No. 21-____

IN THE

Supreme Court of the United States

IN RE ALPHABET INC. SECURITIES LITIGATION

ALPHABET INC., LAWRENCE E. PAGE, SUNDAR PICHAI, GOOGLE LLC, KEITH P. ENRIGHT, AND JOHN KENT WALKER, JR.,

Petitioners,

v.

STATE OF RHODE ISLAND, OFFICE OF THE RHODE ISLAND TREASURER ON BEHALF OF THE EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND; LEAD PLAINTIFF, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

IGNACIO E. SALCEDA
BENJAMIN M. CROSSON
BETTY CHANG ROWE
STEPHEN B. STRAIN
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304

CATHERINE E. STETSON
Counsel of Record
NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioners

Additional counsel listed on inside cover

KATHERINE B. WELLINGTON
DANIELLE DESAULNIERS STEMPEL
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Counsel for Petitioners

QUESTION PRESENTED

Securities and Exchange Commission regulations require companies to disclose in their annual and quarterly filings "risk factors" that may affect their business. There is a six-circuit split over whether those "risk factors" should be forward-looking only, or also must include past information.

The question presented is whether the "risk factors" disclosed in a securities filing must disclose only future risks or must also disclose whether a risk has come to fruition in the past.

PARTIES TO THE PROCEEDING

Alphabet Inc., Lawrence E. Page, Sundar Pichai, Google LLC, Keith P. Enright, and John Kent Walker, Jr., petitioners on review, were the appellees below.

State of Rhode Island, Office of the Rhode Island Treasurer on behalf of the Employees' Retirement System of Rhode Island; Lead Plaintiff, Individually and on Behalf of All Others Similarly Situated, respondent on review, was the appellant below.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *In re Alphabet, Inc. Securities Litigation*, No. 20-15638 (9th Cir. June 16, 2021)
- *In re Alphabet, Inc. Securities Litigation*, No. 4:18-cv-06245-JSW (N.D. Cal. Feb. 5, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Alphabet Inc., Lawrence E. Page, Sundar Pichai, Google LLC, Keith P. Enright, and John Kent Walker, Jr., (collectively, "Alphabet") respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 1 F.4th 687. Pet. App. 1a-37a. That court's order denying rehearing and rehearing en banc is not reported. *Id.* at 52a-53a. The Northern District of California's opinion is not reported but is available at 2020 WL 2564635. *Id.* at 38a-49a.

JURISDICTION

The Ninth Circuit entered judgment on June 16, 2021. Petitioners filed a timely motion for rehearing and rehearing en banc, which was denied on July 23, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To 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.

Securities and Exchange Rule 10(b), 17 C.F.R. § 240.10b-5, which implements Section 10(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> * * *
>
> (b) To make any untrue statement of a 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,
>
> * * *
>
> in connection with the purchase or sale of any security.

The rule governing risk factor disclosures at the time of the statements relevant to this petition, 17 C.F.R. § 229.503(c) (2017), provides:

> (c) *Risk factors*. Where appropriate, provide under the caption "Risk Factors" a discussion of the most significant factors that make the offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply to any issuer or any offering. Explain how the risk affects the issuer or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk. The risk factor discussion must immediately follow the summary section. If you do not

include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on § 230.430A(a) of this chapter. The risk factors may include, among other things, the following:

(1) Your lack of an operating history;

(2) Your lack of profitable operations in recent periods;

(3) Your financial position;

(4) Your business or proposed business;

(5) The lack of a market for your common equity securities or securities convertible into or exercisable for common equity securities.

INTRODUCTION

This petition asks a simple question: In a securities filing where a company must disclose "risks," must it also disclose whether that risk has come to fruition in the past? The answer is simple, too: No. A "risk" is the *possibility* of a future harm or loss. It captures what might occur, not what has occurred. And because a reasonable investor understands that a "risk" captures the future and does not summarize the past, omitting a past event from the "risk factor" section of a securities filing is not misleading.

The Ninth Circuit reached a different conclusion. Without pausing to discuss the plain meaning of the term "risk," the court of appeals held that "[r]isk disclosures that speak entirely of as-yet-unrealized risks and contingencies and do not alert the reader that some of these risks may already have come to fruition can mislead reasonable investors." Pet. App. 24a (internal quotation marks and alterations omitted). Applying that rule, the court concluded that Alphabet misled investors when it disclosed in its securities filings a risk that it might suffer cybersecurity threats in the future, but did not state that it had previously identified and remediated a software bug related to the Google+ social network.

As the panel acknowledged, that decision is part of a circuit split. In the Fourth and Sixth Circuits, companies need only include in their Form 10-K and 10-Q risk disclosure statements what common sense and the Securities and Exchange Commission's rules require: the risks that the company faces. *See Bondali* v. *Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015); *Dice* v. *ChannelAdvisor Corp.*, 671 F. App'x 111, 112 (4th Cir. 2016) (per curiam), *aff'g In re ChannelAdvisor Corp. Sec. Litig.*, No. 5:15-CV-00307-F, 2016 WL 1381772 (E.D.N.C. Apr. 6, 2016). As the Sixth Circuit has explained, risk disclosures serve "to educate the investor on *future* harms." *Bondali*, 620 F. App'x at 491. "They are not meant to educate investors on what harms are currently affecting the company." *Id.* Under that approach, the disclosures at issue here were not misleading.

The Ninth Circuit thinks otherwise. Like the First, Third, and D.C. Circuits, as well as the Southern District of New York, the Ninth Circuit holds that to avoid a securities-fraud claim, if a public company lists a "risk" in the risk disclosure section of a securities filing, it must also disclose whether that risk has come to fruition in the past. *See* Pet. App. 24a-25a; *Karth* v. *Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021); *Williams* v. *Globus Med., Inc.*, 869 F.3d 235, 242 (3d Cir. 2017); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104 (D.C. Cir. 2015); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 516 (S.D.N.Y. 2013).

In those courts, it is not enough to warn in a risk disclosure that a given risk "could or may occur"; companies must also disclose whether they have already "experienced" that sort of "challenge." Pet. App. 25a (internal quotation marks omitted). But that misunderstands the plain meaning of the word "risk" and the very idea behind a risk disclosure—to warn of future dangers. It also makes a hash of the purpose of these disclosures, which is to identify and warn investors of the most important risks facing a public company, not drown them "in an avalanche of trivial information" about past events. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976)).

