No.

In the Supreme Court of the United States

BDO USA, LLP,

Petitioner,

v.

NEW ENGLAND CARPENTERS GUARANTEED ANNUITY AND PENSION FUNDS; STANLEY NEWMARK, IRVING LIGHTMAN REVOCABLE LIVING TRUST, JUPITER CAPITAL MANAGEMENT, JOHN SACHETTI, Individually and On Behalf of All Others Similarly Situated; and JOEL RUBEL, Individually and On Behalf of All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 10b-5 renders unlawful "any untrue statement of a material fact" made "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b). A statement is material only if it "would [be] viewed by the reasonable investor as having significantly altered the 'total mix' of information." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). The Court has long rejected "bright-line rule[s]" for the "inherently fact-specific" materiality inquiry. *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 236 (1988).

Petitioner BDO stated that it audited a company's financial statements in accordance with PCAOB auditing standards. Respondents allege that this statement was false when made because BDO had not yet finished certain required procedures. But they also allege that, in keeping with the auditing standards' remedial provisions, BDO promptly completed the procedures and concluded that its report was unaffected.

The Second Circuit initially found materiality lacking, absent "any link between" the alleged misstatement and errors in the underlying financials. App., *infra*, 75a. But, on rehearing, the court held that no such "link" was "required"; rather, misstatements of this sort are *per se* material. *Id.* at 36a.

The question presented is:

Whether the materiality requirement for securities fraud liability is satisfied *per se* by an auditor's statement of compliance with professional standards (as the Second Circuit held below), or whether materiality in this context requires a fact-specific analysis focused on the link between the allegedly false compliance statement and actual misstatements of financial information (as the Sixth Circuit has held).

PARTIES TO THE PROCEEDING

Plaintiff-appellants in the court of appeals were: New England Carpenters Annuity and Pension Funds; Stanley Newmark, Irving Lightman Revocable Living Trust, Juniper Capital Management, John Sachetti, individually and behalf of all others similarly situated; and Joel Rubel, individually and on behalf of all other similarly situated.

Defendant-appellees in the court of appeals were: Amtrust Financial Services, Inc.; Barry D. Zyskind; Ronald E. Pipoly, Jr.; BDO USA, LLP; RBC Capital Markets, LLC; UBS Securities LLC; Citigroup Global Markets Inc.; Keefe, Bruyette & Woods, Inc.; and Morgan Stanley & Co. LLC.

CORPORATE DISCLOSURE

Pursuant to Rule 29.6 petitioner BDO USA, P.C., formerly BDO USA, LLP, ("BDO") certifies that BDO has no parent corporation, and no publicly held corporation owns 10% or more of BDO's stock.

RELATED PROCEEDINGS

New England Carpenters Annuity and Pension Funds, et. al v. *Amtrust Financial Services Inc., et. al*, No. 20-1643-cv (2d Cir. Jan. 7, 2025)

New England Carpenters Annuity and Pension Funds, et. al v. *Amtrust Financial Services Inc., et. al*, No. 17-cv-1545 (S.D.N.Y. Apr. 22, 2020)

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Respondents' securities fraud claim against BDO is based on nothing more than the allegation that, though BDO claimed to have complied with professional auditing standards in conducting an independent audit of a public company, it initially failed to complete certain mandatory procedures. That compliance statement, they allege, was technically false on the date BDO published its audit report.

But respondents' allegations also make clear that BDO quickly discovered the omitted procedures, swiftly completed them as permitted by auditing standards, and determined that the substance of its audit report was unaffected by the initial noncompliance. Accordingly, the "total mix of information" communicated to investors about the company's finances (*TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)) was unaltered by BDO's allegedly false statement of compliance.

That should have been the end of the securities fraud case against BDO, as nearly five decades of Supreme Court precedent confirms that a false statement or omission is not material under such circumstances. One court of appeals has held exactly that: In the Sixth Circuit, an auditor's false statement of compliance with professional auditing standards is material only if the noncompliance creates "a substantial risk that the actual value of assets or profits were significantly less" than what the company's financial statements indicated. *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 432 (6th Cir. 1980).

Initially, the Second Circuit affirmed the district court's decision dismissing the claim against BDO for lack of materiality, recognizing that respondents "fail[] to allege any link between BDO's" alleged misstatements "and the material errors contained" in the underlying financials. App., *infra*, 75a. But, after respondents sought rehearing—and the SEC filed an *amicus* brief in support—the court of appeals flipped its legal holding. It ruled against BDO solely on the basis that respondents "were *not required* to allege a link between BDO's false certification and specific errors in AmTrust's financial statements" in order "to establish that BDO's false audit certification was material." *Ibid* (emphasis added).

That is, the Second Circuit adopted an unprecedented *per se* rule that an auditor's statement that it complied with professional auditing standards is *always* material. It is irrelevant to materiality, the Second Circuit concluded, whether the alleged regulatory noncompliance had any bearing whatsoever on the financial information provided to investors.

That holding is in direct conflict with the rule of the Sixth Circuit, as well as circuit law from around the country. It creates a dangerous precedent that provides unduly expansive liability against accounting firms in the Second Circuit, which, given the nature of the public financial markets, is generally a proper venue for *any* securities fraud claim involving a public company. This decision will therefore lure all securities plaintiffs who seek to sue accountants to that circuit. It will then impose suffocating pressure on defendants to settle, since the protection provided by the materiality requirement has been eliminated. Because another vehicle is unlikely to be forthcoming, it is crucial that the Court grant review now.

Review is further warranted because the decision below defies this Court's precedent, which forecloses "rigid" or "bright-line" materiality rules in the securities laws. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 236 (1988). Nor can the Second Circuit's holding be reconciled with the Court's clear determination that allegedly false statements of compliance with governing standards are not *per se* material in the False Claims Act context. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 191 (2016).

Review is warranted to restore uniformity to the law—and to underscore that materiality must be governed by the facts of a particular case, rather than by *per se* rules.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (App., *infra*, 1a-37a) is reported at 122 F.4th 28. The panel's original opinion (App., *infra*, 38a-77a) is reported at 80 F.4th 158. The decisions of the district court (App., *infra*, 80a-159a & 160a-167a) are available at 2019 WL 4257110 and 2020 WL 2787117, respectively.

