

IN THE SUPREME COURT OF THE UNITED STATES

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22 KEVIN J. BARBER, Assistant to the Solicitor General,  
23 Department of Justice, Washington, D.C.; for the  
24 United States, as amicus curiae, supporting the  
25 Respondents.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 23-980, Facebook  
5 versus Amalgamated Bank.

6 Mr. Shanmugam.

7 ORAL ARGUMENT OF KANNON K. SHANMUGAM  
8 ON BEHALF OF THE PETITIONERS

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

11 The Ninth Circuit has adopted an  
12 outlying rule that threatens to create a  
13 sweeping regime of securities liability for  
14 omissions. The Ninth Circuit held that a risk  
15 disclosure can be misleading simply because a  
16 company does not disclose that the specified  
17 triggering event for the risk had occurred in  
18 the past.

19 That holding was incorrect. A risk  
20 disclosure warrants that a type of event may  
21 cause harm in the future. It usually makes no  
22 representation that the event had never  
23 previously occurred.

24 The Ninth Circuit's approach would  
25 trigger serious concerns about over-disclosure

1 and fraud by hindsight, and this Court should  
2 reject it.

3           Instead, the Court should adopt a  
4 similar approach to the one it took for  
5 statements of opinion in *Omnicare*. There, the  
6 Court held that statements of opinion were  
7 ordinarily not actionable as false statements,  
8 but the Court recognized that a statement of  
9 opinion could be misleading based on an embedded  
10 representation about how the speaker formed the  
11 opinion.

12           So too here, depending on the content  
13 of the statement, a forward-looking risk  
14 disclosure can be misleading based on an  
15 embedded premise about the current state of --  
16 affairs. But just as a statement that the road  
17 may be flooded if it rains cannot be misleading  
18 simply because it rained yesterday, a typical  
19 risk disclosure cannot be misleading simply  
20 because the triggering event had occurred in the  
21 past.

22           Under the correct approach, this case  
23 is an easy one. Meta's warnings that business  
24 harm could result in the event of data misuse  
25 did not imply that Meta had never previously

1     suffered such misuse. But, in any event, the  
2     initial misuse of the data had been publicly  
3     reported by the time Meta made the statements at  
4     issue, and Respondents have abandoned any claim  
5     based on the continued misuse of the data. And  
6     far from being virtually certain to cause a risk  
7     of harm to Meta's business, the initial misuse  
8     of the data did not result in any harm when it  
9     was publicly reported.

10                 Under any approach other than the  
11     Ninth Circuit's, Petitioners are entitled to  
12     prevail. The judgment of the court of appeals  
13     should be reversed.

14                 I welcome the Court's questions.

15                 JUSTICE THOMAS: But the -- this is --  
16     this case -- it isn't about harm at this stage,  
17     is it?

18                 MR. SHANMUGAM: So the risk disclosure  
19     in this case, Justice Thomas, warned about harm,  
20     harm to Meta's business or reputation.

21                 JUSTICE THOMAS: But I thought the --  
22     the district court only focused on falsity or  
23     misleading -- whether or not this was false or  
24     misleading.

25                 MR. SHANMUGAM: Oh, that is correct.

1     So this is not about injury to the plaintiffs or  
2     any of the other elements. This is about the  
3     element of falsity.

4             Our point is simply that when you look  
5     at what this risk disclosure is warning about,  
6     it is warning about harm to business or  
7     reputation.

8             JUSTICE THOMAS: Well, I -- but the  
9     problem is that the -- a reasonable person could  
10    look at the statement and assume that because it  
11    only talks about future -- probabilities of --  
12    of this harm or this event occurring, that it  
13    never occurred. It's not -- and there, you also  
14    have another 105 statement in which you -- do  
15    discuss past events.

16            So why wouldn't one be able to read  
17    this and assume that it never happened?

18            MR. SHANMUGAM: Sure. So a couple  
19    points in response to that, Justice Thomas.

20            The first is that we don't think that  
21    a reasonable person would draw that inference  
22    from a statement of this variety. Where a  
23    statement says, if something occurs, harm may  
24    follow from that, I don't think it's a necessary  
25    premise of that statement that the event has

1 never occurred. And yet, that is the  
2 implication of Respondents' and the government's  
3 position, subject only to the caveat that if the  
4 omitted information is immaterial, which is, of  
5 course, a separate element, it would not  
6 qualify.

7 Now I do want to say one other thing  
8 in response to your question, which is that the  
9 context matters. This Court has made clear,  
10 most recently in *Omnicare*, that when you apply  
11 the reasonable investor standard, you assume  
12 that the reasonable investor is aware of the  
13 context, the regulatory framework, and so forth.

14 As we explain in our brief, these Item  
15 105 disclosures serve a very specific purpose.  
16 They warn about the types of risks that a  
17 particular company will face in the future so  
18 that investors are on notice of the types of  
19 issues that the company might face.

20 JUSTICE THOMAS: Why would you include  
21 in your 105 a past statement?

22 MR. SHANMUGAM: So I think Item 105  
23 disclosures can include references to past  
24 events, and, of course, where those references  
25 are incorrect, you can have a claim for the



1 statement being false or misleading.

2 But, to the extent that my friends on  
3 the other side and particularly the government  
4 points to the fact that there are certain  
5 examples given of breaches that have taken place  
6 in the past, we don't think that any negative  
7 inference can be drawn from that about the  
8 particular type of episode that occurred here.

9 We think that those disclosures  
10 connote breadth. They convey that there are  
11 many types of ways in which parties can access  
12 data improperly. And, again, the whole point of  
13 this disclosure is to put investors on notice  
14 that this may happen in the future.

15 And I would add --

16 JUSTICE KAGAN: Well, let's --

17 MR. SHANMUGAM: -- one other  
18 contextual point if I could make it very  
19 quickly, which is that it's important to keep in  
20 mind that at the very beginning of the 10-K, at  
21 Joint Appendix 410, Meta warns that statements  
22 that include words like "may" are intended to  
23 identify forward-looking statements.

24 JUSTICE KAGAN: So if I could give you  
25 a hypothetical, and it's a modified version of

1 one of the hypotheticals that is in the briefs.

2 If I say to you a fire occurs at our  
3 production plant, our ability to meet our  
4 production and sales targets could be impaired,  
5 all right, and, in fact, there had been a  
6 significant fire at the production plant,  
7 completely destroying it, where does that -- how  
8 does that come out on your view?

9 MR. SHANMUGAM: So I think, if there  
10 were no longer a production plant by virtue of  
11 the fire, that you would be contravening an  
12 implied premise of the statement, which is that  
13 the production --

14 JUSTICE KAGAN: So that's what I  
15 understood your brief to say, so I'm not --

16 MR. SHANMUGAM: Yes.

17 JUSTICE KAGAN: -- surprised by that.

18 So what if instead there was a fire  
19 and it destroyed 50 percent of the production  
20 capacity of the plant?

21 MR. SHANMUGAM: So I would say no  
22 misrepresentation in that instance, and let me  
23 explain why. I think that the difference is  
24 that there is no implied representation that  
25 there have not been fires at the plant in the

1 past. I think the only implied representation  
2 is that there is a plant.

3 Now you can change the language --

4 JUSTICE KAGAN: Well, I -- I think  
5 that that -- that's not really the way we  
6 communicate. I mean, if you think of the  
7 typical investor and you say in the first  
8 version of the hypothetical, yes, the typical  
9 investor would think it's kind of misleading for  
10 you to make this statement that's framed  
11 entirely in a hypothetical if, in fact, there's  
12 no more plant and no more production capacity,  
13 so too the reasonable investor is going to say,  
14 well, if there's been such substantial damage to  
15 a plant that production capacity is operating at  
16 50 percent or 30 percent or 10 percent, you  
17 know, that too is going to be of interest to the  
18 investor for the exact same reason.

19 And I guess what that suggests to me  
20 is that this inquiry is more contextual than  
21 your position allows for.

22 MR. SHANMUGAM: Well, I think, as I  
23 indicated at the outset, that our position is  
24 the one that is sensitive to context. The  
25 wording of the statement really matters because,

1 after all, as the Court indicated in the opinion  
2 in Omnicare, when you're engaged in this  
3 analysis, you are looking closely, if necessary,  
4 at both the language of the statement and the  
5 context.

6 I -- and I recognize that your  
7 hypothetical gets very close to the actual edge  
8 case because you could posit an example where  
9 the factory has been so greatly damaged that it  
10 is as if the factory doesn't exist.

11 JUSTICE KAGAN: Well, it was meant to  
12 be a hard hypothetical.

13 MR. SHANMUGAM: Well, I --

14 JUSTICE KAGAN: I grant you that. But  
15 I think you could come up with a lot of those,  
16 where there's not an embedded statement of the  
17 kind that you're saying is necessary. It's  
18 like, you know, we said there's a plant and  
19 there's not a plant. It's not a black-and-white  
20 thing in that, but -- but it is clearly  
21 misleading.

22 And -- and when we think about these  
23 questions, we're not looking only to lies,  
24 right, or to, you know, complete false  
25 statements. We're also looking to misleading

1 statements or misleading omissions as the case  
2 may be.

3 And this seems -- you know, the  
4 hypothetical is meant to suggest that there are  
5 a range of ways in which these forward-looking  
6 statements can be misleading as to things that  
7 have occurred in the past.

8 MR. SHANMUGAM: And I actually  
9 completely agree with that, and I think that our  
10 approach takes account of that context. It does  
11 require scrutiny of the statement.

12 I would submit that the other side's  
13 approach does not. And -- and let me at least  
14 describe what I understand the other side's  
15 approach to be, and Mr. Russell and Mr. Barber  
16 can explain if I'm incorrect about this.

17 I understand their position to be that  
18 whenever you have an if/then statement of this  
19 variety, which is a pretty paradigmatic form of  
20 statement in a risk disclosure, that the "if"  
21 carries with it an implied representation that  
22 the specified triggering event has not  
23 previously occurred, subject only to the caveat  
24 that it has to be material.

25 Now let me explain why I think that

1     can't be right with a tangible example.  If you  
2     take a look at Meta's 10-K and the risk  
3     disclosures in that 10-K, which are voluminous,  
4     on page 441, the risk disclosure states that:  
5     "Unfavorable media coverage could negatively  
6     affect our business."  And that is the  
7     equivalent of an if/then statement:  If we  
8     suffer unfavorable media coverage, that could  
9     negatively affect our business.

10                 I don't think anyone would infer from  
11     that that Meta has never previously suffered  
12     unfavorable media coverage.  And, if you read  
13     the entirety of the risk disclosures, it's sort  
14     of replete with examples like that.