The question of what a company must include in its risk disclosures is vitally important. Failing to adhere to the correct standard exposes public companies—including the more than 70 Fortune 500 companies headquartered in the Ninth Circuit—to sprawling class-action securities lawsuits and the significant burdens and costs that come with them. And the broadly phrased decision below applies to any scenario in which a company discloses risks, including, but not limited to, quality control and supply chain risks. It also affects every conceivable industry, including the technology, automotive, chemical, energy, food, retail, and pharmaceutical sectors, to name a few. Moreover, because securities filings are not circuit-specific, the Ninth Circuit's rule will apply to every company conducting business in the Ninth Circuit. This Court should step in now to address this acknowledged circuit split—before the Ninth Circuit's rule becomes the de facto disclosure requirement nationwide.

The Court should grant certiorari and reverse.

STATEMENT

A. Factual Background

1. *The software bug.* From 2011 to 2019, Google operated a social network for consumers called Google+. Like other social networks, Google+ users created profiles, which could include information like the user's name, email address, occupation, gender, and age, as well as a profile photo. Users could choose to make certain profile information visible to anyone on Google+, or visible only to friends in their Google+ "circles."

In addition to enjoying a suite of Google-run services on Google+, users could also interact with third-party applications—that is, applications not run by Google. These third-party applications sometimes requested access to certain user data; for example, a third-party game application might have needed to access the user's Google+ profile photo so other players could recognize their friends. Third-party applications accessed such data via software intermediaries known as application program interfaces.

At the beginning of 2018, Google initiated a "root-and-branch review of third-party developer access" to user data. *See* Ben Smith, *Project Strobe: Protecting your data, improving our third-party APIs, and sunsetting consumer Google+*, Google: The Keyword (Oct. 8, 2018), https://bit.ly/3AdW6Zw (hereinafter "Google Blog Post"). In March of that year, the internal team discovered a software "bug"—a flaw in the code—in one of Google+'s application program interfaces. *Id.* This interface allowed users to grant third-party applications access to their profile information, as well as access to the *public* profile information of their friends on Google+. *Id.* The internal team learned that a routine update of the interface's software in 2015 had introduced a bug that potentially allowed those third-party applications to see the public profile information of the user's friends *and* any profile information visible to the user—including profile information the user's friends had shared only with their friends. The bug did not expose phone numbers, email messages, timeline posts, direct messages, or any other type of communication data. *Id.* Nor did it expose any social security numbers, credit card numbers, or medical information. Google fixed the issue promptly. *Id.*

Due to privacy concerns, Google maintained only the two most recent weeks of log data for this particular application program interface (log data is the record of data requested by applications through the interface). *Id.* Google accordingly could not confirm the full set of specifically affected users. *Id.* Google does, however, have a detailed process for determining whether to provide notice to users of "bugs and issues." *Id.* Here, Google's "Privacy & Data Protection Office reviewed this issue, looking at the type of data involved, * * * whether there was any evidence of misuse, and whether there were any actions a developer or user could take in response." *Id.* Because "[n]one of these thresholds were met in this instance," Google decided that notifying users of the bug was neither necessary nor useful. *Id.*

In October 2018, Google published a blog post reporting on its discovery and repair of the bug. *Id.* In addition to explaining the bug's limited impact, Google's blog post announced that the company was shuttering Google+ for consumers. *See id.* The reason was "very low usage" of the platform and "low * * * engagement," where "90 percent of Google+ user sessions are less than five seconds." *Id.*

The Wall Street Journal also reported about the bug and Google's response. *See* Douglas MacMillan & Robert McMillan, *Google Exposed User Data, Feared Repercussions of Disclosing to Public*, Wall St. J. (Oct. 8, 2008), https://on.wsj.com/3Fn3Qwb. The article stated that Google's legal and policy staff had shared a memorandum on the bug with senior executives in April 2018. The memo reiterated that there was no evidence of data misuse, but also reportedly warned that disclosing the incident would likely trigger "immediate regulatory interest" in Google's privacy practices. *Id.* (internal quotation marks omitted).

Following the bug's disclosure, Alphabet's publicly traded share price fell. Pet. App. 11a-12a.

2. *Alphabet's securities filings.* Alphabet, as a publicly traded company, is required to file annual reports (on Form 10-K) and quarterly reports (on Form 10-Q) with the Securities and Exchange Commission (SEC). *See* 15 U.S.C. § 78m; 17 C.F.R. § 249.310 (Form 10-K); 17 C.F.R. § 249.308a (Form 10-Q).

Form 10-K includes a "risk factor section," in which the company must provide a "concise" "discussion of the most significant factors that make the offering speculative or risky." 17 C.F.R. § 229.503(c) (2017); *see* Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 General Instructions 8, U.S. Sec. & Exch. Comm'n, *available at* https://bit.ly/3A8CCFE (last visited Oct. 21, 2021). Originally, the "risk factor disclosure was" required "only in the offering context." *FAST Act Modernization and Simplification of Regulation S–K*, 84 Fed. Reg. 12,674, 12,688 (Apr. 2, 2019). But in 2005, the SEC added this section to both Form 10-K and Form 10-Q. *Securities Offering Reform*, 70 Fed. Reg. 44,722, 44,830 (Aug. 3, 2005).[1]

Alphabet's 2017 Form 10-K accordingly cautioned investors about data breaches and security failures:

> If our security measures are breached resulting in the improper use and disclosure of user data * * * our products and services may be perceived as not being secure * * * and customers may curtail or stop using

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[1] In 2019, the SEC relocated this provision from 17 C.F.R. § 229.503(c) to 17 C.F.R. § 229.105. *See* 84 Fed. Reg. at 12,702-03. In 2020, the SEC amended Section 229.105 to, among other things, "change the standard for disclosure from the 'most significant' risks to 'material' risks." *Modernization of Regulation S–K Items 101, 103, and 105*, 85 Fed. Reg. 63,726, 63,742-46, 63,761 (Oct. 8, 2020) (codified at 17 C.F.R. § 229.105). As relevant to this petition, the substance of the SEC's risk factor rule is materially unchanged. Because the securities filings at issue in this case occurred in 2017 and 2018, this petition treats Section 229.503(c) as the governing risk disclosure requirement.

