No. 23-980

In the Supreme Court of the United States

FACEBOOK INC., et al.,

v.

AMALGAMATED BANK, et al.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

TYLER S. BADGLEY
MARIA C. MONAGHAN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Ave., NW
Washington, D.C. 20001

JUDSON O. LITTLETON
Counsel of Record
DANIEL J. RICHARDSON
SULLIVAN & CROMWELL LLP
1700 New York Ave., NW
Suite 700
Washington, D.C. 20006
(202) 956-7522
littletonj@sullcrom.com

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INTEREST OF AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of securities firms, banks, and asset managers across the globe. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA regularly files amicus briefs in cases such as this one that have broad implications for financial markets, and frequently has appeared as amicus curiae in this Court.

Many of amici's members are subject to the U.S. securities laws and will be harmed by the theory of liability adopted by the court of appeals in this case.

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* No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 2005, the SEC has required public companies to concisely discuss in their public filings "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105. In these risk factor disclosures, companies advise investors of a wide range of future risks that could harm the business and shareholders' investment—including such risks as supply chain disruptions, environmental hazards, or cybersecurity breaches, to give a few examples.

In recent years, these SEC-mandated risk factor disclosures have been seized upon by plaintiffs bringing event-driven, hindsight-based securities fraud suits. These suits generally do not allege that the company's risk disclosures were misleading about the *future* risk facing the business. Instead, they claim that those forward-looking disclosures misled investors about *past* events that relate to those future risks.

Fundamental securities law principles ought to shut the door on those claims. Although companies must ensure that their statements are not false or misleading to a reasonable investor, see *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186, 191 (2015), absent an affirmative duty to disclose, they are not required to share all material information that investors may care to know, see *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44-45 (2011).

Risk factor disclosures create no such affirmative duty to disclose past events. These disclosures are inherently forward-looking: they tell investors what factors *may* cause harm to the company at some point in the future, thus making their investment "speculative

or risky." Reasonable investors thus do not understand those statements to convey any information about what has already happened to the company. So a securities fraud claim alleging that a company's risk disclosure was misleading because it failed to disclose something that happened in the *past* should not make it out of the gate.

That reasoning should have resolved this case. As relevant here, Facebook warned investors that certain kinds of incidents ("security breaches and improper access to or disclosure of . . . user data") *could* cause certain kinds of harms to the company (damage to Facebook's "reputation and . . . business") and thus "make an investment [in Facebook] risky." Pet. App. 42a. Those statements accurately described future risks facing Facebook's business, and they said nothing one way or the other about Facebook's past experience with security breaches or misuse of user data. Accordingly, those statements could not mislead a reasonable investor as to anything that happened to Facebook in the past.

But a divided panel of the Ninth Circuit disagreed, reasoning that Facebook's forward-looking risk disclosures were misleading because the company had not simultaneously disclosed a *past* incident involving the improper dissemination of user data. According to the majority, Facebook was required to disclose that incident even though the company had thoroughly investigated it and believed when it made the challenged statements that the incident posed no ongoing threat to the business. Pet. App. 11a-12a.

The implications of the Ninth Circuit's decision are deeply troubling: public companies must either inform the public of every past incident that *could* harm the business—"even if the harm caused by the [incident]

was completely 'unknown' to" the company at the time it issued its risk disclosures, Pet. App. 46a (Bumatay, J. concurring in part and dissenting in part)—or face the prospect of crippling class action liability any time a past incident ultimately results in harm.

In fact, as a result of prior decisions that have recently recognized this flawed theory of liability, these consequences are already beginning to manifest. Businesses are being incentivized to flood the market with irrelevant information, to the detriment of both investors and public companies. And these cases are spurring a new wave of event-driven lawsuits, forcing public companies to fend off securities fraud claims any time an incident that a plaintiff can attempt to tie to a risk disclosure causes a drop in a company's share price. The decision below represents the most extreme example yet of this theory gone awry.

Nothing in the securities laws permits this state of affairs. The SEC has instructed companies to provide investors with concise and targeted assessments of *future* risks to their businesses. The court of appeals' decision allows plaintiffs to punish companies for doing exactly that, and incentivizes lengthy, irrelevant, overlawyered risk disclosures. That decision should be reversed.

