No. 23-980

In the Supreme Court of the United States

FACEBOOK, INC., ET AL., PETITIONERS

v.

AMALGAMATED BANK, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws, including the laws at issue in this case. Meritorious private securities actions are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of Justice and the SEC. In 2019 the SEC brought a civil action against petitioner Facebook, Inc. that presented similar legal issues and involved the same underlying events as respondents' current suit. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

A. Legal Background

1. Under the Securities Act of 1933 (Securities Act), ch. 38, 48 Stat. 74 (15 U.S.C. 77a *et seq.*), a securities issuer "may offer securities to the public only after filing a registration statement," unless an exception applies. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 178 (2015); see 15 U.S.C. 77d, 77e. The Securities Exchange Act of 1934 (Exchange Act), ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*), requires certain issuers "to file periodic informational statements," such as the annual Form 10-K and the quarterly Form 10-Q, with the SEC. *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 260 (2024); see 15 U.S.C. 78*l*; 15 U.S.C. 78m (2018 & Supp. IV 2022). The Commission's Regulation S-K sets forth required contents of those filings. 17 C.F.R. 229.10; see 17 C.F.R. Pt. 229.

Issuers' public filings have long disclosed business risks. In 1964 the SEC published Securities Act guidance that advised offerors of "speculative" securities to include in their prospectuses "a carefully organized series of short, concise paragraphs summarizing the principal factors which make the offering speculative." 29 Fed. Reg. 2490, 2492 (Feb. 15, 1964). In 1982 the Commission formalized this guidance as a regulatory requirement in Item 503 of Regulation S-K. 47 Fed. Reg. 11,380, 11,423 (Mar. 16, 1982). And in 2005 the SEC extended that requirement to certain of the filings required by the Exchange Act, including Form 10-K. 70 Fed. Reg. 44,722, 44,786-44,787, 44,830 (Aug. 3, 2005).

Risk-factor statements are now governed by Item 105 of Regulation S-K, 17 C.F.R. 229.105. The regulation directs filers to provide "a discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. 229.105(a). That discussion "must be organized logically with relevant headings" and with "each risk factor * * * set forth under a subcaption that adequately describes the risk." *Ibid.* Item 105 discourages "[t]he presentation of risks that could apply generically to any registrant or any offering," and it requires risk factors to be stated "in plain English." 17 C.F.R. 229.105(a) and (b).

2. False statements in SEC filings can expose issuers to liability for securities fraud. Section 10(b) of the Exchange Act makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security[,] * * * any manipulative or deceptive device or contrivance in contravention of" SEC rules. 15 U.S.C. 78j(b). The Commission's Rule 10b-5 implements Section 10(b) and makes it unlawful for any person, in connection with the purchase or sale of a security, to (a) "employ any device, scheme, or artifice to defraud"; (b) "make any untrue statement of a material fact or * * * omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"; or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5. "Section 10(b) is aptly described as a catchall" antifraud provision. *Chiarella* v. *United States*, 445 U.S. 222, 234-235 (1980). And "Rule 10b-5 is coextensive with the coverage of § 10(b)." *SEC* v. *Zandford*, 535 U.S. 813, 816 n.1 (2002).

The SEC is charged with enforcing Section 10(b) and Rule 10b-5. Aggrieved private parties may also sue to enforce those provisions under a private right of action that Congress has "ratified." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). To prevail under Section 10(b) and Rule 10b-5, the SEC or a private plaintiff must show (1) a material misrepresentation or omission; (2) made with scienter; (3) in connection with the purchase or sale of a security. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005). A private plaintiff must additionally prove (4) reliance; (5) economic loss; and (6) loss causation. *Id.* at 341-342.

B. Factual Background

1. Petitioners are Facebook, Inc. (now known as Meta Platforms, Inc., Pet. App. 6a n.1), and three of its executives. A publicly traded company, Facebook runs an eponymous social-media platform that enables users to interact with each other (including as "friends") and use applications created by third-party developers. *Id.* at 8a. According to the operative complaint here, the company's business is heavily dependent on the monetization of user data, and thus on users' willingness to trust Facebook with that information. J.A. 8-9, 22-27.

In 2015, the newspaper *The Guardian* reported that a British political-consulting firm, Cambridge Analytica, "had created a database of information about American voters by harvesting * * * Facebook data" derived from a personality quiz that an academic at Cambridge University, Aleksandr Kogan, had developed and uploaded to Facebook. Pet. App. 10a. Approximately 270,000 people took the quiz, but Kogan was able to obtain data pertaining to tens of millions of those users' friends as well. J.A. 49-50, 621, 632. Facebook responded to the report by stating through a spokesman that Facebook was "carefully investigating this situation" and would "take swift action against companies" that "[m]islead[] people or misus[e] their information" in violation of Facebook's policies, including by "banning those companies from Facebook and requiring them to destroy all improperly collected data." J.A. 619.

Facebook determined that its users' information had indeed been obtained by Cambridge Analytica in violation of Facebook's policies. Pet. App. 11a-12a. Soon after the *Guardian* article appeared, a Facebook executive told Cambridge Analytica that Kogan's data had been "improperly derived from * * * the Facebook Platform, and then transferred to Cambridge Analytica in violation of our terms." J.A. 87. She directed the firm to delete the data. *Ibid.* But Facebook did not make those findings public. Although company policy provided that "Facebook would notify users" when their accounts were compromised, "a decision [was] made" not to do so in this instance. J.A. 195, 308. Facebook also repeatedly told the media that its "investigation into Cambridge Analytica had not yet uncovered any misconduct related to the firm's work" on certain political campaigns, and the company "assured Facebook users that 'no one is going to get your data that shouldn't have it.'" Pet. App. 13a; see *id.* at 26a; J.A. 7-8. The operative complaint in this case alleged that Facebook did not ban Cambridge Analytica from its platform even after being given reason to believe that the firm had not deleted the misappropriated data. J.A. 96-100, 179-180.

