

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OMNICARE, INC, ET AL., :

4 Petitioners :

5 v. : No. 13-435

6 LABORERS DISTRICT COUNCIL :

7 CONSTRUCTION INDUSTRY :

8 PENSION FUND, ET AL. :

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10 Washington, D.C.

11 Monday, November 3, 2014

12

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:04 a.m.

16 APPEARANCES:

17 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf  
18 of Petitioners.

19 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of  
20 Respondents.

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23 behalf of United States, as amicus curiae, supporting  
24 Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 13-435, Omnicare, Incorporated  
5 v. the Laborers District Council Construction Industry  
6 Pension Fund.

7 Mr. Shanmugam.

8 ORAL ARGUMENT OF KANNON SHANMUGAM

9 ON BEHALF OF THE PETITIONERS

10 MR. SHANMUGAM: Thank you, Mr. Chief  
11 Justice, and may it please the Court:

12 Like other provisions of the Federal  
13 Securities laws, Section 11 of the Securities Act  
14 imposes liability only for untrue or misleading  
15 statements of material fact. The only fact conveyed by  
16 a statement of opinion or belief is the fact that the  
17 speaker held the stated belief.

18 As this Court concluded in Virginia  
19 Bankshares v. Sandberg, a statement of opinion or belief  
20 can, therefore, be actionable only if the speaker did  
21 not actually hold the stated belief.

22 In the decision under review, the Sixth  
23 Circuit, alone among the courts of appeals, concluded  
24 that this Court's reasoning in Virginia Bankshares did  
25 not apply to a claim under Section 11, even though

1 Section 11 contains a materially identical falsity  
2 requirement to the provision at issue there. Neither  
3 the Sixth Circuit's interpretation, nor those of  
4 Respondents or the government, can be reconciled either  
5 with the plain language of Section 11 or with this  
6 Court's decision in Virginia Bankshares.

7 CHIEF JUSTICE ROBERTS: So if I say or the  
8 company says in a prospectus, we believe that we have  
9 3.5 million units of inventory in our secret inventory  
10 warehouse, so long as they say we believe, they can't --  
11 you know, it turns out they have none, that's all right?  
12 They're still protected?

13 MR. SHANMUGAM: I think that that would  
14 probably be a statement of opinion, but it is much  
15 closer to the line between statements of opinion and  
16 statements of fact. Let me explain --

17 CHIEF JUSTICE ROBERTS: Really, you think  
18 it's an open question if they say it's a very precise  
19 number for something that only they know anything about,  
20 and it's wildly off, you think they're protected or may  
21 be simply by saying "We believe"?

22 MR. SHANMUGAM: Well, I -- I think that --  
23 the reason why I think it's a close question as to  
24 whether or not that would be a statement of opinion is  
25 simply because the second restatement's definition of

1 what constitutes a statement of opinion, which we think  
2 is a useful guide, includes not just statements on  
3 matters of judgment, like the statements we have at  
4 issue here, but also statements that express uncertainty  
5 about factual matters.

6 And I think in your hypothetical, Mr. Chief  
7 Justice, you can view that statement as being the  
8 equivalent of a factual statement that along the lines  
9 of, we have approximately 3 million units or widgets in  
10 our inventory, such that if they had nowhere near that,  
11 that statement would be an objectively false statement  
12 of fact and, therefore, actionable.

13 JUSTICE BREYER: But suppose it is actually  
14 disputed, an expert -- expert -- a museum expert on an  
15 archaeological mission says, it is my opinion that those  
16 bones in that mountain are of a diplodocus and not a  
17 Trisopterus. Now, wouldn't you have thought that at  
18 least he'd looked into it, that at least he'd seen the  
19 bones? You see, it's absolutely open, it is a matter of  
20 opinion, but there's some things implied.

21 If you had learned later he'd been in a bar  
22 all night and had never even seen or heard one word  
23 about what the bones were like, wouldn't you think he  
24 had issued a misrepresentation?

25 MR. SHANMUGAM: So, Justice Breyer, first,

1 that would be clearly a statement of opinion --

2 JUSTICE BREYER: Yes.

3 MR. SHANMUGAM: -- because it's a statement  
4 on a matter of judgment.

5 JUSTICE BREYER: Yes.

6 MR. SHANMUGAM: Our view is that where the  
7 speaker does not say anything about the basis for its  
8 opinion, the only fact that is being conveyed is the  
9 fact of the speaker's belief. The plaintiff --

10 JUSTICE BREYER: Yes. And I just produced  
11 an example because I knew that was your view, and what I  
12 looked for was an example where your view doesn't seem  
13 quite so reasonable. And -- and that was why I said it  
14 doesn't seem reasonable there because I think any  
15 listener would think that the archaeologist had not been  
16 spending all night in the bar, but, rather, had at least  
17 looked at the bones or done some basic examination.

18 MR. SHANMUGAM: And so what I would --

19 JUSTICE BREYER: And that's -- now, that's  
20 the point I want you to address yourself to, why is that  
21 statement I just made wrong?

22 MR. SHANMUGAM: Sure.

23 JUSTICE BREYER: It is my opinion it is  
24 right.

25 MR. SHANMUGAM: So notwithstanding -- so

1 notwithstanding the fact that it in our view, Justice  
2 Breyer, there is no implied statement of fact there.  
3 There may nevertheless be a claim, and that is for the  
4 simple --

5 JUSTICE BREYER: There is an implied  
6 statement, I think. The implied statement is that he's  
7 done some work to figure this out.

8 MR. SHANMUGAM: Well -- and I think that we  
9 may end up ultimately getting to the same place because  
10 let me explain how we think the analysis would work in  
11 that situation.

12 JUSTICE BREYER: Yeah.

13 MR. SHANMUGAM: In a situation like that, we  
14 believe that the ultimate legal inquiry is whether the  
15 speaker did not possess the stated belief. But a  
16 plaintiff would be able to come forward with  
17 allegations, in your hypothetical, that the  
18 archaeologist spent the evening in the bar, that the  
19 archaeologist had no basis for his or her opinion, and  
20 in that circumstance, that would be circumstantial  
21 evidence that the speaker, in fact, did not possess the  
22 stated belief that the bones were those of a diplodocus.  
23 And so --

24 JUSTICE GINSBURG: So you're saying that  
25 this evidence, what we're -- we're talking about, the

1 evidence that the speaker didn't believe what he said,  
2 that could be proved by showing he made no investigation  
3 at all.

4 MR. SHANMUGAM: Yes. That is --

5 JUSTICE GINSBURG: So -- so you're saying  
6 that the -- whether there was any investigation or  
7 whether it was reasonable will factor into whether the  
8 belief was honestly held.

9 MR. SHANMUGAM: Yes, that is correct.

10 And --

11 JUSTICE GINSBURG: But why -- and we're  
12 dealing with a registration statement. Why isn't it, as  
13 Justice Breyer suggested, implicit that when somebody --  
14 when an issuer puts something in a registration  
15 statement, that the issuer has acted with diligence in  
16 making that statement?

17 MR. SHANMUGAM: Well, we don't believe that  
18 there is any necessary implication from the statement,  
19 and we think that that is true regardless of whether or  
20 not it appears in a registration statement because,  
21 after all, in Section 11, while Congress certainly  
22 imposed a heightened obligation on issuers and did so by  
23 relaxing other elements of liability, Congress included  
24 exactly the same falsity element as it did in a variety  
25 of other provisions of the Federal securities law --



1 laws.

2 But, again, our view is that for purposes of  
3 pleading a claim, a plaintiff is not restricted to  
4 smoking gun evidence that the speaker did not possess  
5 the stated belief. And so, again, if a plaintiff is  
6 able to come forward with allegations that cross the  
7 pleading threshold of plausibility to suggest that the  
8 speaker, in fact, did not hold the stated belief, that  
9 will, in fact, be sufficient.

10 JUSTICE ALITO: Well, that may be true, but  
11 do you deny the fact that there can be situations in  
12 which a person makes a -- makes a statement of belief  
13 and believes that to be true, but lacks a reasonable  
14 basis for stating the belief? There is a difference  
15 between those two situations, isn't there?

16 MR. SHANMUGAM: I think there is a  
17 difference between those two situations, and I think  
18 this illustrates an important conceptual distinction. I  
19 think in a case where a speaker has no basis whatsoever  
20 for the stated belief, there will be comparatively few  
21 cases -- and I'm certainly not aware of any case from  
22 the reported cases in this area -- where the speaker  
23 held the stated belief but lacked any basis for it  
24 whatsoever.

