No. 24-____

IN THE

Supreme Court of the United States

PLUMBERS LOCAL #290 PENSION TRUST FUND, Individually and on Behalf Of All Others Similarly Situated,

Petitioner,

v.

ROOT, INC.; ALEXANDER TIMM; DANIEL ROSENTHAL; MEGAN BINKLEY; CHRISTOPHER OLSEN; DOUG ULMAN; ELLIOT GEIDT; JERRI DEVARD; LARRY HILSHEIMER; LUIS VON AHN; NANCY KRAMER; NICK SHALEK; SCOTT MAW; BARCLAYS CAPITAL INC.; GOLDMAN SACHS & COMPANY LLC; MORGAN STANLEY & COMPANY LLC; WELLS FARGO SECURITIES, LLC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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August 28, 2024

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QUESTION PRESENTED

This petition presents a question nearly identical to that already before the Court in *Facebook, Inc. v. Amalgamated Bank*, No. 23-980. The circuits have split two ways concerning whether a company's disclosure in the "Risk Factors" section of an SEC filing is misleading if it warns that a risk *may* or *could* materialize when that risk has already transpired at the time the company spoke. The First, Second, Third, Fifth, Ninth, and D.C. Circuits hold that it is misleading to disclose that a risk may or could materialize when that risk has already transpired. The Sixth Circuit has adopted a second, outlier position that such disclosures are never misleading. The question is thus whether the Court should resolve the conflict.

PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

Plumbers Local #290 Pension Trust Fund, individually and on behalf of all others similarly situated, Plaintiff-Appellant

Root, Inc., Defendant-Appellee

Alexander Timm, Defendant-Appellee

Daniel Rosenthal, Defendant-Appellee

Megan Binkley, Defendant-Appellee

Christopher Olsen, Defendant-Appellee

Doug Ulman, Defendant-Appellee

Elliot Geidt, Defendant-Appellee

Jerri DeVard, Defendant-Appellee

Larry Hilsheimer, Defendant-Appellee

Luis von Ahn, Defendant-Appellee

Nancy Kramer, Defendant-Appellee

Nick Shalek, Defendant-Appellee

Scott Maw, Defendant-Appellee

Barclays Capital Inc., Defendant-Appellee

Goldman Sachs & Company LLC, Defendant-Appellee

Morgan Stanley & Company LLC, Defendant-Appellee

Wells Fargo Securities, LLC, Defendant-Appellee

CORPORATE DISCLOSURE STATEMENT

Petitioner Plumbers Local #290 Pension Trust Fund is not a corporation.

LIST OF DIRECTLY RELATED PROCEEDINGS

Counsel for Petitioner is aware of no directly related proceedings.

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REPORTS OF THE OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was issued on April 29, 2024. It is reported at *Kolominsky v. Root, Inc.*, 100 F.4th 675 (6th Cir. 2024), and it is reproduced in the Appendix to this Petition ("Appendix" or "Pet. App.") at 51a-77a. The district court's opinion and order was issued on March 31, 2023. It is reported at *Kolominsky v. Root, Inc.*, 667 F. Supp. 3d 685 (S.D. Ohio 2023), *aff'd*, 100 F.4th 675 (6th Cir. 2024), and it is reproduced in the Appendix at 1a-49a.

JURISDICTION

The court of appeals issued its opinion and judgment on April 29, 2024. Pet. App. at 51a-79a.

On July 16, 2024, Plumbers Local #290 Pension Trust Fund ("Petitioner") filed an application to extend time for filing a petition for a writ of *certiorari*, which Justice Kavanaugh granted on July 22, 2024, thereby extending the time to file to August 28, 2024. *See Plumbers Local 290 Pension Trust Fund v. Root, Inc.*, No. 24A68 (July 22, 2024).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "1933 Act") (15 U.S.C. §§77k, 77l(a)(2), and 77o) are set out verbatim in the Appendix. Pet. App. at 80a-89a.