ARGUMENT

I. RISK FACTOR DISCLOSURES CANNOT SUPPORT LIABILITY BASED ON THE FAILURE TO DISCLOSE PAST EVENTS.

Under SEC regulations, public companies must disclose in their annual and quarterly reports any "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105 (Item 105). By its plain terms, Item 105 requires companies to discuss

only those factors that may harm the company at some point in the future; it does not impose an affirmative obligation to disclose incidents that have occurred in the past. See *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 264 (2024) (citation omitted) (explaining that the securities laws "do not create an affirmative duty to disclose any and all material information"). And because risk disclosures are inherently forward-looking, no reasonable investor would rely on those statements to understand what had already occurred or was then occurring at a company.

The Ninth Circuit rejected that straightforward conclusion and allowed plaintiffs to proceed on the theory that a forward-looking risk factor disclosure was misleading because it failed to disclose a past event that *could* have caused the warned-of risk to materialize. That theory imposes an affirmative disclosure requirement found nowhere in the securities laws or the regulations implementing them. And it creates an amorphous disclosure standard that is unworkable in practice and harmful to securities markets.

If there are any circumstances in which a company would need to disclose past events in its risk factor disclosures, such a claim would, at a minimum, require an allegation that the company actually knew that the specific harm identified in its risk disclosure was imminent and would directly result from that past event. Plaintiffs' allegations in this case did not clear that hurdle—on the contrary, the Ninth Circuit acknowledged that Facebook *did not know* that the undisclosed data breach posed any threat to the company at the time it issued the challenged risk disclosures. By nonetheless allowing plaintiffs' claim to proceed, the Ninth Circuit went further than any court in the country and adopted a theory of liability that forces companies to bloat their

risk disclosures with irrelevant and extraneous descriptions of past events.

A. Public companies have no obligation to disclose past events in their risk factor disclosures.

1. "Risk disclosures … are inherently *prospective* in nature." *Bondali* v. *Yum! Brands, Inc.*, 620 Fed. Appx. 483, 491 (6th Cir. 2015). "They warn an investor of what harms *may* come to their investment," but do not "educate investors on what harms are currently affecting the company." *Ibid.*

That understanding follows from the ordinary meaning of "risk," which is the "possibility of loss, injury, disadvantage, or destruction." *Ibid.* (quoting Webster's Third New Int'l Dictionary 1961 (1986)). A warning that your beachfront house might flood if a hurricane hits the coast says nothing one way or the other about whether storms have hit the area in the past—you have to look elsewhere (or ask a follow-up question) for that information. The securities laws recognize this ordinary-English distinction between forward-looking statements about future risks and representations about the past or present. See generally *Slayton* v. *American Express Co.*, 604 F.3d 758, 765 (2d Cir. 2010) (discussing the PSLRA "statutory safe-harbor for forward-looking statements").

"[W]hether a statement is misleading depends on the perspective of a reasonable investor" who "understands a statement . . . in its full context." *Omnicare*, 575 U.S. at 186, 190 (internal quotation marks omitted). For risk factor disclosures, that "context" is provided by Item 105, which requires a public company to "concisely" explain to investors "in plain English" the "material factors" making an investment in the company "speculative or risky"—i.e., future events that might

harm the value of the company's stock. 17 C.F.R. 229.105.

That context makes clear that companies are not required to disclose an incident that occurred in the past in their risk factor disclosures. Reasonable investors know the difference between a company's predictions (or warnings) about the future and its statements about past or present operations. See, *e.g.*, *Julianello* v. *K-V Pharm. Co.*, 791 F.3d 915, 921 (8th Cir. 2015) (explaining that statements were forward-looking because "the veracity of the statements could only be determined after they were made"); *Raab* v. *General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993) (distinguishing between a company's "accurate reporting of its past results" and "predictions . . . about future growth"). So a company's discussion of *future* risks in compliance with Item 105 does not make any implicit representation to investors about the occurrence (or not) of events in the *past*. Cf. *Goldman Sachs Grp., Inc.* v. *Arkansas Teacher Ret. Sys.*, 594 U.S. 113, 123 (2021) (explaining that a "mismatch between the contents of the misrepresentation and the corrective disclosure" causes any "inference" of price impact "to break down"). Risk disclosures are silent about the past, and "[s]ilence, absent a duty to disclose, is not misleading." *Macquarie Infrastructure Corp.*, 601 U.S. at 265.

