

12   powers or due process concern? The SEC knows

13   how to write regulations that require disclosure

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

15   those kinds of regulations.

16   And what happens here is this

17   regulation does not explicitly require that, and

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

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

20   regulation. And you say sometimes it does,

21   sometimes it doesn't, in response to Justice

22   Barrett and the Chief, and you said it can

23   sometimes contain an implied representation.

24   If you're the regulated party, you

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

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

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

          3   going to therefore -- another problem that they

          4   raise, and I just want you to respond to all

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

          6   then and that's going to defeat the whole

          7   purpose of it.

          8   So I guess the starting point is, why

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

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

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

         12   over-disclosures, which undermines the whole

         13   kind of theory here?

         14   MR. RUSSELL: So I think the premise

         15   of the question and a major premise of the other

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

         17   disclosing only things that might happen in the

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

         19   of the stat -- of the regulation says --

         20   JUSTICE KAVANAUGH: But you -- I'm

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

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

         23   SEC regulations do specifically require

         24   disclosure of things in the past, correct?

         25   MR. RUSSELL: Correct.

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1                JUSTICE KAVANAUGH:  And --

2                MR. RUSSELL:  And they also require --

3                JUSTICE KAVANAUGH:   -- and this

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

5     I'm sorry to interrupt.

6                MR. RUSSELL:  That a lot of

7     regulations require things that -- to be

8     disclosed about the past and the future.  Most

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

10    draw any inference about what this regulation is

11    intended to do just from that fact.

12               But you can look at the regulatory

13    language, which requires disclosure of factors

14    that make the investment risky.  And the fact

15    that there's been a recent misappropriation of

16    30 million users' private data that is a ticking

17    time bomb that's going to cause a hundred

18    billion dollars in damages to the company down

19    the line is a factor that makes investment in

20    the company risky.

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

22               MR. RUSSELL:  More --

23               JUSTICE ALITO:   -- that is -- that is

24    an argument that seemed to me different from --

25    seems to me different from the one that I
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1   thought was presented by the question.

2   So there can be a situation in which

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

4   breach, and the company knows that this thing

5   that happened in the past is going to have a

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

7   recurrence of a similar event. We're talking

8   about the damage from the past event which

9   continues to have an effect.

10   That's different from the situation in

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

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

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

14   happen in the future.

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

16   think --

17   JUSTICE ALITO: Well, I thought we

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

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

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

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

22   things as quite different.

23   MR. RUSSELL: Well, but I was trying

24   to make the more generic point, that simply that

25   Item 105 is not limited to requiring disclosures

1   about things that may happen in the future. And

2   you can get that from the regulatory language.

3   You get it from the fact that Facebook itself

4   disclosed facts, including the prior occurrence

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

6   bunch of other things.

7   My point is simply that nobody who

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

9   risk factor statement that expressly discusses

10   past events, that is intended to inform people

11   about factors that make the investment risky,

12   which can occur in past events, who know that

13   the prior versions of the regulation instructed

14   people that gave examples of past events is

15   going to think this is only talking about the

16   future.

17   JUSTICE ALITO: Let me give you these

18   two situations. This is what most troubles me

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

20   tried to bring out in questioning Mr. Shanmugam,

21   I see problems with his as well.

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

23   the fire example. Suppose a company does an

24   internal -- has an inspector come -- come in.

25   The inspector examines the factory and says your

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

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

3   there is an X percentage chance that there's

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

5   year.

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

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

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

9   significant disruption of our operations. Do

10   they have to disclose that internal report and

11   say we know that there is an X percent chance

12   that a fire is going to occur?

13   MR. RUSSELL: So I think possibly yes,

14   but this is actually the real virtual certainty

15   rule. So this is where something is misleading

16   not because it's already happened in the past

17   but because you are not disclosing something

18   that's virtually certain to happen in the

19   future.

20   JUSTICE ALITO: Well, it's not

21   virtually certain. There's a certain

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

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

24   statement is understood to imply that there

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

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

    2   misleading without regard --

    3   JUSTICE ALITO: Well, the statement --

    4   MR. RUSSELL: -- to the probability of

    5   occurrence.

    6   JUSTICE ALITO: -- the statement is,

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

    8   disruption of our operations.

    9   MR. RUSSELL: I think, if there has

   10   been a fire, that --

   11   JUSTICE ALITO: It doesn't say if

   12   there has been. If there is a fire.

   13   MR. RUSSELL: No, I understand.

   14   JUSTICE ALITO: Okay.

   15   MR. RUSSELL: I understand that, but a

   16   reasonable investor, I think, could read that as

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

   18   fires in hypothetical terms if there had

   19   recently been one that calls into question the

   20   safety of the entire facility.

   21   JUSTICE ALITO: If it calls into

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

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

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

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

 1   mean, that doesn't say anything about the

 2   probability -- it doesn't increase the

 3   infinitesimal probability -- infinitesimally low

 4   probability of it happening in the future.

 5   MR. RUSSELL: I think I agree with

 6   that. I think that event would probably be

 7   deemed immaterial to investors because it

 8   doesn't auger harm to the business going

 9   forward.

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

11   just --

12   MR. RUSSELL: But that's the opposite

13   of this case.