2. At approximately the same time, petitioners submitted SEC filings that addressed the risks that improper disclosure of user data could entail. In the risk-factors section of its Form 10-K for fiscal year 2016 (filed in February 2017), Facebook included the heading, "Security breaches and improper access to or disclosure of our data or user data, or other hacking and phishing attacks on our systems, could harm our repu-

tation and adversely affect our business." J.A. 439 (emphasis omitted). That Form 10-K elaborated on those risks, noting that "[a]ny failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data could result in the loss or misuse of such data, which could harm our business and reputation and diminish our competitive position." *Ibid.* Facebook also stated that, "if * * * third parties or [app] developers fail to adopt or adhere to adequate data security practices, or in the event of a breach of their networks, our data or our users' data may be improperly accessed, used, or disclosed." J.A. 440. Facebook included nearly identical warnings in subsequent 10-K and 10-Q filings. J.A. 192-193.

3. In March 2018, "*The New York Times* and *The Guardian* contacted Facebook for comment on joint articles the outlets planned to publish about Cambridge Analytica's misuse of Facebook users' data." Pet. App. 14a. Facebook then "announced on its investor relations website that it was suspending Cambridge Analytica for violating its policies by sharing Facebook users' data without the users' consent and for failing to delete the improperly collected data." *Ibid.* On March 17, 2018, *The Guardian* published its story under the headline, "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach." J.A. 634 (emphasis omitted). The coverage prompted a series of government investigations and a social-media campaign urging Facebook users to delete their accounts. See J.A. 208-212. Facebook's leadership apologized for failing to inform users that their accounts had been compromised and for otherwise mishandling the Cambridge Analytica matter. J.A. 195; see J.A. 213-218.

On March 19, 2018, the first trading day after the news broke, the price of Facebook's common stock fell almost 7 percent; within a week, it had fallen nearly 18 percent. Pet. App. 15a; J.A. 14.

C. Prior Proceedings

1. Respondents filed this suit against petitioners on behalf of a putative class of Facebook shareholders. Their third amended complaint alleged "that Facebook, through the executive defendants or a company spokesperson, made several false or materially misleading statements between February 3, 2017, and July 25, 2018," in violation of Section 10(b) of the Exchange Act and Rule 10b-5, among other provisions. Pet. App. 17a-18a. The relevant statements included those on the Form 10-K discussed above, see J.A. 192-194, 281-282, as well as certain "statements regarding Facebook's investigation into Cambridge Analytica's 2015 misconduct" and "statements regarding the control Facebook users have over their data on the platform." Pet. App. 18a. Respondents alleged, among other things, that petitioners' risk-factor statements were misleading because they presented the risks of misappropriation of user data as "merely hypothetical," even though petitioners knew that Cambridge Analytica and others already had "improperly gained access to user data and used it in ways not consented to or authorized by those users." J.A. 9 (emphasis omitted); see J.A. 282-285.

In 2019, the SEC brought its own enforcement action against Facebook in federal district court. J.A. 642-660. Like respondents, the Commission alleged that "Facebook's Risk Factor disclosures misleadingly suggested that the company faced merely the risk" of misuse of user data. J.A. 653. "This hypothetical phrasing," the Commission alleged, "created the false impression that

Facebook had not suffered a significant episode of misuse of user data by a developer." J.A. 653-654. Facebook settled the case, agreeing to pay a civil penalty of $100 million. J.A. 661-662. At the same time, the Federal Trade Commission imposed a $5 billion penalty on Facebook for deceiving users about the privacy of their data. Pet. App. 8a-9a.

2. Petitioners moved to dismiss respondents' complaint, and the district court granted their motion. Pet. App. 109a-224a. Most relevant here, the court found that respondents had "failed to plead falsity" with respect to the risk-factor statements. *Id.* at 191a. The court noted that most of those statements had warned of "reputation, business, or competitive" risks, but that respondents had not alleged that "the Cambridge Analytica scandal was harming Facebook's reputation, business, or competitive position" at the time Facebook made the statements. *Id.* at 189a. Although one of the statements had referenced the risk of "improper use or disclosure of user data," the court found that Facebook's failure to disclose Cambridge Analytica's actual misuse of consumer data did not render Facebook's Form 10-K misleading. The court determined that, by virtue of the 2015 *Guardian* article, Cambridge Analytica's misuse "was already public knowledge" when the risk-factor statement was made. *Id.* at 189a-190a. The district court also dismissed respondents' other claims for failure to plead falsity, scienter, and loss causation. See *id.* at 110a, 114a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-53a.

a. The panel majority largely reversed the dismissal of the risk-factor claims, holding that respondents had adequately pleaded falsity as to most of those statements. Pet. App. 21a-29a; see *id.* at 29a (affirming district court's dismissal as to risk-factor statements unrelated to misuse of user data). The panel applied Ninth Circuit precedent holding that "[r]isk disclosures that 'speak entirely of as-yet-unrealized risks and contingencies' and do not 'alert the reader that some of these risks may already have come to fruition' can mislead reasonable investors." *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (2021) (quoting *Berson* v. *Applied Signal Tech., Inc.*, 527 F.3d 982, 986 (9th Cir. 2008)) (brackets omitted), cert. denied, 142 S. Ct. 1227 (2022); see Pet. App. 22a-26a. The majority rejected petitioners' contention that the 2015 *Guardian* article had already made Cambridge Analytica's data misuse public, noting that Facebook had merely told the newspaper it was "carefully investigating" the matter. Pet. App. 26a. The majority found it irrelevant that the risk statements had acknowledged that Facebook had previously been the target of cyberattacks, hacking, and phishing, see J.A. 439, since the data misuse at issue here did not involve those kinds of security breaches. See Pet. App. 27a-28a.