15                 JUSTICE JACKSON:  But, Mr. Shanmugam,  
16     I -- I guess what concerns me a little bit is I  
17     don't know if your position is appreciating the  
18     fact that past occurrences, past triggering  
19     events, can still lead to future harm and that  
20     what is misleading is the suggestion, when you  
21     make your statement completely futuristic, that  
22     no such future harm is going to occur.

23                 So let me give you an example that I  
24     hope will clarify this.  So suppose a realtor is  
25     speaking to a potential buyer about a house --

1     and I think there was some house examples in  
2     your briefing -- and he says: If crime goes up  
3     in this area, homeowners insurance could become  
4     more expensive.

5             The triggering event would be crime,  
6     and the harm would be more expensive home --  
7     owners insurance. Both of those things in the  
8     futuristic statement are happening in the  
9     future.

10            Wouldn't it be misleading to make this  
11     statement if a string of burglaries had actually  
12     happened that month? The homeowner has no way  
13     of knowing that. The realtor knows that. And,  
14     at the time the statement is made, homeowners  
15     insurance has actually already shot up two times  
16     higher than before.

17            What I'm suggesting is it's misleading  
18     because the homeowner is making a determination  
19     of the risk of buying this property and paying a  
20     certain amount of homeowners insurance. And,  
21     when you say your statement totally  
22     futuristically, as though that has -- the  
23     burglaries never happened, they're  
24     miscalculating. They're being misled into  
25     making that calculation.

1                   MR. SHANMUGAM: Justice Jackson, I  
2       would make three points in response to that.

3                   The first is that I don't think that  
4       that statement would be misleading because I  
5       think you have to parse carefully the language  
6       of the statement. And I think, if somebody  
7       says, if crime goes up, some consequence could  
8       occur, I think the natural implication of that  
9       is if crime goes up from where it is now.

10                  But that having been said, I want to  
11       acknowledge, I think --

12                  JUSTICE JACKSON: But, I mean, isn't  
13       the whole point -- the whole point of these risk  
14       disclosure statements, as I think you admitted,  
15       is that the person who is hearing them is trying  
16       to determine whether there's going to be a  
17       future harm to their business investment, right?

18                  I mean, isn't that what they're doing?

19                  MR. SHANMUGAM: I would slightly  
20       disagree with that. I think the point of these  
21       risk disclosures, as the SEC itself has made  
22       clear, is to warn prospectively about the types  
23       of risks that a company would face.

24                  And a perverse consequence of the  
25       other side's approach here is that a company



1       could effectively penalize --

2                   JUSTICE JACKSON:   But why?   But can I  
3       just ask you why?   Why are you warning about the  
4       types of risks?   Isn't it because the investor  
5       is trying to determine that if any of those  
6       risks happen, it -- it's going to be a problem  
7       for the investment?

8                   MR. SHANMUGAM:   Yes, but a company is  
9       not ordinarily making any warranty about the  
10      probability of the risk occurring.   And the way  
11      in which these statements are framed really  
12      bears that out.

13                  Now I do want to acknowledge something  
14      that I think is underlying your hypothetical and  
15      was also underlying Justice Kagan's  
16      hypothetical.

17                  In many of these cases, the omitted  
18      information is something that an investor might  
19      like to know.   I think we would acknowledge that  
20      in these hypotheticals, the omitted information  
21      may be material.

22                  But the problem with the other side's  
23      approach is that it really conflates materiality  
24      with falsity, and while both of those elements  
25      start from a reasonable investor, they measure

1 very different things.

2           Materiality focuses on the omitted  
3 information, whether it is something that in  
4 this Court's words would be important to an  
5 investor's decision about whether or not to  
6 invest.

7           I think the falsity or material -- or  
8 misleadingness inquiry focuses on the statement  
9 itself: What does the statement connote?  
10 And --

11           JUSTICE KAVANAUGH: What -- what other  
12 disclosure requirements are out there about past  
13 events that are relevant to assessing this?

14           MR. SHANMUGAM: Well, there are many,  
15 many. And I do think that this Court can write  
16 an opinion that sort of draws a square around  
17 Item 105 disclosures because, while those are  
18 intended to be forward-looking, to warn about  
19 types of risks, you have Item 101, which  
20 requires a description of the business, you have  
21 Item 106, which is a very specific and recent  
22 item included in Regulation S-K to warn about  
23 cybersecurity events, and you also have Item  
24 303, which this Court is well familiar with from  
25 the Macquarie case last spring, which is the

1 Management Discussion & Analysis section, which  
2 requires broad disclosures about known trends  
3 and uncertainties.

4 And I would further add --

5 JUSTICE KAVANAUGH: So, on the  
6 50 percent hypothetical, if the -- 50 percent of  
7 the plant capacity's been destroyed in the past,  
8 is there a -- a disclosure requirement that  
9 could encompass that that's separate from the  
10 one before us?

11 MR. SHANMUGAM: I think it could be  
12 relevant to, for instance, the description of  
13 the business if the company talks about its  
14 facilities there. And a company also has a  
15 requirement to update, under Form 8-K, when  
16 there have been material changes to the  
17 company's business.

18 There are a panoply of these  
19 requirements, but we rely on them really simply  
20 to make the point that if the SEC ever judges  
21 that there needs to be explicit disclosures  
22 about a particular type of past or present  
23 event, the SEC has the power to promulgate all  
24 necessary and appropriate disclosure  
25 requirements.

1 CHIEF JUSTICE ROBERTS: That's what

2 I --

3 JUSTICE ALITO: Mr. Shanmugam --

4 CHIEF JUSTICE ROBERTS: -- I'm having  
5 a little trouble with the -- the question I  
6 think you're -- you're actually addressing in  
7 terms of the relationship between 105 and the  
8 rest of it.

9 But, I mean, is your position  
10 basically that: Don't worry about half-truths  
11 under 105 because the basic problem is already  
12 going to be disclosed under other provisions?

13 MR. SHANMUGAM: That isn't our  
14 submission, Mr. Chief Justice. We certainly  
15 acknowledge that there can be circumstances in  
16 which even Item 105 disclosures can be  
17 misleading.

18 And we agree on many of the  
19 hypotheticals that Respondents and the  
20 government set out in their briefs, primarily  
21 because those are statements that contain  
22 implied representations of one sort or another.

23 I simply want to make the point that I  
24 think the great risk of accepting Respondents'  
25 and the government's approach and upholding the

1 Ninth Circuit's decision, which, again, is an  
2 outlier in that it requires disclosure of  
3 previous occurrences of the triggering event  
4 without any assessment of how likely the risk is  
5 to occur, I think the great danger is that it  
6 would really convert these disclosures, which,  
7 again, identify types of risks that companies  
8 face, into disclosures of laundry lists of past  
9 occurrences, which companies would presumably --

10 JUSTICE SOTOMAYOR: Counselor --

11 MR. SHANMUGAM: -- have to keep  
12 updated.

13 JUSTICE SOTOMAYOR: -- you keep  
14 accusing the Ninth Circuit and of that absolute  
15 rule, but I'm hearing your absolute rule. Your  
16 absolute rule is -- or categorical rule, you say  
17 it in your brief at page 19: "Risk disclosures  
18 under 105 make no implied representation about a  
19 company's past experiences."

20 Later, you say: "Forward-looking  
21 risk -- disclosures do not make any implied  
22 assertion about previous events and the present  
23 risk of harm they create."

24 So you're -- you want a different  
25 categorical rule. You say it's contextual, but

1 the only context you're looking at is whether  
2 there's a -- a misrepresentation, not a  
3 misleading representation. I think that's the  
4 question that Justice Kagan was asking you.

5 If you take it out -- you're -- you're  
6 shaking your head yes. You're saying it has to  
7 be an explicit or implicit misrepresentation.  
8 But there's no thing -- such thing as having a  
9 misleading represent -- misrepresentation with  
10 risk disclosures. Isn't that what you're  
11 arguing?

12 MR. SHANMUGAM: So, Justice Sotomayor,  
13 I think no litigant before this Court likes to  
14 be accused of having a categorical rule, but let  
15 me explain to you --

16 JUSTICE SOTOMAYOR: No, but you're  
17 smiling because I think that's what you want.

18 MR. SHANMUGAM: No. I don't -- I -- I  
19 think we want a rule that goes like this. I  
20 think, when you have a bare if/then statement  
21 like the statements at issue here, which  
22 essentially boil down to the proposition, if  
23 there is an episode of data misuse, Facebook may  
24 suffer harm to its business or reputation, then,  
25 in that circumstance, there is no implied

1 representation without more about whether or not  
2 data misuse has occurred in the past. It is no  
3 different from the adverse publicity example  
4 from the 10-K or any number of other examples.  
5 But --

6 JUSTICE SOTOMAYOR: Could I stop you  
7 there?

8 MR. SHANMUGAM: Yes.

9 JUSTICE SOTOMAYOR: All right. Let's  
10 go to these statements, okay? I'm going to  
11 start with the one that says: "If [these] third  
12 parties or developers fail to adopt adequate  
13 data security practices," something could happen  
14 in the future.

15 But that misleading statement is  
16 omitting the critical information that Meta had  
17 failed to implement adequate practices to  
18 prevent third parties from misusing its data.

19 MR. SHANMUGAM: So --

20 JUSTICE SOTOMAYOR: It had already  
21 happened. A third party had disclosed it,  
22 failed to disclose how many millions of -- of  
23 user information?

24 MR. SHANMUGAM: It's alleged to be  
25 around 30 million --

1 JUSTICE SOTOMAYOR: And failed --

2 MR. SHANMUGAM: -- which was in the  
3 Guardian article.

4 JUSTICE SOTOMAYOR: -- and failed to  
5 destroy those records, as it represented it had.  
6 So why isn't that a misleading statement?

7 MR. SHANMUGAM: So several points in  
8 response to that, Justice Sotomayor, and I think  
9 it's telling that when you look at Respondents'  
10 and the government's brief, they don't even  
11 really try to identify the statements that are  
12 at issue here. They just want to talk about why  
13 the omitted information matters.

14 Let's leave that aside. I'm happy to  
15 join issue on the statements here. The  
16 statement you're referring to, which is at the  
17 bottom of page 10 of our opening brief, is  
18 identified as Statement 24 in the complaint.

19 I don't think that the claim --

20 JUSTICE SOTOMAYOR: I don't want to  
21 look at the statements -- I've read the  
22 statement the way it was stated. Let's go back  
23 to my point. Why isn't it misleading that there  
24 were no mechanisms by the third party, as you  
25 state, if they have inadequate mechanisms, X is



1 going to happen? We know there isn't any  
2 because Facebook didn't put any in.