JURISDICTION

The court of appeals entered its judgment on October 31, 2024, and denied a timely filed petition for rehearing on January 7, 2025. On March 28, 2025, Justice Sotomayor extended the time to file a petition for certiorari to May 7, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security registered on a

> national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5(b) provides:

> It shall be unlawful for any person * * * [t]o make any untrue statement of material fact or to 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.

STATEMENT

A. Legal background

Federal securities law requires public companies to file audited financial statements annually with the Securities and Exchange Commission ("SEC"). See *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 811 n.5 (1984) (listing statutory provisions). Filed as part of a company's Form 10-K, "these financial reports must be audited by an independent certified public accountant in accordance with generally accepted auditing standards." *Id.* at 811. Ultimately, the auditor will issue an opinion stating whether or not "the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period." *Ibid.*[1]

[1] Two related acronyms are relevant here. Generally accepted accounting principles, or GAAP, are the rules that govern a

In 2002, Congress passed the Sarbanes-Oxley Act, Pub. L. 107-204, 116 Stat. 745. Among other reforms, the Act created the Public Company Accounting Oversight Board ("PCAOB"). See 15 U.S.C. § 7211. The PCAOB's duties include "register[ing] public accounting firms that prepare audit reports" and promulgating "auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports." *Id.* § 7211(c).

An audit of an issuer's financial statements must be performed in accordance with PCAOB standards. 17 C.F.R. § 210.1–02(d). To that end, the outside auditor, in preparing its final report, must "state the applicable professional standards under which the audit was conducted." *Id.* § 210.2-02(b). That is, when issuing an audit report for the financial statement of an issuer, the auditor must state that it complied with PCAOB standards.[2] In practice, audit reports use standard language stating elements mandated by the PCAOB. See PCAOB Auditing Standard ("AS")

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company's preparation of its financial reports. Generally accepted auditing standards, or GAAS, are standards used by outside auditing firms to ensure that those already-prepared financial reports are sound, including that they comply with GAAP. *Arthur Young & Co.*, 465 U.S. at 811 & nn.6-7; see also, *e.g.*, *Ponce* v. *SEC*, 345 F.3d at 722, 735 (9th Cir. 2003) (auditor must conduct the audit "in accordance with GAAS, to determine whether the [financial] statements were prepared in conformity with GAAP").

[2] If an auditor is unable to complete the audit in accordance with PCAOB standards, the auditor will issue a "disclaimer of opinion" providing no formal opinion on the company's financial statements and describing why the auditor was unable to perform its audit in accordance with PCAOB standards. See AS 3105.44-47

3101.06-10 & Appendix B. That standard language includes a boilerplate certification that the auditor complied with PCAOB standards. AS 3101.09.

B. Factual background

1. Respondents are investors in AmTrust Financial Services, Inc. ("AmTrust"), a large publicly traded property and casualty insurer. App., *infra*, 3a-4a. AmTrust experienced rapid growth starting around 2010, fueled in part by strategic acquisitions of other companies. *Id.* at 6a. Between 2012 and 2016, its stock price increased. *Ibid*. Respondents allege that AmTrust overstated its financial condition in its annual financial statements during these years. *Id.* at 9a.

Among other services, AmTrust underwrites extended service plans ("ESPs")—essentially, extended warranties—that retailers provide to customers. App., *infra*, 5a-6a. In 2010, AmTrust acquired another ESP underwriter, Warrantech, making ESPs a core part of AmTrust's business. *Id.* at 6a. Prior to the acquisition, Warrantech had an accounting practice of recognizing the full amount of revenue received from ESP contacts at the time the contract was formed. *Ibid*. The SEC informed Warrantech that it disagreed with this practice and instructed Warrantech to instead recognize the revenue of the contract on a straight-line basis over the life of the contract. *Ibid*. Warrantech publicly announced its compliance with this instruction. *Ibid*. After AmTrust acquired Warrantech, however, respondents allege that AmTrust reverted to the time-of-sale approach. *Ibid*.

In 2017, AmTrust delayed filing its Form 10-K for 2016, explaining that it had uncovered accounting errors that needed correction before filing. App., *infra*, 7a. When AmTrust filed the Form 10-K for 2016, it restated its financial results for each of the years 2012-2016, revealing that the company's income and earnings had been overstated during those years. *Id.* at 7a-8a. The main cause of the overstated income was AmTrust's use of the time-of-sale method for recognizing the income of its ESP contracts. *Id.* at 8a.

2. Between 2012 and 2015, AmTrust engaged BDO to perform independent audits of the company's public financial statements. App., *infra*, 96a. For each of those years, BDO issued an unqualified opinion stating BDO's view that AmTrust's financial statements were fairly presented. *Ibid.* In each audit report, BDO stated that it had performed the audit in accordance with the standards promulgated by the PCAOB. *Id.* at 96a-97a.

Respondents' allegations against BDO concern its 2013 audit opinion—the report BDO released in March 2014 regarding AmTrust's financial statements for the year ending December 31, 2013. App., *infra*, 97a. As with the other years, when BDO issued its audit report, it provided an unqualified opinion that AmTrust's financial statements were fairly stated in all material respects, accompanied with a statement that it had complied with PCAOB standards in conducting its audit. *Id.* at 96a-97a.

Respondents allege that BDO's statement of PCAOB compliance was untrue. Specifically, they allege that BDO's audit team was running significantly behind schedule and that, in a rush to complete the audit on time, BDO employees skipped certain procedures mandated by the PCAOB. App., *infra*, 98a. These procedures included certain journal entry testing, internal controls testing, and testing of material account balances. *Ibid*. Respondents further allege that certain BDO supervisors instructed members of the audit team to create blank placeholder documents so that it appeared that BDO had completed the missing procedures. *Id.* at 98a-99a.[3]

Respondents also allege, however, that BDO promptly cured its audit and discovered no misstatements needing public correction. Specifically, four days after BDO released the audit report, the BDO partners overseeing the audit discovered that these procedures had not been completed and instructed the team to complete the audit and assess whether the missing procedures had any impact on BDO's audit report. App, *infra*, 99aa-100a. The audit team completed the work over the ensuing month. After the missing procedures were completed, BDO determined that the initial failure to complete them had not affected BDO's unqualified audit opinion, and thus did not require any corrective action pursuant to AU 390, the interim auditing standard for "Consideration of Omitted Procedures After the Report Date" then in effect. *Id.* at 100a.