25 However, I think that the government's

1 reasonable basis standard, the position of the Solicitor  
2 General here, suggests, I think, something more. And,  
3 quite frankly, it's not entirely clear how much more  
4 that position would require. It seems to focus on how  
5 the speaker actually arrived at its opinion, and that  
6 suggests that the focus may be on the diligence that the  
7 speaker conducts.

8 But our view is that once you start getting  
9 into a lack of a reasonable belief, you're really  
10 getting into a matter of opinion. And I really do think  
11 that however the government's test operates in  
12 practice -- and, again, I think the government's brief  
13 provides --

14 JUSTICE SOTOMAYOR: What's wrong with that?  
15 There's an assumption that there's something wrong with  
16 that. But if what one wants is honesty in -- in  
17 securities statements of any kind, wouldn't one want  
18 boards, issuers, others to have some sort of reasonable  
19 basis -- I'm borrowing the government's words -- before  
20 it goes about making predictive -- even predictive  
21 statements?

22 MR. SHANMUGAM: So two points in response to  
23 that, Justice Sotomayor. First of all, at the risk of  
24 being glib, we simply don't think that that is the  
25 statute that Congress enacted. And certainly, if

1 Congress had wanted to impose an obligation on issuers  
2 of essentially providing an implied warranty for any  
3 statement of opinion that issuers make in their  
4 registration statements, it could have done so, and  
5 there are other statutes that impose liability where  
6 there is an absence of a reasonable basis.

7 Let me explain why it's problematic as a  
8 matter of policy. We believe that a reasonable basis  
9 standard, that is to say, a standard that goes further  
10 than the standard that I think Justice Breyer was  
11 suggesting, that goes beyond simply saying that you have  
12 to have some basis, but that looks at the reasonableness  
13 of the basis, opens up issuers to after-the-fact second  
14 guessing on matters of judgment.

15 JUSTICE BREYER: Well, what about saying a  
16 factual basis?

17 MR. SHANMUGAM: I'm sorry?

18 JUSTICE BREYER: Factual basis. There has  
19 to be a factual basis for making --

20 MR. SHANMUGAM: Well, again, I think there's  
21 a meaningful difference. And I think in your  
22 hypothetical --

23 JUSTICE BREYER: No, no. I mean why  
24 wouldn't that work as the standard? You're worried  
25 about the standard reasonableness is too open to

1 speculation. Okay. What about just saying there has to  
2 be a factual basis for it?

3 MR. SHANMUGAM: Well, as a practical matter,  
4 I think that where you have no factual basis whatsoever  
5 and where a plaintiff is able to so allege, that will be  
6 sufficient to allow the plaintiff to go forward even  
7 under our legal standard.

8 JUSTICE BREYER: The person did have the  
9 opinion about the diplodocus, it was his opinion. He's  
10 an archaeologist. He, you know, looks around, sees the  
11 sky, the mountains. There's some basis. People all the  
12 time say it's my opinion. Really, they haven't looked  
13 into it and so forth.

14 MR. SHANMUGAM: And as I --

15 JUSTICE BREYER: A registration statement,  
16 you ought to have looked into it.

17 MR. SHANMUGAM: And as I indicated earlier,  
18 Justice Breyer, I'm really not aware of any cases that  
19 involve that precise fact pattern. And --

20 JUSTICE BREYER: I'm sure there are none  
21 involving the diplodocus. But the -- the --

22 MR. SHANMUGAM: Or any other case where the  
23 speaker has no factual basis for the statement.

24 JUSTICE BREYER: Well, don't say no. Say --  
25 don't say no. You -- you leave it up to the judge or

1 the -- depending on the factfinder to say, is there a  
2 factual basis? And just his opinion is something that  
3 depends on context, whether something is an opinion. So  
4 factual basis in support will have, to some extent,  
5 depend on context.

6 MR. SHANMUGAM: And as a practical matter,  
7 Justice Breyer, I really do think that our legal  
8 standard takes care of that situation because in a  
9 situation where the plaintiff is able to make that  
10 allegation -- and I would note parenthetically that the  
11 plaintiffs certainly haven't made that allegation  
12 here -- it would likely be sufficient to surmount the  
13 pleading for --

14 JUSTICE KAGAN: Well, Mr. Shanmugam,  
15 suppose --

16 JUSTICE SCALIA: Do you think that --

17 CHIEF JUSTICE ROBERTS: Justice Scalia.

18 JUSTICE SCALIA: Do you think there's a  
19 difference between a factual basis and a reasonable  
20 factual basis? I mean, if we adopted a factual basis rule,  
21 would we accept an unreasonable factual basis?

22 MR. SHANMUGAM: Well, I think that really  
23 depends on what the reasonable basis stated in the  
24 standard actually means.

25 JUSTICE SCALIA: I mean, I think it's --

Official

1 it's just the same rule in -- in disguise really.

2 MR. SHANMUGAM: Well, I think that in the  
3 context of legal compliance, if statements of the sort  
4 that we have at issue here, I think that -- that that  
5 context in many ways illustrates the potential  
6 difference.

7 So suppose you had an issuer who had two  
8 separate legal opinions, one suggesting that a  
9 particular practice was legal and the other one was not.  
10 Certainly there, I think you would say that the issuer  
11 has at least some basis, but it may be open to  
12 after-the-fact determination as to whether or not that  
13 was a reasonable basis in light of the fact that there  
14 was a competing opinion.

15 Again, it's entirely unclear exactly what  
16 that standard means, I think, in part because it's a novel standard.

17 JUSTICE BREYER: I think Justice Scalia is  
18 right there, and there would be something like that,  
19 but -- and so your point is a -- is a good point, that  
20 it isn't so easy to figure this out exactly what the  
21 standard is. The alternative, of course, is to issue  
22 registration statements that have statements in them of  
23 opinion, very detailed, very fact-based, and where  
24 people would think some work was being done, and, in  
25 fact, far less work has been done than anybody would

1 think was plausible, and they just float right by  
2 without attack. Now, isn't the law designed to catch  
3 those things?

4 MR. SHANMUGAM: Well, I would say this,  
5 Justice Breyer. I mean, again, the statute itself does  
6 not contain any reasonable basis requirement, and  
7 nothing in this Court's decision in Virginia Bankshares,  
8 in our view, suggests such a requirement. So we really  
9 don't think that there is any support --

10 JUSTICE GINSBURG: How do you say that about  
11 Bankshares, which contains the statement that the  
12 Government refers to; conclusory opinions in a  
13 commercial context are reasonably understood to rest on  
14 a factual basis that justifies them as accurate.

15 MR. SHANMUGAM: Yes. And, Justice Ginsburg,  
16 that's a statement at page 1093 of the Court's opinion  
17 in Virginia Bankshares, and we think that in context  
18 that statement stands for the proposition that I've been  
19 articulating this morning, namely that where a speaker  
20 makes a statement of opinion and has no basis for that  
21 statement, that may be relevant in showing disbelief.  
22 That may be relevant in showing what the Court went on  
23 to say was legally required, namely both subjective  
24 disbelief and objective falsity.

25 And before the Sixth Circuit's opinion in

1 this case, that was the consistent understanding of  
2 lower courts in construing this Court's opinion in  
3 Virginia Bankshares, and so we certainly think that  
4 Virginia Bankshares does not stand for the proposition  
5 that an issuer -- whenever an issuer makes a statement  
6 of opinion, somehow includes in that statement an  
7 implied warranty that the speaker has a reasonable basis  
8 for that statement.

9 JUSTICE KENNEDY: If we adopt your position,  
10 which I take it to be that lack of reasonable basis  
11 for a statement can be evidence that the belief was not  
12 sincerely held, in this case do we still have to remand  
13 or did I understand you to say that the plaintiffs below  
14 did not specifically allege that there was no reasonable  
15 basis at all for the statement?

16 MR. SHANMUGAM: So two things. Two things  
17 on that point, Justice Kennedy. If you adopt our view  
18 that the legal standard here turns on subjective  
19 disbelief, which again we believe was the holding of  
20 this Court in Virginia Bankshares, then the plaintiffs  
21 here are foreclosed because the plaintiffs disclaimed  
22 any allegation based on a state of mind, which is to say  
23 that the plaintiffs in this case, in an effort to  
24 exclude -- to avoid being subject to the heightened  
25 pleading standard of Rule 9(b) --



1 JUSTICE GINSBURG: Mr. Shanmugam, I thought  
2 that the complaint alleged that the defendants had no --  
3 that no defendant had a reasonable ground to believe  
4 that Omnicare's arrangements were lawful.