3 MR. SHANMUGAM: So I actually don't  
4 think that that is the claim that plaintiffs  
5 have been pursuing. I think that their claim is  
6 that the app developer here did not develop  
7 sufficient safeguards.

8 JUSTICE SOTOMAYOR: Why isn't that  
9 misleading?

10 MR. SHANMUGAM: I think the reason  
11 that that is not misleading is because there is  
12 no representation here about what has taken  
13 place in the past. That statement, no less than  
14 the other statements on which they rely, is  
15 forward-looking.

16 JUSTICE SOTOMAYOR: Just as --

17 MR. SHANMUGAM: Now it differs in one  
18 respect in that it doesn't identify specifically  
19 harm to business or reputation, but the  
20 fundamental problem with plaintiffs' theory as  
21 to this statement is that the episode of data  
22 misuse that they're complaining about was in the  
23 public domain at the time. So their claim has  
24 to be --

25 JUSTICE SOTOMAYOR: That has to go --

1                   MR. SHANMUGAM:  -- something more than  
2     that.

3                   JUSTICE SOTOMAYOR:  -- to materiality.  
4     That's a different issue.  That's not what we  
5     granted cert on.

6                   MR. SHANMUGAM:  Well, they can't  
7     possibly pursue a claim in a case where the  
8     alleged omitted information was in the public  
9     domain, whether you locate that in the  
10    materiality element or somewhere else.  And  
11    that's precisely why their claim has to be that  
12    our statement had to contain something more than  
13    simply a disclosure about the data misuse that  
14    was already in the public domain.

15                  And my question for the other side is:  
16    What is the something more that they think this  
17    statement should have contained that was not  
18    already in the public domain at that time?

19                  JUSTICE GORSUCH:  Mr. Shanmugam, I  
20    just want to see if I've got it, okay, where  
21    you're coming from at least, okay?  A highly  
22    reticulated regulatory system, Item 105 is about  
23    risk factors and it's necessarily  
24    forward-looking.  Companies typically do if/then  
25    statements.  That's generally okay, you would

1 say. Like opinions, got it, Omnicare. Unless  
2 there's some sort of affirmative representation  
3 about a fact in the world that's wrong.

4 Is that the gist of your view?

5 MR. SHANMUGAM: It is. And to pick up  
6 on Justice Sotomayor's --

7 JUSTICE GORSUCH: And -- and let --  
8 let -- let me -- let me just continue before you  
9 pivot back to Justice Sotomayor, which I want  
10 you to do too, but the -- to take Justice  
11 Kagan's hypothetical, which we're all concerned  
12 about, right, the 50 percent, would that be in  
13 your view -- possibly required by other  
14 provisions like Item 101, which requires  
15 information material to an understanding of the  
16 general development of the business?

17 MR. SHANMUGAM: Yes.

18 JUSTICE GORSUCH: And --

19 MR. SHANMUGAM: It could be already  
20 required. And if it isn't --

21 JUSTICE GORSUCH: And --

22 MR. SHANMUGAM: -- the SEC could --

23 JUSTICE GORSUCH: And -- and Item 303,  
24 which requires a disclosure of known trends or  
25 uncertainties that have had or that are

1 reasonably likely to have a material impact?

2 MR. SHANMUGAM: Yes, it -- it could be  
3 required by Item 303 as well.

4 JUSTICE GORSUCH: And 106 as well,  
5 which is specific to cybersecurity problems?

6 MR. SHANMUGAM: Yes, but doesn't, I  
7 think, by everyone's admission, sweep as broadly  
8 as to cover what took place here.

9 JUSTICE GORSUCH: But we don't have  
10 any of those provisions before us. This is a  
11 105.

12 MR. SHANMUGAM: It is. And I do think  
13 that the Court could write an opinion that makes  
14 clear that the context here is a limiting factor  
15 on the rule, which is to say that precisely  
16 because Item 105 disclosures are  
17 forward-looking, an reasonable investor,  
18 familiar with that regulatory framework, would  
19 understand that, as Meta warned here, these  
20 statements make no representations about the  
21 past.

22 And I do think -- and the reason I  
23 wanted to pivot to Justice Sotomayor --

24 JUSTICE GORSUCH: Pivot -- pivot away.

25 MR. SHANMUGAM: -- was just to add the

1     important caveat that you can change this  
2     statement pretty easily to render it misleading.  
3     If the statement had said Meta has never  
4     experienced an episode of data misuse involving  
5     its users, but if it did, it would do harm to  
6     Meta's business or reputation, of course, in  
7     that context, the statement would be false or  
8     misleading if there had been an episode in the  
9     past.

10             And I do want to say that the Court  
11     took this case to resolve a circuit conflict  
12     here, and there are basically sort of three  
13     options.

14             Our view is that a statement of this  
15     variety, as Justice Gorsuch just set out, is  
16     ordinarily forward-looking, the condition does  
17     not ordinarily contain an implied representation  
18     about what took place in the past.

19             The Ninth Circuit went all the way in  
20     the other direction and the Ninth Circuit said,  
21     if a triggering event has taken place in the  
22     past, the statement can be false or misleading  
23     regardless of whether or not the risk has  
24     materialized.

25             The circuits in the middle say that if

1 the risk is certain or virtually certain to  
2 occur, a statement can be false or misleading in  
3 that circumstance.

4 On these facts, we would not be liable  
5 even under that test, which was essentially the  
6 preexisting test in the Ninth Circuit before the  
7 court relaxed it.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas?

11 JUSTICE THOMAS: You said that the  
12 risk factors are necessarily forward-looking.  
13 Is that a -- regulatory or a statutory  
14 requirement?

15 MR. SHANMUGAM: So I think that the  
16 regulation makes quite clear that what you are  
17 warning about is factors that could render the  
18 company's -- an investment in the company  
19 speculative or risky. That is in the language  
20 of Item 105 itself.

21 Now that having been said, there can  
22 be circumstances in which a company could  
23 include in an Item 105 disclosure something  
24 about the past or present state of affairs. And  
25 the government points to the fact that there was

1 a time when an earlier version of Item 105  
2 required at least some disclosures of that  
3 variety. That's all well and good. As I  
4 indicated in response to Justices Gorsuch and  
5 Sotomayor, a company could choose to do that and  
6 run the risk of being held liable.

7 My point is simply that if a company  
8 does not do that in the statement at issue, it  
9 cannot be liable for securities fraud based on  
10 some categorical implied representation that the  
11 specified event had never occurred in the past.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: Well, isn't it the  
14 case that an evaluation of risks is always  
15 forward-looking? Isn't it inherently  
16 forward-looking? When you want to know about  
17 what risk you face, you want to know what your  
18 risk is in the future, right?

19 MR. SHANMUGAM: It is, and that is  
20 essentially what underlies our argument here. I  
21 would submit that where I think the Ninth  
22 Circuit sort of went off the rails a little bit  
23 is that it seemed to conflate the risk of the  
24 ultimate harm with the risk of the conditional  
25 triggering event occurring.

1 JUSTICE ALITO: Well, I think the --  
2 the intuition is that a statement that simply  
3 blandly says that there's a possibility of a  
4 risk can, in context, be extremely misleading if  
5 there is a high probability of the risk  
6 materializing. I think that is the intuition.

7 The -- the fact that something has  
8 happened in the past very often sheds light on  
9 the risk of a recurrence. If you analyze the  
10 reason why the thing happened in the past, you  
11 may realize that this reason persists and,  
12 therefore, it's predictable that the same thing  
13 may happen in the past. But the mere fact that  
14 something happened in the past doesn't  
15 necessarily tell you what the risk is going  
16 forward.

17 Did -- do you disagree with any of  
18 that?

19 MR. SHANMUGAM: Well, Justice Alito, I  
20 think that that is the intuition that supports  
21 the circuits that have adopted the so-called  
22 virtual certainty rule, the notion that if you  
23 warn that a risk is possible, but, in fact, the  
24 harm is certain or almost certain to  
25 materialize, that there comes a point at which



1     it feels as if the statement is misleading.

2                 Now, here, precisely because we know  
3     that no harm occurred from the initial misuse of  
4     the data by Cambridge Analytica, this is an easy  
5     case even under that standard.

6                 JUSTICE ALITO: Well, what if --

7                 MR. SHANMUGAM: But --

8                 JUSTICE ALITO: All right. Let's take  
9     the -- the hypothetical about the -- the risk of  
10    a fire, and let's say that there was a fire, it  
11    was a damaging fire, and an analysis of the  
12    reason why the fire started was that all the  
13    wiring in the plant is obsolete and eventually  
14    has to be replaced, but it can't be replaced for  
15    the next six months. So it shows there that  
16    there's a -- a substantial risk of the  
17    recurrence of a fire.

18                On the other hand, if there was a fire  
19    and it was caused by the fact that the factory  
20    was hit by a piece of space junk that fell out  
21    of the sky, the fact that that happened doesn't  
22    really tell you much more about the probability  
23    that you're going to have another fire based on  
24    objects falling out of space.

25                So what do we do with that situation?

1                   MR. SHANMUGAM: So I would say two  
2 things about that situation.

3                   The first is that if you have a  
4 statement that simply says, you know, there may  
5 be a risk of a fire occurring at our facility, I  
6 don't think that that statement would be  
7 misleading simply because there's a modest  
8 difference in -- a -- a modest increase in the  
9 probability of that happening because of some  
10 factor or another.

11                  I think the circuits that have adopted  
12 the certainty or virtual certainty standard have  
13 done so precisely because all you're saying is  
14 there's a possibility of this happening. If  
15 there is a certainty of it happening, then the  
16 statement starts to feel misleading.

17                  But the other thing I would say --  
18 and, again, I think this is very important -- is  
19 that here, we're talking about these sorts of  
20 if/then statements. If something occurs, then  
21 there may be harm to the company's business or  
22 reputation.

23                  What you're really warning about in  
24 that circumstance, I would submit, is the  
25 ultimate harm to business or reputation. So, if

1     you're applying a standard like the virtual  
2     certainty standard, you know, I think the  
3     argument that the other side is making is:  
4     Well, if you had an episode of data misuse and  
5     you were aware of it at the time, that, you  
6     know, if it is highly likely that there is going  
7     to be harm to your business, then that statement  
8     is misleading.