14   JUSTICE ALITO: -- tell you where this

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

16   requirement to say -- to -- to quantify in some

17   way the nature of the risk, whether in numerical

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

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

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

21   that to be inconsistent with the idea that the

22   occurrence of an event in the future which

23   highlights the potential for the materialization

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

25   I don't really see a difference between those

1   two.

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

3   a company is entitled to mislead people about

4   something that occurred in the past that, under

5   Basic, would be a material event just because it

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

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

8   judgment themselves, to value the company based

9   on their own assessment once they are put on

10   notice that this is actually something that

11   happened in the past.

12   JUSTICE ALITO: Thank you.

13   JUSTICE JACKSON: So is that why

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

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

16   listener to infer a fact about the past is

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

18   in trying to understand the probability of risk

19   and whether a statement can also be misleading

20   if it would lead to an inference that the risk

21   of future harm is zero or very low when the

22   speaker knows it to be much greater than that.

23   Why isn't that another kind of

24   misleadingness that we should be thinking about

25   or that the SEC was thinking about?

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

2      that that is another kind of harm and another

3      way in which a statement could be misleading.

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

5                Our theory of liability is that this

6      monumentally important event happened in the

7      past and Facebook misled people into thinking

8      that it hadn't.

9                JUSTICE JACKSON:  Okay.

10               CHIEF JUSTICE ROBERTS:  Justice --

11               JUSTICE SOTOMAYOR:  I'm very confused.

12     I thought, when Justice Alito put in his two

13     hypotheticals or asked which of these two

14     situations, something happened and it has

15     continuing risk, or something happened, no risk,

16     but it might happen -- something like it might

17     happen in the future.

18               This situation presents both, doesn't

19     it?

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

21     misunderstood the hypothetical then.  I do think

22     --

23               JUSTICE SOTOMAYOR:  That's what I

24     thought he --

25               MR. RUSSELL:  -- I do think the -- the
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 1   reason it was so devastating to be misled about

 2   this occurrence is both, that people were going

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

 4   which is what happened when they did, and that

 5   it --

 6   JUSTICE SOTOMAYOR: It happened and --

 7   MR. RUSSELL: -- reveals other risks

 8   about Facebook's inability to control outside

 9   developers' access to third-party -- or to

10   private user data. But the ultimate question

11   here, I think, is simply whether there is a

12   categorical rule that these statements are never

13   or always contain that kind of implication. I

14   think everybody agrees that that's not the case.

15   It's always case-dependent, and it's always

16   fact-specific.

17   And so then I think what's left for

18   the Court in this case is to ask, did the Ninth

19   Circuit held something different? And --

20   JUSTICE SOTOMAYOR: Thank you,

21   counsel.

22   MR. RUSSELL: -- are you going to

23   decide the facts of this particular case on

24   whether these particular statements are

25   misleading? I'm happy to talk about why they're

1   not. We haven't focused on that question

2   because we took the Court to take the case to

3   decide the general legal question.

4   CHIEF JUSTICE ROBERTS: Thank you.

5   Justice Thomas?

6   JUSTICE THOMAS: This case, as Mr.

7   Shanmugam indicated, is about falsity. And so

8   at what point do we analyze that? The event

9   took place in -- the misuse, in 2015?

10   MR. RUSSELL: Yeah.

11   JUSTICE THOMAS: And so -- and the

12   statement was when?

13   MR. RUSSELL: The statement was in the

14   2016 annual report.

15   JUSTICE THOMAS: So the -- do we just

16   look at that period to determine whether or not

17   the statement is false?

18   MR. RUSSELL: I --

19   JUSTICE THOMAS: Because you made a

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

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

22   they find out when there's full disclosure that

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

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

25   has been disclosed, et cetera.

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 1              So at what point do we analyze the

 2    falsity?

 3              MR. RUSSELL:  I think at the point

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

 5    acknowledge that if the event had happened so

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

 7    would be no liability.  But, here --

 8              JUSTICE THOMAS:  But we're not talking

 9    about materiality at this point, right?

10              MR. RUSSELL:  Well, I think it would

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

12    there's an interrelationship between these two.

13    Somebody reading a statement that is intended to

14    put you on notice of risks to the business,

15    would make the investment risky, is not going to

16    read the statement as implying anything about

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

18    --

19              JUSTICE THOMAS:  So how do you know in

20    2016 whether or not it was going to have the

21    downstream -- the later effect of a hundred

22    billion dollars in market cap drop -- loss?

23              MR. RUSSELL:  So I think two things

24    about that.  One is I do think what actually

25    happened is probative at the least of what was
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1   foreseeable at the time.

2   And I think Facebook acknowledged in

3   its warning statements that misuse of this kind

4   could seriously damage the business. And it's

5   only intuitive that it would because user data

6   is the lifeblood of the company, and if somebody

7   gives away your user data that you think is

8   private, people are going to be really angry

9   about that, as they were.

10   JUSTICE THOMAS: I understand all of

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

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

13   MR. RUSSELL: Only to the extent, I

14   think, that you would not understand a statement

15   to imply the non-occurrence of an immaterial

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

17   this is a material event, I agree that how

18   material it is doesn't go to falsity.

19   JUSTICE THOMAS: And --

20   MR. RUSSELL: The question is did this

21   happen or not.

22   JUSTICE THOMAS: Yeah. And, finally,

23   what role does the fact that this is at the

24   motion-to-dismiss stage play in our analysis?