In other words, taking respondents' allegations as true, if BDO had completed its audit opinion and performed all necessary procedures on time, and thus its statement of PCAOB compliance was correct at the time it was made, it would have released the exact same audit opinion. See App., *infra*, 153a (BDO's premature compliance statement "ultimately had no effect on the 2013 audit opinion."). Investors would have received no different information about AmTrust's finances. As the district court put it, "the

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[3] The SEC ultimately sanctioned three BDO auditors for their conduct in relation to this audit. App., *infra*, 100a.

only quarrel [respondents] could have with BDO * * * is its apparent decision not to amend the date of the audit report and opinion." *Id.* at 150a. Respondents do not allege facts suggesting that an allegedly incorrect date on the audit report misled investors.

All told, respondents do not allege any link between BDO's audit report and any errors in AmTrust's 2013 financial statements. Indeed, beyond alleging that AmTrust eventually restated its financial reports, respondents have not alleged that the 2013 financial statements contained any specific misstatement or error, much less what that error was or how it was attributable to BDO's alleged lateness in completing the required procedures.

C. Proceedings below

1. The district court grants BDO's motion to dismiss.

On behalf of a putative class of AmTrust investors, respondents filed a complaint in the Southern District of New York, advancing various securities fraud claims against AmTrust, BDO, and numerous other defendants. The only claim relevant to this petition arises under Section 10(b) of the Securities Exchange Act and Rule 10b-5. See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b) ("It shall be unlawful for any person * * * [t]o make any untrue statement of a material fact * * * in connection with the purchase or sale of any security.").

BDO moved to dismiss on several grounds, including that BDO's statement that it had conducted the 2013 audit in compliance with PCAOB standards, even if false, was not materially false. As BDO explained, the statement was not materially false because the alleged noncompliance did not affect the substance of its audit report—and thus the information BDO communicated to the investing public was no different than it would have been if the audit was completed correctly, with all necessary procedures performed on time. Accordingly, there was no link between BDO's alleged false statement and any errors in AmTrust's financial statements.

The district court, Judge Lewis A. Kaplan, agreed. App., *infra*, 155a-156a. The court explained that "Plaintiffs fail to allege any facts relevant to the way or ways in which BDO's failure to supervise, review, document, and perform in good faith the 2013 audit would have been significant to a reasonable investor in making investment decisions. This is so particularly because the conduct ultimately had no effect on the 2013 audit opinion." *Id.* at 153a.

2. The Second Circuit initially affirms before adopting a per se *materiality rule on rehearing.*

On appeal, the Second Circuit initially affirmed the district court's materiality analysis. Like the district court, the panel reasoned that materiality was lacking because "the Complaint fails to allege any link between BDO's misstatements in the 2013 Audit Opinion and the material errors contained in AmTrust's 2013 Form 10-K." App., *infra*, 75a.

Respondents petitioned for panel rehearing, and, in February 2024, the SEC filed an amicus brief in support. The SEC urged the panel to abandon its fact-specific materiality holding and adopt a *per se* rule instead: In the SEC's view, an auditor's certification of PCAOB compliance, in and of itself, "matters to investors regardless of whether the specific deficiencies resulted in misstated financial statements." SEC C.A. Amicus Br. 13 (Feb. 16, 2024), C.A. Dkt. No. 202.

The panel obliged. Reversing itself, it amended the opinion's materiality analysis to conclude that respondents "were *not* required to allege a link between BDO's false certification and specific errors in AmTrust's financial statements to establish that BDO's false audit certification was material." App., *infra*, 36a (emphasis added). The panel reasoned that "BDO's certification that the audit was conducted in accordance with PCAOB standards succinctly conveyed to investors that AmTrust's audited financial statements were reliable" and "[t]he absence of BDO's certification would have been significant, for without it, BDO could not have issued an unqualified opinion, which then would have alerted investors to potential problems in the company's financial reports." *Ibid.* That is, in the panel's view, the statement of compliance with PCAOB standards was inherently meaningful to investors, no matter its ultimate effect on the substance of the audit report.

REASONS FOR GRANTING THE PETITION

The decision below establishes a *per se* rule of materiality. Now, in the Second Circuit, any auditor's allegedly false certification of adherence to professional auditing standards is necessarily material because, without such a certification, investors would have less confidence in the audit report and thus the underlying financial statements—even if the substance of the audit report is unaffected by the alleged false certification.

Prompt review is imperative.

First, the decision below conflicts with an express holding of the Sixth Circuit, and the result reached is irreconcilable with numerous other decisions from circuits around the country.

Second, because securities plaintiffs can often secure venue in the Second Circuit, the decision below, if left unchecked, will lead to opportunistic claims targeting auditors. And, the Second Circuit's holding guts the ability of an auditor to obtain dismissal of even low-quality claims, creating massive settlement pressure regardless of a suit's merit. Review is thus needed now.

Finally, the decision below is fundamentally at odds with this Court's explicit directives regarding materiality. Both within and without the securities fraud context, the Court has repeatedly confirmed that materiality is not susceptible to *per se* rules.

A. The decision below opens a circuit conflict.

Aware that the materiality of a false statement is inherently a highly fact- and context-specific inquiry, no federal court of appeals—so far as we have discovered—has ever before embraced a rule that a particular kind of statement is *per se* material. In adopting a legal standard that deems auditors' statements of PCAOB compliance necessarily material, regardless of the statement's effect on the information available to investors about a company's finances, the court below broke new ground. In doing so, the Second Circuit cleanly split with the Sixth Circuit. And it also diverged from the holdings of several other circuits in similar contexts.

