No. 23-980

IN THE

Supreme Court of the United States

FACEBOOK, INC., ET AL.,

Petitioners,

v.

AMALGAMATED BANK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Both questions presented implicate recognized circuit splits on recurring and important questions of securities law that can spell the difference between dismissal and an outsized settlement. The Ninth Circuit's decision was unprecedented and will open the floodgates to meritless but costly securities-fraud litigation.

On risk disclosures, plaintiffs attempt to evade this Court's review by rewriting the Ninth Circuit's holding. But as the Ninth Circuit's opinion itself, Judge Bumatay's dissent, and outside commentators all confirm, the decision below adopted the extreme rule that risk disclosures are misleading if they fail to chronicle past instances when a risk came to fruition—even if those past events pose no known risk of business harm. That rule is both anomalous and unworkable, and future plaintiffs will use it as a cudgel to extract high-dollar settlements for meritless claims.

On loss causation, plaintiffs' denial that any split exists blinks reality. Their backup argument that the difference between Rules 8 and 9(b) is unimportant cheapens the protections that Congress and this Court have afforded against abusive securities-fraud claims. And their suggestion that courts should assess the merits of their loss-causation theory after discovery ignores that Rule 9(b)'s particularity requirement is often the only barrier between a meritless lawsuit and a costly settlement.

This Court should grant certiorari and reverse.

ARGUMENT

I. THE NINTH CIRCUIT'S OUTLIER RULE FOR RISK DISCLOSURES WARRANTS REVIEW.

The Ninth Circuit's decision transforms the risk-factors section of 10-Ks into a minefield for public companies and a treasure hunt for plaintiffs alleging fraud-by-hindsight whenever an unexpected event leads to a stock drop. This Court's review is warranted.

A. The Ninth Circuit broke ranks from seven other courts of appeals and deepened a three-way circuit split.

1. Plaintiffs' assertion (at 14-18) that there is no split hinges on their mischaracterization of the decision below. They insist (at 1-2, 11-14) the panel majority "did not hold that companies must disclose events that pose no threat of business harm." That attempted makeover of the Ninth Circuit's decision does not hold up.

First, plaintiffs' summary of the Ninth Circuit's holding conflicts with the plain language of the panel's opinion, which stated: "Our case law does not require harm to have materialized for a statement to be materially misleading," and it was "*the fact of the breach itself*, rather than the anticipation of reputational or financial harm, that caused anticipatory statements to be materially misleading." Pet.App.24a-25a (emphasis added). Indeed, Judge Bumatay understood the majority opinion to espouse the "surprisingly broad view" that "it's enough that a breach had occurred, never mind whether the breach led to a discernible effect on Facebook's reputation or business at the time." Pet.App.45a-46a.

Second, outside commentators—including three *amici*—likewise read the Ninth Circuit's decision as adopting an "outlier" rule that companies must disclose past events even if they have no reason to suspect those events will harm the business. Law Profs. Br. 2-3; *see* Chamber of Com. Br. 3 (similar); Wash. Legal Found. Br. 2 (similar). Other industry experts have also sounded the alarm, describing the Ninth Circuit as "an outlier in how it has viewed risk factor disclosure" and warning that "plaintiffs will seize upon [the decision below] to try to bring securities fraud claims with regard to more routine-type risk disclosures." Virginia Milstead & Mark Foster, *Beware of Potential Securities Litigation Over Risk-Factor Disclosures*, Reuters (Jan. 24, 2024); *see also* Richard Zelichov, *High Court Should Settle Circuit Split on Risk Disclosures*, Law360 (Apr. 8, 2024) (describing "growing split" and Ninth Circuit's decision below as "broader" than the rule in other circuits). The breadth of the panel's decision is unlikely to escape the attention of the plaintiffs' bar, which is "increasingly targeting the risk factor sections of SEC filings." Milstead & Foster, *supra*.

2. Beyond misconstruing the decision below, plaintiffs attempt to obscure the split by erasing the business-harm requirement from other circuits' decisions. They argue (at 14-16) that every circuit finds risk disclosures misleading if they fail to disclose that a risk has materialized, regardless of whether the business suffers any harm. Not so: the presence or near-certainty of business harm is a key ingredient in other circuits' rules. *See, e.g.*, *Ind. Pub. Ret. Sys.* v. *Pluralsight, Inc.*, 45 F.4th 1236, 1256-57 (10th Cir. 2022) (claim failed without allegations that defendant

"was so far behind in its sales ramp capacity plan that it was virtually certain to cause harm to the business"); *Karth* v. *Keryx Biopharms., Inc.*, 6 F.4th 123, 137-38 (1st Cir. 2021) (claim failed without allegations that "alleged risk had a 'near certainty' of causing 'financial disaster'" and that defendant "understood the near certainty of the risk"); *Williams* v. *Globus Med., Inc.*, 869 F.3d 235, 243 (3d Cir. 2017) (claim failed without allegations that defendant "was already experiencing an adverse financial impact" or that such an impact "was inevitable"). The Ninth Circuit alone dispenses with the business-harm requirement.