9                 JUSTICE ALITO:   Thank you.

10                MR. SHANMUGAM:   And the problem is  
11     that that doesn't work out on these facts.

12                CHIEF JUSTICE ROBERTS:   Justice  
13     Sotomayor?   No?

14                Justice Kagan?

15                JUSTICE KAGAN:   So this is very much  
16     meant to follow up on Justice Alito's questions  
17     that -- my -- my -- my first note is that in  
18     this statement, Facebook actually does have  
19     various kinds of statements about what has  
20     happened in the past.   It doesn't talk about  
21     Cambridge Analytica, but it does talk about  
22     other things.   It says there have been hacking  
23     incidents in the past.   Hacking is a real  
24     problem, and we've experienced it.

25                And, you know, if you had left that

1 out, I think that you would have every right to  
2 stand up there and say: Like, who could really  
3 think that our statement says that there aren't  
4 hacking incidents in the past? All right?

5 So you put in a bunch of stuff that  
6 nobody could accuse you of just take -- you  
7 know, omitting because who could think that?

8 But now say that there's an  
9 extraordinary release of -- confidential data,  
10 and let's -- make it even more extraordinary in  
11 this case because, if we make it this case, you  
12 know, you'll tell me this was known already and  
13 it really wasn't so bad.

14 But, you know, just imagine that --  
15 that every user of Facebook had all their  
16 confidential data released in some way to a  
17 third party, who then put it on the open market.  
18 So, really, quite an extraordinary mishap.

19 And just as Justice Alito says, the  
20 reason why people want to know about that in  
21 assessing risks going forward is because it says  
22 something about the company's vulnerabilities.  
23 It might say something about operational  
24 problems of the company. It might say something  
25 about management issues at the company, like:

1     How does a company allow that to happen? I  
2     better go find out.

3                 So -- so why wouldn't that be required  
4     here? Whatever anything else requires, what --  
5     we know, what -- whatever other requirements  
6     there are, this requirement, which talks  
7     about -- which is supposed to give people an  
8     understanding of future risks, an investor needs  
9     to know that, doesn't she?

10                MR. SHANMUGAM: Yeah. So I would say  
11     two things in response to that, Justice Kagan.

12                The first is that, again, with regard  
13     to the examples that were given, I think we  
14     would acknowledge that there could be a case in  
15     which you might draw a negative inference from  
16     something that a company said about what took  
17     place in the past. Again, it's a contextual  
18     analysis that depends on the nature of the  
19     statements.

20                But, here, I think it's quite clear  
21     that the examples that were being given were  
22     precisely that. They were examples of the types  
23     of efforts improperly to obtain Facebook user  
24     data that had occurred in the past. And a  
25     reasonable investor, I would submit, would not

1 have been misled by that to believe that no  
2 third party had ever gained access to user data  
3 or misused that data through other means.

4 But, second, to respond to the second  
5 half of your question, of course, there could be  
6 situations in which omitted information would  
7 really be of interest to a reasonable investor.  
8 That goes to materiality.

9 And yet, it is a fundamental principle  
10 that this Court has articulated in cases like  
11 Matrixx and Macquarie that that is not enough at  
12 least for 10(b) liability, where there cannot be  
13 pure omissions liability. There is pure  
14 omissions liability under other provisions of  
15 the securities laws but not 10(b), which is, of  
16 course, enforceable by private investors.

17 And what is the problem that this  
18 Court would be creating if it went as far as the  
19 Ninth Circuit? It would be the problem of  
20 creating a regime where a company would be  
21 penalized for disclosing about the very risk  
22 that eventually materializes.

23 JUSTICE KAGAN: Thank you.

24 JUSTICE GORSUCH: Just to --

25 CHIEF JUSTICE ROBERTS: Yeah.

1 JUSTICE GORSUCH: Thank you, Chief.

2 Mr. Shanmugam, so you would agree,  
3 though, an if/then statement can be misleading  
4 and materially possibly so if it understates the  
5 risk going forward, the probability of it?

6 MR. SHANMUGAM: I think only under the  
7 virtual certainty standard --

8 JUSTICE GORSUCH: Yeah.

9 MR. SHANMUGAM: -- but not under the  
10 standard --

11 JUSTICE GORSUCH: Do you object to  
12 that?

13 MR. SHANMUGAM: -- we are advancing.

14 JUSTICE GORSUCH: I -- I -- I got  
15 that.

16 MR. SHANMUGAM: I think, under that  
17 standard --

18 JUSTICE GORSUCH: Do we need to decide  
19 the difference between what you're advocating  
20 and the virtual certainty -- what you're calling  
21 the virtual certainty standard? Is that  
22 necessary to decision here?

23 MR. SHANMUGAM: I think that this  
24 Court could write an opinion that says simply  
25 that the Ninth Circuit's rule, as we understand

1     it and as the Ninth Circuit set out at pages 24A  
2     and 25A of the Petition Appendix, cannot be  
3     correct, that it cannot be sufficient to render  
4     a statement misleading simply that the pre --  
5     the specified triggering event has previously  
6     occurred in the past, without an assessment of  
7     the risk of harm.

8             The other side comes back and says:  
9     Well, it's implicit that if it's immaterial,  
10    that it would fall outside that rule. But our  
11    submission is that's not what the Ninth Circuit  
12    was really doing here. The Ninth Circuit was  
13    just saying: If you have a previous occurrence,  
14    the falsity requirement is satisfied.

15            The Court could leave for another day  
16    the delta between our proposed test and the  
17    virtual certainty test because I think the  
18    virtual certainty test creates an exception in  
19    circumstances where, again, the risk of harm is  
20    certain or virtually certain to materialize.  
21    Defendants often prevail under that standard.

22            We certainly think this Court should  
23    ideally provide guidance and resolve the circuit  
24    conflict here definitively. But, if the Court  
25    wanted to say, we're not going to decide between



1     those two standards, it just doesn't matter on  
2     these facts.

3                   JUSTICE GORSUCH:   Thank you.

4                   CHIEF JUSTICE ROBERTS:   Justice  
5     Kavanaugh?

6                   JUSTICE KAVANAUGH:   A couple  
7     questions.  On the risk factors, as I understand  
8     it, you don't have to identify the probability  
9     of the event occurring, correct?

10                  MR. SHANMUGAM:   And companies  
11     typically don't.  If a company said it is highly  
12     unlikely that the -- an episode of data misuse  
13     is going to materialize, then all of these  
14     things would be put into play.  Perhaps not  
15     surprisingly, companies don't make warranties of  
16     that variety.

17                  JUSTICE KAVANAUGH:   Because, if they  
18     did that and, as Justice Gorsuch said, they  
19     understated the risks, then they would be -- you  
20     know.

21                  MR. SHANMUGAM:   Correct.

22                  JUSTICE KAVANAUGH:   Yeah.

23                  MR. SHANMUGAM:   In Justice Alito's  
24     hypothetical, if you included language that goes  
25     to how probable it is, then you're going to have

1 a problem if you have information that goes to  
2 that probability.

3 JUSTICE KAVANAUGH: Right.

4 And, second, the SEC, I think you're  
5 acknowledging, could adopt a regulation that  
6 says what it currently says about risk factors  
7 and added: And, by the way, if you're  
8 identifying possible future events that could  
9 create harm, you also need to identify if those  
10 events have occurred in the past?

11 MR. SHANMUGAM: And what's funny about  
12 this, Justice Kavanaugh --

13 JUSTICE KAVANAUGH: Is that a "yes"?

14 MR. SHANMUGAM: Yes.

15 JUSTICE KAVANAUGH: Yeah, okay.

16 MR. SHANMUGAM: And the SEC did not do  
17 that when it promulgated Item 106 just last  
18 year. It did not include episodes of data  
19 misuse in what had to be disclosed. And,  
20 indeed, the SEC shied away from requiring  
21 elaborate disclosures about previous occurrences  
22 precisely because companies complained about the  
23 burden that that would impose.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: So, Mr. Shanmugam,  
3 you said that this is about context and about  
4 the regulatory context, but it seems to me,  
5 based on a lot of the hypotheticals that you've  
6 gotten and the ones written in the briefs, that  
7 it's about more than just the regulatory context  
8 but also about the context of the business, the  
9 nature of the risk, et cetera, which makes it  
10 not easily susceptible to a categorical rule.

11 Let's just say -- you know, Justice  
12 Gorsuch was asking you to kind of articulate  
13 where the line might be. It's hard for me to  
14 see why we would adopt the virtual certainty  
15 test when it's nobody's first choice. And it  
16 seems like the kind of bright -- bright-line  
17 rule that maybe the SEC might want to adopt,  
18 that sort of thing, but it's -- it's hard for me  
19 to see why we would do that.

20 Assume that I think the Ninth  
21 Circuit's rule goes too far and I think your  
22 rule goes too far. It seems to me very hard to  
23 articulate what the line is. And -- and -- and  
24 maybe I can put it this way. It seems like the  
25 hardest hypotheticals are the ones where the

1 risks are either unusual or devastating, like a  
2 50 percent loss of a factory because of a fire  
3 or getting hit by space junk. Those are --  
4 those are things that are unusual and hard.

5 But -- you know, nobody would think  
6 that a social media company or -- wouldn't be at  
7 risk of data breaches or that data breaches  
8 hadn't happened in the past. Or, if you're a  
9 food supply chain, you -- you know, E. coli  
10 outbreaks in spinach, you know, that sort of  
11 thing. If things are going to recur and they're  
12 things you associate with the business and  
13 they're described at a relatively high level of  
14 generality, it seems to me that those kinds of  
15 statements, well, maybe those do seem like  
16 they're general statements just about the  
17 category of risk that a particular kind of  
18 business faces, but if they are more unusual,  
19 kind of either/or binary choices, make or break  
20 the business, well, then those really seem like  
21 they're misleading.

22 So, if I see it that way, how do I  
23 articulate a rule that handles anything more  
24 than the case in front of us?

25 MR. SHANMUGAM: Sure.

1 JUSTICE BARRETT: Maybe I shouldn't.

2 MR. SHANMUGAM: Well, Justice Barrett,  
3 I think what I would say is that I would grant  
4 that I think there are circumstances in which a  
5 reasonable investor may have an intuition that  
6 something has taken place in the past. The  
7 example that I gave earlier, I think, falls into  
8 that category. Nobody would think that a  
9 company as big as Meta had never suffered  
10 unfavorable publicity. And I would submit that  
11 if we're talking about data misuse and the like,  
12 I think most people would assume that there have  
13 been episodes of that variety in the past.

