

No. 25-944

In The Supreme Court of the United States

ROBINHOOD MARKETS, INC., ET AL., PETITIONERS

v.

VINOD SODHA, ET AL.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the corporate disclosure statements included in the appendix to the petition for a writ of certiorari remain accurate, except that the following companies amend their disclosures as follows:

- Citizens JMP Securities LLC states that JMP Group LLC is now a wholly owned subsidiary of Citizens JMP Group LLC, which is a direct wholly owned subsidiary of Citizens Financial Group, Inc. (NYSE: CFG). BlackRock, Inc. (NYSE: BLK) beneficially owns more than 10% of CFG stock.
- Piper Sandler & Co. states that it is a wholly owned subsidiary of Piper Sandler Companies (NYSE: PIPR). Based on disclosures made pursuant to SEC Rules regarding beneficial ownership, BlackRock, Inc. and the Vanguard Group beneficially own greater than 10% of Piper Sandler Companies' outstanding common stock.
- BTIG, LLC states the ultimate parent owner of Condor Trading LP is U.S. Bancorp (NYSE: USB). No publicly held corporation owns 10% or more of U.S. Bancorp's outstanding common shares.
- Siebert Williams Shank & Co., LLC states that no publicly held corporation owns 10% or more of Siebert Williams Shank & Co., LLC's equity interests.

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On the first question presented, there is no daylight between Robinhood and the United States: certiorari is warranted. As the government explains (at 9-10), the Ninth Circuit’s decision “erroneously collapses two distinct elements” of a Section 11(a) misleading-omissions violation into a single materiality inquiry, disregarding both the statutory text and this Court’s precedents. As the government further confirms (at 9, 17), the Ninth Circuit’s Section 11(a) holding “conflicts with decisions of other circuits” and “threatens significant untoward consequences” by pushing issuers to over-disclose, to the detriment of issuers and investors alike. And the government correctly urges this Court to grant review to fix the Ninth Circuit’s error and prevent those consequences.

The United States’ proposed reformulation of the first question presented—which glosses Robinhood’s formulation by asking whether “an *additional* inquiry” beyond materiality is required “to determine whether [an] omission rendered any affirmative statement misleading,” U.S. Br. 19 (emphasis added)—accurately captures the Ninth Circuit’s error and the parties’ central disagreement. The government is correct that the reformulated question “highlights the point on which the parties disagree,” *ibid.*, and Robinhood has no objection to the reformulation if the Court prefers it. Review of that question is “important to issuers of securities, to investors, and to the Commission,” and this case is a clean vehicle for resolving it. *Id.* at 9, 16-18.

The United States is right again (at 1, 23) in urging the Court to grant review of the first question presented even if it declines to review the second—namely, whether an issuer violates Item 303 (and thus Section 11(a)’s separate required-statements prong) by failing to disclose interim financial data before quarterly reporting deadlines. As the government explains (at 9-10), the two questions presented concern distinct prongs of Section 11(a) and separate claims for relief. Denying review of the second question “does not detract from the importance of the first question,” U.S. Br. 23, and the Court should correct the Ninth Circuit’s error on respondents’ misleading-omissions claim whether or not they continue to litigate their Item 303(b) claim below. Indeed, plaintiffs would have little reason to make the additional showings required by Item 303(b) if they could pursue a misleading-omissions claim based on materiality alone.

The United States parts ways with Robinhood only in recommending that the Court deny review of the second

question presented. The government agrees (at 22) that the Ninth Circuit’s Item 303(b) analysis was “erroneous” and never defends the court’s interpretation. As Robinhood has explained (at 7-9), the Ninth Circuit’s Item 303(b) holding—which requires disclosure of short-term “trends” and one-off “uncertainties” or “events” untethered from reporting periods—is inconsistent with the regulatory text and surrounding provisions. It also reads out of the regulation key guardrails recognized by other circuits. Reply 8-10; Grundfest Br. 11-14.

The United States nevertheless contends (at 20-21) that review of the second question presented is unnecessary because no circuit has drawn a “bright-line rule” under Item 303(b) and because the SEC could amend the regulation. But other courts have construed the relevant phrase in Item 303(b)—“trends or uncertainties”—to impose a meaningful durational requirement tethered to reportable periods, which is precisely the approach the Ninth Circuit rejected. And the possibility that the SEC might someday amend the regulation is no reason to deny review today. Certiorari is warranted on the second question presented too.