Plaintiffs attempt to distinguish those cases, arguing (at 15) that "the warned-of risk in those cases *was* a particular form of business harm." But that is no distinction at all: as Judge Bumatay noted in dissent, Facebook's risk disclosures also "warn[ed] about harm to Facebook's 'business' and 'reputation' that 'could' materialize based on improper access to Facebook users' data—not about the occurrence or non-occurrence of data breaches." Pet.App.44a. The majority acknowledged this, but held plaintiffs adequately alleged the disclosures were materially misleading anyway. *See id.* at 12a, 21a, 24a-25a, 29a. No other circuit would have reached that conclusion.

Plaintiffs also dismiss (at 17-18) the Sixth Circuit's holding that risk disclosures need not discuss *past* events because they "are inherently *prospective* in nature." *Bondali* v. *Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015). Plaintiffs say (at 17) that opinion provided only "general musings" in "dicta." Not so: the Sixth Circuit's rule was based on its textual analysis of the word "risk," and it squarely

held that risk disclosures are "not actionable" for failure to disclose past events. *Bondali*, 620 F. App'x at 491. Indeed, in a prior case, the Ninth Circuit recognized this holding and expressly split from it. *See In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 704 n.6 (9th Cir. 2021).

Retreating, plaintiffs argue (at 17-18) that the Sixth Circuit's decision is unpublished and that some courts have declined to follow it. *But see, e.g.*, *Ind. Pub. Ret. Sys.* v. *Pluralsight, Inc.*, 2021 WL 1222290, at *14 (D. Utah Mar. 31, 2021) (following *Bondali* and noting "several courts have found that risk disclosures are not independently actionable"), *aff'd in relevant part*, 45 F.4th at 1255-57. That is precisely the problem: the Sixth Circuit's decision—the only one to conduct a textual analysis—is *correct*, and other courts' deviation from it is a reason to grant review, not deny it. *See* Pet. 26-27. And even if that were not the case, the Ninth Circuit's outlier rule lacks support in *any* circuit.

B. The issue is important, recurring, and squarely presented.

Plaintiffs suggest (at 16, 19) the first question presented is unimportant because lawsuits based on "events that pose no risk of harm to a business" will be dismissed on materiality grounds. That ignores what happened in this case: the Ninth Circuit held Facebook's risk disclosures were "materially misleading" *without* requiring business harm. Pet.App.24a. This holding also invites fraud-by-hindsight allegations that attach significance to past events *after* an unexpected stock drop, even if a company had no reason to suspect business harm at

the time of disclosure. Again, this case is a prime example. Plaintiffs abandoned on appeal their argument that anyone responsible for Facebook's 2016 10-K knew about Cambridge Analytica's *retention and continued* misuse of user data for the Trump campaign. *See* Pet. 11 n.2. Yet, after this came to light and Facebook's stock price fell, plaintiffs alleged the risk disclosures in the 10-K were materially misleading because they did not discuss the *initial* misuse of user data for the Cruz campaign—which was publicly reported years earlier without causing any alleged harm to Facebook's business.

This Court's recent decision in *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 144 S. Ct. 885 (2024), further underscores the importance of the issue in this case. In *Macquarie*, the Court unanimously held that "[p]ure omissions are not actionable under Rule 10b-5(b)." *Id.* at 889. The Court declined to address "when a statement is misleading as a half-truth," *i.e.*, when a statement is rendered misleading by omission, as plaintiffs allege here. *Id.* at 892 n.2. But as the briefing and argument in *Macquarie* confirmed, it is often easy for plaintiffs to recast pure-omission claims as half-truth claims, *see ibid.*—and after *Macquarie*, that is precisely what many plaintiffs will do.

Plaintiffs also note (at 17) that this Court previously denied a petition raising this issue. *See Alphabet Inc.* v. *Rhode Island*, No. 21-594. But the decision below went far beyond *Alphabet*. *See* Pet.App.47a (Bumatay, J., dissenting) ("this case is nothing like *Alphabet*"); Pet. 22-23. If the Ninth

Circuit's outlier rule stands, plaintiffs will flock to file claims there that would not survive in other circuits.