25   MR. RUSSELL: So the question here, I

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

       2   particular statements. It is whether we have

       3   plausibly alleged that a reasonable jury can

       4   conclude that these statements falsely implied

       5   that the omitted event had not occurred.

       6   That's the question that -- Facebook

       7   is going to have plenty of opportunity later in

       8   the case to argue to -- at summary judgment or

       9   to a jury that these statements -- what these --

      10   a reasonable person understood these statements

      11   to make -- to -- to -- to imply.

      12   But, in Omnicare, this Court correctly

      13   acknowledged that what statements imply is a

      14   question that is principally of fact for the

      15   fact finder. And it necessarily makes these

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

      17   provide the -- the clarity that some issuers

      18   might like.

      19   CHIEF JUSTICE ROBERTS: Justice Alito?

      20   Justice Sotomayor, anything further?

      21   Justice Gorsuch, anything?

      22   JUSTICE KAVANAUGH: I just want to

      23   clarify, in response to Justice Sotomayor and

      24   Justice Alito, exactly what you think that the

      25   question is before us.

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 1                    I thought the question was, in a

 2        situation where you disclose the risk of an

 3        event occurring in the future that could cause

 4        harm, is it false not to disclose that the

 5        event -- is that statement false because you

 6        don't disclose that that same event had happened

 7        in the past even though the harm from that event

 8        in the past is over?

 9                    MR. RUSSELL:  That is the question

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

11        which is very different than what we've been

12        talking about all morning.  We agree that the

13        answer is no if --

14                    JUSTICE KAVANAUGH:  Okay.

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

16        misleading to omit the occurrence of an event

17        that is immaterial because it risks no business

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

19                    JUSTICE KAVANAUGH:  Okay.  I'll read

20        the transcript on that.

21                    Okay.  And then the second thing, on

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

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

24        a second, getting past the motion to dismiss is

25        kind of -- it's the game, right?
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 1              MR. RUSSELL:  I don't think so.  A lot
 2    of these cases go to summary judgment, and we've
 3    collected a number of cases in which --
 4              JUSTICE KAVANAUGH:  Well, it's a big
 5    -- it's a big part of the decision.
 6              MR. RUSSELL:  It is.  It is big and it
 7    is important.
 8              JUSTICE KAVANAUGH:  So it's just --
 9    I'm just stating this.  It's not just, oh, it
10    can all be resolved at summary judgment.
11    There's a huge -- there's a huge issue at stake
12    just getting past the motion to dismiss in a lot
13    of these cases.  I think everyone --
14              MR. RUSSELL:  No, I acknowledge that,
15    but I think, at the end of the day, the question
16    here is whether these statements are capable of
17    implying that an event like this hasn't occurred
18    in the past, and if the answer is they are, then
19    I don't think any amount of policy argument in
20    the world will justify saying that they aren't.
21              And if this Court adopts a categorical
22    rule that's saying statements of this kind are
23    agnostic as a categorical rule about what
24    happened in the past, then I think you are
25    effectively saying that some statements that
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1   actually are misleading are not, that they're

2   not actionable. And that, we respectfully

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

4   Congress authorized the SEC, not the courts, to

5   develop.

6   JUSTICE KAVANAUGH: Okay. Thank you

7   for your answers. Appreciate it.

8   CHIEF JUSTICE ROBERTS: Justice

9   Barrett?

10   Justice Jackson?

11   JUSTICE JACKSON: Just to quickly

12   clarify your response to Justice Kavanaugh. So

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

14   a risk of future business harm?

15   MR. RUSSELL: Yes.

16   JUSTICE JACKSON: Is that right?

17   MR. RUSSELL: That is right.

18   JUSTICE JACKSON: And so that's why

19   you think their question presented doesn't

20   accurately capture what was going on, because

21   they sort of suggest that it doesn't?

22   MR. RUSSELL: Right. And the only

23   reason that Facebook has ever given why the

24   misappropriation of 30 million users' private

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

1   people being really mad when it finally came

2   out, is their claim that the public learned the

3   truth in 2015 and didn't care.

4   JUSTICE JACKSON: Thank you.

5   MR. RUSSELL: And -- okay.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   counsel.

8   Mr. Barber.

9   ORAL ARGUMENT OF KEVIN J. BARBER

10   FOR THE UNITED STATES, AS AMICUS CURIAE,

11   SUPPORTING THE RESPONDENTS

12   MR. BARBER: Mr. Chief Justice, and

13   may it please the Court:

14   Petitioners ask this Court to immunize

15   from fraud liability risk-factor statements that

16   misleadingly depict a risk as hypothetical when

17   it has already materialized. That argument is

18   flawed as a matter of law and common sense.

19   Indeed, Petitioners now appear to

20   recognize that a risk statement can implicitly

21   misrepresent the past. That is exactly what

22   Facebook's statements did here.

23   There's been some discussion about the

24   question presented and the extent to which it

25   accurately captures what the court of appeals

 1   held. We agree with Respondents that it does

 2   not. Given the obvious importance of the

 3   Cambridge Analytica matter to Facebook's

 4   business, which depended so heavily on user

 5   data, the court of appeals had no occasion to

 6   hold that the nondisclosure of an unimportant

 7   event renders a risk statement misleading.