1. Directly contrary to the decision below, the **Sixth Circuit** holds that an auditor's failure to comply with professional auditing standards is material only insofar as it affects the substance of information available to investors regarding a company's finances. See *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 432 (6th Cir. 1980). In *Adams*, the Sixth Circuit considered securities fraud claims against Peat, Marwick, Mitchell & Company, an accounting firm that had conducted an audit in connection with the proposed merger of two companies. *Id.* at 423-424.

The district court had held that Peat was liable for securities fraud because, among other reasons, it had not conducted its audit "according to GAAP and GAAS." See *Adams* v. *Standard Knitting Mills, Inc.,* 1976 WL 821, at *17-20 (E.D. Tenn. May 19, 1976). The court treated Peat's failure to comply with GAAS as a material misrepresentation giving rise to liability under Rule 10b-5. Specifically, the court regarded that failure as an omission of a material fact; Peat had a "duty to disclose" that it had not complied with those standards, but failed to do so. *Id.* at *18. Just like the Second Circuit's decision below, the district court concluded that there was "no doubt that, had Peat properly described and disclosed" its failure to comply with GAAS, "plaintiffs would have considered it important and would have significantly affected and influenced their investment decisions." *Id.* at *20.

The Sixth Circuit reversed. The court agreed that the record showed that Peat had not conducted its audit in accordance with GAAS, but, it explained, that fact alone did not resolve the materiality analysis. See *Adams*, 623 F.2d at 432. Despite Peat's omission of its noncompliance to investors, the court explained that "[t]he question of materiality in this context is whether, given all the financial information, there was *a substantial risk that the actual value of assets or profits were significantly less than Peat stated them to be*." *Ibid.* (emphasis added); see also, *e.g.*, *id.* at 434 (rejecting materiality of one audit shortcoming because "Plaintiffs have not proved * * * that there was a material risk that a proper audit of the standard cost system would have revealed materially lower costs").

Put differently, the materiality of Peat's omission came down to the *substance* of what Peat communicated to investors about the audited company's financial position, in light of Peat's noncompliance with professional standards. Not, as the district court had held, the simple fact that investors would be interested to know that the outside auditor had not complied with those standards.

Applying this analysis, the court concluded that the record did not support that Peat's noncompliance "produced financial statements materially at odds with the real facts." *Adams*, 623 F.2d at 432. Peat's failure to comply with GAAS—and its omission of that fact in its audit report—was thus not material. *Ibid.*

Had the complaint against BDO originated in the Sixth Circuit rather than the Second, a court applying *Adams* would have had no choice but to dismiss. Just as in *Adams*, the crux of respondents' theory is that BDO misled investors about its adherence to applicable professional auditing standards. But the Sixth Circuit, unlike the decision below, evaluated the materiality of that fact based on whether and how the auditor's departures from governing standards affected its evaluation of the audited company's finances.

Here, it is undisputed that BDO's alleged noncompliance with PCAOB standards *did not* affect its audit report. As respondents' allegations acknowledge, BDO would have provided investors *exactly the same* information about AmTrust's finances had it completed the audit correctly at the time the opinion was issued. App., *infra*, 100a. Or, as the court below put it, there was no "link between BDO's false certification and specific errors in AmTrust's financial statements." *Id*. at 75a. The *Adams* court would thus have found any noncompliance with PCAOB standards, even if true, immaterial. See, *e.g.*, *Adams*, 623 F.2d at 434 (auditor's GAAS noncompliance immaterial in the absence of evidence "that there was a material risk that [the auditor's] calculations thereby inflated" the company's value). The court below, however, applied a diametrically opposed *per se* legal standard that necessarily yielded the opposite conclusion.[4]

In sum, the Second Circuit's decision below squarely conflicts with the Sixth Circuit's holding in *Adams*.

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[4] Like the Sixth Circuit, numerous district courts have held that false statements of auditing-standard compliance are immaterial absent any effect on underlying financial statements. See *In re Metropolitan Sec. Litig.*, 532 F. Supp. 2d 1260, 1294 (E.D. Wash. 2007) ("[A] false certification of GAAS compliance is only material under Section 11 to the extent that the misrepresentation renders the financial statements inaccurate."); *In re Seracare Life Scis., Inc.*, 2007 WL 935583, at *9 (S.D. Cal. Mar. 19, 2007) ("Since Plaintiffs have failed to particularly allege the falsity of SeraCare's underlying financial statements, any statement regarding the quality of KPMG's audit, even if it were false, * * * would not be a material false statement."); *N.J. Div. of Inv.* v. *Sprint Corp.*, 314 F. Supp. 2d 1119, 1147 (D. Kan. 2004) ("[E]ven assuming that E & Y's statement that it conducted the audits in accordance with GAAS was untrue * * * as a matter of law, the statement is not material" because "it is undisputed that E & Y's alleged [noncompliance] had no effect on the audits.").

2. The decision below is also irreconcilable with repeated circuit court holdings that, while less explicit than *Adams*, similarly turn on the *impact* of the auditor's alleged procedural noncompliance on investors' substantive understanding of a company's finances.

In *Bradford-White Corp.* v. *Ernst & Whinney*, the **Third Circuit** reinstated a jury verdict against an auditor where the "crux of th[e] finding of liability is that Ernst & Whinney failed to conduct an audit * * * which complied with GAAS but that it nonetheless represented that it had complied with GAAS." 872 F.2d 1153, 1159 (3d Cir. 1989). But that liability was proper only because, "had a GAAS audit been conducted, [Ernst & Whinney] would have uncovered material information as to inventory, product warranty liability, net worth and net income, all of which the jury concluded were materially misstated." *Id.* at 1159-60 (quotation marks omitted).

In other words, the false statement of GAAS compliance was actionable not as a *per se* material falsity, but because it directly contributed to the investors being misled about the state of the company's finances. The starting premise of the Third Circuit's analysis was that the verdict of liability for misrepresenting GAAS compliance *would have been* inconsistent with a special interrogatory finding that "the overall financials [of the audited company] were not misstated"—but the court of appeals reinstated the verdict because, unlike the district court, it did not interpret the jury's interrogatory answer as making such a finding. *Bradford-White*, 872 F.3d at 1159-1160. That analysis is flatly incompatible with the Second Circuit's newfound *per se* rule.