A. The United States Is Right That The First Question Presented Warrants Review.

The United States is right on every point concerning the first question presented: the decision below is wrong, the circuits are divided, the stakes are high, and the vehicle is clean. The government’s reformulation also accurately captures—and underscores—the parties’ disagreement.

1. The decision below is wrong. As the United States explains (at 9-13), the Ninth Circuit’s interpretation of

Section 11(a)'s misleading-omissions prong “cannot be reconciled with ... this Court’s precedents.” The statutory text is unambiguous: an issuer can be held liable only if an alleged omission is material *and* renders an affirmative statement misleading, just as this Court held two years ago when interpreting virtually identical language in Rule 10b-5. U.S. Br. 10-12; *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 264-66 (2024); 15 U.S.C. § 77k(a); Reply 3-5. Yet with respect to the entire category of interim information, the Ninth Circuit held that issuers “ha[ve] a duty to disclose ... omitted information” whenever “the omitted information was material.” Pet. App. 29a. The Ninth Circuit accordingly “erred by collapsing two distinct elements of a Section 11(a) misleading-omissions claim into one materiality inquiry.” U.S. Br. 11, 13-16. That error warrants this Court’s review. See *ibid.*

2. The decision below “conflicts with decisions of other circuits.” U.S. Br. 13. The United States agrees with Robinhood that—in direct conflict with the decision below—the “Third, Tenth, and Eleventh Circuits have correctly” interpreted Section 11(a)'s misleading-omissions prong (as well as Rule 10b-5) to require that an alleged omission *both* be material *and* “cause[] an actual statement in the registration statement to be misleading.” *Id.* at 13-14; see Pet. 22-23; Reply 5-6. The United States also observes that the Second Circuit appears to require both “materiality and [a] misleading effect” “in conflict with the decision below”—but that if the Second Circuit’s position is instead “consistent with the Ninth Circuit’s approach, that would only ‘strengthen the case for certiorari.’” U.S. Br. 14-16 (quoting Pet. 25). And the government confirms (at 16) that “both the court below

and the Second Circuit view” themselves as rejecting the First Circuit’s “extreme departure” test. The conflict runs in multiple directions, and only this Court can resolve it.

3. The question is important. As the United States explains (at 17), “the decision below upsets the balance that Congress and this Court have struck” in requiring disclosures under the securities laws. Section 11(a) requires both that an omission be material and that it render an affirmative statement misleading. Those dual requirements ensure that “investors receive accurate information,” without triggering an “avalanche of trivial information” or creating “disincentives” for issuers. U.S. Br. 2, 17 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011)). But the decision below skews that balance toward one end: disclosure. *Id.* at 17. And since interim financial information is so often a litigation target, companies will inevitably “over-disclose,” filling offering documents with unaudited financial data, harming “both issuers and investors” alike. *Ibid.* (collecting cases). Because the Ninth Circuit purported to construe Section 11(a) itself, only this Court can restore the balance Congress struck.

4. Robinhood agrees that the United States’ reformulation of the first question presented accurately captures the point of disagreement between the parties: “Whether an issuer can be found liable under the misleading-omissions prong of Section 11(a) . . . based on a determination that the issuer failed to disclose interim financial information that is material . . . without an additional inquiry to determine whether the omission rendered any affirmative statement misleading.” U.S. Br. 1, 19. Robinhood’s formulation is substantively the same:

“Whether an issuer violates Section 11(a)’s misleading-omissions prong by failing to disclose interim financial data that investors may consider material, without an inquiry into whether the omission rendered any affirmative statement misleading.” Pet. I. But as the United States explains (at 19), its reformulation particularly “highlights the point on which the parties disagree”—*i.e.*, whether “the two prerequisites to a misleading-omissions claim must be analyzed separately.” See Pet. 15-26. Given respondents’ attempts to kick up dust in an effort to avoid certiorari, see Br. in Opp. 3, 22-23, Robinhood has no objection to reformulation.

5. The case also “provides a suitable vehicle for resolving the first question presented,” regardless of whether the Court grants review of the second question presented, too. U.S. Br. 17, 23.

Respondents contend that this petition presents a factbound disagreement and that its interlocutory posture counsels against review. Br. in Opp. 1, 30-32. The United States correctly disagrees on both counts. Because “the Ninth Circuit addressed only the ‘legal standard’ applicable to Section 11(a) misleading-omission claims,” this case “does not, *contra* Br. in Opp. 1, present factbound questions.” U.S. Br. 17-18. And “the interlocutory nature of the case” is no obstacle to review: “*Macquarie* came to the Court in the same posture.” *Id.* at 18. As in *Macquarie*, the Court can clarify the legal standard governing misleading-omissions claims under Section 11(a) without wading into any factual disputes. 601 U.S. at 261-62; see Pet. 36-37.