 8   That's why Petitioners have raised the

 9   broader argument that a risk statement

10   categorically implies nothing about the past.

11   This Court rejected a very similar argument in

12   the Omnicare case, and it should take the same

13   course here.

14   I welcome the Court's questions.

15   JUSTICE THOMAS: Mr. Shanmugam said

16   that you have the burden of or should have the

17   burden of saying exactly what else they should

18   have said to meet the requirements of 105 and

19   10b.

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

21   Respondents' burden, but I do think that

22   Respondents gave a good answer to that question,

23   which is Facebook should have said at least that

24   they had experienced a significant episode of

25   misappropriation of user data. That would have

1   avoided the misleading impression left by the

2   statements that they did make here.

3   JUSTICE THOMAS: Was it considered

4   significant in 2016 when they filed -- filed the

5   statement, the 105 statement?

6   MR. BARBER: Yes, I think it certainly

7   was considered significant based on the actions

8   that Facebook took, emailing Cambridge Analytica

9   quite quickly after determining that its

10   policies had been violated, directing them to

11   delete the data.

12   I think Facebook was, at least on the

13   allegations of this complaint, highly aware of

14   the great risk to its business that was posed by

15   this episode.

16   CHIEF JUSTICE ROBERTS: Do you -- do

17   you agree with Mr. Russell that a probabilistic

18   statement sometimes implies that the event

19   hadn't occurred and sometimes implied that the

20   event had occurred?

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

22   the Chief Justice's question earlier, I agree

23   with Respondents that these kinds of matters are

24   not susceptible to bright-line rules. That goes

25   for falsity. That goes for materiality.

1   And it would be foreign to the common

2   law of fraud and this Court's securities law

3   jurisprudence to impose the kind of

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

5   categorical -- but bright-line rule that

6   Petitioners seem to be advancing. It depends on

7   the particular statement, the particular kind of

8   risk under discussion.

9   CHIEF JUSTICE ROBERTS: Well, in such

10   a complicated scenario of that sort, sometimes

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

12   particular context. That does seem something

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

14   that your client, the Securities and Exchange

15   Commission, might want to exercise its expertise

16   with respect to it.

17   Instead, it, I think, was suggested

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

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

20   should apply these things.

21   Are you concerned about that, that we

22   may not do as good a job as the SEC?

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

24   confine yourself to what Respondents have

25   suggested the Court hold, which is a statement

 1   like this is misleading on this theory only

 2   insofar as it implicitly misrepresents that the

 3   relevant event has not already occurred, and

 4   then the past event that did occur has to be

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

 6   would be fine.

 7   The SEC could always say more about

 8   this, provide more guidance, but that would be

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

10   JUSTICE ALITO: Well, under what

11   circumstances does a statement that is framed

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

13   will be hurt, under what circumstances does a

14   statement that is framed like that imply that

15   the event is not going to happen?

16   MR. BARBER: So, when the relevant

17   risk is something that any reasonable person

18   would expect to have occurred and would have

19   expected the company to confront in the past,

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

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

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

23   the thing happening in the past is more than

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

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

 1   like that to be misleading?

 2   MR. BARBER: Are you positing that

 3   that's what the statement itself says?

 4   JUSTICE ALITO: I'm positing that the

 5   statement says exactly what I said it says. It

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

 7   our operations will be disrupted. It's framed

 8   like that. Under what circumstances is that

 9   misleading?

10   MR. BARBER: I think that would be

11   misleading if the company, the manufacturer, had

12   recently suffered a significant fire that, you

13   know, would be implicitly interpreted as in

14   conflict with the representation that the issuer

15   was making.

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

17   want to dwell on things that fall out of the

18   sky, but what about the situation where the fire

19   is caused by something that's utterly freakish?

20   Something fell -- a meteor -- a meteorite fell

21   out of the sky or some crazy person who was

22   hearing voices decided that that person was

23   going to go throw a Molotov cocktail in the

24   window of this plant.

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

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1        source of the fire in particular matters.  If
2        the company is warning a risk of fire may affect
3        our business negatively and then a devastating
4        fire had just affected the business and had
5        these serious implications for the business's
6        ability to compete going forward, I think that
7        could well be --
8                  JUSTICE ALITO:  So even --
9                  MR. BARBER:  -- misleading.
10                 JUSTICE ALITO:  -- even in those
11       situations, it's caused by a meteorite or it's
12       caused by the crazy Molotov cocktail thrower,
13       you would say you've got to disclose that
14       because a reasonable investor would want to
15       know?
16                 MR. BARBER:  A reasonable investor --
17                 JUSTICE ALITO:  Maybe because the
18       investor would think the place is haunted or
19       it's cursed because this happened in the past.
20                 JUSTICE KAGAN:  Well, isn't what the
21       reasonable investor would want to know in that
22       situation -- and I agree these are two different
23       situations, but, in that situation, what the
24       reasonable investor would want to know is that
25       there wasn't any plant.  No matter, you know,
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1   what had caused the fact there wasn't any plant,

2   there wasn't any plant, so there wasn't going to

3   be any output, so there wasn't going to be any

4   business.

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

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

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

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

9   under control.

10   JUSTICE KAGAN: No. So, still, what

11   the reasonable investor would want to know is --

12   we enjoy this sometimes.

13   (Laughter.)