Similarly, in *In re Stone & Webster, Inc.*, the **First Circuit** held that some allegations regarding an auditor's statements of compliance with GAAS were sufficient to allege material falsity, while others were not. 414 F.3d 187, 214 (1st Cir. 2005). The sufficient allegations, the court explained, contended that the auditor's failure to abide by GAAS led to its "failure to discover * * * deviations from GAAP in the accounting" of the audited company. *Ibid.* Put differently, unlike respondents here, the plaintiffs in *Stone & Webster* had alleged a "link between [the auditor's] false certification and specific errors in [the company's] financial statements." App., *infra*, 36a. By contrast, the insufficient allegations "rest[ed] on nothing more than a litany of conclusory allegations of failure to conform to various GAAS standards." *Stone & Webster*, 414 F.3d at 214. For instance, the plaintiffs never "concrete[ly]" alleged "how the conduct of the audit related to * * * missed warning signs" about the state of the company's finances. *Ibid*.

Courts analyzing the material falsity of auditors' claimed GAAS compliance have similarly focused on the statement's impact on investors in the **Fifth Circuit** (see *Sioux, Ltd.* v. *Coopers & Lybrand*, 914 F.2d 61, 66 (5th Cir. 1990) (finding false statement of compliance with GAAS material where the audit report omitted information about pending litigation that would have apprised prospective investors of "uncertainty")); the **Ninth Circuit** (see *United States* v. *Weiner*, 578 F.2d 757, 779 (9th Cir. 1978) (affirming jury verdict finding auditor's statement of GAAS compliance materially false where those violations led to the "erroneous reporting of various specific accounts contained in the financial statement and incomplete descriptions of certain accounts"); and the **Tenth Circuit** (see *Deephaven Priv. Placement Trading, Ltd.* v. *Grant Thornton & Co.*, 454 F.3d 1168, 1176 n.9 (10th Cir. 2006) (auditor's statement of compliance with GAAS not materially false or misleading where there were no allegations regarding how errors in the underlying financial statements "were the result of [the auditor's] conduct")).

3. In closely related contexts, courts have likewise rejected efforts to adopt *per se* materiality standards. A failure to comply with governing accounting rules is material only insofar as it affects investors' understanding of investment-relevant information, such as the state of the company's finances.

In the **Ninth Circuit**, for instance, a line of cases holds that allegations that a corporate registrant failed to adhere to GAAP in its annual financial statements is material only if the allegations "show with particularity how the adjustments affected the company's financial statements and whether they were material in light of the company's overall financial position." *In re Daou Systems, Inc.*, 411 F.3d 1006, 1018 (9th Cir. 2005). See also*, e.g., United States* v. *Reyes*, 660 F.3d 454, 470 (9th Cir. 2011) ("[I]mproper accounting requiring a restatement does not, by itself, establish materiality.").

In *Daou Systems*, the court found that several of the plaintiffs' allegations of securities fraud against a registrant, premised on the failure to adhere to GAAP, satisfied the materiality requirement. 411 F.3d at 1018. But it did so only after confirming that the "alleged GAAP violations were [not] minor or technical in nature," as such allegations would not suffice to establish materiality. *Ibid.* Rather, the GAAP violations at issue "constituted widespread and significant inflation of revenue," rendering them material. *Ibid.*

The Ninth Circuit's conclusion that allegations of "technical or minor" GAAP noncompliance are immaterial (*Daou Systems*, 411 F.3d at 1020) is irreconcilable with the *per se* rule of materiality established below. The rule here makes *all* misstatements of auditing-standard compliance—which is necessarily a step further removed from investment-relevant financial information than statements of GAAP compliance by the registrant (see *supra* page 4 n.1)—inherently material. If the Ninth Circuit's materiality rules governed, the court below would have affirmed the district court's careful decision—at most, the allegations here were purely "technical" omissions that did not ultimately affect the substance of BDO's audit report. See also *Gebhardt* v. *ConAgra Foods, Inc.,* 335 F.3d 824, 829 (8th Cir. 2003) ("We do not believe that restating earnings makes the original misstatement material per se, especially in cases where the company is required to restate its earnings no matter how small the discrepancy.").

B. This is an ideal vehicle to resolve a critically important question—and time is of the essence

1. Given the court of appeals' dramatic expansion of securities fraud liability against accounting firms, the question presented is quite significant.

The scope of materiality in the securities laws is self-evidently a question of paramount importance. The Court has been crystal clear about the dangers of applying "bright-line rule[s]" and "rigid formula[e]" to analyze the question of materiality. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 236 (1988). As the Court has explained, such an approach necessarily yields results that are "overinclusive or underinclusive." *Ibid*. In particular, *per se* materiality standards risk eroding the "rigorous" and "demanding" materiality requirement (*Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 180 (2016)), thereby dramatically expanding the scope of liability under the securities laws and other anti-fraud statutes.

The materiality standard reflects a careful balance between the need to police harmful misrepresentations and the potential for creating unnecessary and burdensome liability risks that discourage participation in the market or produce adverse consequences. As the Court explained in *TSC Industries, Inc.* v. *Northway, Inc.*, "if the standard of materiality is unnecessarily low" then companies will "be subjected to liability for insignificant omissions or misstatements." 426 U.S. 438, 448-449 (1976). Moreover, the "fear" of "substantial liability may cause [companies] simply to bury the shareholders in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking." *Ibid.*

But that is exactly the result of the decision below. In the realm of auditor disclosures of PCAOB compliance, the *per se* rule adopted by the Second Circuit creates several significant risks.

For starters, the rule massively expands potential liability for auditors who certify compliance with PCAOB standards or GAAS but make "minor," "insubstantial," or technical accounting mistakes that have no consequence for the audit or for investors. *Escobar,* 579 U.S. at 194.