The risk factor disclosures at issue in this case fit that pattern. Facebook warned investors that if certain incidents occurred ("[a]ny failure to prevent or mitigate security breaches and improper access to or disclosure of … user data"), they could lead to adverse effects on its business ("could harm our business and reputation and diminish our competitive position"). Pet. App. 42a. Those statements accurately described risks facing the company in the future. And they did

not make any representation about the company's current operations, such as "that Facebook was free from significant breaches at the time of filing," Pet. App. 44a—to the contrary, Facebook's risk disclosures stated that "computer malware, viruses, social engineering (predominantly spear phishing attacks), and general hacking have become more prevalent in our industry, have occurred on our systems in the past, and will occur on our systems in the future." Pet. App. 45a.

In short, Facebook's risk disclosures complied with Item 105 by warning investors about future risks facing the company related to user data. And they did so without making any statements that would have led a reasonable investor to believe that Facebook had never encountered such a security breach in the past.

2. The Ninth Circuit nonetheless allowed plaintiffs' claim to proceed. In doing so, the majority reasoned that risk disclosures can be misleading when they warn investors that "risks 'could' occur when, in fact, those risks had already materialized." Pet. App. 22a (citing *In re Alphabet Sec. Litig.*, 1 F.4th 687, 702-705 (9th Cir. 2021)). Other courts have likewise applied some form of this "materialization-of-risk" standard to assess similar claims based on risk factor disclosures (though none has gone as far as the Ninth Circuit here). See *Indiana Pub. Ret. Sys.* v. *Pluralsight, Inc.*, 45 F.4th 1236, 1255-1256 (10th Cir. 2022); *Karth* v. *Keryx Biopharm., Inc.*, 6 F.4th 123, 138 (1st Cir. 2021); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104, 106 (D.C. Cir. 2015).

The materialization-of-risk standard applied by these courts is inconsistent with ordinary English, SEC regulations, and precedent. As explained above, Item 105 requires public companies to describe future

risks to an investment; it does not impose any affirmative obligation to disclose past events, and reasonable investors do not interpret statements about the future to make any representation about the past. See *Omnicare*, 575 U.S. at 188. Given that context, a reasonable investor reading a company's risk disclosure would not be misled about what has occurred in the past. See *Bondali*, 620 Fed. Appx. at 491. The decisions recognizing the potential for materialization-of-risk liability largely fail to grapple with that simple logic. See *Pluralsight, Inc.*, 45 F.4th at 1255-1256.

The problems with the materialization-of-risk theory are confirmed by how unworkable it has been in practice. Even the courts that accept backward-looking risk disclosure claims cannot agree on when that standard triggers liability. Some decisions have reasoned that disclosure is required any time a company "*knows with certainty* that a risk would materialize" at some point in the future, *Karth*, 6 F.4th at 138 (emphasis added), or that the harm is "*virtually certain* to occur," *Pluralsight*, 45 F.4th at 1255 (emphasis added). Other decisions recognize that the "risk" that must have "materialized" is the *harm* to the business, not simply the potentially triggering incident. See, *e.g.*, *Karth*, 6 F.4th at 138; *Williams* v. *Globus Med., Inc.*, 869 F.3d 235, 241 (3d Cir. 2017). Before the decision below, the Ninth Circuit had suggested that companies must disclose past events only when the risk "had *already* come to fruition." *Alphabet*, 1 F.4th at 703. In this case, the court of appeals went even further, holding that disclosure is required whenever a warned-of *incident* has occurred, even if that incident has not harmed the company and the company does not believe it will do so.