14   MR. BARBER: Please.

15   CHIEF JUSTICE ROBERTS: Only -- only

16   sometimes.

17   JUSTICE KAGAN: Is that, you know,

18   50 percent of the capacity had been wiped out,

19   right?

20   MR. BARBER: Right.

21   JUSTICE KAGAN: Now there are other

22   cases where what the reasonable investor would

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

24   -- there appears to be insufficient, inadequate

25   management, operational controls, such that the

 1   same thing could happen again.

 2   And -- and so those are two different

 3   hypotheticals, but I imagine your view would be

 4   on either event, if -- if -- you know, a

 5   reasonable investor might want to know that, and

 6   the -- and the hypothetical statement might

 7   suggest the contrary of what is true.

 8   MR. BARBER: Right. My only point is

 9   that if you have a statement like our business

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

11   business would be negatively affected in all

12   these ways, that can reasonably leave the --

13   leave the implicit representation that the

14   business had not just suffered a significant

15   fire.

16   JUSTICE GORSUCH: Mr. Barber, on

17   that --

18   MR. BARBER: Yes.

19   JUSTICE GORSUCH: -- it -- it -- it

20   does seem to me we're talking about two totally

21   different things, risks in the future and

22   damages from the past, and if we're talking

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

24   factor that's clearly covered by one -- 105 as

25   opposed to something that should be disclosed

1   perhaps in 101 or 303, first of all?

2   And, second of all, if you want to

3   cram in risks from past events into 105, why

4   would we do that given the adoption of 106,

5   which addresses these kinds of very problems and

6   doesn't require that?

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

8   Justice Gorsuch.

9   We agree with Respondents that Item

10   105 is not limited in its text to the disclosure

11   of future events and future risks. Facebook's

12   own practices, as you can see in the 10-K at

13   issue here, are consistent with that. The

14   entire 10-K is reproduced in Volume 2 of the

15   Joint Appendix. And literally every section of

16   it or I think almost every section includes

17   discussion of some past event, some present

18   condition. So Item 105 is not limited to those

19   kinds of future-looking disclosures.

20   Item 106 did emphasize for issuers --

21   and this was promulgated well after the events

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

23   -- it emphasized that issuers do sometimes have

24   to disclose past cybersecurity incidents. That

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

1   to discuss past events under Item 105 when

2   necessary to avoid a misleading impression in

3   the statements that are made here.

4   JUSTICE GORSUCH: What do you say to

5   the 101 and 30 -- 303?

6   MR. BARBER: I think the kind of

7   disclosure that needed to happen here was much

8   more at home in the risk factors section than in

9   those sections. So 303 is about the Management

10   & Discussion -- Management Discussion &

11   Analysis.

12   JUSTICE GORSUCH: Known trends and

13   uncertainties that have had, have had, a

14   material unfavorable impact. That would seem to

15   me a heartland case for some destruction of your

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

17   fire or meteorites or both.

18   And 101, information material to an

19   understanding of the general development of the

20   business.

21   MR. BARBER: Yes. I'm not saying that

22   the information would be inappropriate in those

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

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

25   10-K after the news really came out in March

1   2018, they discuss the Cambridge Analytica

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

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

4   was predominantly in the risk factors section.

5   So this is where investors do look for this kind

6   of information, so I think that's an important

7   fact.

8   Another great example is in the actual

9   10-K that was filed, if you look at page 464 of

10   the Joint Appendix, they specifically disclosed

11   having discovered a bug in one of their

12   algorithms in late 2015, which is exactly the

13   time when they discovered the Cambridge

14   Analytica matter.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Justice Thomas?

18   Justice Sotomayor?

19   JUSTICE SOTOMAYOR: I'm listening to

20   Justice Gorsuch go through 101 and 103, and they

21   seem even less precise than what Justice

22   Kavanaugh was seeking for the SG to do. It

23   seems like both are -- are asking for the SEC to

24   anticipate every potential risk for any type of

25   company and then spell out what they have to

1   say.

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

3   what in 105 -- what in the -- in the language of

4   105 suggests that it covers this.

5   MR. BARBER: Sure. So Item 105 speaks

6   to material factors that render an investment in

7   the offering or the registrant risky or

8   speculative. So I think it's perfectly natural

9   to say that not only the potential future

10   occurrence of incidents like cyber -- Cambridge

11   Analytica would be such a material factor but

12   also --

13   JUSTICE SOTOMAYOR: This wasn't a

14   cyber attack, as Respondents said.

15   MR. BARBER: Correct.

16   JUSTICE SOTOMAYOR: This was misuse by

17   -- by a user who was given permission --

18   MR. BARBER: Correct.

19   JUSTICE SOTOMAYOR: -- by Meta. Okay.

20   Go ahead.

21   MR. BARBER: Correct. So I think this

22   kind of event is comfortably encompassed by the

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

24   to get into the specifics of Cambridge

25   Analytica, but they at least had to acknowledge

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 1    that events of this nature had previously

 2    occurred in order to avoid leaving the kind of

 3    misleading impression that was left here.

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

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

 6    case law for the idea that the SEC has to

 7    specifically lay out the particular kind of

 8    half-truths that a disclosure may make to the

 9    investing public in order for those to be

10    actionable under Rule 10b-5.