STATEMENT OF THE CASE

A. This case presents a question that is nearly identical to the one currently before the Court in *Facebook*.

The court of appeals, relying upon, *inter alia*, its unpublished decision in *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015), held that Petitioner's Amended Complaint for Violations of the Federal Securities Laws (Dist. Ct. Dkt. 31) ("AC") did not state a claim under §§11, 12(a)(2), and 15 of the 1933 Act. One reason, according to the court, was that Defendants' purported risk-factor warning—that Root, Inc.'s ("Root") marketing strategy *could* affect Root's crucial customer-acquisition cost ("CAC") metric—was not misleading, even though that strategy was *already* adversely affecting CAC when Defendants spoke and Defendants did not disclose that adverse impact.[1] Pet. App. at 69a ("[Petitioner's] argument that Root should have said its marketing strategy *was* affecting Root's CAC, instead of saying that it *could*, fails.") (emphasis in original). In other words, the court held that a warning that a negative effect on CAC *could* occur did not misleadingly imply that the adverse effects had not already materialized (they had). *Id.*

The question of whether and when a risk warning is misleading is already pending before the Court. *See Facebook, Inc. v. Amalgamated Bank*, No. 23-980. On June 10, 2024, the Court granted the *Facebook* petition for a writ of *certiorari* as to Question 1 presented by the petition. *See Facebook, Inc. v. Amalgamated Bank*, __ U.S. __, 2024 WL 2883752, at *1 (June 10, 2024). That question reads:

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[1] Unless otherwise noted, citations are omitted and emphasis is added.

> [T]he circuits have split three ways concerning what public companies must disclose in the "risk factors" section of their 10-K filings. The Sixth Circuit holds that companies need not disclose past instances when a risk has materialized. The First, Second, Third, Fifth, Tenth, and D.C. Circuits hold that companies must disclose that a risk materialized in the past if the company knows that event will harm the business. The Ninth Circuit here adopted a third, outlier position requiring companies to disclose that a risk materialized in the past even if there is no known threat of business harm.

Petition for a Writ of *Certiorari*, *Facebook, Inc. v. Amalgamated Bank*, _U.S._ (Mar. 4, 2024) (No. 23-980), 2024 WL 1009159, at *i.

The instant petition poses a closely related question—whether the Court should resolve the conflict between the Sixth Circuit's *per se* rule that a risk warning is never misleading for failure to disclose that a risk had already materialized before the company warned that it "'*may*'" or "'*could*'" occur, Pet. App. at 54a (emphasis in original), and the contrary holdings of the First, Second, Third, Fifth, Ninth, and D.C. Circuits.[2] Accordingly, Petitioner requests that the Court hold this petition pending resolution of *Facebook*.

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[2] In addition to presenting the issue of whether warning of a hypothetical risk is actionable when those risks have already materialized, *Facebook* also presents the question of whether the materialized risk poses a "threat of business harm." 2024 WL 1009159, at *i. The former, not the latter, is at issue here. There is no question that the materialized risk here—increased CAC at the time of the IPO—posed a business threat.

B. Facts

1. Introduction

This petition arises from the dismissal of securities class-action claims alleging strict liability and negligence under §§11, 12(a)(2), and 15 of the 1933 Act, and concerns Defendants' materially false and misleading statements and omissions made in connection with Root's Initial Public Offering ("IPO") regarding one of Root's most-critical financial metrics—its CAC—in Root's Registration Statement.[3]

Root is a start-up automotive-insurance company that seeks to differentiate itself from traditional insurers by focusing on reaching customers through a mobile app. Pet. App. at 2a-3a.[4] The IPO was a key part of Root's strategy to raise money to support Root's expansion from a regional to a nationwide insurer.

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[3] The AC also alleged claims under §§10(b) and 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. §§78j(b) and 78t(a)), and U.S. Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. §240.10b-5), Pet. App. at 8a, but Petitioner's appeal did not raise the dismissal of those claims. "Defendants" refers collectively to Root; Root's Chief Executive Officer Alexander Timm, Root's Chief Financial Officer Daniel Rosenthal, Megan Binkley, Christopher Olsen, Doug Ulman, Elliot Geidt, Jerri DeVard, Larry Hilsheimer, Luis von Ahn, Nancy Kramer, Nick Shalek, Scott Maw (the "Individual Defendants"); and Goldman Sachs & Company LLC, Morgan Stanley & Company LLC, Barclays Capital Inc., and Wells Fargo Securities, LLC (the "Underwriter Defendants"). Pet. App. at 1a. "Registration Statement" refers to the prospectus and Form S-1 registration statement, as amended, issued in connection with Root's IPO on or about October 28, 2020. Dist. Ct. Dkt. 31, ¶2 (filed in the district court).