Principally caused by the litany of new requirements PCAOB has imposed,[5] minor audit mistakes are an acknowledged common occurrence. A PCAOB analysis of 710 recent audits revealed that an expected 46% would have a Part I.B deficiency (PCAOB, *Spotlight: Staff Update and Preview of 2022 Inspection Observations*, at 4 (July 2023) perma.cc/5AE8-9R2S)—meaning "[d]eficiencies that * * * relate to instances of non-compliance with PCAOB standards or rules," but "that do not relate directly to the sufficiency or appropriateness of evidence the firm obtained to support its opinion(s)" (PCAOB, *Guide to Reading the PCAOB's New Inspection Report*, at 2, perma.cc/7NLW-X35M). That is, nearly *half* of public-company audits—opportunistic plaintiffs could allege—involve relatively insignificant noncompliance with PCAOB standards.

Accordingly, in the Second Circuit today, nearly half of all public-company audits would give rise to potential auditor liability for making materially false statements merely by certifying compliance with PCAOB standards—no matter what impact the alleged audit deficiency may have on investors. Such a drastic expansion of liability would be devastating to the public markets and the accounting profession. Thousands of companies must publicly file financial statements with the SEC annually, and each of those

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[5] See, *e.g.,* PCAOB, *PCAOB Revises Standard-Setting, Research, and Rulemaking Agendas Following Record-Setting Action in 2023*, (Nov. 1, 2023), perma.cc/TV97-NX96 (boasting that, "[i]n 2023, the Board has taken more formal actions on standard setting and rulemaking than any year in the last 10 years," and has considered "more [regulatory proposals] than any single year in PCAOB history").

submissions must include an independent audit report conducted in accordance with professional auditing standards. See pages 4-6, *supra*. Per the decision below, hundreds—if not thousands—of those audit reports now contain actionable material misstatements, even though the noncompliance is deemed by the PCAOB itself to be minor, and unrelated to the substance of the audit.

The harm of a *per se* rule of materiality is exacerbated by the fact that, in many cases, the materiality standard is the main bulwark preventing auditors from being exposed to crushing liability for innocent and anodyne mistakes. While the claims here also involve elements of scienter and loss causation, that is often not true. Claims brought under Sections 11 and 12(a)(2) of the Securities Act, and Section 18 of the Exchange Act, for example, do not require those elements. In those contexts, the materiality standard prevents every minor accounting mistake from becoming the potential basis for existential liability.

Moreover, even where these other elements do apply, they are often not well suited for early dismissal of insubstantial claims. See, *e.g.*, *Gross* v. *GFI Grp., Inc.*, 162 F. Supp. 3d 263, 269-270 (S.D.N.Y. 2016) (Plaintiff's "burden to plead loss causation is 'not a heavy one'"; instead, loss causation is "an issue typically reserved for summary judgment") (quoting *Loreley Fin. (Jersey) No. 3 Ltd.* v. *Wells Fargo Secs., LLC*, 797 F.3d 160, 187 (2d Cir. 2015)). And as the SEC was sure to point out in its amicus brief below, certain elements under Rule 10b-5 do not apply in Commission enforcement proceedings, either. SEC C.A. Amicus Br., *supra*, at 15; see *Lorenzo* v. *SEC*, 587 U.S. 71, 84 (2019) ("[T]he Commission, unlike private parties, need not show reliance in its enforcement actions."). Once again, materiality is an essential protection against meritless claims.

There is also no logical reason that the Second Circuit's *per se* materiality rule would be limited to PCAOB compliance certifications, or, indeed, just to auditors. The securities markets are replete with boilerplate compliance certifications—for instance, when issuers certify compliance with GAAP. In these areas, just as much as for auditors' certification of compliance with professional standards, investors might attempt to argue that their investment decisions are inherently influenced by the presence of such a certification. Under the reasoning of the decision below, that argument would be enough—on its own—to establish materiality, without any need for an investor to show that the compliance certification actually communicated anything of substance that could have reasonably influenced an investment decision. That approach would not only be impossible to square with this Court's precedents, but also would profoundly disrupt the securities markets by unduly expanding liability.

2. As a practical matter, two intersecting factors render immediate review imperative: *First,* the threat of crushing liability against auditors creates overwhelming settlement pressure if a motion to dismiss is denied, and *second*, securities plaintiffs can, in nearly every case, lay venue in the Second Circuit. If the Court does not grant review now, it is far from clear that another vehicle will soon emerge. Rather, auditors will be defenseless against the *per se* standard adopted below.

Adopting a *per se* rule of materiality spots securities fraud plaintiffs an element of their claim—

specifically, the element without which "the common law could not have conceived of 'fraud.'" *Escobar*, 579 U.S. at 193 (quoting *Neder* v. *United States*, 527 U.S. 1, 22 (1999)). That will make it significantly harder for auditors to weed out insubstantial lawsuits, starting at the motion to dismiss stage. Stripped of the ability to screen claims concerning alleged misstatements that concededly had no impact on investors, auditors would face tremendous added pressure to settle meritless claims by unharmed classes of investors. Cf. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"); *Escobar*, 579 U.S. at 195 n.6 (discussing the applicability of the "familiar and rigorous" materiality standard at the motion to dismiss stage).

And virtually any securities plaintiffs can choose to file suit in the Second Circuit. After all, "its jurisdiction includes New York City, home to the largest securities market in the world." Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 Fordham L. Rev. 225, 226 (2016) (explaining the source of "the Second Circuit's distinctive influence" in securities cases). Quite often enough relevant conduct in a securities case occurs in the Second Circuit to create venue. See *United States* v. *Lange*, 834 F.3d 58, 71-75 (2d Cir. 2016) (discussing the expansive venue standard in securities fraud and conspiracy cases). For that reason, members of this Court have repeatedly described the Second Circuit as "the 'Mother Court' of securities law," cognizant that the Second Circuit is not just the venue of choice for securities litigants, but an easily accessible one too. *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 276

(2010) (Stevens, J., concurring) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)).