11              JUSTICE SOTOMAYOR:  Or exactly what

12    won't previously --

13              MR. BARBER:  Right.  The fact that

14    this -- the elements of this cause of action

15    require what a reasonable investor would think,

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

17    think there's any kind of fair notice issue

18    here.

19              JUSTICE SOTOMAYOR:  And in terms of

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

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

22    knew they had a 30 million user misuse.  They

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

24    And when they sought Cambridge's assurances that

25    they had destroyed the data, they were told
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1   nothing. So they knew there was a risk to their

2   reputation at that point.

3   MR. BARBER: Yes. The way we know

4   that this belonged under Item 105 is that the

5   very risk statement that was rendered misleading

6   by the omission of this information was made in

7   the risk factors section of the 10-K.

8   JUSTICE SOTOMAYOR: Thank you.

9   CHIEF JUSTICE ROBERTS: Justice Kagan?

10   JUSTICE KAGAN: I thought that Justice

11   Alito, one of the questions he was interested

12   in, and if not, I'll just say I'm interested in

13   it, is how do we know when it is that you have

14   to put in these past events. And you and Mr.

15   Russell have said don't -- you know, you don't

16   have to put in anything that's not material.

17   MR. BARBER: Correct.

18   JUSTICE KAGAN: But, as to things that

19   are material, you don't seem to be imposing any

20   higher bar. In other words, that seems to be

21   your only dividing line, is it material or is it

22   not.

23   And I guess maybe this goes back to

24   Justice Barrett's question too. Is there some

25   higher standard that we might use in this area

        1   to prevent a mass of cases that are perhaps less

        2   viable, less meritorious than this one might be

        3   thought?

        4   MR. BARBER: Yes, but I think that bar

        5   is what we've been discussing, which is the need

        6   to show not just that the omitted fact is

        7   material but that the omission rendered the

        8   affirmative statement that's made misleading

        9   because the statement implicitly misrepresents

       10   that the event never occurred.

       11   I think that's a requirement with real

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

       13   that is phrased in very general terms like, our

       14   business may struggle with users trusting us in

       15   the year ahead, that may harm our business

       16   because we depend on ad revenue, that kind of

       17   general statement is much less likely to lead a

       18   reasonable invest -- investor to think anything

       19   in particular about the past occurrence of

       20   misappropriation of user data.

       21   But the problem with the statements

       22   here is that they were reasonably specific and

       23   they were talking about a specific category of

       24   risk, which invites the reasonable investor to

       25   think no significant episode of that kind of

1   risk has already materialized.

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

3   limit on our position, and I think the Court

4   could well make that clear, that you have to

5   look at the generality of the statement. If the

6   statement does acknowledge that events of this

7   kind have occurred, even if you don't get into

8   the specifics of the relevant event, it's going

9   to avoid the kind of misleading impression that

10   could otherwise be left. So it's not just

11   materiality.

12   JUSTICE KAGAN: Thank you.

13   CHIEF JUSTICE ROBERTS: Justice

14   Gorsuch?

15   JUSTICE GORSUCH: Sorry to prolong

16   this, but to what extent does that incentivize

17   companies to just be more general in their

18   disclosures?

19   I mean, you said, if they raise it up

20   a level of generality, it's less likely to be

21   misleading, so you're going to have more -- more

22   useless disclosures, potentially, out -- out of

23   this. Is the SEC concerned about that? I mean,

24   you know, our -- our -- our ad revenue might be

25   harmed if our reputation's at risk from anything

1   we do.

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

3   a major concern for us just because this has

4   been the law, for example, in the Ninth Circuit

5   since at least 2008 with the Berson case. We

6   haven't seen this kind of danger arise. That's

7   Facebook's home circuit. And they provided a

8   lot of very helpful, detailed risk-factor

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

10   JUSTICE GORSUCH: Now -- and now they

11   may not.

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

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

14   equipped to deal with. If that, you know, were

15   to result from affirming the court of appeals'

16   judgment, then the SEC could look at that. It's

17   tinkered with Item 105 before to change the

18   standard for what needs to be disclosed, and it

19   could well do so again. Yes.

20   CHIEF JUSTICE ROBERTS: Justice

21   Kavanaugh?

22   JUSTICE KAVANAUGH: You said there's

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

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

25   hypotheticals have illustrated a lot of

1   uncertainty about when a company would be

2   required to disclose and why not.

3   But that blends back into the question

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

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

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

7   When the company discloses the risk of a future

8   event that could cause harm, also disclose any

9   past occurrences of that event.

10   MR. BARBER: I think --

11   JUSTICE KAVANAUGH: Why -- could the

12   SEC do that?

13   MR. BARBER: -- the SEC could always

14   be clearer in this regard, and maybe it could

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

16   hasn't already written the regs.

17   JUSTICE KAVANAUGH: Well, why -- I

18   mean, why does the judiciary have to walk the

19   plank on this and -- and answer that question

20   when the SEC could do it with all the

21   uncertainty and all the hypotheticals that have

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

23   just speaking for myself, raises a lot of

24   questions for companies about what they have to

25   disclose and what they don't?

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 1              And they're, of course, going

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

 3    going to be stuck with liability.  Going

 4    forward, they're just going to disclose

 5    everything --

 6              MR. BARBERT:  Right.

 7              JUSTICE KAVANAUGH:  -- which defeats

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

 9    the whole purpose.  So --

10              MR. BARBER:  Right.

11              JUSTICE KAVANAUGH:  -- attack any one

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

13              MR. BARBER:  So, Justice Kavanaugh, a

14    few things on that.