[4] This statement of facts is derived from the summaries of the AC's allegations provided in the opinions below and supplemented with citations to the AC where necessary.

Pet. App. at 4a-6a, 17a-18a. To complete this strategy, Defendants marketed Root's purportedly low CAC, *see* Pet. App. at 53a, thus conveying to investors that Root could acquire new customers more profitably than traditional insurers. Pet. App. at 3a-6a.

"CAC is a simple calculation, measuring the cost of acquiring new customers. It is considered a critical performance metric for newer companies because it measures the ability of new companies to improve their profitability as they grow." Pet. App. at 53a n.1. Defendants relied upon Root's purported CAC advantage over more-traditional automobile insurers to market Root's shares. Pet. App. at 53a. "From August 2018 to August 2020, Root's average CAC was $332," and Petitioner alleged that "traditional car insurance companies' CAC is between $500 and $800." *Id.* Accordingly, at least at some point, "Root ... *had* a competitive advantage." *Id.*

As of the time of the IPO, Root intended to grow its business to a national scope. *Id.* In the "Risk Factors" section of Root's Registration Statement (17 C.F.R. §229.105), Defendants warned that "[a]s we grow, we *may* struggle to maintain cost-effective marketing strategies, and our customer acquisition costs *could* rise substantially." Pet. App. at 54a (emphasis in original). But as of the date Defendants offered that purported warning, the adverse effects the warning portended had already transpired—Root's CAC competitive advantage had evaporated: "[A]t the time of the IPO, [Root's] CAC was, in fact, higher than its historic average." Pet. App. at 55a. Indeed, it was effectively no different than the costs incurred by typical insurers.[5] The Registration Statement did not

[5] Dist. Ct. Dkt. 31, ¶¶7, 80, 94-95, 131-135.

ameliorate its misleading warning—it failed to disclose these troubling facts. But when they were revealed after the IPO—in which Petitioner purchased shares—Root's share price plummeted, damaging Petitioner and the proposed class. Pet. App. at 53a.

The AC alleged that the purported risk warning therefore "was an inaccurate statement of material fact," as it implied that Root faced a hypothetical, not extant, risk of increasing CAC, and a misleading omission, inasmuch as "the hypothetical risk recited in the Registration Statement had already materialized as of the IPO, but was not disclosed to investors in the IPO." Dist. Ct. Dkt. 31, ¶¶110-111.

2. The course of the proceedings.

This action commenced on March 19, 2021.[6] Petitioner filed the operative complaint (the AC) on November 19, 2021. Pet. App. at 8a. Defendants moved to dismiss the AC on May 20, 2022. *Id.* On March 31, 2023, the district court filed its order dismissing the AC with prejudice and entered judgment that same day. Pet. App. at 1a-49a. Petitioner timely appealed on April 28, 2023.[7]

3. Root's IPO.

The IPO was conducted on or about October 28, 2020. Pet. App. at 2a. The SEC declared Root's Registration Statement effective on October 27, 2020. Pet. App. at 3a. At the IPO, "Root's Class A common stock sold for $27.00 per share, resulting in over $600 million in net proceeds for Root and achieving a

[6] Complaint for Violations of the Federal Securities Laws (Dist. Ct. Dkt. 1).

[7] Notice of Appeal (Dist. Ct. Dkt. 66).

valuation for the company of approximately $6.7 billion." Pet. App. at 7a.

4. Root's business model.

"Root ... [is] a technology company seeking to disrupt the traditional car insurance market, [which] attracted investors such as [Petitioner] with its purportedly low [CAC]." Pet. App. at 53a. Root "pric[es] and quot[es] insurance through a mobile phone app and us[es] the app to collect driving data from Root's customers." Pet. App. at 2a. According to Root, its strategy makes it "better able to screen risky drivers compared to traditional automobile insurers like GEICO, Allstate, and Progressive." *Id.*

"At the time of the IPO, Root was licensed to sell in 36 states, but it had plans to expand to all 50 states by the beginning of 2021." Pet. App. at 53a. Defendants stated: "In the near term, as we expand our licensed footprint to 50 states, we will invest in our national brand...." Pet. App. at 54a.

