

No. 25-1376

In the Supreme Court of the United States

ON24, INC., ET AL., PETITIONERS

v.

LEADERSEL INNOTECH ESG

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondent tries to recast the Ninth Circuit’s legal errors—and resulting circuit split—as mere factual disputes. But the court and parties agreed on the key facts: the warned-of risk in ON24’s disclosures was material churn, and no material churn had occurred at the time of those disclosures. In deeming the relevant risk nevertheless “materialized,” the Ninth Circuit required ON24 to predict the future—and predict future third-party behavior, no less. No other circuit demands that impossible task. The Ninth Circuit’s legal error renders risk disclosures in that circuit largely meaningless and conflicts with the balanced approach this Court and others have required for securities laws.

Respondent’s attempt to brush aside the petition’s two questions that were raised in *Robinhood Markets, Inc. v. Sodha*, No. 25-944 (U.S. filed Feb. 5, 2026), fares no better. The Ninth Circuit misunderstood Section 11(a)’s disclosure obligation by requiring *all* information related to a challenged statement to be disclosed, regardless of whether that statement created a misleading impression. That departs from this Court’s precedent and mirrors the questions presented in the pending *Robinhood* petition, where the Court has called for the views of the Solicitor General. While respondent nitpicks at factual distinctions between *Robinhood* and this case, that does nothing to change the common legal questions controlling both cases’ outcomes. The Court should at least hold this petition pending *Robinhood*, a case the Ninth Circuit itself recognized bears on this one.

Finally, that the Ninth Circuit applies its outlier disclosure standards in unpublished decisions is no reason to deny review. Quite the opposite: it demonstrates that the Ninth Circuit’s misguided approach has become entrenched. This Court regularly reviews unpublished decisions; it has done so four times from the Ninth Circuit alone in the past three years.

This Court should grant certiorari or at least hold this petition pending disposition of *Robinhood*.

I. THE CIRCUITS ARE SPLIT ON WHAT RISK DISCLOSURES REQUIRE

A. The Ninth Circuit stands alone in its conception of risk materialization

Respondent insists there is no circuit split because other decisions hold that a risk disclosure describing a warned-of event as hypothetical may be misleading when that event has already occurred or is virtually certain to occur. Opp.11–13. But that proves ON24’s point. As the Ninth Circuit concluded and respondent agrees, the warned-of event was “material churn and downselling.” Opp.11 (quoting Pet. App. 6a); *contra* Opp.20 (arguing there is a factual dispute as to what the relevant event was). Yet nowhere did respondent allege—or the Ninth Circuit conclude—that material churn and downselling occurred before the IPO.

To the contrary, respondent’s brief in opposition admits its complaint was based on predictions about customers “destined to churn” (Opp.17)—that is, a purported “material number” of customers had “communicated their *intent* not to renew or to downsell” before the IPO, and “*some* short term subscriptions” had already failed to renew. Opp.8 (emphases added);

see Opp.3–4 (describing allegations of potential, not actual, material churn). And citing its decision in *In re Alphabet, Inc. Securities Litigation*, 1 F.4th 687, 703 (9th Cir. 2021), the Ninth Circuit held that respondent had sufficiently alleged that the risk “had started to come to fruition” before the IPO. Pet. App. 6a (emphasis added). But “start[ing] to come to fruition” is just another way of saying that the warned-of event hadn’t yet occurred (even if it could perhaps be foreseen with 20/20 hindsight).

No other circuit requires issuers to predict the future that way. In *Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138–139 (1st Cir. 2021), the First Circuit held that the risk of a supply interruption had not materialized, even though a key manufacturer in that supply chain was faltering, because that faltering did not mean a supply interruption would necessarily occur. In *Williams v. Globus Medical, Inc.*, 869 F.3d 235, 241–243 (3d Cir. 2017), the Third Circuit held that the risk warned of—“that the loss of an independent distributor could have a negative impact on sales”—“only materialized” if sales were actually affected or inevitably would be. The court rejected plaintiff’s argument that the risk had materialized merely because the company had already lost an independent distributor. And in *Indiana Public Retirement System v. Pluralsight, Inc.*, 45 F.4th 1236, 1256–1257 (10th Cir. 2022), the Tenth Circuit held that the warned-of risk—that the company’s business could be harmed if it failed to hire sufficient sales representatives—had not materialized even though the company had fallen behind in hiring because the slowdown was not “virtually certain to cause harm to the business.”