C. The Ninth Circuit's rule is wrong.

Plaintiffs' merits arguments (at 20-22) are wrong, and in any event do not counsel against review to resolve the circuit split. Plaintiffs frame this as a truth-on-the-market case—*i.e.*, a case where a false or misleading statement has no effect because the market already knows the truth—but that simply dodges the question presented, which is whether the risk disclosures here were false or misleading in the first place.

Plaintiffs argue that Facebook "offers no support for its *factual* claim that investors never view risk-factor statements as conveying information about past events." Opp. 20 (emphasis added). This is not a "factual" claim subject to proof, but a legal argument about the nature of risk disclosures—which "are inherently *prospective* in nature." *Bondali*, 620 F. App'x at 491. And plaintiffs' demand for an explicit statutory carveout precluding liability for risk disclosures both misses the point (no carveout is necessary where a statement is, by its nature, not misleading) and ignores that, before the SEC began requiring risk disclosures in 2005, companies initially included them as "cautionary statements" to qualify under the PSLRA's safe harbor for forward-looking statements. 15 U.S.C. § 78u-5(c)(1)(A)(i).

II. THE NINTH CIRCUIT'S UNPRECEDENTED LOSS-CAUSATION ANALYSIS WARRANTS REVIEW.

Almost twenty years after *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), "the meaning of loss causation remains a source of much

misunderstanding." *Loreley Fin. (Jersey) No. 3 Ltd.* v. *Wells Fargo Sec., LLC*, 797 F.3d 160, 183 (2d Cir. 2015). The lower courts have split over what pleading standard applies, and how to apply it. The Court should grant certiorari to resolve the split and provide guidance on this critical threshold issue in securities-fraud litigation.

A. The split is open and recognized.

Numerous courts of appeals have acknowledged the split over whether Rule 8 or Rule 9(b) governs loss-causation pleadings.[1] Commentators have, too.[2] And while plaintiffs point (at 23) to petitions this Court denied ten or more years ago, the split has only deepened since then. Pet. 28-31.

Plaintiffs' argument (at 25-27) that there is no split is meritless. Plaintiffs acknowledge the Fourth and Ninth Circuits have held Rule 9(b) applies, and do not deny the confusion in many other circuits. They argue only that the Fifth and Sixth Circuits "did not address the question." Opp. 25. That is incorrect.

The Fifth Circuit, citing *Dura*, holds that "for a plaintiff's complaint to adequately allege or plead [loss causation], it *need only* set forth a short and plain statement of the claim showing that the pleader is

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[1] *E.g.*, *Or. Pub. Emps. Ret. Fund* v. *Apollo Grp. Inc.*, 774 F.3d 598, 604-05 (9th Cir. 2014); *Mass. Ret. Sys.* v. *CVS Caremark Corp.*, 716 F.3d 229, 239 n.6 (1st Cir. 2013).

[2] *E.g.*, Gregory A. Markel & Martin L. Seidel, *Lower Courts Divided on Standard for Pleading Loss Causation Post*-Dura, N.Y. L.J. (Mar. 31, 2011); Evan Hill, *The Rule 10b-5 Suit: Loss Causation Pleading Standards in Private Securities Fraud Claims After* Dura Pharmaceuticals, Inc. *v.* Broudo, 78 Fordham L. Rev. 2659 (2010).

entitled to relief, pursuant to Federal Rule[] of Civil Procedure 8(a)(2)." *Lormand* v. *US Unwired, Inc.*, 565 F.3d 228, 256 (5th Cir. 2009) (emphasis altered; quotation marks omitted); *accord Pub. Emps. Ret. Sys.* v. *Amedisys, Inc.*, 769 F.3d 313, 320 (5th Cir. 2014). Other courts have read that holding to mean what it says: Rule 8 applies, not Rule 9(b). *Supra* n.1.

The Sixth Circuit likewise holds that "[a]t the dismissal stage, it is sufficient that [loss causation] allegations be plausible." *Ohio Pub. Emps. Ret. Sys.* v. *Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 384 (6th Cir. 2016). Plaintiffs insist that holding does not rule out Rule 9(b), but the Sixth Circuit itself says otherwise. *Plymouth Cnty. Ret. Ass'n* v. *ViewRay, Inc.*, 2022 WL 3972478, at *2 (6th Cir. Sept. 1, 2022) ("Falsity and scienter must be pleaded with particularity, . . . while loss causation need be pleaded only plausibly." (citing *Ohio Pub. Emps.*, 830 F.3d at 384)).