14 I think what you may be reacting to  
15 here is the sense that sometimes there are  
16 events that seem so significant that it feels as  
17 if there ought to be an obligation to disclose  
18 them, and maybe the unusual events fall into  
19 that category because those are perhaps likely  
20 to be events that are really, really  
21 significant.

22 Our point is simply that that goes to  
23 materiality first and foremost. And, again, I  
24 think part of the problem with the other side's  
25 approach is that it really conflates these

1 elements that are meant to be different. The  
2 language of Rule 10b-5 itself makes clear that  
3 an omission has to be both material on its own  
4 terms and necessary in order to avoid rendering  
5 a statement not misleading.

6 JUSTICE BARRETT: Well, I think some  
7 of the hypotheticals that you're getting show  
8 that not everybody shares that intuition, that  
9 materiality is the only thing at stake, that it  
10 can also be misleading. Depending on how  
11 specific the risk is, you know, people probably  
12 have different intuitions that fall along a  
13 spectrum.

14 So what -- if -- if I'm resisting, I  
15 feel like you're still advocating for your  
16 categorical rule.

17 MR. SHANMUGAM: Well -- but, all  
18 right, so let me offer the important caveat,  
19 which is where I started the argument, which is  
20 the caveat that we really drew from this Court's  
21 opinion in *Omnicare*, which is that implied  
22 representations, I think, can take care of many  
23 of these circumstances. And we acknowledge in  
24 our reply brief that, for instance, a statement  
25 can have an implied representation about the

1     current state of affairs. Take the final exam  
2     example. If I fail one of my finals this  
3     semester, I may have to retake a class. I  
4     think, there, there's an implied representation  
5     that you're talking about your finals this  
6     semester, and if you failed one of them, that  
7     statement is then false or misleading.

8             It is because there is an implied  
9     representation that we think is absent from a  
10    statement of this variety. And I think the  
11    Court can write an opinion that is mindful of  
12    the language of this statement but recognizing  
13    that the reason that there's a circuit conflict  
14    is that companies use this form of formulation  
15    quite frequently. And so, in some sense, the  
16    Court is deciding it for a category of types of  
17    statements, but, if the wording changes, the  
18    analysis is going to be different.

19            CHIEF JUSTICE ROBERTS: Justice  
20    Jackson?

21            JUSTICE JACKSON: So I have two  
22    questions that are kind of similar. I think  
23    that what is bugging me about your view is that  
24    you seem to suggest that the only implied  
25    misrepresentation or implied representation that

1 matters is a statement that falsely suggests  
2 that something didn't happen in the past when it  
3 actually did. You've said that many times.

4 But I'm wondering whether there isn't  
5 also a statement about what needs to happen in  
6 the future from the investor's perspective so  
7 that when you say, if this kind of data breach  
8 happens, it could damage Facebook's business,  
9 the investor thinks, okay, so if I invest in  
10 this business now, I'm going to have to start  
11 looking out for signs of this kind of data  
12 breach happening in the future, I'm going to be  
13 focused on that aspect of, you know, the  
14 research as I try to figure out this investment.

15 You're sort of throwing him off the  
16 scent of the fact that what he really needs to  
17 do is figure out what harms are going to arise  
18 from the data breach that has already occurred.  
19 This is similar to Justice Kagan's point about  
20 how an investor uses the information. They're  
21 looking for vulnerabilities in the company, et  
22 cetera.

23 And so I'm just -- I'm just nervous  
24 about the suggestion that the only  
25 representation that's being made in a futuristic



1 statement is one that relates to the past as  
2 opposed to a possible statement about the future  
3 in the way that I've described.

4 MR. SHANMUGAM: So I'd make two points  
5 about that, Justice Jackson.

6 The first is that I think it's  
7 important to look at Item 105, and one of the  
8 things that Item 105 requires is that the risk  
9 that you're disclosing be a material risk; in  
10 other words, it's got to be something that is  
11 reasonably likely to arise.

12 And so I actually think, if you had,  
13 for instance, the example of our factory being  
14 hit by a meteor, that's something that you would  
15 probably not have to disclose.

16 JUSTICE JACKSON: No, no, but it's  
17 already occurred. In -- in the --

18 MR. SHANMUGAM: Right.

19 JUSTICE JACKSON: -- in all the  
20 hypotheticals that I'm talking about --

21 MR. SHANMUGAM: Right.

22 JUSTICE JACKSON: -- it's a hundred  
23 percent, let's say, that this is -- that there's  
24 going to be harm from this because it's  
25 happened.

1                   MR. SHANMUGAM: And in some sense, my  
2 point is that precisely because it has to be  
3 material, I think a reasonable investor would  
4 think this is something that is a very real  
5 risk, it may have happened in the past, it could  
6 happen in the future. And -- and I think that  
7 that is an important --

8                   JUSTICE JACKSON: No, I guess my  
9 question is, why aren't you making a statement  
10 with your purely futuristic formulation that  
11 leads the reasonable investor to believe that no  
12 harm of this nature is going to happen right --  
13 right now, right now?

14                  MR. SHANMUGAM: Right. Well --

15                  JUSTICE JACKSON: I have to wait --  
16 that the -- so, in my -- in my real estate  
17 example, the person is -- when the -- when the  
18 real estate agent says, if crime goes up, home  
19 insurance rates might go up, the investor says,  
20 okay, I'm going to start looking at crime  
21 reports because, you know, if this were to  
22 happen in the future, then, fine, this risk will  
23 materialize. What he doesn't know is that crime  
24 has already gone up, crime has already gone up,  
25 and that, really, tomorrow the insurance rates

1 are going to go up.

2 And what I'm suggesting is that you've  
3 misled him into thinking that he has to wait for  
4 a future triggering event as opposed to he has  
5 to do what he needs to to mitigate the harm that  
6 will already happen as a result of the past  
7 triggering event.

8 MR. SHANMUGAM: Yes. And I think we  
9 would draw a line between a circumstance in  
10 which the harm has currently materialized, in  
11 other words, the harm is ongoing and, therefore,  
12 will exist in the future, and a circumstance in  
13 which there is simply a present risk of harm,  
14 whether from a past event or a future event.

15 I think, if there is merely a risk,  
16 there would be no liability because that risk is  
17 precisely what you're warning of, and you're not  
18 making any warranty about whether the triggering  
19 event has occurred in the past.

20 And the last thing I would say is that  
21 I really do think it's a question for my friends  
22 on the other side what they think the statement  
23 here should have said because it seems clear  
24 that they think it should have said something  
25 more than -- that there was the initial episode

1 of misuse, which was already in the public  
2 domain. And I think that the answer to that  
3 question will point up just how expansive and  
4 broad the implied representation, really, the  
5 warranty, is --

6 JUSTICE JACKSON: Thank you.

7 MR. SHANMUGAM: -- that they think  
8 every statement includes.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Russell.

12 ORAL ARGUMENT OF KEVIN K. RUSSELL

13 ON BEHALF OF THE RESPONDENTS

14 MR. RUSSELL: Mr. Chief Justice, and  
15 may it please the Court:

16 I'd like to start by making clear our  
17 position. First, as to the actual question  
18 presented, we agree that a risk disclosure is  
19 not misleading because it omits disclosure of an  
20 event that is immaterial because it risks no  
21 business harm. The Ninth Circuit did not hold  
22 otherwise.

23 Second, we agree that in addition to  
24 proving materiality, plaintiffs must also show  
25 that the risk statement implies that the omitted

1 event did not occur. We don't claim that every  
2 risk statement includes that implication. Our  
3 position is simply that they can and frequently  
4 do, and that ultimately depends on the facts and  
5 context of each case.

6 Third, for that reason, the Court  
7 should reject Facebook's categorical rule that  
8 Item 105 statements are always agnostic about  
9 whether the risk has transpired in the past.  
10 Facebook admits that if a student tells his  
11 parents that there's a risk he may fail an exam  
12 when he's already done so, that is misleading  
13 because it implies it's impossible that he won't  
14 when that isn't true. The same is true of many  
15 risk factor statements, including the ones at  
16 issue in this case stating that their --  
17 describing an improper disclosure of user data  
18 as a hypothetical risk implied that it was  
19 possible it wouldn't occur. And that wasn't --  
20 possible because it already had.

21 This does not mean that issuers must  
22 disclose every material occurrence of a risk.  
23 They simply must say enough to remove the false  
24 impression that the omitted event has not yet  
25 materialized, something they generally can do,

1 as Facebook did here with respect to hacking, by  
2 simply acknowledging that the risk has  
3 materialized in the past.

4 Finally, the Ninth Circuit did not  
5 adopt any contrary categorical rule. The Court  
6 did not discuss whether these particular  
7 statements were agnostic about the past because  
8 Facebook never argued that they were. It  
9 elected instead to argue only that the warned-of  
10 risks had not transpired because it viewed the  
11 warned-of risks as speaking only to hacking  
12 events and business harm.

13 Because Facebook does not challenge  
14 the Ninth Circuit's fact-bound rejection of  
15 those claims in this Court, this Court should  
16 provide any necessary guidance for future cases  
17 in the course of affirming the judgment.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Mr. Russell, what  
20 else should Facebook have provided in the 105  
21 statement to comply with 10(b)?

22 MR. RUSSELL: So I think they could  
23 have said what they said and then said something  
24 like: Such improper disclosure or misuse of  
25 user data has occurred in the past, including

1 recently on a substantial scale. I think that  
2 would have removed any misimpression that an  
3 event like what happened in Cambridge Analytica  
4 hadn't occurred.

5 And the reason that it is reasonable  
6 for somebody to think that this statement  
7 implies that it hadn't occurred is because an  
8 investor -- reasonable investor hearing a  
9 company describe factors that are relevant,  
10 that -- factors that make the investment risky  
11 would expect that if something like this had  
12 happened, 30 million users' private data  
13 released, eventually causing a hundred billion  
14 dollar reduction in the market capitalization of  
15 the company, that the company who is intent on  
16 telling the whole truth about the factors that  
17 make the investment risky would not speak about  
18 such things --

19 JUSTICE GORSUCH: Mr. Russell --

20 CHIEF JUSTICE ROBERTS: Counsel --

21 MR. RUSSELL: -- in hypothetical  
22 terms.

23 JUSTICE GORSUCH: I'm sorry, Chief.

24 CHIEF JUSTICE ROBERTS: Oh, yeah.

25 Your basic submission is that a probabilistic

1 statement about something carries the inference  
2 that that something has not occurred.