More recently, the Sixth Circuit joined the divide in *Newtyn Partners, LP v. Alliance Data Systems Corp.*, 165 F.4th 947, 963 (6th Cir. 2026), holding it was not misleading for a company to tout its “deep, long-standing relationships” with sponsors even though a key sponsor was considering leaving. The Sixth Circuit explained that the sponsor had not yet left—and the company had expressly warned that it could face sudden sponsor withdrawals. *Id.* at 955–956, 961–962. The court also held it was not misleading to warn that “the loss of any [top 10] [sponsors] could cause a significant reduction” in revenue, even though three such sponsors had already departed. Because risk disclosures are “inherently prospective in nature,” a “warning that top sponsors could exit” a program “does not falsely impart that top sponsors have not departed.” *Id.* at 964. In each of those cases, it was not enough that an event had occurred that increased the *likelihood* that a risk would materialize.

And the Second Circuit’s approach in *Smith v. Gap, Inc.*, 177 F.4th 405 (2d Cir. 2026), deviates even more starkly from the Ninth Circuit’s. There, the court rejected the notion that “a risk disclosure is actionable whenever a company fails to disclose that the risk already materialized in some way.” *Id.* at 410. Gap warned that “[t]o the extent” it misjudged the market for merchandise, the resulting markdowns “will adversely affect our operating results.” *Id.* at 409. Gap failed to disclose that it had already misjudged the market for a specific line and was offering discounts. *Id.* at 407, 409–410. The court explained that Gap’s disclosures “concerned ubiquitous risks in the industry,” and “[n]o reasonable investor would have understood” them to mean Gap “had not

misjudged the market for certain clothes or was not discounting excess inventory at the time.” *Id.* at 411. The disclosures did not present the risk “as merely hypothetical” because Gap “disclosed that it is vulnerable to demand and pricing shifts and to suboptimal selection.” *Ibid.* Here too, the risk of churn and down-selling is ubiquitous for a subscription-based service—and ON24 specifically warned investors that if “new customers elect not to continue their subscription as the impact of COVID-19 lessens, our business, financial condition and results of operations would be harmed.” ER-63.

Unlike these five other circuits, the Ninth Circuit “does not require harm to have materialized for a statement to be materially misleading.” *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 949 (9th Cir. 2023). Consistent with that precedent, the decision below treated ON24’s detailed warnings of the possibility of material churn as misleading based on a handful of atypical short-term contracts not renewing and customers stating their intent not to renew in the future. Pet. App. 6a (“risk of material churn and downselling had started to come to fruition”); Opp.8 (noting “customers had already communicated their *intent* not to renew or to downsell; and the fact that *some* short-term subscriptions had already begun to churn before the IPO” (emphasis added)).

No other circuit would have reached that result because those allegations do not make the warned-of risk virtually certain to occur. As respondent explains, ON24 should have issued definitive statements predicting which customers were “destined to churn.” Opp.17, 26. Under the Ninth Circuit’s rule, issuers must make definitive

predictions about uncertain future events to avoid liability. That result will make the Ninth Circuit a hub for securities litigation based on 20/20 hindsight.¹

B. This case presents the same issue as *Facebook* without the vehicle problems

Respondent argues the question presented here is the “inverse” of the one in *Facebook* because it “is premised on the risk being ‘unmaterialized,’” while *Facebook* “accepted that the risk had already materialized.” Opp.18–19. Not so. Both petitions ask the same underlying legal question: what does it mean for a warned-of “risk” to have “materialized” such that an issuer’s cautionary language becomes actionable?

But ON24’s petition differs from *Facebook* in an important way: only one warned-of risk is at issue here (the risk of material churn). In *Facebook*, the warned-of risk could have been either a data breach—which had unquestionably occurred—or business harm arising from that breach—which had not. Dispute over how to characterize the risk, and the resulting correct outcome, animated the majority and dissenting opinions in the Ninth Circuit. *Facebook*,

¹ Respondent cites a Fifth Circuit decision as consistent with the Ninth Circuit. Opp.13. Yet that decision allowed claims to proceed where the company “omitted known risks of severe magnitude” that would “almost certainly lead towards disaster.” *Lor-mand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009). Even if respondent’s characterization of *Lor-mand* is correct, that just makes the division five circuits to two, which only underscores the need for this Court’s review.