15              I think one of the signs of a weak

16    policy argument is that you could make it in

17    either direction equally.  You could equally

18    argue that issuers will be disincentivized --

19    kind of what Justice Gorsuch was getting at --

20    they would be disincentivized to make risk

21    disclosures because of fear of liability.

22              The likeliest scenario here is that

23    risk disclosures would remain about the same

24    length.  Issuers would just be a little bit more

25    careful about disclosing past materializations
```

1   of the risk.

2   I think the SEC did write the

3   regulations that it needed to write here,

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

5   Rule 12b-20, saying that not only do you have to

6   disclose the things that are directly required

7   to be disclosed by Regulation S-K, but you also

8   have to disclose whatever else is necessary to

9   avoid those statements being misleading.

10   That is enough. This Court -- this is

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

12   half-truth cases, this Court and other courts

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

14   regulator directly said that this kind of

15   falsity is -- is required or is -- is

16   prohibited?

17   And to that point as well --

18   JUSTICE KAVANAUGH: But I guess the

19   problem there -- last question, sorry.

20   But the -- there's not one reasonable

21   person -- reasonable people are going to have

22   different views about what -- whether the lack

23   of disclosure of the past event occurring makes

24   the current statement misleading. I mean,

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

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

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

3   MR. BARBER: I appreciate that. I

4   think I would go back to the Omnicare case again

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

6   Whenever you have a provision that prohibits

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

8   going to have some uncertainty and it's not

9   going to be completely cut and dry.

10   That was a case involving a provision

11   that's strict liability, Section 11 of the

12   Securities Act. Here, we have a provision that

13   requires scienter. The PSLRA requires strong

14   pleading, strong inference of scienter. So

15   that's another protection against limitless

16   liability of the kind Petitioners fear.

17   JUSTICE KAVANAUGH: Okay. Thank you

18   very much.

19   MR. BARBER: Thank you.

20   CHIEF JUSTICE ROBERTS: Justice

21   Barrett?

22   JUSTICE BARRETT: Mr. Barber, I think

23   I heard you tell Justice Gorsuch that your

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

25   hear you correctly?

1   MR. BARBER: Yes. In the Ninth

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

3   JUSTICE BARRETT: Outside of the Ninth

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

5   wondering how your position differs from the

6   virtual certainty test that several other

7   circuits apply. Is it different?

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

9   problem with that, Justice Barrett, is that the

10   other circuits don't apply the virtual certainty

11   rule in the way that Petitioners say they do.

12   What the other circuits say -- what

13   most circuits say is: A risk statement can be

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

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

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

17   certain to do so. And that's fine. I don't

18   think anybody has a quarrel with that at least

19   for purposes of this case.

20   What Petitioners are saying is that

21   the virtual certainty rule says: Even in that

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

23   only misleading if the undisclosed past event is

24   virtually certain to harm the business.

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

 1   circuit applies that rule.

 2   There's one case from the Tenth

 3   Circuit that if you look at the end of the

 4   relevant section of the court's opinion, the

 5   Indiana Public Retirement case, the court does

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

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

 8   the court describes the rule correctly, the way

 9   I just described it.

10   The problem with the virtual certainty

11   rule as Petitioners imagine it is that it would

12   distort the materiality standard because it's

13   never been thought that the omission of a

14   particular fact is only actionable if it's

15   virtually certain to harm the business.

16   The standard under this Court's cases

17   is: Would a reasonable person view the

18   information as significantly altering the total

19   mix of information bearing on the investment

20   decision?

21   JUSTICE BARRETT: Does the

22   government's position differ from the virtual

23   certainty rule as it already exists? I mean as

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

25   Shanmugam has mischaracterized what the virtual

 1   certainty rule requires.

 2   But, as the law actually exists, as

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

 4   from that? Would we be shifting the law if

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

 6   circuits now have it wrong?

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

 8   firm position on that for purposes of this case

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

10   category of cases where we're just dealing with

11   a potential future event and the likelihood of

12   it.

13   Given the fact that, as has been

14   discussed, Item 105 doesn't require specific

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

16   say, like, 70 percent or whatever, then

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

18   false based on the understatement of the risk,

19   you would probably have to show something like a

20   virtual certainty to actually make that

21   actionable.

22   JUSTICE BARRETT: Okay. Thank you.

23   CHIEF JUSTICE ROBERTS: Justice

24   Jackson?

25   JUSTICE JACKSON: So I think what's a

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

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

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

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

 5   against the backdrop of a duty to disclose the

 6   information.

 7   And what Petitioner says is there is

 8   no standalone obligation to talk about past

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

10   have this purely futuristic statement.

11   So it seems to me to be different than

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

13   thinking that it might still trigger liability

14   is that it becomes potentially misleading in a

15   continuing harm scenario, the kind that Justice

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

17   say originally that you -- that this past thing

18   happened, but if the past thing happens and

19   before the harm completely materializes, before

20   the harm completely happens, you have to make a

21   disclosure statement that maybe there's