5 MR. SHANMUGAM: Yes, and that was going to  
6 be my second point, Justice Ginsburg. So just to be  
7 clear, there are two paragraphs of the complaint that we  
8 think are relevant here. The first is Paragraph 178,  
9 which is the paragraph in which the plaintiffs  
10 disclaimed any allegation relying on fraud or  
11 intentional misconduct. And we think that under our  
12 legal standard that forecloses plaintiffs in this case  
13 from going forward. I would note that plaintiffs don't  
14 really dispute that under our legal standard their claim  
15 is foreclosed. They make no effort in their brief to  
16 suggest that their claim could nevertheless go forward.

17 Now, if this Court were to adopt the  
18 Solicitor General's legal standard and to say that the  
19 legal standard here is whether or not there was a  
20 reasonable basis for the opinion, this Court would  
21 obviously have to vacate and remand because that was not  
22 the legal standard that the Sixth Circuit applied. We  
23 think that we would have a very strong argument on  
24 remand that we should, nevertheless, prevail because the  
25 plaintiffs in this case have pointed only to the

1 conclusory allegation that you identified,  
2 Justice Ginsburg, and that is the allegation in  
3 Paragraph 183 that says that none of the defendants had  
4 a reasonable ground to believe in the statements in the  
5 registration statement.

6 If the inquiry in this case focuses on how  
7 the speaker arrived at its opinion, this complaint is  
8 really threadbare in terms of allegations that relate to  
9 that issue, and so we've -- but that would be an issue  
10 for the Sixth Circuit on remand.

11 JUSTICE ALITO: If the test is subjective as  
12 you claim, with respect to the issuer, whose subjective  
13 state of mind should -- must the Court look at? Would  
14 it be solely the person who signs on behalf of the  
15 issuer, or would it be everyone else who is required by  
16 law to sign the registration statement?

17 MR. SHANMUGAM: So I think that the inquiry  
18 would be much the same as the inquiry with regard to  
19 claims that have a scienter requirement, such as claims  
20 under Section 10(b). I would note that there is a  
21 little bit of disagreement in the lower courts about how  
22 broad the category of individuals at an issuer is, whose  
23 state of mind is relevant, but the inquiry generally  
24 focuses on those who either made or approved the  
25 statement at issue.

1           JUSTICE KAGAN:           Mr. Shanmugam, suppose that  
2     in a particular registration statement there was a  
3     statement that said a particular kind of transaction was  
4     lawful, all right, and the person who makes that  
5     statement, whoever it is, really believes it. But, in  
6     fact, that person knows that the Government is breathing  
7     down his neck, that the Government seems to have a  
8     different view. That person knows that its competitors  
9     have a different view. And that person has also  
10    consulted three lawyers, and two of them have given a  
11    different view. But he still believes what he believes.  
12    He believes that the Supreme Court is going to vindicate  
13    his legal position.

14           But the only thing he says is, I think this  
15    is lawful. Now, why isn't that something where there is  
16    an omission that makes the statements misleading?

17           MR. SHANMUGAM:           So we don't think that there  
18    is an omission under that circumstance because we think  
19    that the only fact that is being disclosed by the  
20    statement is the fact of the speaker's belief, and if  
21    you look at the relevant language on which respondents  
22    and the Government really focus, it is that language  
23    concerning omissions. It's not the language concerning  
24    falsity. And that language focuses time and time again  
25    on the fact at issue. So it refers to omissions,

1 omission to state a material fact. And so what is  
2 omitted has to be a fact necessary to make the  
3 statements therein, and I think that's a reference back  
4 to statements of material fact --

5 JUSTICE KAGAN: Well, it just says  
6 statements therein. It doesn't actually say statements  
7 of material fact or not.

8 MR. SHANMUGAM: I think that's most  
9 naturally a reference back to the language a couple  
10 volumes earlier about statements of material fact, and I  
11 think this all just underscores the fact that Congress  
12 in this provision did not impose a broad affirmative  
13 duty to speak, nor did it impose liability on untrue or  
14 misleading statements.

15 JUSTICE KAGAN: Well, it didn't -- it didn't  
16 impose an obligation to speak, but once you speak, it  
17 said that you're -- that you can't make omissions that  
18 make your speech -- your statements misleading. And I  
19 guess what I'm saying is, you know, what I've given you  
20 is a case where this is a judgment call, whether you  
21 think something is legal or not.

22 But what you know -- and after all you're in  
23 the position to know and all your readers are not in a  
24 position to know. What you know is that the Government  
25 seems to disagree, that your competitors seem to

1 disagree, and that most of the lawyers seem to disagree.  
2 And still you're going to put this in your statement and  
3 say, oh, no problem, that's not misleading.

4 MR. SHANMUGAM: Well, in your hypothetical,  
5 Justice Kagan, you know, I think -- there are two points  
6 I would make about it. The first is that, again, the  
7 fact that is being conveyed is the fact of the  
8 speaker's belief, and that is what makes the statement  
9 material, which is to say that when you have statements  
10 of opinion in a registration statement, the reason that  
11 they are material is precisely because it is  
12 management's view on a particular question.

13 And so when you have a statement of that  
14 variety, that is the fact that has to be shown to be  
15 either false or misleading. Obviously if the speaker  
16 does not possess the stated opinion, the statement is  
17 false. But we don't believe --

18 JUSTICE KAGAN: But don't you think a  
19 reasonable reader would look at that statement and say  
20 two things actually: Both, he's done something to try  
21 to check as to whether the transaction is legal, and he  
22 doesn't know anything that's very dispositive going the  
23 other way. And both of those things, I mean, could be  
24 false.

25 MR. SHANMUGAM: I think where a speaker says

1 nothing about the basis for the opinion, there are  
2 obviously a spectrum of potential bases for the opinion  
3 that the speaker could have, and so, again, we don't  
4 think that there is any necessary implication about the  
5 scope of the basis for the opinion.

6 Now, again, if it's a case where the speaker  
7 truly has no basis for the opinion, we believe it will  
8 be quite possible for a plaintiff to include all  
9 these underlying allegations about the basis as a way of  
10 showing subjective disbelief.

11 And so what that really leaves you with, we  
12 would respectfully submit, is the hypothetical situation  
13 in which a speaker in the face of overwhelming contrary  
14 evidence and no basis nevertheless adheres to a genuine  
15 belief, and the question of whether or not liability  
16 should lie in those circumstances.

17 And our view is simply that it is not worth  
18 the candle to frame the legal standard in a way as to  
19 cover that entirely hypothetical situation.

20 And in part, to get back to  
21 Justice Sotomayor's question from the beginning of the  
22 argument, that is because it is important to underscore  
23 the fact that this is a statute that imposes strict  
24 liability. And as this Court explained in *Pinter versus*  
25 *Dahl*, when it comes to statutes that impose strict

1 liability, issuers really need to have certainty and  
2 predictability.

3 And a legal standard that focuses on  
4 reasonable basis is going to open up issuers to  
5 after-the-fact second-guessing by jurors about whether  
6 or not a particular basis is reasonable.

7 JUSTICE KAGAN: But I don't think,  
8 Mr. Shanmugam, that the fact that the statute has -- is a  
9 strict liability statute might cut the other way. Why  
10 is it a strict liability statute? Because Congress had  
11 some understanding, number one, that it was the issuer  
12 who knows the facts, not the readers; and number two,  
13 that it is awfully hard to show subjective intent.

14 MR. SHANMUGAM: Well, Congress dealt with  
15 the context of registration statements precisely by  
16 relaxing the other elements of liability that of course  
17 exist under other provisions of the securities laws.  
18 And what that leaves us with is a statute where this  
19 falsity element is really the entire ball game because  
20 elements such as reliance and loss causation are no  
21 longer affirmative elements of liability.

22 And, of course, what that means is not only  
23 that it is easier for plaintiffs ultimately to prove  
24 liability but that it is also easier for plaintiffs to plead  
25 a claim under this provision. And I do think that a

1 reasonable basis standard, depending on how that  
2 standard is framed, could make it very difficult for  
3 issuers to avoid liability at the pleading stage.