B. This case is an ideal vehicle to resolve the split and provide guidance on an important and recurring issue.

Plaintiffs argue (at 27-28) the pleading standard for loss causation is unimportant, suggesting there is no meaningful difference between Rule 8 and Rule 9(b). But Rule 9(b)'s particularity requirement provides enhanced protection for defendants on "certain subjects understood to raise a high risk of abusive litigation." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 569 n.14 (2007). As this Court and Congress have recognized, private securities-fraud class actions are exactly the sort of suits requiring "a check against abusive litigation," which "[e]xacting pleading requirements" provide. *Tellabs, Inc.* v. *Makor Issues*

& Rts., Ltd., 551 U.S. 308, 313 (2007). Accordingly, Congress has previously stepped in after the "Courts of Appeals diverged on the character of the Rule 9(b) inquiry in § 10(b) cases," and this Court has granted review after the "Courts of Appeals . . . diverged again" in applying the PSLRA. *Id.* at 319, 322 (addressing scienter). This Court should do so again to vindicate Congress's desire for "a uniform pleading standard for § 10(b) actions." *Id.* at 320.

Plaintiffs argue (at 28) that the Ninth Circuit's substitution of Rule 9(b) for Rule 8 in its amended opinion, without any change in its analysis, confirms any difference in these standards is negligible. That draws the wrong lesson. Rule 9(b) is *supposed* to "serve[] an important screening function in securities fraud suits." *Melder* v. *Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994); *see also Tellabs*, 551 U.S. at 327 n.9 (Rule 9(b) can "prevent[] a plaintiff from getting discovery on a claim that might have gone to a jury"). The difference between the two rules should be, and often is, dispositive. *See, e.g.*, *Republic Bank & Tr. Co.* v. *Bear Stearns & Co.*, 683 F.3d 239, 256-57 (6th Cir. 2012) (rejecting securities-fraud claim under Rule 9(b) and distinguishing similar case as decided under Rule 8). The fact that the Ninth Circuit perceived no additional requirements from Rule 9(b) underscores both its error and the need for this Court's guidance on "the character of the Rule 9(b) inquiry in § 10(b) cases" to prevent the strict-by-design pleading standard from becoming a paper tiger. *Tellabs*, 551 U.S. at 319.

Plaintiffs also assert (at 24, 28) that Facebook "made no Rule 9(b) argument to the panel." That is false: Facebook argued that plaintiffs "must meet the higher, exacting pleading standards of Federal Rule of

Civil Procedure 9(b)" and that "[t]hese exacting standards apply to all elements of a securities fraud action." Petr. C.A. Br. 18. Facebook specifically argued that plaintiffs' "theory of loss causation lacks any support in the caselaw and is incompatible with the strict pleading standards for securities-fraud actions." *Id.* at 47; *see also id.* at 2 ("plaintiffs must allege with particularity that Facebook knowingly lied to the market and those lies caused a stock drop" (emphasis omitted)). Facebook had no reason to expect the panel would depart from binding circuit precedent applying Rule 9(b)—and once it did, Facebook petitioned for rehearing on that issue. The question is cleanly presented.

C. The Ninth Circuit's analysis is unprecedented and wrong.

Plaintiffs' leading merits argument (at 28-30) is that any errors in the Ninth Circuit's analysis pertain to "substantive law, not pleading rules." That is a red herring: pleading rules operate within the framework of what the substantive law requires. Here, the § 10(b) cause of action required plaintiffs to connect "the defendant's misrepresentation" to "the plaintiff's economic loss." *Dura*, 544 U.S. at 346. And Rule 9(b) required them to plead particularized facts drawing that connection. Plaintiffs did not and could not do that, and it was only by watering down the pleading standard that the Ninth Circuit approved their novel loss-causation theory.

Plaintiffs' defense of that decision fares no better. They cite no case—in this Court or any other—holding that a single corrective disclosure can cause two separate stock drops months apart. Instead, plaintiffs argue (at 30-31) that the truth can be revealed bit by bit. Here, however, plaintiffs pleaded *no facts*—much

less the particularized facts Rule 9(b) requires—showing that *new information* precipitated the second, $100-billion stock drop in July 2018. To the contrary, that second stock drop followed a disappointing earnings report that did nothing to correct the alleged misstatements. *See* Pet. 9, 35-36.

Finally, plaintiffs argue (at 32) that this is "just the beginning" and "discovery may disprove loss causation." But the point of Rule 9(b) is to require particularized facts up front, *before* unlocking the doors to discovery. Plaintiffs' argument also ignores the practical reality that in nearly every securities-fraud class action, the consequence of pushing cases past dismissal is not a trial on the merits; it is settlement. Pet. 25 & n.3, 32. That cost should not be foisted on public companies based on a legal error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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