5. Root's crucial CAC metric.

CAC "is considered a critical performance metric for newer companies because it measures the ability of new companies to improve their profitability as they grow." Pet. App. at 53a n.1. The Registration Statement emphasizes the importance of CAC to Root's profits, pointing out that Root's average CAC was $332 during the period of August 2018 to August 2020, Pet. App. at 53a, a figure that was well below the typical CAC of traditional-insurance companies, which is typically $500 to $800 due to intense competition. *Id.* For automobile insurers that, like Root, focus on direct-to-

consumer marketing—*i.e.*, GEICO and Progressive—the average CAC is approximately $700.[8]

Throughout October 2020, investors and analysts were keenly focused on Root's CAC.[9] Multiple analyst reports emphasized Root's low average CAC of $332 and the advantage over competitors that figure conferred.[10]

6. Defendants' purported risk warning misled investors into believing that Root's CAC had not already risen substantially, when it had.

Defendants emphasized the competitive advantage conferred by Root's low average CAC throughout the Registration Statement. Pet. App. at 53a-54a. For instance, the Registration Statement explained that "'mobile device[s]'" were "'an underutilized distribution channel'" that Root was well-positioned to exploit because it was "'[e]ngaging [its] customers and prospective customers directly through the mobile device.'"[11] Root proclaimed it had succeeded in profitably exploiting that channel despite the "'historical[] … difficulty'" experienced by others seeking to do the same: "'Through our hyper-targeted, data-driven and ever-improving performance marketing capabilities, we have been able to acquire customers far below the average cost of doing so through each of the direct and agent-based channels.'"[12]

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[8] Dist. Ct. Dkt. 31, ¶80.

[9] Pet. App. at 3a; Dist. Ct. Dkt. 31, ¶¶81-85.

[10] Dist. Ct. Dkt. 31, ¶¶82-85.

[11] *Id.*, ¶106.

[12] *Id.*

The Registration Statement emphasized Root's ability to exploit the mobile-device channel, observing that it "is the fastest growing retail channel in the United States" and explaining that "[w]e therefore designed a mobile-directed customer acquisition strategy, *delivering customer acquisition costs below the average cost of doing so through each of the direct and agent channels*." Pet. App. at 54a (emphasis in original). The Registration Statement further explained "[*t*]*he efficiency of our customer acquisition strategy has resulted in a cost acquisition advantage versus direct and agent channels*." *Id.* (emphasis in original). It illustrated that success by pointing out that "[w]hile our customer acquisition costs can vary by channel mix, by state or due to seasonality, over the period from August 2018 to August 2020 our average customer acquisition cost was $332." *Id.*

In addition to touting Root's well-below-typical CAC, Defendants also disclosed information regarding Root's plans for growth, including plans to "expand our licensed footprint to 50 states," and "invest[ment] in our national brand." *Id.*

Defendants addressed the potential tension between their success in keeping Root's CAC particularly low and their plans for growth, purporting to warn that "[a]s we grow, we *may* struggle to maintain cost-effective marketing strategies, and our customer acquisition costs *could* rise substantially." *Id.* (emphasis in original). Thus, Defendants warned of potential—not extant—negative outcomes.

7. Developments following the IPO revealed to investors that Defendants' purported risk warning that CAC "could" rise was misleading because it had already risen as of the IPO.

Despite Defendants' warning of the possibility of *future* CAC increases, Root's increased marketing expenditures to support Root's *planned* national expansion to all fifty states—which began *before* the IPO—had already materially elevated Root's CAC as of the IPO. *See* Pet. App. at 53a ("Allegedly, the increase in CAC was caused by Root's nationwide expansion."); Pet. App. at 7a ("Defendant Rosenthal confirmed that Root's CAC for the third fiscal quarter, which closed prior to the IPO, was 'elevated' due to 'amplified brand spend'"); Pet. App. at 5a (before the IPO, Defendant Timm acknowledged a CAC price "'spike'").

Investors began to learn the truth when, in late November 2020, analysts initiated coverage of Root and painted a troubling picture of Root's present and expected future CAC, a picture that bore no resemblance to that described in the Registration Statement.[13] On November 23, 2020, a UBS analyst reported that Root's "'heavy customer acquisition costs will result in elevated cash burn and net losses through 2023 requiring additional capital raises (debt and/or equity) to maintain regulatory capital requirements.'"[14]

The analyst further observed that Root's CAC had risen above $500 during the third fiscal quarter of 2020—which ended September 30, 2020—before the

[13] Dist. Ct. Dkt. 31, ¶¶94, 131-133.