4 And as, of course, this Court has recognized  
5 in the securities context, obtaining resolution of these  
6 claims on a dispositive motion is often, as a practical  
7 matter, the only way in which defendants can avoid  
8 liability because of the pressures of settlement in  
9 cases of this variety.

10 Unless the Court has any further questions,  
11 I'll reserve the balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Goldstein.

14 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN  
15 ON BEHALF OF THE RESPONDENTS

16 MR. GOLDSTEIN: Mr. Chief Justice, and may  
17 it please the Court:

18 The difficult part of this case for the  
19 other side is that we all know that opinions, and  
20 Virginia Bankshares makes this point, frequently imply  
21 facts. The difficult part of this case for our side --  
22 and it's important for me to confront the hard part of  
23 the case -- is that sometimes they're just state --  
24 opinions are just statements of belief. And what you  
25 have to figure out, I think, is, A, what is the default



1 rule that you should be looking at a registration  
2 statement for; and, B, what is it that the issuer can do  
3 to make it clear, no, look, this is just our sense of  
4 the matter?

5 They didn't write the registration statement  
6 in a bar one night. A registration statement is a very  
7 solemn document, and you know that from a variety of  
8 things. The first is, as Justice Kagan points out, it is a  
9 strict liability document.

10 Unlike the great majority of the provisions  
11 of the securities laws, Congress said we don't have to  
12 prove scienter. Congress said that reliance doesn't  
13 matter. Congress said that causation is for the other  
14 side to prove. We know that when Congress wrote that  
15 statute, it had opinions in mind because Section 11  
16 refers to opinions.

17 There are audit opinions, and with respect  
18 to an audit opinion, the auditor has to prove that he or  
19 she engaged in due diligence.

20 We know that it had forward-looking  
21 statements in mind, which are opinions, because it said  
22 that forward-looking statements the -- that are subject  
23 to section -- that are subject to the exemption, it is  
24 the plaintiff that has to prove that they actually knew  
25 that the forward-looking statement was false.

1 JUSTICE ALITO: The Sixth Circuit held that  
2 once a false statement has been made, a defendant's  
3 knowledge is not relevant to a strict liability claim.  
4 Was that correct?

5 MR. GOLDSTEIN: It is true with respect to  
6 the factual representations that are expressed or  
7 implied. The Sixth Circuit was not confronting, I  
8 think, an important part of the case because the  
9 petitioners had not made the argument, what do we do if  
10 the opinion is hedged? What do we do if, instead of  
11 just a representation, that -- here is our opinion which  
12 carries with it the implication about a certain set of  
13 facts, we instead say, we're uncertain?

14 And I think that's an important issue that  
15 isn't before you, either. But with respect -- it is a  
16 strict liability statute. If the factual  
17 representations that are expressed or implied are  
18 incorrect, then they are liable. And the reason for  
19 that is that this is not a securities fraud --

20 JUSTICE ALITO: Since that's the holding of  
21 the Sixth Circuit, don't we at a minimum have an  
22 obligation to vacate and remand? Because they didn't  
23 hold that their reasonable basis standard was satisfied  
24 here.

25 MR. GOLDSTEIN: Well, Your Honor, the

1 judge -- as a purely technical matter, I think that's  
2 not correct. We don't -- I don't particularly care what  
3 the last word in your opinion is. What the Sixth  
4 Circuit did is it remanded to the district court. If  
5 you refine the rule for applying the -- for applying  
6 Section 11, I think what you do is affirm and correct  
7 what you regard as the misapprehension of the Sixth  
8 Circuit's rule.

9 JUSTICE BREYER: But assuming they're wrong  
10 about this, they said the Section 11 does not require a  
11 plaintiff to plead a defendant's state of mind, and a  
12 statement of opinion is actionable when it is ultimately  
13 found to be false.

14 Now, that, I don't think, is what you are  
15 arguing, what the SG is arguing. The point is that the  
16 statement, it is my opinion that the warehouse will hold  
17 up in a 93-mile-an-hour wind for 17 hours as long as the  
18 windows are closed. And that statement may be false,  
19 but it may also be true that the issuer before issuing  
20 the statement performed a variety of tests, in which  
21 case you would agree, I think, that it is not  
22 actionable.

23 And so -- so it isn't just that it's false,  
24 it's that there was no reasonable basis for holding it.  
25 Moreover, whether the issuer has a reasonable basis is a

1 fact about the issuer's state of mind. It isn't whether  
2 there's a reasonable basis in the world. It is about  
3 whether those people who issued this statement had a  
4 reasonable basis for issuing it or not. I think that's  
5 about their state of mind in a sense. But those two  
6 things, I think, do require reversal.

7 MR. GOLDSTEIN: Well, Your Honor, first of  
8 all, you have described what the Government has  
9 articulated as the rule, and that is the reasonable  
10 basis standard. We endorse that test. We have a still  
11 broader argument that we would win on, even if you --  
12 that we would win the case even if you disagreed with  
13 it. And that is this is a strict liability statute.

14 If it turns out that the implied factual  
15 representation, or indeed the express factual  
16 representation -- that is, that the building will hold  
17 up -- turns out to be wrong, and the building will fall  
18 down, even though they did their very best to figure it  
19 out, this is the hard case, and that is they tried really hard to  
20 figure out about the building. They had a structural  
21 engineer take a look at it.

22 On our broader reading of the statute,  
23 Section 11 changes and assigns the risk of error to  
24 them.

25 JUSTICE SOTOMAYOR: Sorry, that doesn't --

1 that doesn't make much sense to me. A statement is made  
2 truly or falsely at the time it's made.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SOTOMAYOR: So how can you rely on  
5 evidence of what happened later?

6 MR. GOLDSTEIN: Okay.

7 JUSTICE SOTOMAYOR: We would never have  
8 closure on a securities action if we were to rely solely  
9 on the fact that the building fell down 10 years hence.

10 MR. GOLDSTEIN: Fair enough. And that is --  
11 that -- Justice Breyer's hypothetical happened to be  
12 about what would happen in the future, and that would  
13 indicate the forward-looking --

14 JUSTICE BREYER: No.

15 MR. GOLDSTEIN: Can I give you a  
16 hypothetical that I think will avoid your problem but  
17 still raises the hard case for us?

18 And that is we have a million dollars in  
19 inventory today on the day of the registration  
20 statement. So the following -- in our view, we have a  
21 million dollars in inventory. It's an opinion. It's  
22 describing what happens today. We know under  
23 Section 11, which talks about the date the registration  
24 statement becomes effective, that if the warehouse burns  
25 down a week later, they're not responsible.

1           But what about the case in which the day  
2 before the registration statement is issued, the  
3 warehouse burned down, and they had no way of knowing  
4 it? It was in rural India. Their very best efforts  
5 wouldn't have disclosed it. Under Section 11, they're  
6 responsible. What Section 11 does --

7           JUSTICE BREYER:           No, no, I don't see how  
8 that could be. They said, in our opinion, we have X  
9 amount of inventory. And you're starting out by saying,  
10 well, it is an opinion, but an opinion carries the  
11 implication that they would have some basis for it. And  
12 they did have a basis for it. In fact, they had a  
13 reasonable basis. So how there can the plaintiff  
14 recover?

15           MR. GOLDSTEIN:           This is a problem that the  
16 common law confronted, and it's addressed in the  
17 restatement first of contracts and of torts in 474 of  
18 the Restatement of Contracts and in 542 of the  
19 Restatement of Torts.

20           And it says if you get an opinion, if your  
21 expert archaeologist or if an art appraiser says this is  
22 a Picasso, you're allowed to rely on the truth of the  
23 assertion. The reason they say "in our opinion" is not  
24 to express doubt.

25           If you go back and look at the transcript

1 today, Mr. Shanmugam will have said "we believe," "we  
2 think," or "in our view" 20 times in the first 20  
3 minutes of this oral argument. He wasn't intending to  
4 express doubt. He was trying to say, "Look, I have  
5 looked at this problem. Here is our view of the  
6 situation as people who are specially involved."

7 Sometimes opinions are intended to evoke  
8 certainty, not uncertainty.

9 JUSTICE BREYER: Okay. You've given me  
10 those times. What about the other times?

11 MR. GOLDSTEIN: Okay. And that's, I think,  
12 the point. And that is, you have to decide which of  
13 those things is present in a registration statement.  
14 And our view is that, in a registration statement, you  
15 are dealing with a circumstance, because it's strict  
16 liability, it shifts the risk of error to the issuer  
17 because they're collecting the money for when they  
18 get --

19 JUSTICE GINSBURG: Mr. Goldstein, can I just  
20 clarify what seems to be your point. You do not take  
21 the reasonable factual basis. You are saying it's the  
22 same thing as if we excised "we believe." That you take  
23 that out, and then you have a statement of fact which is  
24 false, and then they're responsible. So you're really  
25 saying there is no such thing as an opinion versus a

1 fact, that it's just the same as if they left out "we  
2 believe."