The court of appeals affirmed the district court's dismissal, for lack of scienter, of respondents' claims based on statements that Facebook had made to journalists about its Cambridge Analytica investigation. Pet. App. 29a-32a. And while the court affirmed the dismissal of claims related to some of Facebook's "statements about users' control over their personal data," *id.* at 32a, it reversed as to other such statements, including statements related to Facebook's practice of allowing certain "whitelisted" third-party apps to collect users' data without their consent, *id.* at 9a, 38a; see *id.* at 32a-40a.

b. Judge Bumatay concurred in part and dissented in part. Pet. App. 41a-53a. He agreed with the majority that the district court had erred in dismissing certain of respondents' claims arising from Facebook's assurances that users maintained control over their own data. See *id.* at 41a, 48a-51a. He would have affirmed the district court's dismissal of the risk-factor claims, however. See *id.* at 41a-48a. Judge Bumatay would have held that, even if Facebook knew of "potentially serious breaches" of user-data protections when the company made the risk-factor statements, those statements were not false or misleading because respondents had not alleged that "Facebook knew that those breaches would lead to immediate harm to its business or reputation." *Id.* at 48a.

SUMMARY OF ARGUMENT

A. Petitioners principally contend that, when a company's statement of "risk factors" under Item 105 of Regulation S-K, 17 C.F.R. 229.105, describes a particular risk as hypothetical, that statement cannot be rendered false or misleading by the fact that the risk had already materialized when the statement was made. That proposed rule defies both common sense and the great weight of judicial authority. In the securities context as elsewhere, a forward-looking statement of risk can be misleading insofar as it implies that the relevant risk has not already come to fruition. The antifraud provisions of the securities laws prohibit half-truths, not just flat-out lies, and there is no exception to that principle for risk-factor statements.

B. In urging this Court to adopt their proposed categorical rule, petitioners assert (Br. 21-22, 24) that no reasonable investor would understand a risk disclosure to say anything about past events or present conditions. But just as a statement of opinion can imply a proposition of fact, see *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188 (2015), a prospective statement of risk can implicitly represent that a specified adverse event has not already occurred. Whether a particular risk-factor statement carries that implication depends on the facts and context. Because a risk statement does not *always* carry such an implication, petitioners are wrong to assert (Br. 32) that the Ninth Circuit's approach would compel issuers to disclose "every instance of the [risk-]triggering event having occurred in the past."

C. Some courts have suggested that risk-factor statements are misleading only if they omit "previous occurrences of the triggering event" that the company knows "are almost certain to cause the warned-of harm to the company's business." Pet. Br. 39. Petitioners view that "virtual certainty" rule as inappropriate but still preferable to the court of appeals' approach. *Ibid.* (citation omitted). This Court should reject the virtual-certainty rule. Among other things, that rule would artificially raise the bar in the risk-factor context for establishing the element of materiality, which does not require that a misrepresentation involve near-certain harm to the issuer's business.

D. Respondents have adequately pleaded that the risk-factor disclosures in petitioners' SEC filings were false or misleading. The relevant statements characterized the misuse of user data as a future risk that could hypothetically harm Facebook's business, even though the company had recently suffered a major episode of such misuse. Petitioners' contrary arguments reflect a misunderstanding of the Ninth Circuit's opinion and an insufficient appreciation of the likelihood that the investing public was misled.

ARGUMENT

RESPONDENTS HAVE ADEQUATELY PLEADED THAT FACEBOOK'S RISK-FACTOR STATEMENTS WERE FALSE OR MISLEADING

This Court granted the petition for a writ of certiorari limited to the question whether "risk disclosures [are] false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm." Pet. i. As respondents explain, the nondisclosure of an event that has no "ongoing or future" implications for the business does not render a risk statement materially misleading, and the Ninth Circuit did not hold that Rule 10b-5(b) liability can be premised on such an omission. Resp. Br. 1, 12-13 (citation omitted). The court instead held that respondents have plausibly alleged that false or misleading statements appeared in Facebook's Item 105 disclosures, insofar as Facebook's risk-factor statements depicted the risk of user-data misuse as hypothetical when a plainly important episode of such misuse had recently occurred.

In challenging the court of appeals' actual holding, petitioners make broader arguments that extend beyond their question presented. Petitioners contend (Br. 21, 41) that, as a categorical matter, risk-factor disclosures "do not make any implied assertion about previous events and the present risk of harm they created," or at least can be deemed false or misleading only if the undisclosed past event "was virtually certain to cause business harm" when the risk-factor statement was made. Both of those contentions are inconsistent with basic principles of securities law and therefore should be rejected.

A. Risk-Factor Disclosures Can Falsely Imply That The Warned-Of Risks Have Not Already Materialized

1. An incomplete risk-factor statement is a quintessential half-truth

Consistent with the common law of fraud, the antifraud provisions of the securities laws prohibit not just outright lies but also half-truths—"representations that state the truth only so far as it goes, while omitting critical qualifying information." *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 263 (2024) (quoting *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 188 (2016)). (For instance, a child would tell a half-truth if he told his parents that he "had dessert" after eating an entire cake. *Id.* at 264.) The standard used to determine whether a particular statement is misleading is an objective one that "depends on the perspective of a reasonable investor" and is informed by the common law. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186-187 (2015); see *id.* at 191 & n.9.

Petitioners primarily contend (Pet. 19-25) that no reasonable investor would interpret a typical risk disclosure under Item 105 of Regulation S-K as implying that the warned-of risk has not already materialized. That argument is inconsistent with both law and common sense. In law as in life, "[a] statement about the future may imply a representation concerning an existing or past fact." Restatement (Second) of Torts § 525 cmt. e (1977); accord 3 Dan B. Dobbs et al., *The Law of Torts* § 678, at 692 (2d ed. 2011); see Restatement (Second) of Contracts § 159 cmt. c (1981) ("[A] promise or a prediction of future events may by implication involve an assertion that facts exist from which the promised or predicted consequences will follow, which may be a misrepresentation as to those facts."). Thus, if a realtor tells the prospective buyer of a house that "a rise in crime could reduce the value of the property," and a wave of burglaries has recently hit the neighborhood, a reasonable person would deem the realtor's statement to be misleading. Similarly, the statement "I could lose my job if I'm ever arrested" would be misleading if the speaker had actually been arrested the previous week. "To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit." *Rubinstein* v. *Collins*, 20 F.3d 160, 171 (5th Cir. 1994) (citation omitted).