[14] Dist. Ct. Dkt. 31, ¶131; Pet. App. at 7a.

IPO.[15] A Barclays Capital Inc. ("Barclays") analyst report—also dated November 23, 2020—similarly reported that Root's CAC reached $514 during the third fiscal quarter of 2020, again before the IPO.[16] Thus, as of the IPO, far from enjoying a competitive advantage, Root's CAC was already within the CAC range that was typical for the industry—although that was not publicly known—with further CAC increases virtually certain to occur given Root's commitment to "'invest in [its] national brand'" due to its efforts to "'expand [its] licensed footprint to 50 states.'"[17]

Both the UBS and the Barclays analysts also projected dramatic future increases in Root's CAC.[18] The former warned that Root's CAC was expected to be nearly $700 by the first fiscal quarter of 2021, the period ending March 31, 2021.[19] The latter warned that one of the "'risks to monitor'" is that "'CAC is spiking to $660+ near term on the new national TV campaign,'" and that "'CAC is spiking up right now, weighing on profits.'"[20] The Barclays analyst forecasted Root's CAC to reach a level of "'nearly $700 by 1Q21,'" as a result of Root's national-advertising campaign, an estimate that "'could prove conservative.'"[21]

Then, on December 1, 2020, in Root's first financial report as a publicly-traded company, Rosenthal confirmed that Root's CAC had materially increased during the

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[15] Pet. App. at 7a; Dist. Ct. Dkt. 31, ¶131.

[16] Dist. Ct. Dkt. 31, ¶¶94, 133.

[17] *Id.*, ¶¶80, 106.

[18] *Id.*, ¶¶94-95, 131-133.

[19] *Id.*, ¶131.

[20] *Id.*, ¶¶94, 132.

[21] *Id.*, ¶133.

third fiscal quarter of 2020—*i.e.*, before the IPO—and would remain elevated, stating that "'amplified brand spend ... will result in elevated customer acquisition cost levels *for the next two quarters*.'"[22] Indeed, Rosenthal acknowledged that the elevated CAC was "'in line with our [undisclosed] expectations during the quarter,'" thus confirming that when the IPO commenced, Defendants already expected—but did not disclose—significant CAC inflation.[23]

In Root's second financial report as a publicly-traded company, on February 25, 2021, Timm admitted that Root "'still ha[s] much work to do in the quarters *and years* ahead, particularly around ... managing customer acquisition costs.'"[24] A Bank of America Securities analyst lamented Root's inflated CAC, concluding "'the Root model falls short.'"[25]

When this action was filed on March 19, 2021, Root's Class A common stock traded at $12.00 per share, an approximate 55.5% decline from the IPO price of $27.00 per share. Pet. App. at 7a.

C. The district court's order.

The district court analyzed the §§11 and 12(a)(2) of the 1933 Act claims together as they were based upon the same false and misleading statements and omissions. Pet. App. at 12a. The court found that none of the statements alleged in the AC—including the purported risk warning—were false or misleading. Pet. App. at 12a-35a.

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[22] Dist. Ct. Dkt. 31, ¶¶96, 134-136; Pet. App. at 7a.

[23] Dist. Ct. Dkt. 31, ¶135.

[24] *Id.*, ¶¶97, 137 (alteration in original).

[25] *Id.*, ¶¶138-139.

The court also rejected the AC's allegation that Root's purported risk warning that "'[a]s we grow, we *may* struggle to maintain cost-effective marketing strategies, and our customer acquisition costs *could* rise substantially'" was misleading. Pet. App. at 24a (emphasis in original). The court acknowledged that Petitioner "argue[d] that this statement gives rise to liability because the 'hypothetical risk' described in the statement 'had already materialized as of the IPO.'" Pet. App. at 25a. Nonetheless, the court apparently reasoned that the purported risk warning did not convey *any* present information to investors—it held the risk warning "is a forward-looking statement concerning Root's future CAC," and "this prediction about Root's future could not have materialized as of the IPO." *Id.*

The court also relied on *Zeid v. Kimberley*, 930 F. Supp. 431 (N.D. Cal. 1996), which held "'warnings regarding potential adverse factors are not actionable *as a matter of law*' where plaintiffs were asserting that defendants should have stated that certain adverse factors 'are' affecting rather than 'may' affect the financial statements." Pet. App. at 25a (quoting *Zeid*, 930 F. Supp. at 437). It rejected numerous other authorities disagreeing with *Zeid*'s analysis—even though they were "factually similar"—because they were "out-of-circuit cases" (which was also true of *Zeid*). Pet. App. at 25a-26a.