3 MR. GOLDSTEIN: Two things. The first is,  
4 we do believe in the reasonable basis standard; that is,  
5 the government has a more modest, what you could call a  
6 middle ground. We endorse it. We have a more expansive  
7 reading of the statute as well. So that's point 1.

8 Point 2 is we do think absolutely that you  
9 can have an opinion in a registration statement that  
10 makes clear it is not something on which you should rely  
11 on for the ultimate truth. And you could look at some  
12 of the statements --

13 JUSTICE KAGAN: Isn't that exactly what you  
14 have here? Because if you look at these registration  
15 statements, you know, we have been looking at one or two  
16 sentences in a vacuum, but, in fact, if you look at the  
17 registration statements themselves, they're sort of  
18 surrounded by reasons to discount the opinion. It says,  
19 you know, CMS, the government might think differently,  
20 and if that's so, we're really in bad shape. It says,  
21 these laws may be interpreted in the future in a manner  
22 inconsistent with our interpretation. I mean, it seems  
23 to me that they actually did a pretty good job of  
24 saying, look, we think this, but there are -- there are  
25 some problems --



1 MR. GOLDSTEIN: Right.

2 JUSTICE KAGAN: -- with this and it could go  
3 the other way.

4 MR. GOLDSTEIN: I think this is a really  
5 important point. I think the critical thing is to  
6 realize that Mr. Shanmugam doesn't. His view is, even  
7 if there are no qualifications whatsoever, it is only  
8 telling you what is in his client's head. So that's  
9 point 1. And they did not make this argument in the  
10 district court or the court of appeals here that you  
11 have to look at the full context of the opinion and see  
12 whether the party is actually fully hedging.

13 Now, point 2 is that there are statements  
14 that we are relying in our complaint that aren't like  
15 that. If I could take you to the Joint Appendix to give  
16 you one good example, and I'll take you to page 192.  
17 And this is our allegation about therapeutic  
18 interchange. We allege -- and they settled a bunch of  
19 cases, including with the government over whether they  
20 were switching their patients' drugs in order to have an  
21 arrangement that was more profitable to them but not  
22 good for the patient. And we allege that therapeutic  
23 interchange, as implemented by them, was illegal.

24 Here is what they said at the top of 192 :  
25 "When required and/or specifically requested by the

1 physician or patient, branded drugs are dispensed and  
2 generic drugs are substituted in accordance with  
3 applicable State and Federal laws as requested by the  
4 physician or resident."

5           So this is an instance in the registration  
6 statement where they didn't have any of that hedging.  
7 They simply said, we are acting legally. And our point  
8 is that either of two things is implied by that. One is  
9 that it's legal or at least that no person -- or that a  
10 person would reasonably conclude that it's legal.

11           What we want to do on remand is the  
12 following: We want to show the actual facts, and we  
13 want to show that a person would not reasonably conclude  
14 this activity was legal. To the extent they have hedged  
15 in the registration statement and said, look, here's a  
16 vague law, and we know there are vague laws out there,  
17 we know there are vague regulations, and if the  
18 registration statement is read to say, look, you could  
19 read it as A, as B or C, then we're going to have to  
20 prove that the facts are inconsistent with A, B or C.

21           That is to say on the government's  
22 intermediate view, that the actual facts don't comport  
23 with a reasonable reading of the statutes and  
24 regulations that are involved. Remember, that it is  
25 very hard to understand why Congress would have written

1 a statute that says you're going to be strictly liable  
2 for misrepresentations, and we're going to ignore the  
3 fact that the reason you state opinions in a  
4 registration statement is precisely so that people will  
5 rely on them.

6 The whole point of having these in the  
7 registration statement is to persuade people about the  
8 state of the company, about the state of what it's  
9 doing, about its profitability and the like. And if you  
10 announce a legal rule that says we're going -- so long  
11 as you put the words "we believe" in front of any of  
12 those sentences, then what you're going to have is a  
13 situation in which every single time when Congress is  
14 trying to make sure that the company speaks truthfully,  
15 the plaintiff is going to be held to the burden of  
16 proving what's inside people's heads. And I don't think  
17 that that is what you would naturally infer from a  
18 statute like this.

19 JUSTICE KAGAN: Could I just make sure I  
20 understand, Mr. Goldstein? The basis of your argument  
21 in the text is not the untrue statement of material  
22 facts language, right? Because I would take it that you  
23 agree with the government and with Mr. Shanmugam that as  
24 to that, the only untrue statement in an opinion is  
25 whether you hold it? But the basis of your view, both

1 as to agreeing with the government and also suggesting  
2 that a further view is the omissions language; is that  
3 right?

4 MR. GOLDSTEIN: That is not quite correct.  
5 I think that it's a very subtle difference to say, is  
6 what we're holding them liable for the implied  
7 statement, which was untrue, or the omission of the fact  
8 that makes it non-misleading? I'll tell you -- let me  
9 give what you Virginia Bankshares said about this. It  
10 spoke -- and this is in the context of Rule 1489, which  
11 uses the same language as Section 11, and this is on  
12 page 1092.

13 "Such statements are factual," in two  
14 sentences, "as statements that the directors do act for  
15 the reasons given or hold the belief stated and as  
16 statements about the subject matter of the reason or  
17 belief expressed." And in that example, the Court  
18 understood the statement, we -- you know, we recommend  
19 this merger because \$42 is a high price to be an implied  
20 statement about the nature of the price and whether it  
21 was high or fair.

22 I don't think much matters in the  
23 characterization of whether it's an implied statement  
24 or, instead, the failure to include a fact that would  
25 make it true, but that's how Virginia Bankshares looked

1 at the question. -

2 JUSTICE SOTOMAYOR: Well, there in that case  
3 of Virginia Banks, it was a given, it was stipulated or  
4 proven already by the jury verdict that they didn't  
5 believe what they said.

6 MR. GOLDSTEIN: And I think that's a really  
7 important thing about Virginia Bankshares. I think the  
8 most that my friend can try and derive from Virginia  
9 Bankshares is under that under Section 1489, the Court  
10 said you can hold someone liable if you have both  
11 subjective and objective disbelief.

12 What they're trying to do is to say that  
13 that is not just sufficient, but necessary. And that  
14 is, that you -- Virginia Bankshares stands for the  
15 proposition that you have to prove subjective disbelief.

16 And let me just point you to the language of  
17 the Court's opinion that I think is completely  
18 inconsistent with that. There are -- this is going to  
19 be on page 1095 of the Court's opinion. The first  
20 sentence is going to be from precisely before what Mr.  
21 Shanmugam read.

22 Under Section 14-A then, "A plaintiff is  
23 permitted to prove a specific statement of reason  
24 knowingly false or misleadingly incomplete even when  
25 stated in conclusory terms," and that is referring to

1 the following statement that, "However conclusory the  
2 director's statements may have been, then it was open to  
3 attack by garden-variety evidence, allowing respondents  
4 the opportunity for recovery on the allegation that it  
5 was misleading to call \$42 high," and the Court said you  
6 could recover just on that allegation.

7         And remember how anomalous it would be to  
8 say that Virginia Bankshares holds that you must prove  
9 the state of mind of the speaker. This is a strict  
10 liability statute. To say you have to prove that the  
11 person didn't believe the implied fact is to say it's  
12 not a strict liability statute, it's essentially  
13 scienter. And why is it, we would ask, that Congress  
14 would say, we recognize an implied statement in the  
15 opinion, but we're going to require that you prove that  
16 they essentially intentionally lied to you. It's just  
17 contrary to the entire structure and notion of Section  
18 11, which isn't a fraud statute at all. It is derived  
19 from principles of common law that said, if you have a  
20 even negligent misrepresentation, even an innocent  
21 misrepresentation, you just state the facts wrong.