> our products and services, and we may incur significant legal and financial exposure.
>
> * * *
>
> Concerns about our practices with regard to the collection, use, disclosure, or security of personal information or other privacy related matters, even if unfounded, could damage our reputation and adversely affect our operating results.

Pet. App. 55a.

Form 10-Q (the form used for quarterly reports) requires companies to disclose "any material changes from risk factors as previously disclosed" in the company's Form 10-K. 70 Fed. Reg. at 44,830; *see also* Form 10-Q General Instructions, U.S. Sec. & Exch. Comm'n, https://bit.ly/3DbcJa5 (last visited Oct. 21, 2021). Alphabet's April 2018 Form 10-Q, which covered the period ending March 31, 2018, and its July 2018 Form 10-Q, which covered the period ending June 30, 2018, incorporated the risk factors disclosed in its 2017 Form 10-K and stated that "[t]here have been no material changes to [those] risk factors." Pet. App. 9a.

B. Procedural History

1. Three days after the bug's disclosure, the State of Rhode Island, Office of the Rhode Island Treasurer on behalf of the Employees' Retirement System of Rhode Island ("Rhode Island"), and others, filed two securities fraud class actions against Alphabet. Pet. App. 12a & n.2. The district court appointed Rhode Island as the lead plaintiff and consolidated the actions. *Id.* at 12a.

The consolidated amended complaint alleges that the defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5. *Id.* at 12a-13a.[2] Section 10(b) prohibits using or employing, "in connection with the purchase or sale of any security," "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5 implements that provision, making it unlawful to "make any untrue statement of a 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 * * * in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b). This Court has interpreted Section 10(b) as providing an implied private cause of action with six elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

As relevant here, Rhode Island alleged that Alphabet's silence on the bug in its April and July 2018 quarterly reports was a material omission given the company's prior statements describing data security as a "risk factor." Pet. App. 21a-22a; *see id.* at 14a-16a. The complaint also faulted Alphabet for not disclosing other—unspecified—"previously unknown, or

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[2] Rhode Island also alleged violations of Rule 10b-5(a) and (c). Those claims are not at issue here.

unappreciated security vulnerabilities" that Google's internal team had allegedly brought to light. *Id.* at 7a-8a (internal quotation marks omitted).[3] Rhode Island alleged that the defendants were either directly involved in making the alleged omissions or were liable under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), which imposes liability on any person who "controls" the person responsible for a violation of Section 10(b).

2. Alphabet moved to dismiss the amended complaint for failure to state a claim. *See* Pet. App. 13a, 38a-39a. Alphabet explained that any omission from its securities filings could not have materially misled investors because, at the time of those securities filings, the bug had been fully remediated. The "risk factors," however, were forward-looking; they were not meant to include past issues. Under Rhode Island's theory, securities filings would be bloated with stale information, drowning out the risks the company faces.

The district court agreed with Alphabet and dismissed the suit. As that court explained, "[t]here is no support for the position that a remediated technological problem which is no longer extant must be disclosed in the company's future-looking disclosures."

[3] The complaint also refers to another bug Google discovered in Google+ and disclosed to the public in December 2018. Excerpts of Record 43 (Complaint ¶ 64); *see* Pet. App. 12a. That bug was disclosed outside the class period and accordingly is not relevant here.

Id. at 44a. The court thus held that the alleged omission was not materially misleading under Section 10(b) and Rule 10b-5. *Id.* at 43a-44a.[4]

3. The Ninth Circuit reversed. As that court saw it, "[r]isk disclosures that 'speak entirely of as-yet-unrealized risks and contingencies' and do not 'alert the reader that some of these risks may already have come to fruition' can mislead reasonable investors." *Id.* at 24a (quoting *Berson* v. *Applied Signal Tech., Inc.*, 527 F.3d 982, 985-987 (9th Cir. 2008) (alterations omitted)). Under that rule, the Ninth Circuit concluded that "Alphabet's warning in each Form 10-Q of risks that 'could' or 'may' occur is misleading to a reasonable investor when Alphabet knew that those risks had materialized." *Id.* at 25a. In so holding, the court expressly "decline[d] to follow the Sixth Circuit's unpublished decision in *Bondali* v. *Yum! Brands, Inc.*, which held that a statement disclosing future harms generally would not mislead a reasonable investor about the current state of a corporation's operations." *Id.* at 25a n.6.

The court rejected Alphabet's argument that it was not required to disclose the bug because it had been fixed *before* the company filed its quarterly reports. "Given that Google's business model is based on trust," the Ninth Circuit said, "the material implications of a bug that improperly exposed user data for

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[4] The district court also dismissed the suit for Rhode Island's failure to adequately plead scienter. Pet. App. 46a-48a. And given this failure to adequately plead a valid Section 10(b) claim, the district court dismissed the Section 20(a) controlling-person claims. *Id.* at 49a (explaining that "without a primary violation of federal securities law, Plaintiffs cannot establish controlling person liability" (internal quotation marks omitted)).

three years were not eliminated merely by plugging the hole in Google+'s security." *Id.* at 26a.[5]

The Ninth Circuit denied Alphabet's petition for rehearing and rehearing en banc. *Id.* at 52a-53a. It did, however, grant Alphabet's motion to stay the mandate pending resolution of this petition. *Id.* at 50a-51a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CIRCUIT SPLIT AMONG SIX COURTS OF APPEALS.