This does not mean that a statement about the potential consequences of hypothetical future events is *always* misleading if it does not reference a past instance when such an event occurred. The statement "Next month's outdoor concert will be canceled if it rains on the scheduled day" would not be rendered misleading by the speaker's failure to disclose that it had rained the previous day. Statements about the potential effects of future rainfall cannot reasonably be understood to imply the non-occurrence of past rain, and the previous day's rainfall would have no bearing on the likelihood that a concert scheduled for the following month would ultimately be canceled.

In the securities context, whether a given statement about the likely consequences of potential future events is a material misrepresentation depends on whether a reasonable investor (a) would construe the statement as an implicit representation that such events have not already occurred, and (b) would view the undisclosed occurrence as significant to an appraisal of the company's business prospects. Those are "inherently fact-specific," context-dependent inquiries. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 236 (1988). In at least some circumstances, however, it is plainly misleading to characterize an adverse event that has already materialized as a merely hypothetical future risk.

2. The case law supports respondents' theory of falsity

Courts have repeatedly applied the principle described above in adjudicating claims of securities fraud. *Siracusano* v. *Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009), aff'd, 563 U.S. 27 (2011), for example, involved a pharmaceutical company's nondisclosure of adverse information regarding one of its products. See *id.* at 1172. In the risk-factors section of its Form 10-Q, the company warned that product-liability claims could negatively affect the company's " 'product branding and goodwill,' " but the filing did not reveal that the company had already been sued about the product and additional litigation was likely. *Ibid.* Citing the same circuit precedent it invoked here, the Ninth Circuit concluded that the company's statement was misleading because it spoke of "the risks of product liability claims in the abstract, with no indication that the risk 'may already have come to fruition.' " *Id.* at 1181 (quoting *Berson* v. *Applied Signal Tech., Inc.*, 527 F.3d 982, 986 (9th Cir. 2008)); see Pet. App. 25a. This Court then granted certiorari to consider whether the nondisclosure of adverse drug events could be materially misleading if "a statistically significant number of adverse events" had not occurred. *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 30 (2011). The Court "conclude[d] that the materiality of adverse event reports cannot be reduced to a bright-line rule," *ibid.*, and it affirmed the Ninth Circuit's judgment, *id.* at 31.

In *In re Westinghouse Securities Litigation*, 90 F.3d 696 (3d Cir. 1996) (Alito, J.), shareholders alleged that a registration statement was misleading because it warned that the adequacy of the issuer's loss reserves depended on economic conditions, when the issuer already "knew that the reserves were and would remain inadequate, even without any future or prolonged economic downturn." *Id.* at 709. The court of appeals reversed the dismissal of the plaintiffs' claim, observing that "a reasonable investor would be very interested in knowing, not merely that future economic developments might cause further losses, but that * * * current reserves were known to be insufficient under current economic conditions." *Ibid.*; see *id.* at 710 (citing *Rubinstein*, *supra*).

The Ninth Circuit more recently applied the same logic in *In re Alphabet, Inc. Securities Litigation*, 1 F.4th 687 (2021), cert. denied, 142 S. Ct. 1227 (2022). There, a Form 10-K filed by Alphabet, Inc., Google's parent company, warned investors that "[c]oncerns about our practices with regard to the collection, use, disclosure, or security of personal information or other privacy related matters, even if unfounded, could damage our reputation and adversely affect our operating results." *Id.* at 694 (brackets in original). An internal review later "discovered that a security glitch in [the] Google+ social network had left the private data of some hundreds of thousands of users * * * exposed to third-party developers," but Alphabet did not change the risk-factor statements in its subsequent filings. *Id.* at 693, 696. The district court dismissed the plaintiffs' claims related to those filings, see *id.* at 698, 702, but the Ninth Circuit reversed, see *id.* at 707. The court of appeals held that "the complaint plausibly alleges that Alphabet's warning in each [filing] of risks that 'could' or 'may' occur is misleading to a reasonable investor when Alphabet knew that those risks had materialized." *Id.* at 704; see *id.* at 703 (citing *Berson* and *Siracusano*).

Other courts of appeals have likewise recognized that forward-looking risk statements can violate the securities laws by creating misleading impressions about the past or present. See, *e.g.*, *Karth* v. *Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021) ("A company must * * * disclose a relevant risk if that risk had already begun to materialize."); *Williams* v. *Globus Med., Inc.*, 869 F.3d 235, 241 (3d Cir. 2017) ("[C]ourts are skeptical of companies treating as hypothetical in their disclosures risks that have already materialized."); *Rombach* v. *Chang*, 355 F.3d 164, 173 (2d Cir. 2004) ("Cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired."); cf. *Dolphin & Bradbury, Inc.* v. *SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (explaining that there is a "critical distinction between disclosing the risk a future event *might* occur and disclosing actual knowledge the event *will* occur").

Courts have regularly applied similar reasoning outside the securities context as well. See, *e.g.*, *Field* v. *Mans*, 157 F.3d 35, 38, 43 (1st Cir. 1998) (defendant's request for permission to sell property falsely implied that the property had not already been sold); *Cora Pub, Inc.* v. *Continental Cas. Co.*, 619 F.2d 482, 487 (5th Cir. 1980) (citing fraud cases where purchasers of insurance had concealed the fact that the risk to be insured against "had already occurred, or that forces reasonably certain to cause the risk to occur were underway"). There is consequently a strong judicial consensus supporting the court of appeals' reasoning here.