None of these formulations is defensible. To the extent courts require companies to disclose incidents that have already harmed the company, that approach contradicts Item 105. If a warned-of harm has *already* arisen, it is not a factor that makes an investment in the business "risky" or "speculative" *going forward*. 17 C.F.R. 229.105. Other SEC regulations require companies to disclose past or ongoing incidents that may be material to investors. See, *e.g.*, 17 C.F.R. 229.103 ("material pending legal proceedings"); *Id.* 229.303(b)(2)(ii) ("known trends or uncertainties that have had . . . a material favorable or unfavorable impact"). By its terms, Item 105 does not require any such disclosure of past or ongoing harms.

Courts that instead require disclosure of incidents that have not already harmed the company have been unable to offer any meaningful guidance. One court has suggested that disclosure is necessary when a company is "desperately working to protect itself from rapidly approaching harm." *Karth*, 6 F.4th at 138. That standard is either easily manipulable or met by any company diligently working to identify and mitigate risks to its business. And securities fraud plaintiffs pursuing claims many years after the fact will always be able to allege (with the benefit of hindsight) that a company knew that its mitigation efforts would be fruitless and a particular incident would likely cause harm.

Consider a typical example. Many risk factor disclosures discuss the harms a company might suffer if it cannot secure adequate supply to manufacture its products. Imagine a public company learns that a major supplier is likely to cancel its contract because of an attractive offer from another buyer, and immediately begins trying to renegotiate the contract and looking

for alternative sources of supply. If the company ultimately cannot resolve the issue, and its bottom line suffers, when did that harm "materialize?" When the company first learned of the supplier's intentions? When its attempt to renegotiate the contract stalled out? Or at some point in its attempt to secure another source of supply? Decisions embracing the materialization-of-risk standard do not say. And of course businesses have strong reasons to avoid disclosing potential risks too early, at a stage when the company may still be able to address the issue without causing unwarranted concerns by their investors.

All told, the right rule is the simplest one: plaintiffs cannot pursue claims alleging that a company's forward-looking risk disclosure misled them about whether an event happened in the past. That rule is consistent with ordinary English, the "context" of Item 105 risk factor disclosures, and the securities laws' longstanding recognition of the distinction between forward-looking statements and statements of present or historical fact.

B. At a minimum, the rule adopted by decision below is clearly wrong.

Even if the Court does not adopt a bright-line rule foreclosing any backward-looking risk disclosure claims, the Ninth Circuit's decision below should be reversed. Before that decision, no court had allowed a risk disclosure-based claim to proceed when the company undisputedly did not know at the time it made the challenged statement that an undisclosed past incident would actually harm the company. Yet the Ninth Circuit openly embraced that outcome in this case, essentially forcing public companies to flood the market with information about incidents that may never be relevant to investors.

Plaintiffs' allegations in this case center on Facebook's risk factor disclosures warning investors of the harm to its business that could follow from security breaches or misuse of user data. Plaintiffs allege those disclosures were misleading because Facebook did not mention an earlier security breach that involved improper use of user data. Pet. App. 10a-12a. But before issuing the challenged risk factor disclosures, Facebook had already addressed the breach, including by negotiating an agreement to ensure the destruction of the misused data. Pet. App. 11a. The Ninth Circuit thus accepted that, at the time Facebook made its supposedly fraudulent statement, it "did not yet know the extent of the reputational harm it would suffer as a result" of the undisclosed data misuse. Pet. App. 24a. But to the majority, that fact was irrelevant. All that mattered was that Facebook was aware that the incident had occurred and that it *could* "harm [its] reputation" or "adversely affect [its] business." Pet. App. 42a (Bumatay, J., concurring in part and dissenting in part).

No court has adopted that theory of risk-disclosure liability, and for good reason. Under the Ninth Circuit's rule, to avoid hindsight-based securities fraud liability, companies must disclose any incidents that *may* one day cause the harms identified in their risk disclosures—even if they fully believe they will be able to prevent or mitigate those harms before they arise. As Judge Bumatay explained, that test "transform[s] every risk statement into a false or misleading statement if a risk later comes to fruition" and "create[s] a new requirement that a company disclose every bad thing that ever happened to it." Pet. App. 46a-47a.