The decision below deepens an acknowledged circuit split. Two courts of appeals—the Fourth and Sixth Circuits—recognize that the risk disclosures in annual and quarterly reports need not describe past events. *See Bondali*, 620 F. App'x at 491 (6th Cir.); *Dice*, 671 F. App'x at 112 (4th Cir.). A district court in the Tenth Circuit holds the same. *See Indiana Pub. Ret. Sys.* v. *Pluralsight, Inc.*, No. 1:19-CV-00128-JNP-DBP, 2021 WL 1222290, at *13 (D. Utah Mar. 31, 2021). In stark contrast, the First, Third, Ninth, and D.C. Circuits, as well as the Southern District of New York, hold that companies' risk disclosures must include related events that have already materialized. *See* Pet. App. 24a-25a; *Karth*, 6 F.4th at 138 (1st Cir.); *Williams*, 869 F.3d at 242 (3d Cir.); *In re Harman Int'l*

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[5] The Ninth Circuit also held that this omission was material, Pet. App. 23a-24a, and that Alphabet acted with the requisite scienter, *id.* at 28a-32a, and thus reversed the district court's dismissal on those grounds as well. The Ninth Circuit also reversed the district court's dismissal of the Section 20(a) claims, *id.* at 33a, and reversed the district court's sua sponte dismissal of Rhode Island's claims under Rule 10b-5(a) and (c), *id.* at 36a-37a. The Ninth Circuit affirmed the district court's dismissal of ten other statements alleged in the complaint to be materially misleading. *Id.* at 33a-36a.

Indus., 791 F.3d at 104 (D.C. Cir.); *In re Facebook, Inc. IPO*, 986 F. Supp. 2d at 516 (S.D.N.Y.). This straightforward division of authority on an important question of federal law affecting all publicly traded companies is worthy of this Court's intervention.

1. In the Fourth and Sixth Circuits, companies need not disclose past events in their risk disclosures. They must disclose *risks*.

In *Bondali*, the Sixth Circuit held that "cautionary statements" made in securities filings "are not actionable to the extent plaintiffs contend defendants should have disclosed risk factors [that] are affecting" the company's performance "rather than [that] may affect" the company's performance at some point in the future. 620 F. App'x at 491 (internal quotation marks omitted). As the Sixth Circuit explained, this is "apparent" from the "dictionary definition of 'risk' ": a " '*possibility* of loss, injury, disadvantage, or destruction.' " *Id.* (quoting *Risk*, Webster's Third New International Dictionary 1961 (1986) (emphasis in *Bondali*)). "Risk disclosures like the ones accompanying 10-Qs and other SEC filings are [thus] inherently *prospective* in nature"; they "warn an investor of what harms *may* come to their investment" and "educate the investor on *future* harms." *Id.* "They are not meant to educate investors on what harms are currently affecting the company," and so "a reasonable investor would be unlikely to infer anything regarding the current state of" the company from its risk disclosures. *Id.* In *Bondali*, a food company had disclosed that "food safety issues 'have occurred in the past, and could occur in the future.' " *Id.* at 490. But the company did not disclose a specific food-safety incident that had occurred earlier that year. *Id.* Applying this rule, the Sixth Circuit held that that omission was not misleading in violation of Section 10(b). *Id.* at 491.

The Fourth Circuit has approved of this approach. In *In re ChannelAdvisor Corp. Securities Litigation*, the Eastern District of North Carolina considered whether it was "false" for a company to disclose that a shift from one pricing model to another "could" cause the company's "margins [to] decline" while omitting that the company was currently planning to shift its pricing model. 2016 WL 1381772, at *2 (internal quotation marks omitted). Citing *Bondali*, the court held that there was "no reason to differentiate [that] risk disclosure[ ] from those held inactionable by the Sixth Circuit." *Id.* at *6. As the court explained, "it is unlikely that a reasonable investor would, from that cautionary language, infer anything about [the company]'s *current*" pricing model. *Id.* (emphasis added). The district court thus dismissed the complaint, *id.*, and the Fourth Circuit affirmed, *see Dice*, 671 F. App'x at 112.

Other district courts agree. *See, e.g.*, *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, MDL No. 19-MD-2879, 2021 WL 2407518, at *25 (D. Md. June 11, 2021) ("To the extent Plaintiff alleges that Marriott's risk factor disclosures were misleading about its *current* state of cybersecurity, those allegations fail because the risk factor disclosures are not intended to educate investors about harms currently affecting the company."); *Indiana Pub. Ret. Sys.*, 2021 WL 1222290, at *14 (D. Utah) (collecting cases and explaining that a "company's risk disclosures [are] not actionable under Section 10(b)" when "the disclosures communicate[ ] that the risks were only *possible* when, in fact," they had "already come to pass" (internal quotation marks omitted)).

2. In the decision below, the Ninth Circuit expressly rejected the idea that companies were only required to describe future threats in their risk disclosures. *See* Pet. App. 24a-25a & n.6. Like the First, Third, and D.C. Circuits, the Ninth Circuit requires companies that disclose a particular risk to also disclose whether that risk has come to fruition in the past to avoid Section 10(b) liability.

In *Williams*, the Third Circuit held that "a company may be liable under Section 10[(b)] for misleading investors when it describes as hypothetical a risk that has already come to fruition." 869 F.3d at 242. *Williams* concerned a defendant that had warned investors in its 10-K and 10-Q that its "sales could be adversely affected" if it were to lose any of its independent distributors. *Id.* at 238. The defendant had lost a major distributor at the time it made those statements, and so the plaintiffs claimed fraud. *Id.* at 241. But there was no evidence that, at the time of the company's securities filing, the loss of the distributor had affected the company's sales. *Id.* at 242. The Third Circuit thus held that although the company was required to disclose risks that had come to pass as part of its risk disclosures, the risk to sales had not yet occurred, so the company had not committed a Section 10(b) violation. *See id.* at 242-243.

The First Circuit applied the same rule in *Karth*, explaining that "[a] company must * * * disclose" that a "risk had already begun to materialize." *Karth*, 6 F.4th at 138. In that case, the company disclosed as a risk in its 10-K that it depended on a "single supply source" for its product, and that if this source were to "fail to meet * * * quality or delivery requirements," the company "could experience a loss of revenue." *Id.* at 130. According to the plaintiff, that risk had come to pass: The supply-chain "disruption was actively occurring," requiring the company to disclose the supply source failure in the risk disclosure section of its securities filing. *Id.* at 138. The First Circuit agreed that companies were required to disclose risks that had come to fruition. *Id.* at 137-138. But because there was no evidence of a "supply interruption" at the time the company made the statements, the court declined to find Section 10(b) liability. *Id.* at 138-139; *see also id.* at 136 (discussing *Hill* v. *Gonzani*, 638 F.3d 40 (1st Cir. 2011), and *Tutor Perini Corp.* v. *Banc of Am. Sec. LLC*, 842 F.3d 71 (1st Cir. 2016)).