3. Administrative practice supports respondents' theory of falsity

The SEC too has consistently taken the view that disclosable risk factors can include past and present business conditions and events, and that nondisclosure of such information can render risk statements misleading. The Commission's 1964 guidance discussed above, see p. 2, *supra*, listed among potential risk factors that should be disclosed "an absence of operating history of the registrant" and "an absence of profitable operations in recent periods." 29 Fed. Reg. at 2492. As respondents note (Br. 29 & n.8), the original version of Item 105 took the same approach. More recently, the SEC issued guidance advising issuers who disclose cybersecurity risk factors under Item 105 "to disclose previous or ongoing cybersecurity incidents or other past events in order to place discussions of these risks in the appropriate context," 83 Fed. Reg. 8166, 8169-8170 (Feb. 26, 2018)—even before the Commission made this a freestanding disclosure requirement in the new Item 106, 17 C.F.R. 229.106; see 88 Fed. Reg. 51,896, 51,921 (Aug. 4, 2023) (noting that the 2018 guidance "remains in place").

The Commission has likewise consistently enforced the securities laws on the understanding that risk statements can be false or misleading in the manner respondents allege here. Indeed, the Commission brought and settled an enforcement action against Facebook that relied on the same theory of falsity that respondents assert. See pp. 7-8, *supra*. It has brought similar enforcement proceedings in numerous other cases spanning decades. See, *e.g.*, D. Ct. Doc. 1, at 2, 11, *SEC* v. *Mylan N.V.*, No. 19-cv-2904 (D.D.C. Sept. 27, 2019); *SEC* v. *True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1102 (D. Minn. 2012) (citing, *e.g.*, *SEC* v. *Tecumseh Holdings Corp.*, 765 F. Supp.

2d 340, 352-356 (S.D.N.Y. 2011); *SEC* v. *Fundpack, Inc.*, No. 79-859, 1979 WL 1238, at *4 (D.D.C. Aug. 16, 1979).

4. Petitioners' principal authority is an outlier decision that lacks persuasive force

Petitioners rely (Br. 22; Pet. 18-19) on the Sixth Circuit's unpublished decision in *Bondali* v. *Yum! Brands, Inc.*, 620 Fed. Appx. 483 (2015). The issuer there, which owned two fast-food chains, made risk-factor statements warning that potential "food safety issues" could adversely affect the company's profitability, at a time when the issuer allegedly knew that eight batches of its chicken located in China already "had tested positive for drug and antibiotic residues." *Id.* at 484-487. In rejecting the plaintiffs' claim, the court of appeals characterized risk-factor disclosures as "inherently *prospective* in nature," such that "a reasonable investor would be unlikely to infer" from such disclosures "anything regarding the current state of a corporation's compliance, safety, or other operations." *Id.* at 491.

The court of appeals in *Bondali* provided no reasoning to support its view that a reasonable investor would be unlikely to draw such an inference. And immediately after making the observations just quoted, the Sixth Circuit noted that "there may be circumstances under which a risk disclosure might support Section 10(b) liability." 620 Fed. Appx. at 491. The court concluded that, "[i]n any event," the plaintiffs had "not alleged facts showing any investment risk had already materialized" by the time the risk disclosures were made, and it suggested that the eight positive test results were too minor in relation to the issuer's overall business to render the risk-factor statements misleading. *Ibid.* Thus, while *Bondali* contains language supporting petitioners' narrow view of risk-factor disclosures as exclusively "prospective in nature," *ibid.* (emphasis omitted); see Pet. Br. 4, 15, 17, 27, even the Sixth Circuit did not unequivocally embrace that proposition.

B. Petitioners' Proposed Categorical Rule Limiting Risk-Factor Fraud Claims Is Unsound

Petitioners urge this Court (see Br. 24-25) to reject the consensus view described above and to adopt a rule that risk disclosures can be false or misleading under Rule 10b-5(b) only if they contain embedded false statements of fact or opinion or misstate the degree or nature of future risk. Petitioners are correct that risk-factor statements can be false or misleading in those circumstances. But petitioners offer no sound basis for concluding that these are the *only* ways in which risk-factor statements can mislead investors.

1. Petitioners' approach would artificially limit liability for misleading risk statements

Petitioners' proposed bright-line rule would arbitrarily narrow the coverage of Rule 10b-5(b) in risk-factor cases. Petitioners emphasize (Br. 21-22) that risk statements are "inherently forward-looking and probabilistic" and are directed toward "the *possibility* of future harm." But that is precisely what can make such a statement misleading. When warned-of risks have already materialized, statements portraying those risks as merely potential problems can mislead the investing public.

Petitioners contend that a reasonable investor would understand a risk-factor statement to convey information only about the future and never about the past. See, *e.g.*, Br. 40 ("[T]he reasonable investor would understand the company's statement to mean what it says: that, if the triggering event were to occur in the future, business harm could result."); Pet. App. 44a (Bumatay, J., concurring in part and dissenting in part) (similar). That contention resembles one this Court rejected in *Omnicare*, *supra*. That case concerned the circumstances in which statements of opinion can be misleading under Section 11(a) of the Securities Act, which, like Rule 10b-5, prohibits statements that "contain[] an untrue statement of a material fact or omit[] to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a); see *Omnicare*, 575 U.S. at 178; 17 C.F.R. 240.10b-5(b).[1]

The issuer, Omnicare, argued that, because statements of opinion "convey [no]thing more than the speaker's own mindset," they can be false or misleading only if the stated opinions are not "sincerely held." *Omnicare*, 575 U.S. at 187. The Court disagreed, finding that Omnicare's approach went "too far, because a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion." *Id.* at 188; see *id.* at 198-203 (Scalia, J., concurring in part and concurring in the judgment) (recognizing that statements of opinion sometimes can imply certain facts about the manner in which the opinion was formed).