The court dismissed the §15 of the 1933 Act control-person claim because it found there was no primary violation. Pet. App. at 48a-49a.

D. The court of appeals affirmed.

The court of appeals affirmed the district court's judgment in its entirety. Pet. App. at 1a-50a. As a

preliminary matter, the court held that Federal Rule of Civil Procedure 9(b) applied to Petitioner's non-fraud claims under §§11, 12(a)(2), and 15 of the 1933 Act, but Petitioner's "claims meet [the Rule 9(b)] standard." Pet. App. at 56a-60a.[26] Rule 9(b) thus played no role in the court's analysis of Defendants' purported risk warning. Pet. App. at 65a-70a.

Turning to the purported risk warning, the court of appeals first analyzed whether the bespeaks caution doctrine applied and concluded that it did. Pet. App. at 65a-67a.[27] The court acknowledged that "'present fact ... is a different matter,'" and that the doctrine speaks to "'optimistic projections,'" Pet. App. at 66a-68a, but never explained its application to a risk warning that contains no "'optimistic projections.'" Nonetheless, the court held that the purported risk warning "is a cautionary statement, is labeled a risk factor, and is forward-looking," and thus "falls squarely within the Bespeaks Caution doctrine's protection." Pet. App. at 69a.[28]

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[26] Judge Clay filed a concurring and dissenting opinion disagreeing with the majority's holding that Rule 9(b) applied to Petitioner's non-fraud claims. Pet. App. at 71a-77a.

[27] "The [bespeaks caution] doctrine shields companies ... from liability when they make statements that are forward-looking and accompanied by meaningful cautionary language." Pet. App. at 68a. The doctrine does not apply to the "present-oriented aspect" of a statement that "has both a forward-looking aspect and an aspect that encompasses a representation of present fact." *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1213 (1st Cir. 1996).

[28] The court stated: "[B]oth parties presume that the Bespeaks Caution doctrine applied to this forward-looking statement." Pet. App. at 66a. But Petitioner never did so, contending at all times that the doctrine was irrelevant to Petitioner's claim that the supposed risk warning's present implications were misleading. *See id.* (Petitioner "argues that the doctrine will not shield Root

Ultimately, however, the court addressed Petitioner's argument that the purported risk warning conveyed misleading *present*—not forward-looking—information without reference to the bespeaks caution doctrine: Petitioner's "argument that Root should have said its marketing strategy *was* affecting Root's CAC, instead of saying that it *could*, fails. Statement Three is not a sham warning, and a reasonable investor would understand as much. The district court did not err." Pet. App. at 69a-70a.

In support of that conclusion, the Sixth Circuit cited its own unpublished decision in *Bondali*, 620 F. App'x at 491, and the district court decisions in *In re FBR, Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 362 (S.D.N.Y. 2008), and *Zeid*, 930 F. Supp. at 437. Pet. App. at 69a-70a. *Bondali*, the court of appeals' primary authority, does not address the bespeaks caution doctrine. *See Bondali*, 620 F. App'x at 491.

The court did not address any of the contrary decisions from other Circuits.

REASONS FOR GRANTING THE WRIT

A. Introduction

Section 11 of the 1933 Act "creates a private action for damages when a registration statement includes untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading," under which "the issuer of the securities is held absolutely liable," without regard to fault. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 207-08 (1976). Section 12(a)(2) of the 1933 Act has a

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from liability because the risk that Root warned of had already occurred, i.e., the warning was a sham.").

similar requirement. *See generally In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). Liability under §15 of the 1933 Act is derivative of the preceding two provisions. *See generally J&R Mktg. v. GMC*, 549 F.3d 384, 398 (6th Cir. 2008). Thus, the Sixth Circuit's holding that Petitioner failed to allege a false or misleading statement or omission is dispositive of all the 1933 Act claims alleged in the AC.