The net result will be a predictable spate of new securities lawsuits filed in the Second Circuit, designed to extract windfall settlements from accounting firms. Because the decision below is now law of the circuit—and auditor defendants will not be able to take an interlocutory appeal from an unsuccessful dispositive motion—the only way this Court would see a subsequent case presenting the same issue is if an auditor takes a case through to trial, loses, appeals to the Second Circuit, and then seeks certiorari. Given the magnitude of damages at stake, it is unlikely that a future defendant will stomach such substantial risk. And since plaintiffs will flock to the Second Circuit, it is also unlikely that cases will emerge from other circuits. Absent certiorari now, this critically important issue will likely evade review.

3. Finally, the question at hand—whether an auditor's allegedly false statement of compliance with PCAOB standards is material *per se*—is ideally presented by this case. The Second Circuit originally affirmed Judge Kaplan's grant of BDO's motion to dismiss; the court below held that the complaint "fail[ed] to allege any link between BDO's misstatements in the 2013 Auditor Opinion and the material errors contained in AmTrust's 2013 Form 10-K." App. *infra*, 75a. Then, at the SEC's urging, the panel reversed itself *solely as a matter of law*. On rehearing, it adopted a *per se* rule of materiality, holding that respondents "were not *required to* allege a link between BDO's false certification and specific errors in AmTrust's financial statements to establish that BDO's false audit certification was material." App., *infra*, 36a (emphasis added). There was no *factual* difference, just a different legal rule applied to the same settled record. That is, the juxtaposition between the two panel decisions conclusively confirms that the result reached below turned solely on the answer to the question presented.

C. The Second Circuit's standard defies this Court's materiality precedents.

Finally, review is warranted because the *per se* materiality standard adopted below is irreconcilable with decades of this Court's precedent. The Court has repeatedly made clear that courts should *not* use bright-line rules—of which a *per se* standard is the most obvious example—to assess materiality in securities cases. The Court's guidance in the related False Claims Act context, which holds in no uncertain terms that statements of compliance with governing standards are not material *per se*, further underscores the Second Circuit's error.

1. This Court rejects per se *materiality rules in the securities context.*

The Second Circuit's *per se* materiality rule directly conflicts with the materiality standard this Court has consistently applied to the securities laws. In *TSC Industries*, the Court articulated the now hornbook standard for materiality: "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." 426 U.S. at 449. And since *TSC Industries*, the Court has repeatedly applied the "total mix of information" test and confirmed that it applies in Section 10 cases like this one, in addition to Section 14 cases. See, *e.g.*, *Basic*, 485 U.S. at 232).

In so holding, the Court has cautioned that "certain information concerning corporate developments could well be of 'dubious significance,'" and thus it has been "careful not to set too low a standard of materiality." *Basic*, 485 U.S. at 231 (quoting *TSC Indus.*, 426 U.S. at 448. A rule to the contrary would "bring an overabundance of information within [the] reach" of disclosure rules, leading overcautious "management 'simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Id.* (quoting *TSC Indus.*, 426 U.S. at 448-49).

The Court has also repeatedly rejected the adoption of "bright-line rule[s]" that, though "easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances," would "ignor[e] the purposes of the Securities Acts." *Basic*, 485 U.S. at 236; see also *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 38 (2011) (stating likewise). Courts therefore must not "designate[] a single fact or occurrence as always determinative" of materiality or "confin[e] materiality to a rigid formula." *Basic*, 485 U.S. at 236; see also *id.* at 236 & n.14 (stating that "[c]ourts also would do well to heed th[e] advice to" "consider[] * * * materiality on a case-by-case basis"). In other words, courts should not embrace *per se* rules that certain conduct is always, or never, material, as such a rule "must necessarily be overinclusive or underinclusive." *Id.* at 236; see also *Matrixx Initiatives*, 563 U.S. at 39 (same).

To that end, in *Basic*, the Court rejected the argument that the nondisclosure of merger talks could never be a material omission simply because the negotiations were merely preliminary discussions before an "agreement-in-principle" had been reached. 485 U.S. at 233-236. But in rejecting that "artificial[] exclu[sion]" of potentially investment-relevant information (*id.* at 236), the Court also rejected the *per se* rule of materiality that had been endorsed by the court below in that case. *Id.* at 237-38. The lower court had held that the nondisclosure of the merger discussions "bec[ame] material" simply "*by virtue of the statement denying their existence*." *Id.* at 237 (quoting *Levinson* v. *Basic Inc.*, 786 F.2d 741, 748 (6th Cir. 1986)). But this Court vacated that reasoning, as "[i]t is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." *Id.* at 238.

The *per se* standard embraced by the decision below is precisely the sort of "bright-line rule for materiality" that this Court has repeatedly rejected. *Basic*, 485 U.S. at 249. After all, there can be no more "rigid formula" (*id.* at 236) than a *per se* rule holding that a certain statement—here, a statement of compliance with PCAOB standards—is material no matter its impact on investment-relevant information communicated to investors about a company's finances. Indeed, the Second Circuit's conclusion that respondents did not need to allege any "link between [the auditor's] false certification and specific errors in [the company]'s financial statements" (App., *infra*, 36a) is practically a word-for-word repudiation of the Court's requirement in *TSC Industries* that, to be material, the omitted fact at issue had to have had some "bearing on the soundness and reliability of the market prices listed in the proxy statement." 426 U.S. at 463.

The Second Circuit's stark break with this Court's precedent, and the resulting *per se* rule of materiality, warrants review.

2. The decision below conflicts with the Court's materiality law in the related False Claims Act context.

The Second Circuit's materiality analysis also departs from this Court's express holdings in the closely related False Claims Act ("FCA") context. There the Court's precedent could not be more clear that allegedly false statements related to regulatory compliance are not *per se* material. The Second Circuit's decision cannot be squared with this settled law.

a. The FCA "imposes significant penalties on those who defraud the government." *Escobar*, 579 U.S. at 180; see also 31 U.S.C. § 3729(a)(1) (making liable, *inter alia,* any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim").

The materiality standard under the FCA shares a common foundation with "other federal fraud statutes," including the securities laws, as the "materiality requirement descends from 'common-law antecedents'" shared by these laws. *Escobar,* 579 U.S. at 193 (quoting *Kungys* v. *United States*, 485 U.S. 759, 769 (1988)). "Indeed, 'the common law could not have conceived of 'fraud' without proof of materiality.'" *Ibid* (quoting *Neder*, 527 U.S. at 22).