The majority's reasoning also blinks reality. No reasonable investor in a major tech company would believe that the company had experienced no "significant breaches at the time of filing" simply because it did not spell out any such historical incidents in a forward-looking risk disclosure. Pet. App. 44a. And any investor who formed that impression "wasn't acting so reasonably." Pet. App. 44a-45a.

The Ninth Circuit's rule even contradicts Item 105. The SEC has directed companies to focus their disclosures on material risks to their particular businesses (rather than generic risks that threaten the entire market), see 17 C.F.R. 229.105, and encouraged companies to make their risk disclosures short and digestible. See *ibid.*; see also 85 Fed. Reg. 63,726, 63,745-63,746 (Oct. 8, 2020). But the Ninth Circuit's decision incentivizes companies to lard up their annual and quarterly reports with incidents that are not currently having a material impact on the business and likely never will. Investors will have to wade through that material and determine for themselves what information poses a meaningful risk to their investments—rather than relying on the company's "concise[]" explanation of the material factors relevant to its business. 17 C.F.R. 229.105. That outcome undermines the SEC's approach to risk factor disclosures and shifts the responsibility for assessing risk from public companies to their investors.

II. ALLOWING BACKWARDS-LOOKING RISK DISCLOSURE CLAIMS HARMS PUBLIC COMPANIES AND INVESTORS.

Claims that companies misled investors by failing to disclose past events in their forward-looking risk disclosure are not just legally flawed; they are affirma-

tively harmful. Even before the decision below, companies struggled to comply with the conflicting materialization-of-risk standards applied by certain courts of appeals. See *supra*, at 10-11. That struggle has become more acute following the Ninth Circuit's decision below. See Virginia Milstead & Mark Foster, *Beware of Potential Securities Litigation Over Risk-Factor Disclosures*, Reuters (Jan. 24, 2024), https://tinyurl.com/2m5txp5d (warning of additional steps companies need to take to avoid potential liability "[i]n the wake of some recent decisions from the 9th U.S. Circuit Court of Appeals").

The direct result of allowing these kinds of claims is overdisclosure. As much as companies try to keep risk disclosures brief and easily digestible, they have already come to make up a major part of public companies' filings. But in order to avoid securities class-action liability under the Ninth Circuit's rule, companies would need to disclose any incident that could theoretically lead to some harm in the future. If a company discusses how IT-system failures could cause lost sales and revenue, it should now disclose each prior occasion on which its system has gone down for a few hours in case a serious IT meltdown actually occurs. And if a company discloses the risk that emerging competitors could erode its market share, it must reveal its sensitive intelligence about what those competitors are currently doing—even if the company does not know whether competitors' efforts will be successful. In either case, the company would otherwise run the risk of a securities plaintiff arguing that the company misled investors by failing to reveal incidents that *could* harm the company. Pet. App. 24a.

Notably, under the decision below, even acknowledgments that warned-of incidents have previously occurred may no longer be enough to protect a company from liability. The Ninth Circuit had previously declined to allow liability based on risk disclosures when a company "acknowledged" that it had previously experienced the "challenges" it had warned of in its disclosures. See *Alphabet*, 1 F.4th at 703-04 (distinguishing *Wochos* v. *Tesla, Inc.*, 985 F.3d 1180, 1195-96 (9th Cir. 2021), on this ground); see also *In re Marriott Int'l, Inc.*, 31 F.4th 898, 904-05 (4th Cir. 2022) (dismissing claims based on risk factor disclosures when the company stated it had experienced cyberattacks in the past). But Facebook acknowledged that it had experienced security breaches in the past, Pet. App. 45a, and the Ninth Circuit nonetheless found that the company was required to disclose the specific challenged incident here.