3 MR. RUSSELL: No. Our -- our position  
4 is that it can. It doesn't always.

5 CHIEF JUSTICE ROBERTS: Okay. Well,  
6 it -- it can.

7 MR. RUSSELL: Yes.

8 CHIEF JUSTICE ROBERTS: But, I mean,  
9 with respect to certainly some but maybe most, a  
10 probabilistic statement will do the exact  
11 opposite. For example, if you're leaving my  
12 house and I say, you might slip on the steps,  
13 you wouldn't say, well, that's never happened  
14 before.

15 MR. RUSSELL: That's right.

16 CHIEF JUSTICE ROBERTS: Your -- your  
17 inference would be that has happened and that's  
18 why I'm giving you the warning.

19 And it seems to me, if you're saying  
20 it -- it can go one way in some cases, it can go  
21 another way in the other cases, it's a real  
22 expansion of the disclosure obligation. In  
23 other words, it's not something that is narrow  
24 because, whether it's happened or not, you --  
25 you -- you -- you -- you have to disclose it.



1 MR. RUSSELL: No. That's not our --

2 CHIEF JUSTICE ROBERTS: Well,  
3 exactly -- well, who -- how are we supposed to  
4 parse whether it's slipping on my steps or, you  
5 know, what you say is the -- actionable in this  
6 case?

7 MR. RUSSELL: I think you -- you  
8 simply have to do what the Court says you have  
9 to do in omission cases in Omnicare, which is  
10 you always have to ask how would a reasonable  
11 person understand the implications of this  
12 sentence and -- and if it is a case where  
13 somebody would understand that the warned-of  
14 risk is something that happens all the time or  
15 you'd only be talking about it if it happened in  
16 the past.

17 If it's an event like adverse  
18 publicity that everybody knows has happened in  
19 the past, nobody's going to understand the  
20 statement to be implying that it hadn't  
21 happened.

22 JUSTICE GORSUCH: So -- so, Mr.  
23 Russell --

24 CHIEF JUSTICE ROBERTS: So --

25 JUSTICE GORSUCH: I'm sorry, Chief.

1 CHIEF JUSTICE ROBERTS: I was just  
2 going to follow up.

3 MR. RUSSELL: Mm-hmm.

4 CHIEF JUSTICE ROBERTS: So, basically,  
5 if you have this and it's -- the suit is -- is  
6 brought, you say: Well, it -- it either -- the  
7 inference it either has happened in the past or  
8 it hasn't happened in the past and we're going  
9 to go to trial to decide that, it seems to me  
10 that's kind of a blank check.

11 MR. RUSSELL: No, you treat it the way  
12 you do every omissions case. You can enter  
13 summary judgment or enter a motion to dismiss if  
14 no reasonable juror could find that this  
15 statement implied that the event hadn't happened  
16 in the past.

17 In this case, there are at least four  
18 reasons why it would be reasonable for a jury to  
19 decide that this particular set of statements  
20 did.

21 The first is the structure, which it  
22 is the received wisdom of many courts in many  
23 contexts over many years, "can" and "often" does  
24 imply that speaking of something in a  
25 hypothetical term implies that it hasn't

1     happened.

2                     But the context of this case  
3     reinforces that here because, here, we are not  
4     talking about something like adverse publicity,  
5     which people would know happens all the time.

6                     JUSTICE GORSUCH:  Well, Mr. Russell,  
7     on that, so -- so I just want to make sure,  
8     there -- there seems to be a -- a point of  
9     agreement not only on the question actually  
10    presented but that forward-looking risk factor  
11    statements don't generally imply anything.  
12    There has to be some implied representation  
13    about a past fact for you to get in the door.  
14    Is -- is that right?  Is that common ground?

15                    MR. RUSSELL:  I don't know that I  
16    would agree on the "generally."  I think we do  
17    agree that it's context and -- dependent, and  
18    sometimes it does, sometimes it doesn't.

19                    JUSTICE GORSUCH:  But it depends upon  
20    an implied representation that there is -- no  
21    problem in the past?

22                    MR. RUSSELL:  Yes.

23                    JUSTICE GORSUCH:  Okay.  We agree on  
24    that.

25                    MR. RUSSELL:  Yes.

1 JUSTICE GORSUCH: Everybody seems  
2 to -- you guys agree on that at least.

3 What about the -- the statement we  
4 have here? I -- I want some help with that  
5 because it -- I wonder whether we're in the --  
6 the world of a meteorite or -- or Justice  
7 Alito's falling debris or whether we're in the  
8 Chief Justice's world of slip-and-fall on my  
9 front porch.

10 Defendant represented that our  
11 industry is prone to cyber attacks. It says  
12 that -- hacking has become more prevalent in our  
13 industry, and it says we cannot assure you that  
14 the measures we have will provide absolute  
15 security.

16 Why isn't this -- given those kinds of  
17 warnings, where is the implied representation  
18 that Meta has never had a significant data  
19 breach?

20 MR. RUSSELL: Because Meta itself  
21 insisted vehemently below and in public when  
22 this was finally disclosed in 2018 that this was  
23 not a hacking event. This was not a  
24 cybersecurity event.

25 And the risk disclosures discussed

1 separately the risk of misappropriation of user  
2 data by developers, and in that context, it  
3 doesn't say any of the things that you just  
4 read.

5 JUSTICE GORSUCH: Yeah. Well, that's  
6 the next paragraph, and it -- it -- it does say  
7 that we provide limited information. However,  
8 if they fail to adopt or adhere to adequate data  
9 security practices or in the event of a breach  
10 of their networks, you're going to have a  
11 problem.

12 MR. RUSSELL: Right.

13 JUSTICE GORSUCH: So, again, where is  
14 the implied representation that -- that this  
15 hasn't happened in the past? Isn't this exactly  
16 the sort of thing that a reasonable investor  
17 does know can happen to large companies with --

18 MR. RUSSELL: I don't -- I  
19 respectfully disagree.

20 JUSTICE GORSUCH: I mean, the federal  
21 government -- I mean, I -- I think China  
22 probably has all of our FBI files. You know, I  
23 mean, data breaches are part of our -- our lives  
24 these days.

25 MR. RUSSELL: But this wasn't a data

1 breach. And this is really important. That was  
2 a principal argument that Facebook made below,  
3 that these statements only warned about data  
4 breaches, and the Ninth Circuit rejected that  
5 reading, and the reason for that is because,  
6 unlike a hacking event -- I don't know what  
7 China does -- here, Facebook allowed a  
8 third-party developer -- it just gave them the  
9 data.

10 And that doesn't happen, Justice  
11 Barrett, all the time. Actually, at the --  
12 before the disclosures in this case, reasonable  
13 investors would have thought that it never  
14 happened and particularly on this scale.

15 And for -- Facebook had faced  
16 allegations of this in December of 2015, and it  
17 didn't respond by saying: Yeah, that happened  
18 and we took care of it. It said: We have to  
19 conduct an investigation, and if we do, we will  
20 take swift action. And by the time they issued  
21 this report in 2016, they hadn't said boo about  
22 this.

23 And so, in that context, I think it is  
24 very reasonable for investors to understand that  
25 by treating it as simply something that may

1     happen in the future, they are confirming that  
2     their -- what their silence had already  
3     conveyed, which is that it's -- that we didn't  
4     substantiate the allegations in the 2015  
5     article.

6             JUSTICE BARRETT:   So you're saying  
7     that it is unusual because it wasn't -- you're  
8     saying it wasn't a data breach.   It was  
9     Facebook, Meta just handing over the data.

10            You're saying it falls more in the  
11     category of a factory half burning to the  
12     ground, something that we wouldn't necessarily  
13     expect because you would have trusted Meta not  
14     to hand it over.   Is that what you're saying?

15            MR. RUSSELL:   That's right.   And  
16     that's why users were so angry --

17            JUSTICE KAGAN:   And it's handing over  
18     the data --

19            MR. RUSSELL:   -- when they found out  
20     about this.

21            JUSTICE KAGAN:   -- without any real  
22     controls, isn't that right?   Isn't that the  
23     allegation?

24            MR. RUSSELL:   Right, that -- that this  
25     evidence -- this episode showed not only that

1     they had given this away in this one instance  
2     but that that didn't have the capability to keep  
3     their promises to users that users can control  
4     who has access to their private data.

5             JUSTICE BARRETT:  Mr. Russell, can I  
6     just ask you one other question?  You know,  
7     Justice Gorsuch and -- and the Chief too were  
8     kind of trying to pin you down on exactly what  
9     you think about these if/then statements or  
10    these statements of risk, and you agreed that  
11    sometimes they might be purely forward-looking,  
12    right?

13            MR. RUSSELL:  Yes.

14            JUSTICE BARRETT:  And you said:  But  
15    they can contain implied representations.

16            And -- and I think Mr. Shanmugam's  
17    position is that ordinarily they don't.  And is  
18    yours that they ordinarily do?

19            MR. RUSSELL:  I think that may be a  
20    fair representation.  That is the received  
21    wisdom from all these courts in all these cases  
22    in all these contexts.

23            But, at the end of the day -- and I'm  
24    not sure that it's helpful or necessary to say  
25    whether they ordinarily do or they ordinarily



1     don't. At the end of the day, each case has to  
2     be considered on its facts.

3                 JUSTICE KAVANAUGH: Well -- doesn't  
4     that raise what for me is a kind of separation  
5     of powers or due process concern? The SEC knows  
6     how to write regulations that require disclosure  
7     of past events. As we've discussed, they have  
8     those kinds of regulations.

9                 And what happens here is this  
10    regulation does not explicitly require that, and  
11    then the question is: Okay, why not let the SEC  
12    do that if they want to? And then we have this  
13    regulation. And you say sometimes it does,  
14    sometimes it doesn't, in response to Justice  
15    Barrett and the Chief, and you said it can  
16    sometimes contain an implied representation.

17                If you're the regulated party, you  
18    don't have fair notice, one could say, of what  
19    you're required to do. It's guesswork about  
20    when you're required to disclose. And you're  
21    going to therefore -- another problem that they  
22    raise, and I just want you to respond to all  
23    this -- that you're going to just over-disclose  
24    then and that's going to defeat the whole  
25    purpose of it.

1                   So I guess the starting point is, why  
2     not let the SEC do this if they want to? Isn't  
3     there a notice problem when you do it this way?  
4     And doesn't that, in turn, lead to  
5     over-disclosures, which undermines the whole  
6     kind of theory here?

7                   MR. RUSSELL: So I think the premise  
8     of the question and a major premise of the other  
9     side's argument is that Item 105 is directed at  
10    disclosing only things that might happen in the  
11    future. And that's just wrong, right? The --  
12    the text of the -- that the regulation says --

13                  JUSTICE KAVANAUGH: But you -- I'm  
14    sorry to interrupt, but I just want to get this  
15    one point out and you can keep going. A lot of  
16    SEC regulations do specifically require  
17    disclosure of things in the past, correct?