As the government confirms (at 23), that is so regardless of whether the Court grants certiorari with respect to the second question presented. As discussed

below, see Part B, *infra*, the second question presented also warrants review. But even if the Court were to disagree, that would have no bearing on the certiorari calculus for the first question presented. The two questions concern different prongs of Section 11(a) and different theories of liability: the first question concerns Section 11(a)'s misleading-omissions prong (and whether that prong's two elements collapse into one materiality inquiry), and the second concerns Section 11(a)'s required-statements prong (and whether the Ninth Circuit's expansive interpretation of Item 303(b) is correct). U.S. Br. 9, 23. The questions presented thus ask the Court to correct distinct errors in the Ninth Circuit's decision, offering independent grounds for review. *Ibid.*; Reply 3-5, 7-9.

Denying review of the second question presented, moreover, would "not detract from the importance of the first question presented." U.S. Br. 23. The first question asks the Court to review a novel interpretation of Section 11(a) that will impose massive burdens on issuers in the jurisdiction that sees the most IPOs in the country. Reply 11; SIFMA Br. 15-20. The SEC is powerless to correct the Ninth Circuit's rule, which will "harm[] both issuers and investors" and "subvert[] the Commission's determinations" about appropriate disclosures. U.S. Br. 17. Just as in *Macquarie*, the Court should clarify that Section 11(a)'s misleading-omissions prong contains two distinct elements, and that a bare showing of materiality is insufficient without *also* showing that an affirmative statement was rendered misleading. *Id.* at 11-12.

As the United States explains (at 23), it does not matter that "respondents' required-statements claim would continue to be litigated" if this Court were to review

only the first question presented. The Court routinely grants review of only one claim while leaving plaintiffs free to pursue other claims on remand. See, e.g., *Atlantic Richfield Co. v. Christian*, 590 U.S. 1, 10 n.2, 23 (2020); *Dutra Grp. v. Batterton*, 588 U.S. 358, 368-69 (2019); *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 637-38 (2015); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412-13 (2014); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 339-40 (2005); cf. *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 770 & n.3 (2023). It should not hesitate to do so here, where correcting the Ninth Circuit’s error with respect to Section 11(a)’s misleading-omissions prong “would be important not only in this case but also to Section 11(a) misleading-omission claims more generally.” U.S. Br. 23.

Indeed, correcting the Ninth Circuit’s error on Section 11(a)’s misleading-omissions prong alone would substantially alter the course of this litigation. Under the Ninth Circuit’s rule, respondents (and other similarly situated plaintiffs) have little reason to pursue a required-statements Item 303(b) theory. The Ninth Circuit’s misleading-omissions holding allows plaintiffs to sue over a failure to disclose interim information by alleging (and later showing) *only* that the omissions were material. Reply 4; Pet. 35 n.2 (Section 11(a) imposes strict liability). That rule makes liability nearly automatic: once a plaintiff shows that an omission was material, nothing more is required. Item 303(b), by contrast, requires additional showings under even the Ninth Circuit’s view: plaintiffs still need to show, for example, that the trends or uncertainties were “known,” were likely to affect “net sales or revenues,” and were more than “statistical noise.” Pet. App. 30a-34a, 39a n.11. Plaintiffs have little reason to

make those showings when they can proceed on a misleading-omissions claim with materiality alone—which is why this Court should grant review of the first question presented and restore both elements of Section 11(a)’s misleading-omissions prong.

B. The United States Is Wrong That Review Of The Second Question Presented Should Wait.

The Court should also grant review of the second question presented. The United States does not defend the Ninth Circuit’s interpretation of Item 303(b), and there is no sound reason not to review both of the Ninth Circuit’s holdings at the same time.

1. The United States does not attempt to square the Ninth Circuit’s interpretation with Item 303(b)’s text. According to the Ninth Circuit, the term “trends” can encompass multi-week blips; the term “uncertainties” does not require any persistence; and the relevant provision somehow also covers one-off “events”—a term that does not appear in the relevant disclosure requirement. Reply 8-10. But at every turn, the context of the phrase “trends or uncertainties” points to long-term, persistent conditions in the context of reportable periods—just as other circuits have held. *Ibid.*; Grundfest Br. 11-14. The relevant subsection is titled “[f]ull fiscal years”; other required disclosures in that subsection are tethered to “changes from period to period”; and another requirement in the same subsection refers to the “short-term” as the “next 12 months from the most recent fiscal period end required to be presented.” 17 C.F.R. § 229.303(b)(1), (2)(ii), (iii). By ignoring that context and removing any durational or reportable-period guardrails,

the Ninth Circuit erred, and the United States does not disagree.