The Sixth Circuit here held that when a company portrays a material risk to its business as merely a hypothetical one in a purported risk warning, stating that the risk "'may'" or "'could'" materialize when it has already transpired, that is not misleading. Pet. App. at 65a, 69a-70a. Petitioner's claims therefore "fail[]." Pet. App. at 69a. The opinion thus establishes a *per se* rule—such misleading risk warnings are never actionable.

Contrary to the Sixth Circuit's *per se* rule, multiple Circuits have held that it is misleading for a company to portray a material risk to its business as a merely hypothetical prospect when the risk: (a) has already materialized; or (b) has not yet materialized but is virtually certain to occur. *See Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021); *Set Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 85 (2d Cir. 2021); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 242 (3d Cir. 2017); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009); *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021), *cert. denied sub nom. Alphabet Inc. v. Rhode Island*, 142 S. Ct. 1227 (2022); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104 (D.C. Cir. 2015).

The Sixth Circuit's outlier decision here thus conflicts with the decisions of the First, Second, Third, Fifth, Ninth, and D.C. Circuits. A closely related question is currently before the Court in *Facebook*, and

the Court should hold the instant petition pending resolution of that matter.

B. Contrary to the decisions of the First, Second, Third, Fifth, Ninth, and D.C. Circuits, the Sixth Circuit applies a *per se* rule—a risk warning can never be misleading because it supposedly conveys no present information.

1. The question presented is important, recurring, and squarely at issue.

The question presented here is important and recurring. The Sixth Circuit's opinion below will shield an entire category of statements from liability under the securities laws merely because of their placement in the "Risk Factors" section of any SEC filing. As a result, the Sixth Circuit's decision will allow issuers to withhold important information from investors that is already in the issuers' possession—the fact that a risk described as hypothetical or contingent has already materialized. The issue is a recurring one, as evidenced by the decisions of seven circuits described herein. It has also been addressed by numerous district courts.

This case is an excellent vehicle in which to resolve the question presented. While the Sixth Circuit's opinion addresses two preliminary issues before establishing its *per se* rule, neither militates against the Court's review should the question presented here not be resolved in *Facebook*.

First, the opinion concludes that even though Petitioner's appeal concerned only strict-liability or negligence claims under the 1933 Act, the elevated pleading standards of Rule 9(b) apply. Pet. App. at 56a-60a; *but see* Pet. App. at 70a-77a (Clay, J., concurring

and dissenting) (disagreeing with the majority's Rule 9(b) ruling). But because the majority concluded that Petitioner's "claims meet [the Rule 9(b)] standard," Pet. App. at 60a, the Rule 9(b) holding is of no moment.

Second, the Sixth Circuit held that the Defendants' purported risk warning "must [be] analyze[d] ... through the Bespeaks Caution doctrine." Pet. App. at 66a. It explained that "the Bespeaks Caution doctrine ... shield[s]... companies from liability when the[ir] forward-looking statements are accompanied by meaningfully cautionary language so that a reasonable investor would understand the statements." Pet. App. at 69a.

This holding, too, is irrelevant to the question presented in this petition. As the court below recognized, Petitioner "argues that the [bespeaks caution] doctrine will not shield [Defendants] from liability because the risk that [Defendants] warned of [—that Root's "customer acquisition costs *could* rise substantially"—] had already occurred." Pet. App. at 54a, 66a (emphasis in original). In other words, Petitioner contended that Defendants' statement was misleading because it falsely implied that the negative result that it supposedly warned "may" or "could" arise had not already materialized—it had—or because Defendants misleadingly omitted the fact that the warned-of CAC increases had already materialized before Defendants spoke. Thus, Petitioner alleges that the purported risk warning is misleading due to the *present*—not forward-looking—information that it contains. As the Sixth Circuit's bespeaks caution analysis acknowledged, "'present fact ... is a different matter.'" Pet. App. at 66a.