Petitioners' narrow view of risk-factor statements, as looking exclusively to the future and never implying anything about the past or present, see Br. 21-24, is similar to Omnicare's literalistic view that statements of opinion describe the speaker's mindset and nothing

[1] Section 11(a) includes additional language, covering pure omissions of information "required to be stated" in a registration statement, 15 U.S.C. 77k(a), that distinguishes it from Rule 10b-5. See *Macquarie*, 601 U.S. at 264-265. But *Omnicare* did not involve that clause of Section 11(a). See 575 U.S. at 186 n.3.

else, see *Omnicare*, 575 U.S. at 187. In rejecting Omnicare's proposed limitation on Section 11 liability, the Court acknowledged that Congress's decision to include misleading omissions within the range of conduct that Section 11 proscribes made that provision "less cut-and-dry than a law prohibiting only false factual statements." *Id.* at 193. The Court explained, however, that "Section 11's omissions clause * * * necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning." *Id.* at 193-194. Similarly here, the need for a nuanced, context-specific inquiry into the inferences that reasonable investors would draw from a particular risk-factor warning is simply the logical consequence of Rule 10b-5(b)'s ban on misleading omissions. Like the rule that Omnicare advocated, petitioners' proposed rule would "punch a hole" in the antifraud provisions "for half-truths in the form of" risk-factor disclosures. *Id.* at 193.

This Court's securities-law decisions have consistently rejected similar efforts to impose categorical limitations that are untethered to the expectations of ordinary investors. In *Matrixx*, for instance, the Court eschewed the issuer's proposed "bright-line rule that reports of adverse events associated with a pharmaceutical company's products cannot be material absent a sufficient number of such reports to establish" a statistically significant link between the product and the adverse events. 563 U.S. at 39 (footnote omitted); see *id.* at 39-43. The Court in *Basic* likewise rejected the contention that the existence of merger negotiations will be material to a reasonable investor only after the negotiators have reached an agreement in principle. See 485 U.S. at 232-236. The Court explained that "[a] bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions." *Id.* at 236. The categorical rule that petitioners propose has no more to recommend it.

2. Petitioners' reliance on statutory and regulatory context is misplaced

As explained above, statements of future risk are characteristically premised upon, and can imply representations about, present or past events. Nothing in the relevant text of Regulation S-K suggests an intent to depart from that understanding. Item 105 directs filers not simply to make predictions about the future, but to provide "a discussion of the *material factors* that make an investment in the registrant or offering speculative or risky." 17 C.F.R. 229.105(a) (emphasis added). A past event like Cambridge Analytica's misuse of Facebook user data, whose ultimate effects on the company's reputation and consequent business success were unknown but potentially substantial when Facebook filed its Form 10-K, is naturally characterized as such a "material factor[]." See Resp. Br. 27-28 (citation omitted).

Petitioners suggest that other provisions of Regulation S-K, by "requir[ing] companies to provide investors with specific information about what has happened to the company in the past and what is happening to the company in the present," imply that the SEC did not "want[] to require" such disclosures under Item 105. Pet. Br. 23 (citing 17 C.F.R. 229.101(a)(1), 229.103(a), 229.106, 229.303(b)(2)(ii)). That inference conflicts with long-standing SEC guidance and enforcement practice, which recognize that disclosing past and present matters in risk-factor statements can be appropriate and sometimes necessary to avoid misleading investors. See pp. 18-19, *supra*. Consistent with the text of Rule 10b-5(b), moreover, the Commission has made clear that, even if particular information is not "expressly required to be included in a statement or report," it must be included "as may be necessary to make the required statements, in the light of the circumstances under which they are made[,] not misleading." 17 C.F.R. 240.12b-20; see 17 C.F.R. 240.10b-5(b). There would be nothing anomalous about disclosing past events in the risk-factors section of an SEC filing. Indeed, other aspects of Facebook's risk-factor disclosures in the Form 10-K at issue here did just that. *E.g.*, J.A. 439 (noting that cyberattacks "have occurred on our systems in the past").

Nor is it decisive (contra Pet. Br. 31) that Rule 10b-5(b) does not prohibit "pure omissions." See *Macquarie*, 601 U.S. at 264. Respondents' risk-factor claims allege that affirmative statements in petitioners' Form 10-K were rendered misleading by the omission of important information. See J.A. 192-194. And the Court in *Macquarie* reaffirmed that Rule 10b-5(b) applies to "misleading half-truths." 601 U.S. at 266.

Petitioners also suggest (Br. 38) that the court of appeals' decision conflicts with the safe harbor for forward-looking statements in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, see 15 U.S.C. 78u-5, and the closely related common-law "bespeaks caution" doctrine. Petitioners have not directly invoked either of those rules, however, and neither supports their argument here.

Congress enacted the PSLRA's safe harbor to insulate from suit issuers who "offer forward-looking projections" that do not accurately predict future events, so long as those projections are "accompanied by meaningful cautionary statements." 15 U.S.C. 78u-5(c)(1)(A)(i); see Pet. Br. 38. But neither the statutory safe harbor nor the bespeaks-caution doctrine immunizes forward-looking statements that leave a false impression as to past or present conditions. "A warning that identifies a potential risk, but 'implies that no such problems were on the horizon even if a precipice was in sight,' would not meet the statutory standard for safe harbor protection." *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 102 (D.C. Cir. 2015) (quoting *Asher* v. *Baxter Int'l Inc.*, 377 F.3d 727, 733 (7th Cir. 2004), cert. denied, 544 U.S. 920 (2005)) (brackets omitted), cert. denied, 577 U.S. 1139 (2016). By the same token, "[t]he 'bespeaks caution' doctrine is a protection against violations based on events that occur later. It does not protect against failure to disclose facts existing at the time the document is written." 1 Alan R. Bromberg & Lewis D. Lowenfels, *Bromberg and Lowenfels on Securities Fraud* § 5:281(7), at 1170 (2d ed., 2024-1 ed. issued in June).