In *In re Harman International Industries*, the D.C. Circuit likewise explained that companies face liability if their risk disclosures do not "account for [a risk's] materialization, rather than [its] abstract possibility." 791 F.3d at 106. The defendant in *Harman*—a manufacturer of personal navigation devices—had informed analysts that although its unsold inventory was very high, it planned to sell a substantial number of units that year. *Id.* at 96-97. The plaintiffs filed a securities class action alleging that Harman's statements were misleading because, at the time the statements were made, the company's products in inventory were already becoming obsolete. *Id.* at 99. The D.C. Circuit agreed, explaining that the company's statements "were misleading in light of historical fact." *Id.* at 104. "Even if viewed as implicitly raising the specter of obsolescence, the statements were insufficient for at least the reason that they did not warn of actual obsolescence that had already manifested itself." *Id.*[6]

The Southern District of New York mandates the disclosure of risks that have come to pass as well. For example, in *In re Facebook, Inc. IPO Securities & Derivative Litigation*, the Southern District of New York explained that "[c]ourts in this Circuit have held that a company's purported risk disclosures are misleading where the company warns only that a risk may impact its business when that risk has already materialized." 986 F. Supp. 2d at 516 (collecting cases). That case concerned an alleged omission by Facebook in its registration statement. The registration statement had warned that "increased mobile usage and product decisions *may* negatively affect [Facebook's] revenue when, in fact, these factors allegedly already *had* negatively impacted [its] revenue." *Id.* at 514 (first alteration in original and internal quotation marks omitted). The district court agreed that Facebook's risk disclosures were misleading under Rule 10(b) because they "only warned what might occur if certain contingencies were met; the disclosures did not make clear that such contingencies had, in fact, already occurred." *Id.* at 516.

In the decision below, the Ninth Circuit firmly placed itself on this side of the split—and then went even further. The court expressly rejected the Sixth Circuit's approach, Pet. App. 25a n.6, and instead held that "[r]isk disclosures that 'speak entirely of as-yet-

[6] Although the specific question at issue in *Harman* concerned the scope of a statutory safe harbor that shields companies against liability for certain statements, the Third Circuit has cited *Harman* as falling on this side of the split. *See Williams*, 869 F.3d at 241-242.

unrealized risks and contingencies' and do not 'alert the reader that some of these risks may already have come to fruition' can mislead reasonable investors," *id.* at 24a (quoting *Berson*, 527 F.3d at 985-987 (alterations omitted)). Applying that rule, the Ninth Circuit concluded that "Alphabet's warning in each Form 10-Q of risks that 'could' or 'may' occur is misleading to a reasonable investor when Alphabet knew that those risks had materialized." *Id.* at 25a. The Ninth Circuit reached this conclusion despite—unlike in even the First, Third, and D.C. Circuits—the source of the risk having been remediated at the time the disclosures were made.

This circuit split is outcome-determinative in this case. In the Fourth and Sixth Circuits, risk disclosures are forward-looking; they need not describe events that have already occurred. If plaintiffs had filed suit in either of those circuits, their case would have been dismissed. Indeed, the district court below followed the Fourth and Sixth Circuit's approach and dismissed the complaint. But the Ninth Circuit reversed and permitted this lawsuit to move forward. This Court should grant certiorari to resolve that straightforward conflict.

II. THE DECISION BELOW IS WRONG.

A risk is something that *might* occur in the future. It is not something that has already occurred in the past. A company's disclosure of risk factors thus describes issues or problems that may occur, not issues or problems that have already occurred. The Ninth Circuit below ignored that fundamental principle, instead holding that a reasonable investor would be misled if a risk disclosure did not include information about an issue that had *already* been identified and addressed. That is as wrong as it sounds. By requiring the disclosure of events that have already happened, the decision below undermines the very purpose of a "risk factor" disclosure: to highlight for investors the most important information about the *future* issues facing a company. This Court should grant certiorari and reverse.

1. Section 10(b) of the Securities and Exchange Act prohibits "us[ing] or employ[ing], in connection with the purchase or sale of any security registered on a national securities exchange," "any manipulative or deceptive device or contrivance" proscribed by the SEC. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b)). SEC Rule 10b-5 in turn prohibits "omit[ting] 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." 17 C.F.R. § 240.10b-5(b). Information is "material" if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-232 (internal quotation marks omitted).

"[Section] 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required * * * when necessary 'to make * * * statements made, in the light of the circumstances under which they were made, not misleading.' " *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011) (quoting 17 C.F.R. § 240.10b-5(b)). "A statement is 'misleading' and actionable under Rule 10b-5 if a reasonable investor, in the exercise of due care, would have received a false impression from the statement." Litigating Business and Commercial Tort Cases § 6:7 (Aug. 2021 update); *accord* 2 Publicly Traded Corporations Handbook § 12:41 (2021) ("to be considered misleading, an incomplete statement must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists" (internal quotation marks omitted)).

In other words, Rule 10b-5 does not contain "a free-standing completeness requirement." *Brody* v. *Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). For good reason. Even the most comprehensive disclosure statement could virtually always contain more detail. But too much detail can be as bad as too little, which is why the "materiality" and "misleading" standards exist: They "filter out" information "that a reasonable investor would not consider significant * * * in making his investment decision." *Basic*, 485 U.S. at 234.

Although Rule 10b-5 does not create an affirmative disclosure requirement, other SEC regulations do require affirmative disclosure of specific kinds of information. A company has to disclose in its Form 10-K a slew of events that occurred since its last filing: "the general development of the business," including "[a]ny material changes to a previously disclosed business strategy" and "[t]he acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business," 17 C.F.R. § 229.101 (2020); "information that will reasonably inform investors as to the suitability, adequacy, productive capacity, and extent of utilization of [the company's] principal physical properties," *id.* § 229.102; and "any material pending legal proceedings," *id.* § 229.103(a). Companies must also disclose "the most significant factors that make the offering speculative or risky" and "[e]xplain how the risk affects the issuer or the securities being offered." *Id.* § 229.503(c) (2017).