2. Nor can the government reconcile the lower courts' conflicting interpretations of Item 303(b). As Robinhood has explained, the Eleventh and Fifth Circuits have construed Item 303(b) to require disclosures of only "observed pattern[s] [that] accurately reflect[] persistent conditions," with a focus on omissions that render "reported results . . . misleading." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1191-92 (11th Cir. 2002); *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 217-21 (5th Cir. 2004). The First Circuit has held that Item 303(b) does not require disclosing "intra-quarterly information" unless it portends an "extreme departure from publicly known trends and uncertainties." *Glassman v. Computervision Corp.*, 90 F.3d 617, 631 (1st Cir. 1996). And the Southern District of New York has consistently held that patterns of less than two months are insufficient. Pet. 30.

Yet the Ninth Circuit rejected all these approaches. It vacated the district court's opinion for following the First Circuit's rule, explicitly rejected the Southern District's temporal approach, and refused to adopt the guardrails enforced by the Fifth and Eleventh Circuits. Pet. App. 32a-39a. Issuers in the Ninth Circuit will now be exposed to Item 303(b) liability where issuers in other jurisdictions would not. That is precisely the sort of split that warrants review.

The United States offers two reasons to discount the split, but neither is persuasive. First, the United States observes (at 21) that the Ninth Circuit cited the Eleventh Circuit's decision in *Oxford*. But citing a decision is not the same thing as following it. The Eleventh Circuit

imposed real guardrails on Item 303(b), and the Ninth Circuit disavowed those same limitations. And that is to say nothing of the Fifth or First Circuits' approaches, neither of which can be squared with the Ninth's. In fact, the Fifth Circuit held that a "decrease in the price of natural gas" over *five months* following a two-year increase in natural gas prices "was not a trend required to be disclosed by Item 303" because there was not yet any "complete picture" of the decrease and no other statement was rendered misleading. *Kapps*, 379 F.3d at 209, 220-21. That holding cannot be reconciled with the decision below.

Second, the United States suggests (at 21) that no "court of appeals has adopted a bright-line rule concerning the minimum length of an Item 303 'trend.'" But that says nothing about the Ninth Circuit's decision to jettison *any* temporal limitations for the term "uncertainty" or to inject the term "events" into the relevant disclosure requirement. Reply 8-9. And even as to the term "trend," the government does not address the other circuits that have imposed real durational limits to ensure the regulation remains focused on disclosures in reportable periods. *E.g.*, *Kapps*, 379 F.3d at 220-21; *Glassman*, 90 F.3d at 631. That conflict is precisely the sort of question that warrants review. See, *e.g.*, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 30-31 (2012) (whether, to constitute a taking, floodings must be inevitably recurring or may be only temporary in duration).

3. The government says (at 21) that it can amend Item 303(b), but it identifies no impending rule change. To be sure, the Commission is currently engaged in a "comprehensive review of Regulation S-K," of which Item 303 is a part—but any change to Item 303(b) may be

years away, if it happens at all. *Ibid.*; cf. 86 Fed. Reg. 2080, 2092-93 (Jan. 11, 2021) (recent amendments to Item 303(b) did not materially alter the relevant text). That speculative possibility is no reason to deny review. To the contrary, the Court often grants certiorari to ensure uniform interpretation of a regulation even though an agency could later amend the regulation. Cf., e.g., *Macquarie*, 601 U.S. at 262 (reviewing Rule 10b-5); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 203 (2011) (reviewing a later-amended Federal Reserve regulation). And review is needed now to stave off the disruption and over-disclosure from the Ninth Circuit’s decision. See SIFMA Br. 14-15, 21 (detailing burdens); Pet. App. 62a-63a, *Macquarie*, No. 22-1165 (May 30, 2023) (cataloguing Item 303(b) lawsuits).*

* The United States suggests (at 21-23) that the Ninth Circuit’s Item 303 analysis contains an additional materiality error that Robinhood’s petition does not ask this Court to review. An additional error in the decision below is no reason to deny review of the errors that Robinhood has raised.

CONCLUSION

The petition for a writ of certiorari should be granted.

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