22         Then what you have is effectively  
23 rescission. And that is, the issuer got the money from  
24 the person who bought the stock. There was a mistake.  
25 It went wrong. We're not saying that they're

1 intentional liars, but they got the money on the basis  
2 of an incorrect representation. They get the money  
3 back. And you can't say that you have a state-of-mind  
4 requirement when the statute simultaneously says for  
5 auditors, for the lawyer who has to produce a legal  
6 opinion with respect to forward-looking statements, then  
7 you inquire whether -- and it's going to be on the  
8 defendant to prove that they engaged in due diligence.

9 JUSTICE ALITO: Well, if it's not purely  
10 subjective, if it's the reasonable basis test, what does  
11 that mean? Mr. Shanmugam says that's very open-ended.  
12 And I think he has a point. I don't really know what a  
13 reasonable basis would be in that situation.

14 MR. GOLDSTEIN: Well, this is something that  
15 the common law has employed and utilized for well over a  
16 hundred years. In this case, we would be required to  
17 prove, with respect to the hedged legal statements, that  
18 a reasonable -- or that the legal view of the company is  
19 consistent with the facts, and that is, you couldn't  
20 reasonably hold this legal view if you were taking  
21 kickbacks and you weren't passing the money on to the  
22 government. There is --

23 JUSTICE ALITO: But to what degree must the  
24 person -- let's just take the CEO who signs on behalf of  
25 the corporation. To what degree must he conduct an

1 investigation to determine whether illegality is going  
2 on someplace in the company?

3 MR. GOLDSTEIN: If you are making -- if you  
4 go out of your way to say what we're doing is legal,  
5 then you're going to have to undertake a reasonable  
6 investigation. I'm not -- let me just say to you --

7 JUSTICE ALITO: Well, what does that mean?

8 MR. GOLDSTEIN: It means --

9 JUSTICE ALITO: Now, I believe it's -- I  
10 believe -- the CES says, I believe that nobody in this  
11 company is paying bribes.

12 MR. GOLDSTEIN: Yes.

13 JUSTICE ALITO: And the CEO says no one  
14 from -- it's a true statement of belief, and he's  
15 received information from certain corporate compliance  
16 officers that no bribes are being paid.

17 MR. GOLDSTEIN: Yes.

18 JUSTICE ALITO: How much investigation does  
19 he have to go on, does he have to do? Does he have to  
20 hire an outside firm to do an investigation to see if  
21 maybe somebody is paying bribes?

22 MR. GOLDSTEIN: It depends on whether he has  
23 information. The most specific thing that I can help  
24 you with your opinion in the case is that, remember,  
25 this due diligence standard exists in the statute. Any



1 expert that offers an opinion is going to have to show  
2 reasonable investigation. Congress didn't write more  
3 into the statute for the defense because it's very  
4 contextual.

5 If the CEO knew that there had been claims  
6 in the press, for example, there had been allegations,  
7 they were facing a qui tam lawsuit, then there would be  
8 a heightened obligation to investigate.

9 My point for you is that Mr. Shanmugam  
10 thinks none of that's relevant, and that is --

11 JUSTICE ALITO: Well, I understand that. He  
12 says it's purely subjective. You say basically, it's  
13 the -- state of mind is completely irrelevant. But if  
14 we're in the middle someplace?

15 MR. GOLDSTEIN: Right, and the middle ground  
16 is that when he makes that statement in the registration  
17 statement, he is trying to induce me to believe, at the  
18 very least, I wouldn't say this if I didn't have a  
19 reasonable basis. We then will have to prove as the  
20 plaintiffs that there was not a reasonable set of facts  
21 that could lead them to say this. In his view, even if  
22 it was completely unreasonable, that is to say the CEO  
23 heard these rumors and ignored them --

24 JUSTICE ALITO: But you're not really  
25 helping me. But maybe -- all you're saying is

1 reasonable, reasonable, reasonable. I -- I would like  
2 some more concrete guidance as to what is reasonable.

3 MR. GOLDSTEIN: I'm sorry, it's just very  
4 context-dependent. In your hypothetical, what I would  
5 say is that if the CEO knows that there's never been an  
6 allegation about this, his general counsel has said, We  
7 are complying with the law, I don't think the CEO is  
8 going to have to do more.

9 But, in fact, if the contracts by their  
10 terms, which is what we allege, involve direct payments  
11 for increasing market share, if they are paying --  
12 here -- here's another good example. We have in the  
13 complaint that their own lawyers told them not to make  
14 these purchases with respect to nursing homes because it  
15 would amount to an illegal kickback.

16 CHIEF JUSTICE ROBERTS: Yeah, well, that's  
17 your -- your case, but I gather your answer to  
18 Justice Alito is that the CEO doesn't know about  
19 anything, and his lawyer comes in and says, Nope, I  
20 don't know about anything, then that cannot be the basis  
21 for a suit?

22 MR. GOLDSTEIN: In your hypothetical in  
23 which there is no question about the reasonableness, I  
24 think that they will have an excellent --

25 CHIEF JUSTICE ROBERTS: No, I'm asking you,

1 is it reasonable for --

2 MR. GOLDSTEIN: Yes.

3 CHIEF JUSTICE ROBERTS: -- him to say, I  
4 don't know anything about any bribes.

5 The lawyer comes in, Do you know anything  
6 about bribes?

7 No, I don't know anything about any bribes.

8 Is it reasonable for him to say, In our  
9 opinion, our employees are not giving bribes?

10 MR. GOLDSTEIN: If that is true across the  
11 company, because it's not just the CEO that signs the  
12 registration statement, then yes.

13 CHIEF JUSTICE ROBERTS: Okay. Thank you.  
14 Ms. Saharsky.

15 ORAL ARGUMENT OF NICOLE SAHARSKY

16 ON BEHALF OF UNITED STATES,

17 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

18 MS. SAHARSKY: Mr. Chief Justice, and may it  
19 please the Court:

20 The parties have offered you two extreme  
21 positions, and we think that the answer lies in the  
22 middle. And this is an answer that comes right from the  
23 language of the statute because it's not the case as  
24 petitioner suggests that the statute only requires that  
25 you make statements that are literally accurate. The

1 statute says that you have to make statements that are  
2 both literally accurate and not misleading as to a --  
3 that there cannot be a material omission.

4 And this is a -- this is really a standard  
5 that makes sense in the context of this particular case  
6 where we're talking about whether something in a  
7 registration statement has a reasonable basis.

8 And I want to clarify what we mean by  
9 reasonable basis. We mean a basis that would be  
10 expected under the circumstances, that a lack of a  
11 reasonable basis is what makes an omitted fact make the  
12 statement about the opinion misleading.

13 So to answer Justice Alito's question, a  
14 plaintiff has the burden to come into court and provide  
15 an omitted fact that should have been put in the  
16 statement of opinion or provided along with it in order  
17 to make it not misleading. And that has --

18 JUSTICE KENNEDY: Well, it seem -- it seems  
19 to me that you're not in the middle, that you're almost  
20 90 percent with the respondent because you give very  
21 little weight to the subjective belief component.

22 MS. SAHARSKY: We think that the -- you  
23 could establish liability either way. It's really the  
24 Court of Appeals kind of addressed two questions, and we  
25 agree with the Court of Appeals halfway. The first

1 question is do you always have to have subjective  
2 disbelief to recover under Section 11 for an opinion.  
3 The Court of Appeals correctly said the answer to that  
4 was no.

5 But then to --

6 JUSTICE SOTOMAYOR: But you -- I -- I -- are  
7 you disavowing Virginia Bankers? Virginia Bankers says  
8 you need two things, you need subjective disbelief  
9 and/or not quite, but you need an objective fact that's  
10 not true, meaning you need to prove the falsity of the  
11 objective fact?

12 MS. SAHARSKY: Well, with respect, we don't  
13 think that the court in Virginia Bankshares held that  
14 both were required because as you pointed out before the  
15 jury --

16 JUSTICE SOTOMAYOR: No, you're right. It  
17 only held that the second was required, so you always  
18 have to prove that. So what mental state are you saying  
19 has to be proven? Either they didn't believe what they  
20 were saying and there was no reasonable, or there was no  
21 reasonable basis for what they were saying?

22 MS. SAHARSKY: That's right. Either they  
23 didn't believe what they were saying, or there was no  
24 reasonable basis for what they were saying. And to --

25 JUSTICE SOTOMAYOR: How do we --

1 CHIEF JUSTICE ROBERTS: You were asking, in  
2 Justice Kennedy's, you said it was right and wrong, and  
3 then you got the part out about it being right. What --  
4 in what way was it wrong?