A "risk" disclosure that discloses only future potential harms is not misleading to a reasonable investor. That conclusion flows from the definition of "risk." As the Sixth Circuit has explained, "risk" is the "*possibility* of loss, injury, disadvantage, or destruction." *Bondali*, 620 F. App'x at 491 (quoting *Risk*, Webster's Third New International Dictionary 1961 (1986)) (emphasis in *Bondali*). That comports with the plain meaning of the term. *See, e.g.*, *Risk*, American Heritage College Dictionary 1177 (3d ed. 2000) ("[t]he possibility of suffering harm or loss"); *Risk*, Webster's New World Dictionary 1159 (3d ed. 1988) ("the chance of injury, damage, or loss"); *Risk*, Oxford English Dictionary, https://bit.ly/3BYZ3Pr (last visited Oct. 21, 2021) ("(Exposure to) the possibility of loss, injury, or other adverse or unwelcome circumstance; a chance or situation involving such a possibility."). Risk is thus an inherently forward-looking concept; it captures what *might* occur, not what *has* occurred.

That is how the concept of risk is understood in a wide variety of contexts. *See, e.g.*, 1 Real Estate Transactions: Structure and Analysis with Forms § 10:2 (Sept. 2021 update) (real estate: "Risk is a forward-looking, or ex ante, concept."); Steve C. Gold, *When Certainty Dissolves into Probability: A Legal Vision of Toxic Causation for the Post-Genomic Era*, 70 Wash. & Lee L. Rev. 237, 303 (2013) (tort theory: "[l]awyers customarily think of risk as a forward-looking concept" (internal quotation marks omitted)); Lindsay Farmer, *Time and Space in Criminal Law*, 13 New Crim. L. Rev. 333, 335 (2010) (criminal law: the "concept of risk is essentially temporal—predicting the probable incidence of future events"). Securities law sources are in accord. *See, e.g.*, 2 Bromberg & Lowenfels on Securities Fraud § 5:281 (2d ed. Apr. 2021 update) ("risk disclosure is inherently forward-looking").

A reasonable investor would understand this forward-looking conception of risk. *See, e.g.*, *Greenhouse* v. *MCG Cap. Corp.*, 392 F.3d 650, 656 (4th Cir. 2004) ("a 'reasonable investor' is neither an ostrich, hiding her head in the sand from relevant information, nor a child, unable to understand the facts and risks of investing"); *Whirlpool Fin. Corp.* v. *GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) ("[a] reasonable investor is presumed to have information available in the public domain"). No one consults a 10-day weather forecast to determine whether it rained in the past. So too here: No reasonable investor would expect a risk disclosure statement to discuss past events. A reasonable investor would thus understand that a risk disclosure serves to identify and disclose a *potential* issue that could arise in the *future*. And "a reasonable investor would be unlikely to infer anything regarding the current state of a corporation's compliance, safety, or other operations from a statement intended to educate the investor on *future* harms." *Bondali*, 620 F. App'x at 491.

Accordingly, a reasonable investor would not consider the omission of an issue that has *already* occurred from a company's "risk disclosures" to be misleading within the meaning of Section 10(b). To be sure, a company may still be subject to a Section 10(b) claim if it misrepresents the information it does disclose about current or past events. For instance, a company's statement that "no current security concerns exist" or that it had "never" experienced a security issue—when in fact a security issue was ongoing or had occurred in the past—might be subject to liability under Section 10(b), depending on the circumstances. *Cf. In re Heartland Payment Sys., Inc. Sec. Litig.*, Civ. No. 09-1043, 2009 WL 4798148, at *4 (D.N.J. Dec. 7, 2009); *see also* Pet. App. 18a (acknowledging that "transparently aspirational statements" are not materially misleading, unless "they provide [a] concrete description of the past and present [and] affirmatively create a plausibly misleading impression of a state of affairs that differed in a material way from the one that actually existed" (internal quotation marks omitted)). But it is unreasonable to read a warning in a risk disclosure statement that a certain event *might* occur in the future as a guarantee that *no* similar event *has occurred* in the past.

2. Applying these principles, the statements at issue in this case are not misleading. In its 2017 10-K, Alphabet warned of the risk that its "security measures" could be breached, "resulting in the improper use and disclosure of user data." Pet. App. 55a. It further warned that "[c]oncerns about our practices with regard to the collection, use, disclosure, or security of personal information or other privacy related matters, even if unfounded, could damage our reputation and adversely affect our operating results." *Id.* at 55a-56a. Those risk disclosures are about the possibility of *future* events; they do not say anything about events occurring in the past (or even in the present). After filing its 2017 10-K, Alphabet identified and addressed the Google+ security bug promptly, prior to its next securities filing. *See* Google Blog Post, *supra*. Accord-

ingly, in its first and second 2018 10-Q filings, Alphabet stated that there had been "no material changes to [the] risk factors" outlined in the 2017 10-K. Pet. App. 9a (emphasis omitted).

That is not misleading. It is true. The risks Alphabet faced in the past are the same risks it faced in the future. Alphabet's risk disclosures do not give "a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." Publicly Traded Corps. Handbook, *supra*, § 12:13 (internal quotation marks omitted). They do not say anything about events that occurred in the past (or even events that are occurring in the present). They instead address the risks that Alphabet *may* face in the future. Alphabet did not state that it had not experienced or identified any security breaches between December 2017 and March 2018. It did not say that it had not altered its data security protocols. Rather, Alphabet's 2017 10-K and early 2018 10-Qs correctly informed investors that a company like Alphabet is *always* at risk of a security breach and that this concern could *always* cause reputational or other harm, regardless of whether a prior breach had occurred. *See* Pet. App. 55a-56a. That was true before Alphabet discovered the security bug. It remained true after the bug was identified and remediated. Alphabet's risk disclosure was not misleading.

The Ninth Circuit reached the opposite result, holding that these statements were so misleading as to give rise to a Section 10(b) claim. That misunderstands the very point of a risk disclosure—to warn of *future* danger. *See supra* pp. 24-26.

A risk that has already "come to fruition" is no longer a risk. It is an event that has come to pass. It therefore need not be disclosed in the section of a securities filing reserved for issues that *may* occur. Other sections of a securities filing address events that occurred in the past, to the extent they require disclosure (and here, the Ninth Circuit rightly affirmed the district court's dismissal of plaintiffs' alleged misstatements regarding the bug in those sections). That simple principle should have resolved this case. But the Ninth Circuit instead redefined the forward-looking concept of "risk" to capture past events. It did so without pausing to interrogate the meaning of the word "risk," let alone explaining how something that *had already occurred* should be disclosed as a "risk." That was an error.