Businesses will thus have no choice but to inundate investors with information about likely-insignificant events—a development that will be to investors' detriment. As this Court has repeatedly recognized, investors suffer when markets are flooded with "essentially useless information that a reasonable investor would not consider significant." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 234 (1988); see *Matrixx Initiatives*, 563 U.S. at 38 (fearing that low materiality thresholds would "bury shareholders in an avalanche of trivial information"). The SEC agrees. See Chair Mary Jo White, *The Path Forward on Disclosure*, Sec. & Exch. Comm'n (Oct. 15, 2023), https://tinyurl.com/4eyxzfu7 (explaining that excessive disclosure leads to a "a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the

information that is most relevant"); Commissioner Troy A. Paredes, *Remarks at the SEC Speaks in 2013*, Sec. & Exch. Comm'n (Feb. 22, 2013), https://tinyurl.com/3ctffk82 (expressing "concern . . . that investors will have so much information available to them that they will sometimes be unable to distinguish what is important from what is not"). Yet backward-looking risk disclosure claims make that outcome unavoidable.

III. RISK-DISCLOSURE CLAIMS HAVE CONTRIBUTED TO A WAVE OF EVENT-DRIVEN LITIGATION.

The implications of the decision below are serious in their own right. But the damage caused by the Ninth Circuit's decision is all the more significant because of the prominent role that backward-looking risk disclosure claims have come to play in securities litigation. In recent years, risk-disclosure claims have fueled a new wave of meritless event-driven lawsuits, which seek to leverage securities class actions to impose liability on companies for any event that causes a drop in share price—no matter how attenuated its connection to securities markets.

1. Baseless securities-fraud litigation continues to be a pervasive problem in the U.S. economy. In 2019, plaintiffs filed 428 securities class actions, more than double the average figure for the decade prior. See U.S. Chamber of Commerce Inst. for Legal Reform, *An Update on Securities Litigation*, IRL Briefly 3 (Mar. 25, 2020) https://tinyurl.com/nh94bh3y. New claims for 2023 continued to outpace prior years. See Cornerstone Research, *Securities Class Action Filings: 2023 Year in Review* 1 (2023), https://tinyurl.com/3pdre7nu. "To put this in the simplest terms, the likelihood of a U.S.-listed company getting hit with a securities suit is the highest it has ever

been." Kevin LaCroix, *Federal Court Securities Suit Filings Remain at Elevated Levels*, D&O Diary (Jan. 1, 2020), https://tinyurl.com/5ymrnwat.

Only a tiny minority of these securities class actions end in judgment for the plaintiff class. See Cornerstone, *Securities Class Action Filings* 6. But all of them impose massive costs on American businesses. As plaintiffs' lawyers well know, many companies will settle even baseless suits to avoid the expense and uncertainty of litigation. See *Novak* v. *Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (noting the prevalence of "strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries"). The threat of securities-fraud liability has even made it difficult for many public companies to insure their directors and officers. See U.S. Chamber Inst. for Legal Reform, *An Update on Securities Litigation* 6.

A growing proportion of those suits can be characterized as event-driven litigation. Plaintiffs seize on a headline-grabbing incident that harms a company (and its stock price), search for any public statements by the company that are even conceivably related to the subject matter, and then allege that the company misled investors about it. *Id.* at 2; see Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1335 (2022); Matt Levine, *Everything Everywhere is Securities Fraud*, Bloomberg (Jan. 26, 2019), https://tinyurl.com/49av5ubd ("And so contributing to global warming is securities fraud, and sexual harassment by executives is securities fraud, and customer data breaches are securities fraud, and mistreating killer whales is securities fraud."). These suits effectively seek to extract payments from the company to investors based on the principle that "anything bad

that is done by or happens to a public company is also securities fraud." *Id.*

2. Risk-disclosure claims have come to play a critical role in this strategy. As commentators have recently noted, the "main theory" in many event-driven cases is that the event "was the materialization of an under-disclosed or downplayed risk." Elisa Mendoza & Jeffrey Lubitz, *Event-Driven Securities Litigation: The New Driver in Class Action Growth*, Institutional Shareholder Services 4 (Dec. 1, 2020), https://tinyurl.com/4k54tah5. The Ninth Circuit's expansive view of risk-disclosure liability would go even further, allowing plaintiffs to argue not just that a company failed to disclose the *risk*, but that it failed to disclose *incidents* even obliquely related to that risk. After any significant stock drop, plaintiffs scour risk disclosures to determine whether the particular event was disclosed, even if a company had no reason to know it would later harm the business. Failure to disclose even small incidents can lead to costly litigation down the line.