18                  MR. RUSSELL: Correct.

19                  JUSTICE KAVANAUGH: And --

20                  MR. RUSSELL: And they also require --

21                  JUSTICE KAVANAUGH: -- and this  
22    doesn't explicitly do that. Keep going, though.  
23    I'm sorry to interrupt.

24                  MR. RUSSELL: That a lot of  
25    regulations require things that -- to be

1 disclosed about the past and the future. Most  
2 of them do both. And so I don't think you can  
3 draw any inference about what this regulation is  
4 intended to do just from that fact.

5 But you can look at the regulatory  
6 language, which requires disclosure of factors  
7 that make the investment risky. And the fact  
8 that there's been a recent misappropriation of  
9 30 million users' private data that is a ticking  
10 time bomb that's going to cause a hundred  
11 billion dollars in damages to the company down  
12 the line is a factor that makes investment in  
13 the company risky.

14 JUSTICE ALITO: Well, that's a --

15 MR. RUSSELL: More --

16 JUSTICE ALITO: -- that is -- that is  
17 an argument that seemed to me different from --  
18 seems to me different from the one that I  
19 thought was presented by the question.

20 So there can be the -- a situation in  
21 which an event has happened in the past, a big  
22 data breach, and the company knows that this  
23 thing that happened in the past is going to have  
24 a continuing effect, that it does not have to be  
25 a recurrence of a similar event. We're talking

1 about the damage from the past event which  
2 continues to have an effect.

3 That's different from the situation in  
4 which something happened in the past, it's a  
5 discrete event, it's over, but there's concern  
6 that there's a real risk that it's going to  
7 happen in the future.

8 MR. RUSSELL: I think that's right. I  
9 think --

10 JUSTICE ALITO: Well, I thought we  
11 were -- we took the case to decide the second  
12 question, not this first question that you've --  
13 that -- and that may be the one that fits best  
14 with the facts of the case, but I see those two  
15 things as quite different.

16 MR. RUSSELL: Well, but I was trying  
17 to make the more generic point, that simply that  
18 Item 105 is not limited to requiring disclosures  
19 about things that may happen in the future. And  
20 you can get that from the regulatory language.  
21 You get it from the fact that Facebook itself  
22 disclosed facts, including the -- the prior  
23 occurrence of hacking, and it does so and with  
24 respect to a bunch of other things.

25 My point is simply that nobody who

1 reads these things, I think, will think that a  
2 risk factor statement that expressly discusses  
3 past events, that is intended to inform people  
4 about factors that make the investment risky,  
5 which can incur past events, who know that the  
6 prior versions of the regulation instructed  
7 people that gave examples of past events is  
8 going to think this is only talking about the  
9 future.

10 JUSTICE ALITO: Let me give you these  
11 two situations. This is what most troubles me  
12 about your -- your argument, although, as I -- I  
13 tried to bring out in questioning Mr. Shanmugam,  
14 I see problems with his as well.

15 Suppose a company -- let's go back to  
16 the fire example. Suppose a company does an  
17 internal -- has an inspector comes -- come in.  
18 The inspector examines the factory and says your  
19 wiring has -- has got to be replaced, but it  
20 can't be done in less than six months and that  
21 there is an X percentage chance that there's  
22 going to be a fire in your factory in the next  
23 year.

24 Do they have to disclose -- if -- and  
25 they say in their -- in the 10 -- in answering

1 the 10-K, if there is a fire, there may be a  
2 significant disruption of our operations. Do  
3 they have to disclose that internal report and  
4 say we know that there is an X percent chance  
5 that a fire is going to occur?

6 MR. RUSSELL: So I think possibly yes,  
7 but this is actually the real virtual certainty  
8 rule. So this is where something is misleading  
9 not because it's already happened in the past  
10 but because you are not disclosing something  
11 that's virtually certain to happen in the  
12 future.

13 JUSTICE ALITO: Well, it's not  
14 virtually certain. There's a certain  
15 percentage. Let's say it's a 15 percent chance.

16 MR. RUSSELL: Well, I think, if the  
17 statement is understood to imply that there  
18 hasn't been a fire in the past, that's our case,  
19 that is our claim here, and that that would be  
20 misleading without regard --

21 JUSTICE ALITO: Well, the statement --

22 MR. RUSSELL: -- to the probability of  
23 occurrence.

24 JUSTICE ALITO: -- the statement is,  
25 if there is a fire, there will be a substantial

1 disruption of our operations.

2 MR. RUSSELL: I think, if there has  
3 been a fire, that --

4 JUSTICE ALITO: It doesn't say if  
5 there has been. If there is a fire.

6 MR. RUSSELL: No, I understand.

7 JUSTICE ALITO: Okay.

8 MR. RUSSELL: I understand that, but a  
9 reasonable investor, I think, could read that as  
10 saying, you know, we wouldn't be talking about  
11 fires in hypothetical terms if there had  
12 recently been one that calls into question the  
13 safety of the entire facility.

14 JUSTICE ALITO: If it calls into  
15 question the safety of the facility, if the --  
16 the X is high enough, if the probability of it  
17 happening is high enough, but if -- if there was  
18 a fire in the past because of a meteorite, I  
19 mean, that doesn't say anything about the  
20 probability -- it doesn't increase the  
21 infinitesimal probability --

22 MR. RUSSELL: Yes.

23 JUSTICE ALITO: -- infinitesimally low  
24 probability of it happening in the future.

25 MR. RUSSELL: I -- I think I agree

1 with that. I think that event would probably be  
2 deemed immaterial to investors because it  
3 doesn't auger harm to the business going  
4 forward.

5 JUSTICE ALITO: All right. Well, I'll  
6 just --

7 MR. RUSSELL: But that's the opposite  
8 of this case.

9 JUSTICE ALITO: -- tell you where this  
10 is going and I'll let you go. Unless there's a  
11 requirement to say -- to -- to quantify in some  
12 way the nature of the risk, whether in numerical  
13 terms or in descriptive terms, there's a very  
14 high risk, there's a high risk, a moderate risk,  
15 whatever, then I don't see the basis -- I see  
16 that to be inconsistent with the idea that the  
17 occurrence of an event in the future which  
18 highlights the potential for the materialization  
19 of the risk in the future has to be disclosed.  
20 I don't really see a difference between those  
21 two.

22 MR. RUSSELL: Well, I don't think that  
23 a company is entitled to mislead people about  
24 something that occurred in the past that, under  
25 Basic, would be a material event just because it



1 has an assessment that it's not going to happen  
2 again. It's up to the investors to make that  
3 judgment themselves, to value the company based  
4 on their own assessment once they are put on  
5 notice that this is actually something that  
6 happened in the past.

7 JUSTICE ALITO: Thank you.

8 JUSTICE JACKSON: So is that why  
9 you're sticking with -- with that -- it has to  
10 be a statement that is -- that would cause a  
11 listener to infer a fact about the past is  
12 untrue? I mean, I'm sort of with Justice Alito  
13 in trying to understand the probability of risk  
14 and whether a statement can also be misleading  
15 if it would lead to an inference that the risk  
16 of future harm is zero or very low when the  
17 speaker knows it to be much greater than that.

18 Why isn't that another kind of  
19 misleadingness that we should be thinking about  
20 or that the SEC was thinking about?

21 MR. RUSSELL: I -- I don't dispute  
22 that that is another kind of harm and another  
23 way in which a statement could be misleading.  
24 I'm simply saying this case is not about that.

25 Our theory of liability is that this

1 monumentally important event happened in the  
2 past and Facebook misled people into thinking  
3 that it hadn't.

4 JUSTICE JACKSON: Okay.

5 CHIEF JUSTICE ROBERTS: Justice --

6 JUSTICE SOTOMAYOR: I'm very confused.  
7 I thought, when Justice Alito put in his two  
8 hypotheticals or asked which of these two  
9 situations, something happened and it has  
10 continuing risk, or something happened, no risk,  
11 but it might happen -- something like it might  
12 happen in the future.

13 This situation presents both, doesn't  
14 it?

15 MR. RUSSELL: I'm sorry, I may have  
16 misunderstood the hypothetical then. I do  
17 think --

18 JUSTICE SOTOMAYOR: That's what I  
19 thought he --

20 MR. RUSSELL: -- I do think the --  
21 the -- the reason it was so devastating that --  
22 to be misled about this occurrence is both, that  
23 people were going to be really mad when they  
24 find out about it, which is what happened when  
25 they did, and that it --

1 JUSTICE SOTOMAYOR: It happened and --

2 MR. RUSSELL: -- reveals other risks  
3 about Facebook's inability to control outside  
4 developers' access to third-party -- or to the  
5 private user data. But the ultimate question  
6 here, I think, is simply whether there is a  
7 categorical rule that these statements are never  
8 or always contain that kind of implication. I  
9 think everybody agrees that that's not the case.  
10 It's always case-dependent, and it's always  
11 fact-specific.

12 And so then I think what's left for  
13 the Court in this case is to ask, did the Ninth  
14 Circuit held something different? And --

15 JUSTICE SOTOMAYOR: Thank you,  
16 counsel.

17 MR. RUSSELL: -- are you going to  
18 decide the facts of this particular case on  
19 whether these particular statements are  
20 misleading? I'm happy to talk about why they're  
21 not. We haven't focused on that question  
22 because we took the Court to take the case to  
23 decide the general legal question.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 JUSTICE THOMAS: And this case, as Mr.  
2 Shanmugam indicated, is about falsity. And so  
3 at what point do we analyze that? The event  
4 took place in -- the misuse, in 2015?

5 MR. RUSSELL: Yeah.

6 JUSTICE THOMAS: And so -- and the  
7 statement was when?

8 MR. RUSSELL: The statement was in the  
9 2016 annual report.

10 JUSTICE THOMAS: So the -- do we just  
11 look at that period to determine whether or not  
12 the statement is false?

13 MR. RUSSELL: I --

14 JUSTICE THOMAS: Because you made a  
15 big -- you made a big -- issue of the  
16 materiality part, which is -- and the harm, that  
17 later on they find out when there's full  
18 disclosure that you've got a hundred billion  
19 dollar loss, 30 million people's data has  
20 been -- have been -- has been disclosed, et  
21 cetera.