Under the FCA, just as under Rule 10-5b, "[t]he materiality standard is demanding." *Escobar*, 579 U.S. at 194. The statute defines materiality to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money." 31 U.S.C. § 3729(b)(4). Thus, similar to how courts applying *TSC Industries* must assess whether a statement or omission alters the "total mix of information" (426 U.S. at 449), under the FCA, "materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar,* 579 U.S. at 193 (quoting 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003)).

b. In *Escobar*, the Court considered the materiality of a false statement certifying compliance with governing standards. See 579 U.S. at 183-186. Specifically, that case involved Medicaid reimbursement claims by a health care provider that offered various services, such as individual and family therapy. By state regulation, these claimed services could only be provided by staff with certain qualifications.

The qui tam plaintiffs in *Escobar* alleged that the staff providing the claimed services did not satisfy these regulatory standards, and thus the implicit representation that the staff providing the service "possesse[d] the prescribed qualifications for the job" was false. 579 U.S. at 1190. The court of appeals held that the provider had "knowingly misrepresented compliance with a material precondition of payment" by falsely certifying compliance with these regulations. *Ibid.* (quoting *United States ex rel. Escobar* v. *Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015)). It "further held that the regulations themselves 'constitute[d] dispositive evidence of materiality.'" *Ibid.* (quoting 780 F.3d at 514). Put differently, because these regulations declared an "'express and absolute' condition of payment," falsely certifying compliance with them was *per se* material. *Ibid.* (quoting 780 F.3d at 514).

This Court vacated that judgment. *Escobar*, 579 U.S. at 186. The Court explained that the court of appeals' materiality analysis was misguided because "[w]hether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry." *Escobar*, 579 U.S. at 190. To the contrary, "statutory, regulatory, and contractual requirements are *not automatically material*, even if they are labeled conditions of payment," because—as the Court had explained in the securities fraud context—"materiality cannot rest on 'a single fact or occurrence as always determinative.'" *Id*. at 191 (quoting *Matrixx Initiatives*, 563 U.S. at 39) (emphasis added). See also *ibid.* ("Materiality [] cannot be found where noncompliance is minor or insubstantial.").

Instead, materiality turns on there being "proof" that the false certification of compliance would likely have induced the government to make a payment where it otherwise would not have paid. *Escobar*, 579 U.S. at 195. For instance, if there is evidence that the "Government consistently refuses to pay claims in the mine run of cases based on noncompliance." *Ibid.* At the pleading stage, the plaintiff may only overcome the "rigorous" materiality standard by pleading such facts with "plausibility and particularity" to survive a motion to dismiss. *Id.* at 195 n.6.

The Court thus rejected the "extraordinarily expansive view of liability" that would arise if "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation." *Escobar*, 579 U.S. at 195-96.

c. The *per se* rule of materiality adopted by the court below is impossible to reconcile with the materiality analysis of *Escobar* and the many circuit decisions applying it. Indeed, as one court of appeals has explained, "[a]fter *Escobar*, it is clear that noncompliance with [governing standards] is not material per se." *United States Ex Rel. Rose* v. *Stephens Inst.*, 909 F.3d 1012, 1020 (9th Cir. 2018). Rather, courts "must examine the particular facts of each case" to conduct a proper "analysis of materiality." *Ibid.* See also, *e.g., Hagerty ex rel. United States* v. *Cyberonics, Inc.,* 844 F.3d 26, 32-33 (1st Cir. 2016) (rejecting a "per se rule that if sufficient allegations of misconduct are made, it necessarily follows that false claims and/or material false information were filed") (quoting *United States ex rel. Ge* v. *Takeda Pharm. Co.*, 737 F.3d 116, 124 (1st Cir. 2013)); *United States ex rel. Sorenson* v. *Wadsworth Bros. Constr. Co., Inc.*, 48 F.4th 1146, 1158 (10th Cir. 2022) (stating that sustaining a complaint alleging "nothing more than a naked" failure to comply with statutory or regulatory requirement "would make a mockery of [*Escobar*]").

Escobar and its progeny thus establish that statements of compliance with standards controlling government payouts—even statutory, regulatory, or contractual standards upon which payment is expressly conditioned—are not inherently material. The Second Circuit, by contrast, holds that a comparable statement of compliance in a different context—an auditor's legally required statement of compliance with PCAOB standards—is. There is no way to reconcile those holdings: either, as the court held below, a false statement of compliance with governing standards is *per se* material, and thus there is no need for a plaintiff to allege facts showing that the statement was likely to influence investor behavior, or, as this Court held in *Escobar*, materiality requires such additional factual allegations.

The Second Circuit reached the wrong result, and it did so by applying a legally unsupportable test that makes a hash of this Court's materiality jurisprudence. As described—and as made clear in *Escobar*—materiality under the FCA is closely linked to materiality in other legal contexts, including the securities laws. See, *e.g., Escobar*, 579 U.S. at 193-194 (stating that the "materiality requirement descends from 'common law antecedents'" and drawing on materiality principles from tort law and contract law); *id.* at 191 (relying on the materiality analysis in *Matrixx Initiatives*, 563 U.S. at 39, a Section 10 case). The need to preserve the consistent application of the materiality standard in cross-cutting contexts is an additional reason to grant review.

* * *

In the initial panel decision below, BDO prevailed because respondents "failed[ed] to allege any link between" BDO's alleged misstatements and "material errors contained" in Amtrust's 10-K. App., *infra*, 75a. On rehearing, the court of appeals flipped its disposition solely because it adopted a radically different materiality rule: In its new opinion, to show that the "audit certification was material," respondents were no longer "required to allege a link between BDO's false certification and specific errors in AmTrust's financial statements." *Id*. at 36a. This tectonic change in law—a clear adoption of a *per se* materiality standard—opens a circuit conflict, establishes an enormously expansive rule in the one judicial circuit in the country in which virtually any securities lawsuit may be filed, and breaks with decades of this Court's holdings regarding materiality. Further review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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