22   something misleading about making your statement

23   purely futuristically in that situation because

24   it leads investors to underestimate the risk or

25   the potential for the future harm.

1   MR. BARBER: So, Justice Jackson, a

2   couple of things on that.

3   I -- I disagree that you only have a

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

5   regulatory disclosure requirement. Half-truth

6   claims are not limited to that particular

7   context.

8   The reason why we're in that situation

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

10   disclosure requirement like Item 105, then they

11   don't have much incentive to go around the

12   markets telling people how risky their

13   investments might be in the company. So I think

14   that's important.

15   But I also do disagree at a second

16   level that Item 105 just doesn't ever require

17   disclosure of past events, because what it

18   requires disclosure of is material factors that

19   render an investment in the company risky or

20   speculative, and that can readily encompass past

21   events, present conditions, and potential future

22   events.

23   JUSTICE JACKSON: Thank you.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

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 1                MR. BARBER:  Thank you.
 2                CHIEF JUSTICE ROBERTS:  Mr. Shanmugam,
 3      rebuttal?
 4             REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
 5                  ON BEHALF OF THE PETITIONERS
 6                MR. SHANMUGAM:  Thank you, Mr. Chief
 7      Justice.  Four points.
 8                First, let me start with Respondents'
 9      and the government's test.  Mr. Russell said
10      that under their test, risk disclosures can and
11      frequently do imply something about the past.
12      But, as Justice Kagan asked, the devil is in the
13      details.  How do you determine when risk
14      disclosures fall on that side of the line?
15                From Respondents' and the government's
16      brief, it seemed like their answer was the
17      materiality requirement.  If omitted information
18      is important to a reasonable investor, then the
19      risk disclosure contains an implication about
20      that.
21                But there are a couple of problems
22      with that.  The first is the one that we
23      discussed in my opening argument, which is that
24      that conflates and collapses the elements of
25      falsity and materiality.  And, second,
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    1   materiality really doesn't provide a great deal

    2   of protection because it is a relatively low

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

    4   would be a categorical rule by any other name.

    5   Now Mr. Russell also suggested in

    6   points of his argument that it's really all

    7   about the intuition as to whether or not the

    8   event is of the sort that has occurred in the

    9   past. And so bad publicity would presumably

   10   fall on the side of the line of something a

   11   reasonable investor would understand has

   12   occurred in the past, and Justice Alito's meteor

   13   strike or Molotov cocktail would not.

   14   I would submit that we would prevail

   15   under such a standard because a reasonable

   16   investor would think that Facebook had suffered

   17   episodes of data misuse in the past. But I

   18   think the problem with an intuition-based test

   19   is it's not really an administrable standard and

   20   it's not an objective one. And I would submit

   21   that it's a very difficult one for a defendant

   22   to prevail on on a motion to dismiss.

   23   Most of the cases in the circuit

   24   conflict have come up on and been resolved on a

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

 1   just dealing with the ordinary Twombly/Iqbal

 2   standard here. We're dealing with the

 3   heightened pleading standard of the PSLRA under

 4   which both the statements themselves and the

 5   reasons why the statements are misleading must

 6   be pleaded specifically.

 7   Second, the wording of the statements

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

 9   said was such improper data misuse has occurred

10   in the past, including recently on a substantial

11   scale. The problem with that formulation is

12   that all of that was in the public domain. This

13   Court can judge that for itself. The articles

14   that were in the public domain before the 10-K

15   are at Joint Appendix 616 to 630. It was public

16   that millions of users' data were in play as a

17   result of what took place here.

18   And to the extent that Mr. Russell

19   relies on the hundred billion dollar alleged

20   drop in the stock price, that took place after

21   the continued misuse became public, but it is

22   clear that that continued misuse is no longer in

23   the case. It was waived below, and that was for

24   good reason because the district court said that

25   no responsible person at Meta was aware of that

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

 2 early 2017.

 3   What should this Court do here? Well,

 4 I think that this Court should write an opinion

 5 that simply says that statements like this one

 6 and others like it contain no implied

 7 representation that the previous triggering

 8 event had never occurred, and this Court should

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

10 note parenthetically the SEC requires

11 disclosures to be concise, not voluminous.

12   And the Court can make clear, as it

13 did in Omnicare, that the answer naturally

14 depends on the wording or the context in which

15 the statement was made. So, if you have a

16 defendant that says something about the

17 probability of the event occurring or said

18 something like if this event were ever to incur,

19 thereby implying that it had not occurred in the

20 past, the outcome could be different.

21   Finally, just a word about the

22 implications of this case. The effect of

23 accepting either Respondents' or the

24 government's position would be to hold a company

25 liable for securities fraud precisely because it

1   warned of the specific risk at issue,

2   presumably, on the theory that a company failed

3   to catalogue all of the prior episodes of the

4   event occurring.

5   That would create a regime that is

6   effectively a regime of omissions liability

7   because what you would be saying is that if a

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

9   the hook for any previous episode that has not

10   been disclosed. That would place an onerous

11   obligation on companies not only to disclose

12   initially but continually to update its risk

13   disclosures in its quarterly reports, and it

14   would penalize companies for doing the right

15   thing and what Item 105 requires, which is to

16   identify risks that may affect the company's

17   business.

18   The Ninth Circuit's formulation of

19   this standard here cannot stand, and for that

20   reason, we would submit its judgment should be

21   reversed. 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.)

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