3. The court of appeals' decision does not create an undue risk of overdisclosure or abusive litigation

Petitioners contend that the Ninth Circuit's approach would require issuers to include in risk-factor statements "every instance of the triggering event having occurred in the past," resulting in "bloated risk disclosures," "'abusive'" securities-fraud litigation, and "staggering" economic consequences. Br. 32, 35, 37 (citation omitted). The issuer in *Omnicare* raised similar policy concerns. See *Omnicare*, 575 U.S. at 193 (noting Omnicare's stated concern about "'adverse policy consequences,'" including "'unpredictable' and possibly 'massive' liability") (citations omitted). As in that case, petitioners' policy arguments are both more appropriately directed to Congress and "overstate[d]" in any event. *Id.* at 194; see *id.* at 193; see also *Matrixx*, 563 U.S. at 43 (explaining that the Court's rejection of the defendant's proposed bright-line rule "does not mean that pharmaceutical manufacturers must disclose all reports of adverse events").

Respondents' legal theory does not imply that every risk-factor statement must disclose every prior instance where the relevant risk has materialized. See Pet. App. 46a-47a (Bumatay, J., concurring in part and dissenting in part) (observing that a company need not "disclose every bad thing that ever happened to it"). As noted above, a plaintiff suing under Rule 10b-5 must show, among several other elements, "a material misrepresentation or omission by the defendant." *Matrixx*, 563 U.S. at 37 (citation omitted). A risk statement that omits a past instance in which the risk came to fruition is not always misleading or materially misleading. See p. 14, *supra*; cf. *Bondali*, 620 Fed. Appx. at 491 (concluding that failure to mention a prior occurrence is not misleading where the past instance is trivial or remote in time). The determination whether reasonable investors would read a particular risk statement to imply the non-occurrence of particular past events depends on context, as is often the case in this area of the law. See *Omnicare*, 575 U.S. at 194; *Matrixx*, 563 U.S. at 44.

Petitioners acknowledge (Br. 35, 37) that their fears of overdisclosure and "staggering" liability for issuers have not yet come to pass, even though courts have long allowed claims like respondents' to proceed, see pp. 15-17, *supra*. As petitioners note, the SEC has stressed the importance of brevity in issuers' disclosures generally and in risk-factor statements in particular. Pet. Br. 32-35 (citing, *e.g.*, 17 C.F.R. 229.105(a) and (b); 85 Fed.

Reg. 63,726, 63,744-63,745 (Oct. 8, 2020)). Yet the Commission has also long recognized that risk-factor statements can be misleading in the manner respondents allege. See pp. 18-19, *supra*.

C. A Risk-Factor Warning That Does Not Reveal Prior Instances Where The Risk Materialized Can Be Misleading Even If Consequent Harm To The Issuer's Business Is Not Certain Or Nearly Certain To Occur

Some courts have held or suggested that risk-factor statements can be unlawfully misleading only if they fail to reference "previous occurrences of the triggering event" that the company knows "are *almost certain* to cause the warned-of harm to the company's business." Pet. Br. 39 (emphasis added); see *id.* at 39-41. Petitioners view that "'virtual certainty' standard" as "flawed" but still preferable to the approach taken by the court of appeals. *Id.* at 39. This Court should not adopt the "virtual certainty" approach.

Adoption of the "virtual certainty" test would scramble the elements of a securities-fraud claim. A typical risk-factor statement under Item 105 warns of two risks: first, that "some triggering event" may occur, and second, that the event may cause "some consequence—usually harm to the business." Pet. Br. 2. Here, for example, petitioners' Form 10-K identified both a potential triggering event ("improper access to or disclosure of our data or user data") and a potential harmful consequence of such an event ("could harm our reputation and adversely affect our business"). J.A. 439 (emphasis omitted). Such a statement can mislead when the triggering event has already materialized, even if the follow-on business harm has not yet come to pass. Thus, in the hypothetical involving a realtor described above, see p. 14, *supra*, the realtor's statement about a potential spike in crime would be misleading even if only the crime wave, and not any resulting drop in property values, had already begun to happen. And in *Matrixx*, the statement that product-liability claims could "affect Matrixx's 'product branding and goodwill,' leading to reduced customer acceptance," was misleading even though only the adverse health events and the lawsuits, and not necessarily the "reduced customer acceptance," had begun to materialize when the statement was made. 563 U.S. at 34 (citation omitted); see *Siracusano*, 585 F.3d at 1172, 1181.

The misleading character of such statements does not depend on whether the undisclosed triggering event—here, Cambridge Analytica's misuse of Facebook user data—was "almost certain" to produce business harm at the time the statements were made. The antifraud provisions at issue address the relative importance of an issuer's misrepresentation or omission principally by requiring it to be "material." *Matrixx*, 563 U.S. at 37 (citation omitted). This Court has long held that, "to fulfill the materiality requirement," "'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *Basic*, 485 U.S. at 231-232 (citation omitted). There is no sound reason to think that a reasonable investor would care about only those potential business harms that are nearly certain to occur. See, *e.g.*, *Matrixx*, 563 U.S. at 44 (reports of adverse drug events can be material even absent "statistical significance"). If adopted in risk-factor cases, the "virtual certainty" test would effectively replace the established materiality standard with a substantially more demanding requirement.

D. Respondents Have Plausibly Alleged That Facebook's Risk-Factor Statements Were False Or Misleading

Respondents have adequately pleaded that the relevant risk-factor statements in Facebook's 2016 Form 10-K and subsequent filings were false or misleading.