87 F.4th at 948–950, 959. And there was confusion about whether undisclosed information about the breach could be material when other information about the breach had been publicized. *Ibid.* After this Court granted review, these questions persisted, and the case was dismissed as improvidently granted.

No such confusion exists here. Despite respondent’s attempt to manufacture a factual dispute, there is no question that the relevant risk is material churn. *Supra* pp. 2–3. That risk indisputably had not occurred before the IPO. The petition thus presents the question the Court could not decide in *Facebook* and should be granted.

II. THE SECOND AND THIRD QUESTIONS PRESENTED ARE THE SAME AS THOSE RAISED IN THE PENDING *ROBINHOOD* PETITION

This Court recently called for the views of the Solicitor General on the questions presented in *Robinhood*: (1) whether an issuer violates Section 11(a)’s misleading-omissions prong by failing to disclose information that investors may consider material, regardless of whether the omission rendered any affirmative statement misleading; and (2) whether Item 303—and thus Section 11(a)’s prohibition on omitting required statements—imposes a virtually unlimited disclosure requirement regardless of whether the information at issue constitutes a trend or is necessary to correct a misleading impression. *See Robinhood* Pet.I, 26–29. Those are the second and third questions presented here. *See* Pet.i. The Ninth Circuit itself recognized the overlap between this case and *Robinhood*. It vacated

submission of this case pending its *Robinhood* decision and ordered supplemental briefing to address the effect of that decision before issuing its opinion. Pet.11–12.

1. Respondent contends this case does not implicate *Robinhood*'s questions because *Robinhood* concerns interim financial data while this case involves customer-churn data. But the underlying legal questions are the same: Can an issuer be liable for omitting information, material or otherwise, even if that omission might not render affirmative statements misleading? Or does that result conflict with this Court's precedent in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, which holds that a half-truth theory is available only if an alleged omission is both material and necessary to correct a misleading impression created by other statements? *See* 601 U.S. 257, 263 (2024).

On those legal questions, there is no meaningful distinction between the undisclosed interim financial data in *Robinhood* (*see Sodha v. Golubowski*, 154 F.4th 1019, 1035 (9th Cir. 2025)) and ON24's allegedly undisclosed data "regarding customer churn risk and actual churn occurrences" (Pet. App. 6a). Even if a reasonable investor might have found ON24's data material, it did not render misleading any statement ON24 actually made; nothing in ON24's offering documents suggested that zero customers had failed to renew or that zero customers had expressed future intentions not to renew. That is particularly so in light of ON24's detailed disclosures about the risk of pandemic-related changes in demand. Pet.7–9. While respondent argues the Ninth Circuit faithfully applied *Macquarie*, that argument again assumes the

warned-of risk was of *any* churn occurring. Opp.25–26.

Newtyn illustrates the Ninth Circuit’s departure from *Macquarie* and the plain text of Section 11(a). There, the Sixth Circuit held that “loosely optimistic remarks” about a “stable client base” and a “deep” client relationship “would not cause a reasonable investor to infer anything about the terms of [the company’s] specific contractual relationships”—particularly when coupled with “meaningful cautionary language.” 165 F.4th at 962–963. The court also concluded that “disclosure of accurate historical data typically does not give rise to liability even if less favorable results might be predictable in the future,” such that “accurate portrayals of the status” of a certain business “would not have misled a reasonable investor as to potential termination or modification” of specific contracts. *Id.* at 962 (quotation marks omitted). The Ninth Circuit reached the opposite conclusion on substantively identical language: it held ON24’s generically optimistic statement about a “highly engaged and loyal customer base” and its description of accurate historical data created a misleading impression about a handful of customer non-renewals. Pet. App. 5a. Thus, contrary to respondent’s view (Opp.21), resolution of the presented questions would dispose of the case with respect to all challenged statements.