The Ninth Circuit compounded that conceptual error by failing to confront the inevitable results of its opinion: an endless litany of past-event disclosures that will drown out the forward-looking information investors and potential investors actually need. When the SEC first mandated the inclusion of risk disclosures in securities filings in 2005, it made clear that companies should provide their risk disclosures in "plain English," limit their disclosures to "the material risks" they face, and avoid "unnecessary restatement or repetition of risk factors." 70 Fed. Reg. at 44,786. In other words, companies should not attempt to bury their risk disclosures in a flood of jargon or irrelevant information. *See Division of Corp. Finance: Updated Staff Legal Bulletin No. 7: "Plain English Disclosure*," U.S. Sec. & Exch. Comm'n (June 7, 1999), https://bit.ly/3iyfZV7 (discussing the "plain English" requirement); *see also Basic*, 485 U.S. at 234 (explaining that Section 10b does not require "full disclosure").

Yet the Ninth Circuit's rule encourages precisely that. It requires a company that discloses a risk of *future* harm to also disclose all the times that risk has already come to fruition. As this Court explained in rejecting "too low a standard of materiality," *Basic*, 485 U.S. at 231, requiring companies to disclose too much information "may accomplish more harm than good," *TSC Indus.*, 426 U.S. at 448 (rejecting lower materiality standard for Rule 14a-9 claims); *see Basic*, 485 U.S. at 231 (adopting this standard for Rule 10b-5). Just like a "minimal [materiality] standard," the Ninth Circuit's maximal misstatement standard threatens to "lead management 'simply to bury the shareholders in an avalanche of trivial information.' " *Basic*, 485 U.S. at 231 (quoting *TSC Indus.*, 426 U.S. at 448). That is "hardly conducive to informed decisionmaking," *id.* (quoting *TSC Indus.*, 426 U.S. at 449)—the very reason that risk disclosures exist. *See* 70 Fed. Reg. at 44,786 ("The risk factor section is intended to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities.").

Because the Ninth Circuit's rule does not comport with the plain meaning of "risk" or the purpose of the SEC's risk disclosure rules, this Court should grant certiorari and reverse the decision below.

III. THIS CASE IS A CLEAN VEHICLE TO ADDRESS AN IMPORTANT QUESTION.

The question presented is vitally important. In the First, Third, Ninth, and D.C. Circuits, a public company that discloses only *risks* in its risk disclosure statement is subject to a potential securities-fraud claim if it does not also disclose that the risk has come to fruition in the past. In the Fourth and Sixth Circuits, failing to include a past event in a forward-facing disclosure will not expose that same company to suit. Whether a company is exposed to the significant costs associated with defending against a securities-fraud class action should not depend on the jurisdiction in which a suit is brought. This Court should step in and provide clarity on this crucial issue, which governs what thousands of companies are required to disclose in their securities filings each quarter.

1. Under the Ninth Circuit's rule, any time a company mentions in its risk disclosure the possibility that a future issue might arise, it must now also identify any time in the past that a related incident has occurred—even if it was quickly addressed, as in this case. That rule will affect every publicly traded company. Even those courts with an overly accommodating view of "risk" have stopped short of imposing liability for failure to include past events in risk disclosure statements. *See Karth*, 6 F.4th at 138 (holding that "[a] company must also disclose a relevant risk if that risk had already begun to materialize," but finding no evidence that "risk" had "begun to materialize" by the time the company filed the relevant securities filings); *Williams*, 869 F.3d at 242 ("agree[ing] 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," but concluding that "this is not such a case"). The Ninth Circuit's decision here, however, means that companies face significant litigation risk if they fail to disclose past events in their forward-looking risk disclosures. *See* Lyle Roberts, *Learning the Alphabet*, The 10b-5 Daily (Aug. 5, 2021, 5:30 PM), https://bit.ly/3DcGYgS ("The panel's

view [in the decision below] of a company's duty of disclosure arguably goes well beyond what other courts have found Section 10(b) and Rule 10b-5 to require.").

The threat of litigation is particularly high with respect to risk disclosures about security and data privacy. Today, practically every company operates online or collects consumer data. Indeed, for at least the past three years, 100% of Fortune 100 companies included cybersecurity in their 10-K risk disclosures. Steve W. Klemash et al., *What Companies Are Disclosing About Cybersecurity Risk and Oversight*, Harv. L. Sch. Forum on Corp. Governance (Aug. 25, 2020), https://bit.ly/3F75WA7 (analyzing Fortune 100 companies' 2018, 2019, and 2020 10-Ks). Nearly all of these companies also identified data privacy as a risk factor. *Id.* And, more than likely, nearly all of those companies have experienced some kind of security or privacy event. *See, e.g.*, Steve Morgan, *Global Ransomware Damage Costs Predicted To Reach $20 Billion (USD) By 2021*, Cybercrime Mag. (Oct. 21, 2019), https://bit.ly/3v0HH1R (cybercrime experts "predict[ ] that there will be a ransomware attack on businesses * * * every 11 seconds by 2021.").

Under the Ninth Circuit's rule, each of these companies—and any others that include a similar risk disclosure—must now also disclose every security or data privacy bug they have experienced, no matter how large or small, and no matter how far in the past, even if it was easily fixed and did not cause consumers harm. That is no easy matter. *See, e.g.*, Scott Christiansen & Mayana Pereira, *Secure the Software Development Lifecycle with Machine Learning*, Microsoft (Apr. 16, 2020), https://bit.ly/303RcSm ("At Microsoft, 47,000 developers generate nearly 30 thousand bugs a month."); *Fiscal Year 2021 Update: Long Range Plan for Information Technology in the Federal Judiciary*, Jud. Conf. of the U.S. 12 (Sept. 2020) (explaining that Administrative Office has instituted a "Bug Bounty" "to reward certain vetted third parties for information about any vulnerabilities" in the Judiciary's software infrastructure); N.V., *Tech.View: Cars and software bugs*, The Economist (May 16, 2010), https://econ.st/3Dz3TDk ("Even with the best programmers in the world, the average car of [this decade] will come with 150,000 software bugs embedded in its systems. * * * In some cases, a bug might be so subtle as to barely affect the way a program—and the component it controls—works.").