5 MS. SAHARSKY: The way in which the Sixth  
6 Circuit decision was wrong is because it suggested this  
7 idea of liability by hindsight, that if there is  
8 something that you give an opinion on about legality and  
9 it's later proven or later -- later established to be  
10 false by a -- untrue by a court, that you could be found  
11 liable by hindsight, and we think that's not true.

12 What matters is the state of mind and the  
13 basis that you had at the time the registration  
14 statements were made. And that's actually directly in  
15 the language of the text of the statute which focuses on  
16 when the registration statement became effective.

17 But just to make clear, and, again, in  
18 response to Justice Alito's question, this is a  
19 context-specific inquiry, and the burden is on the  
20 plaintiff to come forward with an omitted material fact  
21 that should have been stated. And in the context about  
22 an opinion, the kinds of things that would be omitted  
23 material facts that would matter are things that  
24 undercut a basis that you would expect. So it could be  
25 a lack of any investigation whatsoever.

1           But it could be, as Justice Kagan said, that  
2 you have been sued. And several courts have held  
3 against you. Those are the kind of facts.

4           JUSTICE ALITO:           But this is always going to  
5 come up after it's been shown that the statement turned  
6 out -- the statement of belief turned out to be  
7 incorrect. The registration statements says, We believe  
8 X. It turns out X is not true.

9           So it's not going to be very hard in that  
10 situation for a plaintiff to allege that the -- that the  
11 issuer did not make a reasonable investigation because  
12 if -- if they had done a reasonable investigation, they  
13 would have discovered that X wasn't true.

14          MS. SAHARSKY:           Well, with respect, I'm not  
15 sure that that's true because of the stringent pleading  
16 standards that are in place. First of all, it's not  
17 just that they could allege a conclusion under this  
18 Court's decision in Twombly and Iqbal. It's that you  
19 have to have facts to support it.

20          Also, there are some courts, like the court  
21 in this case, depending on the allegations, that say  
22 they need to meet the particularity standard for fraud,  
23 a claims that sounds like fraud under Section 9(b). So  
24 there is, in fact, a burden on the plaintiffs.

25          And one point that I want to make is that

1 this is the kind of inquiry that comes up in omissions  
2 cases all the time. The question is the plaintiff says,  
3 and has to say with facts behind it, There's something  
4 that was omitted that matters.

5 And the question ultimately for the finder  
6 of fact to decide is did it make the statement  
7 misleading or not, and that is a very context-specific  
8 discussion. But --

9 JUSTICE ALITO: They say, someone pleads  
10 that -- they said we believe there were no bribes paid,  
11 and then later it's discovered that lots of bribes were  
12 being paid off someplace. So they alleged all the  
13 things that have turned out to be inconsistent with the  
14 statement of belief, and they say had they sent someone  
15 there to investigate, they would have found this, they  
16 would have found that. So how difficult is that going  
17 to be?

18 MS. SAHARSKY: Well, again, I think the  
19 depends on the case.

20 You know, one thing that I would suggest to  
21 the Court by way of reassurance, is both that the Court  
22 has addressed a number of omissions cases and asking,  
23 you know, is the kind of information something that  
24 should have been included to make the statement not  
25 misleading, but also that the standard that we're



1 talking about, the lack of a basis, has deep roots in  
2 the common law, it's been the long-standing position of  
3 the SEC, and there are numerous courts that have used  
4 this standard, including the Third Circuit's decision in  
5 the Trump case, the Weiss case that's cited in our  
6 brief.

7 JUSTICE KAGAN: Do you think that there are  
8 specific omissions in this case?

9 MS. SAHARSKY: Well, the case wasn't really  
10 pleaded the way that we conceive of it in terms of the  
11 lack of a reasonable basis, so we do think the  
12 appropriate thing for the Court to do would be to  
13 provide appropriate instructions to the lower courts,  
14 send this case back, and potentially allow this case to  
15 be repleaded because of the fact that we do think there  
16 was a kernel of this lack of reasonable basis idea in  
17 two places in the complaint in this case.

18 The one is the relatively conclusory  
19 statement in Section 183 of the complaint that there was  
20 not a reasonable basis, but then there was also, as  
21 Mr. Goldstein noted, paragraphs 89 and 90 of the  
22 complaint, which were specific facts that were alleged  
23 about the company's attorney saying with respect to one  
24 of the specific contracts, this contract has all the  
25 kick -- the hallmarks of a kickback, an illegal kickback,

1 and that is the kind of thing that potentially is an  
2 omission that could be material and could make the other  
3 statements in the registration statement misleading if  
4 you don't provide such information.

5 JUSTICE ALITO: Well, do you think that  
6 Twombly in this -- in this context requires the  
7 plaintiff to allege what kind of investigation was  
8 conducted before there is discovery?

9 MS. SAHARSKY: I think that that would be a  
10 case-specific determination, but I don't think that that  
11 under Twombly and Iqbal, that the -- that the plaintiff  
12 could just come in and give a very generic, a very  
13 conclusory allegation. That's what the Court said is no  
14 conclusory allegations.

15 But another -- another point I think that  
16 might be helpful to the Court is that this is really --  
17 this no reasonable basis standard is really something  
18 that polices the egregious cases because it has to be  
19 the case that the plaintiff can come forward with  
20 information and that the basis that the company had is  
21 really outside the bounds of reasonableness, and we need  
22 to have it for egregious cases, for example, if there  
23 was a company that really did no investigation before  
24 putting statements like financial statements or  
25 financial predictions in its --

1 JUSTICE BREYER: Well, why wouldn't they  
2 just say, Look, the statement turned out to be false, we  
3 don't doubt that he did hold that opinion as his  
4 opinion, he was sincere, but he had no basis for that  
5 whatsoever, period. That's what the complaint says.  
6 Now, how can you avoid discovery on that?

7 MS. SAHARSKY: Well, I think the plaintiff  
8 has the burden to -- to allege specific omitted facts  
9 that should have been given in the registration --

10 JUSTICE BREYER: He never looked into it.  
11 He had no basis for it. That's trying to prove a  
12 negative. What are they supposed to allege a negative,  
13 he didn't go to the law books, didn't go to the library,  
14 didn't talk to this, didn't talk to that. I mean, it's  
15 pretty hard to do, isn't it?

16 MS. SAHARSKY: Well, I think it depends in  
17 the context of the entire complaint, whether there's  
18 sufficient factual matter there or not. But again, what  
19 I would tell the Court is that this kind of issue, not  
20 with respect to opinions specifically, but in general,  
21 arises in omissions cases, and there are many omissions  
22 cases under Section 11, which is not surprising when you  
23 think about it because these registration statements are  
24 so carefully vetted. It's not often the case that you  
25 find facts that are stated that are actually untrue.

1           And that's really the key point that I want  
2           to make when you are thinking about Petitioner's  
3           statement, is the SEC does really view this as a problem  
4           to say that the Petitioner's idea that you can just put  
5           "we believe" in front of something and then not have any  
6           need to make an investigation into it or see whether it  
7           has a basis.

8           CHIEF JUSTICE ROBERTS:           Why can't that be  
9           submitted to the jury? In other words, you can look,  
10          not to see if in fact it has a reasonable basis, but to  
11          use the evidence about how unreasonable the basis must  
12          be to suggest that the belief was not sincere?

13          MS. SAHARSKY:           Well, Congress made --

14          CHIEF JUSTICE ROBERTS:           If someone comes in,  
15          in Justice Breyer's hypothetical, and there's no basis  
16          at all and says, "I believe that this," and the evidence  
17          shows he had no basis at all, a jury can easily  
18          determine, we don't think he really believed it.

19          MS. SAHARSKY:           You're right that that's  
20          probative evidence. But I think the key point is the  
21          language Congress enacted, that Congress did not limit  
22          liability to statements that are literally true or  
23          false. There could be statements that are literally  
24          true, like he had the belief, but were misleading, and I  
25          think that that's the situation. There are places where you

1 could have something that is subjectively believed, a  
2 company in litigation, and the company lawyer thinks  
3 we're going to win this, we can, but they haven't been  
4 winning it, and they don't disclose the fact that there  
5 are some serious risks there.

6 And that's the kind of thing that really  
7 shouldn't be put in registration statements without  
8 qualification.

9 JUSTICE KAGAN: Ms. Saharsky, does this  
10 affect not only the private right of action? I was  
11 uncertain whether it also affected the SEC's ability to  
12 stop a registration statement which it thought had a  
13 misleading statement of opinion. If we come out the way  
14 Mr. Shanmugam says, is the SEC's ability to do that  
15 severely compromised?