Indeed, it is well-settled that the bespeaks caution doctrine does not apply to the "present-oriented

aspect" of a statement that "has both a forward-looking aspect and an aspect that encompasses a representation of present fact." *Shaw*, 82 F.3d at 1213; *accord Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947-48 (9th Cir. 2005); *Harden v. Raffensperger, Hughes & Co., Inc.*, 65 F.3d 1392, 1405-06 (7th Cir. 1995). The same is true of the related Private Securities Litigation Reform Act of 1995 ("PSLRA") safe harbor. *See, e.g.*, *Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676, 691 (5th Cir. 2014) (The Fifth Circuit "join[ed] the First Circuit, Third Circuit, and Seventh Circuit in concluding that a 'mixed present/future statement is not entitled to the safe harbor with respect to the part of the statement that refers to the present.'"); *accord Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971, 984 (6th Cir. 2018) ("[A] non-forward-looking statement that can be analyzed discretely from forward-looking statements, and does not function as an express assumption underlying a future projection, is outside the PSLRA safe harbor for forward-looking statements[.]"). Accordingly, the bespeaks caution doctrine has no application to Petitioner's contention that the "present-oriented aspect[s]" of the purported risk warning are misleading. *See Shaw*, 82 F.3d at 1213.

2. The Sixth Circuit is the only circuit to hold that warning that a risk may or could materialize when it has already transpired is never misleading.

In addressing the specifics of Petitioner's argument, the Sixth Circuit made no mention of the bespeaks caution doctrine, holding that:

> [Petitioner]'s argument that Root should have said its marketing strategy *was* affecting Root's CAC, instead of saying that it *could*,

> fails. *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. Aug. 20, 2015) (quoting *In re FBR, Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 362 (S.D.N.Y. 2008) ("[C]autionary statements are 'not actionable to the extent plaintiffs contend defendants should have disclosed risk factors 'are' affecting financial results rather than 'may' affect financial results.'" (citations omitted)); *Zeid v. Kimberley*, 930 F. Supp. 431, 437 (N.D. Cal. 1996) (explaining that a fraud-based claim cannot be founded on boilerplate warnings and disclaimers when there is no evidence that the warnings were not false themselves).

Pet. App. at 69a-70a (emphasis in original). *Bondali* did not involve the bespeaks caution doctrine.

The Sixth Circuit's decision thus establishes a *per se* rule: claims arising when a company purports to warn that a risk may or could occur even though the warned-of risk had already materialized—like Petitioner's claim here—simply "fail[]." Pet. App. at 69a. The two quotations from *Bondali* and *Zeid* are to the same effect—they suggest that a warning that a risk may or could materialize that is offered after the risk has already come to pass can never be misleading.

3. The First, Second, Third, Fifth, Ninth, and D.C. Circuits hold that risk warnings are misleading when they warn of purported hypothetical risks when those risks have already materialized and demonstrate the error of the Sixth Circuit's approach.

The First, Second, Third, Fifth, Ninth, and D.C. Circuits disagree. As the Third Circuit put it in

analyzing the falsity element common to both §10(b) of the Securities Exchange Act of 1934 and §11 of the 1933 Act, "[w]e agree that a company may be liable under Section 10b for misleading investors when it describes as hypothetical a risk that has already come to fruition." *Williams*, 869 F.3d at 242; *accord Karth*, 6 F.4th at 138; *Alphabet*, 1 F.4th at 703; *Set Cap.*, 996 F.3d at 85; *Harman*, 791 F.3d at 104; *Lormand*, 565 F.3d at 249. The emphatic language employed by the Fifth Circuit illustrates how stark the conflict between the majority of circuits and the Sixth Circuit is—"'[t]o warn that the untoward *may* occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.'" *Rubinstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994).

Thus, as the *Rubinstein* court put it, the Sixth Circuit's decision in Petitioner's case finds that "'deceit,'" *see id.*, is not actionable under the federal securities laws. Pet. App. at 65a-70a. But "whether a statement is 'misleading' depends on the perspective of a reasonable investor," *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186 (2015), and multiple circuits have repeatedly held that risk warnings such as that given here—which portrayed an extant adverse business result as a mere future possibility—are misleading. Because reasonable investors would certainly interpret such purported warnings the same way as the host of judges who have found such warnings to be misleading, the Sixth Circuit's approach is erroneous and should be rejected. The Court should resolve the conflict and reject the Sixth Circuit's flawed, outlier position.

CONCLUSION

The Court should hold this petition pending its resolution of *Facebook*. Should the Court reject the Sixth Circuit's approach to risk warnings in *Facebook*, the Court should grant the petition, vacate the decision of the court of appeals, and remand for further proceedings consistent with the Court's *Facebook* decision. Should the Court not address the conflict between the Sixth Circuit's decision here and the decisions of the First, Second, Third, Fifth, Ninth, and D.C. Circuits in *Facebook*, the Court should grant this petition.

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August 28, 2024