The Ninth Circuit's rule also impacts many other kinds of risk disclosure. According to the decision below, any time a company warns in its risk disclosure that a given risk "could or may occur," it must also disclose whether the company has also already "experienced th[at] sort of challenge[ ]." Pet. App. 25a (internal quotation marks omitted). Every time a company discloses a quality control risk, for instance, it must also disclose *every* quality control problem it has identified and remedied. Every time a company discloses the potential for supply chain problems, it must also disclose *every* such problem—even issues it remedied before they affected any products or impacted consumers. This rule will have far-reaching effects across many industries facing these and similar risks: automotive, chemical, energy, retail, food, and pharmaceutical, to name just a few.

The Ninth Circuit's rule will impact investors as well. The Ninth Circuit's approach requires companies to disclose rafts of stale information that will confuse investors or drown out the information they actually want and need. *See supra* pp. 28-29. And it will lead to a fresh round of securities litigation any time a company declines to disclose a problem that plaintiffs argue is related to a risk disclosure, even if the problem is identified and resolved prior to the company's securities filing, and even if the problem does not affect its users or products.

That litigation is costly, as Congress has recognized. For many years, meritless securities litigation ran rampant. Companies were plagued by "nuisance filings, targeting of deep-pocket defendants," and "vexatious discovery requests." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). These abuses often resulted in "extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." *Id.* (citing H.R. Rep. No. 104-369, at 31-32). In an effort to shield public companies and society from these costs, Congress enacted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; *see Dabit*, 547 U.S. at 81 (explaining that unchecked private securities litigation "was being used to injure 'the entire U.S. economy' " (quoting H.R. Rep. No. 104-369, at 31)).

The Ninth Circuit's decision threatens to re-open the floodgates that the PSLRA was intended to close. Among other things, that statute codified a "safe harbor" for forward-looking statements to encourage companies to include predictions about future performance. *See* 15 U.S.C. § 78u-5. To invoke the safe harbor, however, a company must include "meaningful cautionary statements." *Id.* § 78u-5(c)(1)(A)(i). Many companies accordingly began "includ[ing] risk factor disclosure[s] in their Exchange Act reports * * * to take advantage of the safe harbor." 70 Fed. Reg. at 44,786-87 n.594. In other words, risk disclosures were originally designed as *shields* against liability.

The decision below has turned them into swords for class-action litigants. When Congress enacted the PSLRA in 1995, companies were not required to include risk disclosures in their 10-Ks and 10-Qs. *See generally* 70 Fed. Reg. at 44,830. There was accordingly no need for Congress to clarify in the PSLRA whether and how liability might attach for risk disclosure statements. By adopting an expansive theory of liability for "risk disclosures," however, the Ninth Circuit's rule runs counter to the purpose of the statutory safe harbor—to encourage companies to *include* statements about potential risk to caveat potential predictions. And it exposes them to the very type of aggressive, meritless litigation Congress adopted the PSLRA to constrain.

That a Section 10(b) claim can succeed only if a misstatement is also material is cold comfort. Materiality is "an inherently fact-specific finding." *Basic*, 485 U.S. at 236. It requires "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him." *Id.* (quoting *TSC Indus.*, 426 U.S. at 450); *see* James J. Park, *Assessing the Materiality of Financial Misstatements*, 34 J. Corp. L. 513, 517 (2009) (explaining that the SEC's materiality guidance is "vague and impossible to implement"). In light of that, it will be hard to judge in advance when the materiality threshold has been reached, allowing plaintiffs' lawyers to bring suit, pursue discovery, and extract significant damages even for minor undisclosed problems. *See* Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 J. Corp. L. 77, 93 (2017) ("[T]he murky and arguably incoherent image of the reasonable investor painted by the case law makes it difficult for corporate issuers and their agents to both make disclosure choices *ex ante* and to defend those choices *ex post*, when confronted with litigation.").

Worse still, in the Ninth Circuit's estimation, some past events *cannot be* resolved in a way that moots the needs for disclosure. According to the Ninth Circuit, if the company's "business model is based on trust," *any* potential problem may well be material, because the mere fact that any issue (no matter how small) ever existed (no matter how quickly addressed) could undermine consumers' confidence in the company and its products. *See* Pet. App. 26a. Few plaintiffs will be unable to clear this watered-down materiality requirement.

2. This case is an ideal vehicle to resolve this discrete and important question, which has divided six circuits. The district court applied the rule adopted by the Fourth and Sixth Circuits and dismissed the suit. The Ninth Circuit followed—and exacerbated—the First, Third, and D.C. Circuits' approach and allowed this suit to go forward. And because the Ninth Circuit's rule will effectively become the nationwide rule in securities cases, absent this Court's review here, this issue may well go uncorrected.

Securities filings are not circuit-specific. Jurisdiction over Section 10(b) claims lies where the alleged securities violation occurred, or where the company is headquartered or transacts business. *See* 15 U.S.C. § 78aa(a). That means any company potentially subject to suit in the Ninth Circuit—including the more than 70 publicly traded Fortune 500 companies headquartered there—must comply with its more stringent risk disclosure requirements. And the split is not likely to deepen; after the Ninth Circuit's ruling, no plaintiff filing suit over a risk disclosure is likely to sue anywhere else, much less in the Fourth or Sixth Circuits. As a result, the Ninth Circuit's judgment will displace the judgment of Congress and the Security and Exchange Commission by mandating the disclosure of past events as "risks." *See Learning the Alphabet*, *supra* ("Companies headquartered in the Ninth Circuit will need to think carefully about the scope of their disclosures."). Clarity is needed for the thousands of companies that must include risk disclosures in their quarterly and annual securities filings. The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
NEAL KUMAR KATYAL
KATHERINE B. WELLINGTON
DANIELLE DESAULNIERS STEMPEL
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

IGNACIO E. SALCEDA
BENJAMIN M. CROSSON
BETTY CHANG ROWE
STEPHEN B. STRAIN
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304

Counsel for Petitioner

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