16 MS. SAHARSKY: Yes. The language, the  
17 operative language, is nearly identical. This is  
18 between Section 8, which is about the SEC stop orders,  
19 and Section 11, and the key language is that there has  
20 to be the misstatement of material fact or the omission  
21 that makes the -- because the omission is present makes  
22 this statement not misleading.

23 So this is nearly identical language, and  
24 the SEC has taken the position for many years that in  
25 fact a lack of a reasonable basis is a serious problem

1 even if the person sincerely believes it. Those are the  
2 cases cited in our brief, and the reason we're here  
3 today is because it will severely hamper the SEC's authority, as  
4 well as the authority of private persons to recover, if  
5 you can just put things in registration statements  
6 without even having a basis for them.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Shanmugam, you have seven minutes  
10 remaining.

11 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM  
12 ON BEHALF OF THE PETITIONERS

13 MR. SHANMUGAM: Thank you, Mr. Chief  
14 Justice.

15 This is the rarer case in which none of the  
16 parties is defending the reasoning of the court of  
17 appeals below. And just to reiterate, the court of  
18 appeals in this case held that the falsity requirement  
19 in Section 11 operates differently because Section 11 is  
20 a strict liability statute, and that's the reasoning at  
21 page 47 of the Joint Appendix.

22 So the real question before this Court is  
23 whether to reverse outright, as we submit this Court  
24 should do, or to vacate and remand for application of a  
25 somewhat different legal standard such as the reasonable

1 basis standard.

2 I want to really set out three reasons in  
3 this rebuttal why we believe that the Court should  
4 reverse outright.

5 First of all, I want to focus on the text of  
6 the statute. And to go to the colloquy, Justice Kagan,  
7 that you and I were having, and the similar colloquy  
8 that you also had with my colleagues at the bar, whether  
9 or not there is a reasonable basis is not a fact that  
10 can be said to be omitted, and that is for the precise  
11 reason that this test is not simply a "some basis"  
12 standard. This is a reasonable basis standard that  
13 requires some evaluation of whether the basis is  
14 sufficient.

15 And so that is really a judgment. It is  
16 really a matter of opinion, and I don't think that it  
17 can fairly be said to be a fact that is omitted. And  
18 again, as I suggested earlier --

19 JUSTICE KAGAN: But there might be omitted  
20 facts, such as I didn't check with any of my lawyers, or  
21 I checked with my lawyers and they told me the opposite.  
22 I mean, those are facts, and that's the thing that makes  
23 the statement in the registration statement itself  
24 misleading.

25 MR. SHANMUGAM: And so the only point I

1 would add is the point that I think I made in my opening  
2 argument, which is that the statement of material fact  
3 here is still the statement of the opinion, and there is  
4 nothing misleading about that statement as to that  
5 stated fact. That is to say, either that is the opinion  
6 of the issuer or it isn't. And I think it was telling  
7 that Mr. Goldstein in his argument --

8 JUSTICE KAGAN: But I think what  
9 Ms. Saharsky is saying, maybe not Mr. Goldstein, is that  
10 there's another part of the statute which is omissions,  
11 and that those omissions of facts -- I didn't check with  
12 anybody or I checked with everybody and they said the  
13 exact opposite -- that's the thing that makes my own  
14 statement misleading, and that's why it fits within the  
15 statute.

16 MR. SHANMUGAM: Right, but it still has to  
17 be an omission that is, in the words of the statute,  
18 "necessary to make the statements therein not  
19 misleading." And again, we think that the statements  
20 therein are really the statements of material fact.

21 Now, Mr. Goldstein made a somewhat different  
22 textual argument, and I want to address that, too, just  
23 to kind of lay all of our cards on the table. He argued  
24 that, in essence, because this concept of due diligence,  
25 this concept of having a reasonable belief, exists in



1 the affirmative defense, that this Court can somehow  
2 just import that concept into the affirmative falsity  
3 requirement.

4 To me, that really illustrates why this is a  
5 profoundly atextual view, because in essence what he is  
6 saying is that, although Congress incorporated a  
7 reasonableness standard in certain specific contexts  
8 with regard to defenses for persons other than the  
9 issuer, you should impose it as an affirmative  
10 requirement with regard to statements of opinion whoever  
11 the speaker is.

12 And again, we simply don't think that can be  
13 squared with the text of the statute.

14 I would note a couple of further things in  
15 response to Ms. Saharsky's argument as to the text here.  
16 First of all, as I said in my opening, if Congress  
17 wanted to specifically impose liability in the absence  
18 of a reasonable basis, it certainly could have done so.  
19 There are statutes outside the securities context that  
20 use that phrase in order to impose liability.

21 But second, to the extent that the SEC views  
22 this as a massive problem, the SEC certainly could  
23 promulgate a rule under its authority under Section 19  
24 of the Securities Act, which allows the SEC to specify  
25 what should be included in a registration statement.

1 And the SEC in fact has somewhat broader power than  
2 Ms. Saharsky suggests because, while it is true that the  
3 SEC stop order power under Section 8(d) uses similar  
4 language, the SEC also has the power to prevent a  
5 registration statement from going into effect under  
6 Section 8(b) where that statement is inaccurate or  
7 incomplete in any respect.

8 In our view, that is broader language that  
9 would give the SEC somewhat more expansive authority if  
10 it believed that a statement of opinion is objectively  
11 false.

12 With regard to Virginia Bankshares, I would  
13 just note one thing in response to Justice Sotomayor's  
14 question, and that is that, as we point out at page 10  
15 of our reply brief, there was no jury finding in  
16 Virginia Bankshares on the issue of subjective  
17 disbelief. This Court was instead characterizing the  
18 jury's finding precisely because this Court believed  
19 that what it meant for a statement of this variety to be  
20 false was for the speaker to have acted with subjective  
21 disbelief. And again, I would point the Court to what  
22 we said in our reply brief. We cite the verdict form as  
23 confirmation of that proposition.

24 Third, I want to say just a word about the  
25 policy considerations here, pro and con a reasonable

1 basis standard. As I pointed out earlier, we believe  
2 that that standard is amorphous, and I don't think that  
3 anything that's taken place in the intervening half an  
4 hour has dispelled that proposition.

5 Ms. Saharsky says that whether or not a  
6 basis is reasonable is whether or not the basis is one  
7 that would be expected under the circumstances, and I  
8 would respectfully submit that that really doesn't  
9 provide much more by way of clarity, and it certainly  
10 would make it very easy for a plaintiff to plead a claim  
11 under this legal standard because all they would  
12 presumably have to say is that the basis is not that  
13 that was expected under the circumstances.

14 And as Mr. Goldstein said, this inquiry  
15 would be very context specific, and again in a context  
16 where issuers really require predictability and  
17 certainty, we believe that that is cold comfort.

18 There is one other policy consideration,  
19 however, which I didn't mention earlier that I just want  
20 to mention very briefly. There are very few statements  
21 of opinion that are required to be included in  
22 registration statements. There is the statement of the  
23 auditor, statement of the lawyer that the issuance of  
24 these securities is valid. But beyond that, the statute  
25 and the regulations really do not require very many of

1 these statements. And we, therefore, believe that a  
2 standard -- an amorphous liability standard like the  
3 reasonable basis standard will really have a chilling  
4 effect in cases of this variety.

5 And I would note, as was illustrated in the  
6 discussion with Mr. Goldstein, that in this case most of  
7 the statements at issue were accompanied by cautionary  
8 language, and I think that the reason why that is so is  
9 that the reason why companies like Omnicare make  
10 disclosures like this is precisely to warn about the  
11 risks of doing business. If you take a look at --

12 JUSTICE KENNEDY: What would be your  
13 position if those qualifying statements that do appear  
14 just before and just after this belief statement were  
15 omitted?

16 MR. SHANMUGAM: Well, our view would be the  
17 same in the sense that we certainly think that  
18 subjective disbelief would still be required, and of  
19 course we believe that that is the holding of this  
20 Court's decision in Virginia Bankshares as it has been  
21 understood.

22 But I make the point for a somewhat  
23 different reason, which is simply to illustrate why  
24 issuers believe that it is desirable to make statements  
25 of this variety, and if issuers are subject to liability

1 under an amorphous standard they will simply omit to do  
2 so.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:05 p.m., the case in the  
7 above-entitled matter was submitted.)

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