The upshot is that securities plaintiffs now weaponize risk disclosures to convert every decline in share price following an adverse event into an opportunity for coercive litigation. In doing so, they increase costs for American businesses and distort the securities laws to "provide investors with broad insurance against market losses," rather than targeting deliberate acts of fraud. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005).

As just one example of this phenomenon, look no further than the wave of backward-looking risk disclosure claims seeking to profit from the COVID-19 pandemic. These suits allege that companies misled investors by failing to disclose the risks associated with a

global pandemic in early 2020—a time when COVID-19 was known, but far from understood. See, *e.g.*, *Gutman* v. *Lizhi Inc.*, 633 F. Supp. 3d 681, 685, 690 (E.D.N.Y. 2022) (alleging that defendants violated Items 105 and 303 by failing to disclose COVID-related risks in mid-January 2020 alongside risk disclosures related to health epidemics and other disasters); *In re Carnival Corp. Sec. Litig.*, 2021 WL 2583113 (S.D. Fla. May 28, 2021) (alleging that defendants' statements about the low risk of COVID-19 in January 2020 were misleading because they had special "insight" based on conversations with Wuhan-based suppliers). So far, courts have rightly rejected these claims, refusing to fault public companies for failing to predict the consequences of an unprecedented global pandemic. But under the expansive theory adopted by the majority in this case, courts may not be able to quickly dispose of these kinds of claims going forward.

3. Recent decisions of this Court make it all the more important that opportunistic, backward-looking risk disclosure claims be eliminated. In the past few years, this Court has decided two cases that help to stem the tide of event-driven litigation. In *Goldman Sachs*, the Court held that courts should consider the "generic nature of a misrepresentation" when determining if it actually caused a decline in a company's share price, 594 U.S. at 123—thereby making it more difficult for plaintiffs to certify classes in event-driven suits based on highly generic statements (*e.g.*, "[o]ur clients' interests always come first"), *id.* at 120. And most recently in *Macquarie Infrastructure Corp.*, 601 U.S. at 263, the Court held that plaintiffs could not pursue claims based on "pure omissions," which "occur[] when a speaker says nothing." Again, that decision

limited event-driven lawsuits, many of which had previously argued that a company had misled the market—even when it had made no statement on the subject at all. See Gideon Mark, *Event-Driven Securities Litigation*, 24 U. Pa. J. Bus. L. 522, 548-550 (2022).

Backward-looking risk disclosure claims represent the next front in the battle against baseless event-driven litigation. Because a company that responsibly fulfills its obligations under Item 105 will often disclose risks that relate in some way to any adverse event affecting its stock price, plaintiffs find little difficulty alleging that some risk disclosure was misleading for failing to disclose an adverse event earlier. Accordingly, plaintiffs who are unable to rely on generic statements or "pure omissions" to pursue their claims will turn to risk disclosures to fill the gap. Absent reversal of the decision below, such claims will undermine the gains made by *Goldman Sachs* and *Macquarie*.

* * *

This Court has long recognized that "litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith Inc*. v. *Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975)). Although Congress enacted the Private Securities Litigation Reform Act "[a]s a check against abusive litigation" in securities litigation, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), those tactics remain all too common, and businesses continue to face suits that impose massive costs in order to coerce settlements—even when the prospects of success are low. Backward-looking risk disclosure claims are the latest front in this long-

running saga, and this Court should take this opportunity to close the door on those claims for good.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

TYLER S. BADGLEY
MARIA C. MONAGHAN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

KEVIN CARROLL
SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION
1099 New York Ave., NW
Washington, D.C. 20001

JUDSON O. LITTLETON
Counsel of Record
DANIEL J. RICHARDSON
SULLIVAN & CROMWELL LLP
1700 New York Ave., NW
Suite 700
Washington, D.C. 20006
(202) 956-7522
littletonj@sullcrom.com

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