1. Respondents have plausibly alleged that petitioners "represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired." Pet. App. 24a. The risk-factor statements at issue are reasonably read as describing events like Cambridge Analytica's improper receipt and use of Facebook users' data as hypothetical risks rather than risks that had previously materialized. For example, petitioners described how "any" failure to prevent improper access to user data "could" result in the misuse of such data, and how such misuse could occur "if" third parties or app developers failed to follow data-security practices. J.A. 439-440. Those statements could plausibly be thought to have created the inaccurate impression that a "significant episode of improper access to or disclosure of user data by a developer," like Cambridge Analytica's misuse of the user data it had obtained, J.A. 283, had not recently occurred. See, *e.g.*, *Berson*, 527 F.3d at 986 (holding that plaintiffs had adequately pleaded securities-law violations where language in the defendant's SEC filings "speaks entirely of as-yet-unrealized risks and contingencies" and does not "alert[] the reader that some of these risks may already have come to fruition").

For the reasons set forth above, that theory of Rule 10b-5 liability is well grounded in precedent and the expectations of ordinary investors. A "reasonable investor would be very interested in knowing, not merely that future" misuses of user data could harm petitioners' business, "but that" a major instance of such misuse had already materialized. *Westinghouse*, 90 F.3d at 709. A reasonable investor would view that information as significant both because of the magnitude of Cambridge Analytica's own misconduct, and because Facebook's failure to prevent that misconduct might cause Facebook users to view their own privacy on the platform as more vulnerable going forward. See Resp. Br. 28. Indeed, respondents' allegations would be sufficient even under the virtual-certainty standard described above. See pp. 27-28, *supra*. Those allegations support the inference that such an important event implicating users' data was bound to harm Facebook's business, which significantly depends on users' confidence in the privacy of their data. See, *e.g.*, J.A. 8-9, 16-17, 22-27.

The Ninth Circuit rightly noted the striking parallels between this case and *Alphabet*, *supra*. The plaintiffs there plausibly alleged that Alphabet had misled investors by warning of data-security risks that could arise and harm its business, at a time when Alphabet already "knew that those risks had materialized," 1 F.4th at 704, primarily in the form of a major security glitch or "Privacy Bug," *id.* at 695-696. Dissenting in relevant part below, Judge Bumatay asserted that the ultimate business harm at issue in *Alphabet*, "greater regulatory scrutiny," had already "come to fruition" when the allegedly misleading statements were made. Pet. App. 47a. But the *Alphabet* plaintiffs alleged that the defendant's executives had "chose[n] a strategy of nondisclosure" in order to *avoid* such scrutiny. 1 F.4th at 696. As the panel majority below explained, Alphabet's SEC filings were misleading because the "privacy bug itself[] had materialized" when those filings were submitted, even though "Alphabet's identified harm of damage to its business, financial condition, results of operations, and more had not yet materialized at the time of the filings." Pet. App. 25a (internal quotation marks omitted). That reasoning is equally applicable here.

2. Petitioners describe the court of appeals as holding that a risk statement is misleading even if an undisclosed past event poses no "risk of ongoing or future business harm." Pet. Br. I; see *id.* at 33. That characterization reflects a misreading of the court's opinion. In observing that "it is 'the fact of the [triggering event] itself, rather than the anticipation of reputation or financial harm,' that renders a risk disclosure misleading," *id.* at 33 (quoting Pet. App. 25a) (brackets in petitioners' brief), the court was explaining that (contrary to Judge Bumatay's view) such a statement's misleading character does not depend on whether the ultimate business harm has already occurred when the statement is made. See Pet. App. 24a-25a ("Because Facebook presented the prospect of a breach as purely hypothetical when it had already occurred, such a statement could be misleading even if the magnitude of the ensuing harm was still unknown.").

Because the undisclosed events here were plainly important, the court of appeals had no occasion to address the proper treatment of risk-factor statements that fail to disclose *insignificant* past events. Holding that such omissions cannot give rise to Rule 10b-5 liability therefore would provide no ground for reversal here. Presumably that is why petitioners' primary argument for reversal is the broader claim that risk statements categorically imply nothing about the past and can be misleading under the securities laws only if their explicit content is false. As discussed, that argument is mistaken. See pp. 13-27, *supra*.

3. Petitioners also contend (Br. 27-28) that the particular omissions alleged in this case could not have misled investors because Facebook's other risk-factor statements mentioned past occurrences of hacking and other cyberattacks, and because the 2015 *Guardian* article had already reported on Cambridge Analytica's misuse of customer data. See Pet. Br. 27-28; see also Pet. App. 45a (Bumatay, J., concurring in part and dissenting in part). Those arguments lack merit.

The data misuse at issue here was not a cyberattack. Indeed, Facebook itself stated after the Cambridge Analytica news broke in March 2018 that "[t]he claim that this is a data breach is completely false." J.A. 631; see Pet. App. 26a-27a. The fact that Facebook's risk statements explicitly acknowledged past hacking and other cyberattacks simply exacerbated the misleading nature of describing misuse of customer data as only a future risk, see J.A. 439.

As for the 2015 *Guardian* article, Facebook responded to the article by depicting the Cambridge Analytica matter as something to be investigated. See Pet. App. 26a. Facebook's subsequent conduct—such as its failure to notify users that their data had been compromised, which the company later admitted was error—tended to signal that nothing improper had happened. See p. 5, *supra*. And the court of appeals' decision was premised on that court's understanding that "the extent of Cambridge Analytica's misconduct was not yet public when Facebook filed its 2016 Form 10-K." Pet. App. 26a. The March 2018 media coverage of Cambridge Analytica, and the ways in which government agencies and the public responded to that news, further suggest that the earlier article had not fully apprised the public of the firm's misuse of consumer data. Respondents have plausibly alleged that the reporting in 2015 did not transmit the truth "to the public with a degree of intensity and credibility sufficient to" preclude investors from being misled by petitioners' subsequent risk-factor statements. *Ibid.* (quoting *Provenz* v. *Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996), cert. denied, 522 U.S. 808 (1997)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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