2. This case also implicates *Robinhood*’s second question: whether the Ninth Circuit’s approach to Item 303 conflicts with the Fifth and Eleventh Circuits’. *Robinhood* Pet.29–30. In those courts, scattered, immaterial data points are not a “trend.” The Fifth Circuit in *Kapps v. Torch Offshore, Inc.*, 379

F.3d 207, 218 (5th Cir. 2004), held that even a 60% decline in natural gas prices over several months had “not yet constitute[ed] a trend, having not significantly impacted” the company’s results. The Eleventh Circuit similarly recognized in *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182, 1191 (11th Cir. 2002), that disappointing sales results were “of such short duration” that they may “not support any conclusions about the registrant’s business environment.”

Had the Ninth Circuit applied the standards set forth in those circuits, it would have reached a different outcome. The limited non-renewals and unnamed customers’ intentions had “not yet” become a “trend, having not significantly impacted” ON24’s results. *Kapps*, 379 F.3d at 218. Indeed, they do not even approach the *actual* negative results that were rejected as insufficient in *Oxford*. The Ninth Circuit’s failure to enforce Item 303’s textual limitations turns that rule into a boundless mandate to disclose every piece of internal data that might conceivably relate to future performance—precisely the “avalanche of trivial information” this Court warned against in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448–449 (1976).

While respondent insists that pre-IPO customer-profile shift and minuscule pre-IPO churn were “reasonably likely to have a material effect” on ON24’s business, it makes no effort to explain why this inchoate data qualifies as a “trend” under the reasoning of those other circuits. Opp.27. And regardless, respondent’s defense of the Ninth Circuit’s ruling does nothing to lessen the parallels between ON24’s

petition and the *Robinhood* petition addressing Item 303's requirements.

Because both this case and *Robinhood* implicate the same Section 11(a) questions, this petition—if not granted—at least should be held pending the Court's resolution of the *Robinhood* petition.

III. THERE ARE NO OBSTACLES TO THIS COURT'S REVIEW

As ON24 explained, the questions presented are worthy of this Court's review not just because of their legal significance but due to the profound practical consequences they implicate. Pet.29–31. While respondent attempts to brush this significance aside as “policy concerns,” it never disputes those concerns arise if ON24 is correct about the Ninth Circuit's legal errors. Opp.29 n.7. As discussed, the Ninth Circuit is an outlier on all three questions presented. Respondent's argument that these are issues for Congress or agencies also makes little sense when ON24's questions presented turn on errors in interpreting or applying existing statutory and regulatory text.

Finally, respondent relies heavily on the fact that the Ninth Circuit's unpublished disposition is not precedential. But the Ninth Circuit's unpublished application of its expansive disclosure standards makes the problem worse, not better. It demonstrates that the Ninth Circuit's approach is entrenched and routinely applied in a way that discourages further review. And the decision's reliance on *Alphabet* demonstrates the ease with which future panels can invoke published Ninth Circuit precedent to reach the

same incorrect and harmful results, whether via published opinions or otherwise.

For that reason, “the Court grants certiorari to review unpublished and summary decisions with some frequency.” Stephen M. Shapiro et al., *Supreme Court Practice* ch. 4, § 4.11 (11th ed. 2019) (ebook) (citing *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019); *Felkner v. Jackson*, 562 U.S. 594 (2011); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Illinois v. Fisher*, 540 U.S. 544 (2004)). In the past three years alone, the Court has granted review of unpublished Ninth Circuit decisions on four occasions. See *Rico v. United States*, 607 U.S. 609 (2026), *rev’g* 2025 WL 720900; *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146 (2025), *rev’g* 2023 WL 7015279; *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 605 U.S. 223 (2025), *rev’g* 2023 WL 4884882; *Diaz v. United States*, 602 U.S. 526 (2024), *aff’g* 2023 WL 314309.

Regardless, this Court routinely holds unpublished decisions pending the resolution of other cases. See, e.g., *Olivas v. United States*, 144 S. Ct. 2711 (2024), *granting, vacating, and remanding in light of Diaz v. United States*, 602 U.S. 526 (2024).

CONCLUSION

The Court should grant the petition or at least hold it pending its disposition of the petition in *Robinhood*.

Respectfully submitted,

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