22 So at what point do we analyze the  
23 falsity?

24 MR. RUSSELL: I think at the point  
25 that they made the statement. And so the -- we

1     acknowledge that if the event had happened so  
2     long ago that it was wasn't material, there  
3     would be no liability. But, here --

4             JUSTICE THOMAS: But we're not talking  
5     about materiality at this point, right?

6             MR. RUSSELL: Well it wouldn't be -- I  
7     think it would be false if they were to imply --  
8     there -- there's an interrelationship between  
9     these two. Somebody reading a statement that is  
10    intended to put you on notice of risks to the  
11    business, would make the investment risky, is  
12    not going to read the statement as implying  
13    anything about immaterial events, right? And  
14    so, the -- if the event --

15            JUSTICE THOMAS: So how do you know in  
16    2016 whether or not it was going to have the  
17    downstream -- the later effect of a hundred  
18    billion dollars in market cap drop -- loss?

19            MR. RUSSELL: So I think two things  
20    about that. One is I -- I do think what  
21    actually happened is probative at the least of  
22    what was foreseeable at the time.

23            And I think Facebook acknowledged in  
24    its warning statements that misuse of this kind  
25    could seriously damage the business. And it's

1     only intuitive that it would because user data  
2     is the lifeblood of the company, and if somebody  
3     gives away your user data that you think is  
4     private, people are going to be really angry  
5     about that, as they were.

6             JUSTICE THOMAS: I understand all of  
7     that, but for -- when -- when we're analyzing  
8     this for falsity, none of that comes into play.

9             MR. RUSSELL: Only to the extent, I  
10    think, that you would not understand a statement  
11    to imply the non-occurrence of an immaterial  
12    event, right? And so, once you understand that  
13    this is a material event, I agree that how  
14    material it is doesn't go to falsity.

15            JUSTICE THOMAS: And --

16            MR. RUSSELL: The question is did this  
17    happen or not.

18            JUSTICE THOMAS: Yeah. And, finally,  
19    does -- what role does the fact that this is at  
20    the motion-to-dismiss stage play in our  
21    analysis?

22            MR. RUSSELL: So the question here, I  
23    think, is not what's the best reading of these  
24    particular statements. It is whether we have  
25    plausibly alleged that a reasonable jury can

1 conclude that these statements falsely implied  
2 that the omitted event had not occurred.

3 That's the question that -- Facebook  
4 is going to have plenty of opportunity later in  
5 the case to argue to -- at summary judgment or  
6 to a jury that these statements -- what these --  
7 a reasonable person understood these statements  
8 to make -- to -- to -- to imply.

9 But, in Omnicare, this Court correctly  
10 acknowledged that what statements imply is a  
11 question that is principally of fact for the  
12 fact finder. And it necessarily makes these  
13 kind of cases a little bit messy. It doesn't  
14 provide the -- the clarity that some issuers  
15 might like.

16 CHIEF JUSTICE ROBERTS: Justice Alito?  
17 Justice Sotomayor, anything further?  
18 Justice Gorsuch, anything?

19 JUSTICE KAVANAUGH: I just want to  
20 clarify, in response to Justice Sotomayor and  
21 Justice Alito, exactly what you think that the  
22 question is before us.

23 I thought the question was, in a  
24 situation where you disclose the risk of an  
25 event occurring in the future that could cause

1     harm, is it false not to disclose that the  
2     event -- is that statement false because you  
3     don't disclose that that same event had happened  
4     in the past even though the harm from that event  
5     in the past is over?

6             MR. RUSSELL: That is the question  
7     presented on -- on that question, which has --  
8     which is very different than what we've been  
9     talking about all morning. We agree that the  
10    answer is no if --

11            JUSTICE KAVANAUGH: Okay.

12            MR. RUSSELL: -- you know, it is not  
13    misleading to omit the occurrence of an event  
14    that is immaterial because it risks no business  
15    harm. And in this case, that is not this case.

16            JUSTICE KAVANAUGH: Okay. I'll read  
17    the transcript on that.

18            Okay. And then the second thing, on  
19    Justice Thomas's point, I mean, getting past the  
20    motion, just to put the real world into this for  
21    a second, getting past the motion to dismiss is  
22    kind of -- it's the game, right?

23            MR. RUSSELL: I don't think so. A lot  
24    of these cases go to summary judgment, and we've  
25    collected a number of cases in which --



1 JUSTICE KAVANAUGH: Well, it's a  
2 big -- it's a big part of the decision.

3 MR. RUSSELL: It is. It is big and it  
4 is important.

5 JUSTICE KAVANAUGH: So it's just --  
6 I'm just stating this. It's not just, oh, it  
7 can all be resolved at summary judgment.  
8 There's a huge -- there's a huge issue at stake  
9 just getting past the motion to dismiss in a lot  
10 of these cases. I think everyone --

11 MR. RUSSELL: No, I -- I acknowledge  
12 that --

13 JUSTICE KAVANAUGH: Yeah.

14 MR. RUSSELL: -- but I think, at the  
15 end of the day, the question here is whether  
16 these statements are capable of implying that an  
17 event like this hasn't occurred in the past, and  
18 if the answer is they are --

19 JUSTICE KAVANAUGH: Yeah.

20 MR. RUSSELL: -- then I don't think  
21 any amount of policy argument in the world will  
22 justify saying that they aren't.

23 And if this Court adopts a categorical  
24 rule that's saying statements of this kind are  
25 agnostic as a categorical rule about what

1     happened in the past, then I think you are  
2     effectively saying that some statements that  
3     actually are misleading are not, that they're  
4     not actionable. And that, we respectfully  
5     suggest, is the office of a safe harbor, which  
6     Congress authorized the SEC, not the courts, to  
7     develop.

8             JUSTICE KAVANAUGH: Okay. Thank you  
9     for your answers. Appreciate it.

10            CHIEF JUSTICE ROBERTS: Justice  
11     Barrett?

12            Justice Jackson?

13            JUSTICE JACKSON: Just to quickly  
14     clarify with -- your response to Justice  
15     Kavanaugh. So it's your view that this past  
16     event did present a risk of future business  
17     harm?

18            MR. RUSSELL: Yes.

19            JUSTICE JACKSON: Is that right?

20            MR. RUSSELL: That is right.

21            JUSTICE JACKSON: And so that's why  
22     you think their question presented doesn't  
23     accurately capture what was going on, because  
24     they sort of suggest that it doesn't?

25            MR. RUSSELL: Right. And the only

1 reason that Facebook has ever given why the  
2 misappropriation of 30 million users' private  
3 data didn't risk business harm, didn't risk  
4 people being really mad when it finally came  
5 out, is their claim that the public learned the  
6 truth in 2015 and didn't care.

7 JUSTICE JACKSON: Thank you.

8 MR. RUSSELL: And -- okay.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Barber.

12 ORAL ARGUMENT OF KEVIN J. BARBER

13 FOR THE UNITED STATES, AS AMICUS CURIAE,  
14 SUPPORTING THE RESPONDENTS

15 MR. BARBER: Mr. Chief Justice, and  
16 may it please the Court:

17 Petitioners ask this Court to immunize  
18 from fraud liability risk-factor statements that  
19 misleadingly depict a risk as hypothetical when  
20 it has already materialized. That argument is  
21 flawed as a matter of law and common sense.

22 Indeed, Petitioners now appear to  
23 recognize that a risk statement can implicitly  
24 misrepresent the past. That is exactly what  
25 Facebook's statements did here.

1           There's been some discussion about the  
2     question presented and the extent to which it  
3     accurately captures what the court of appeals  
4     held. We agree with Respondents that it does  
5     not. Given the obvious importance of the  
6     Cambridge Analytica matter to Facebook's  
7     business, which depended so heavily on user  
8     data, the court of appeals had no occasion to  
9     hold that the nondisclosure of an unimportant  
10    event renders a risk statement misleading.

11           That's why Petitioners have raised the  
12    broader argument that a risk statement  
13    categorically implies nothing about the past.  
14    This Court rejected a very similar argument in  
15    the Omnicare case, and it should take the same  
16    course here.

17           I welcome the Court's questions.

18           JUSTICE THOMAS: Mr. Shanmugam said  
19    that you have the burden of or should have the  
20    burden of saying exactly what else they should  
21    have said to meet the requirements of 105 and  
22    10b.

23           MR. BARBER: I don't think that's  
24    Respondents' burden, but I do think that  
25    Respondents gave a good answer to that question,

1     which is Facebook should have said at least that  
2     they had experienced a significant episode of  
3     misappropriation of user data. That would have  
4     avoided the misleading impression left by the  
5     statements that they did make here.

6             JUSTICE THOMAS: Was it considered  
7     significant in 2016 when they filed -- filed the  
8     statement, the 105 statement?

9             MR. BARBER: Yes, I think it certainly  
10    was considered significant based on the actions  
11    that Facebook took, emailing Cambridge Analytica  
12    quite quickly after determining that its  
13    policies had been violated, directing them to  
14    delete the data.

15            I think Facebook was, at least on the  
16    allegations of this complaint, highly aware of  
17    the great risk to its business that was posed by  
18    this episode.

19            CHIEF JUSTICE ROBERTS: Do you -- do  
20    you agree with Mr. Russell that a probabilistic  
21    statement sometimes implies that the event it --  
22    hadn't occurred and sometimes implied that the  
23    event had occurred?

24            MR. BARBER: I do. And I think, to  
25    the Chief Justice's question earlier, I agree

1 with Respondents that these kinds of matters are  
2 not susceptible to bright-line rules. That goes  
3 for falsity. That goes for materiality.

4 And it would be foreign to the common  
5 law of fraud and this Court's securities law  
6 jurisprudence to impose the kind of  
7 bright-line -- I don't want to call it  
8 categorical -- but bright-line rule that  
9 Petitioners seem to be advancing. It depends on  
10 the particular statement, the particular kind of  
11 risk under discussion.

12 CHIEF JUSTICE ROBERTS: Well, in -- in  
13 such a complicated scenario of that sort,  
14 sometimes it's yes, sometimes it's no. It  
15 depends on the particular context. That does  
16 seem something that it would be nice for your --  
17 or something that your client, the Securities  
18 and Exchange Commission, might want to exercise  
19 its expertise with respect to it.

20 Instead, it's -- I think, was  
21 suggested earlier that this is a good case where  
22 we, the Court, can provide a lot of guidance on  
23 how you should apply these things.

24 It -- are you concerned about that,  
25 that we may not do as good a job as the SEC?

1                   MR. BARBER: I think, as long as you  
2                   confine yourself to what Respondents have  
3                   suggested the Court hold, which is a statement  
4                   like this is misleading on this theory only  
5                   insofar as it implicitly misrepresents that the  
6                   relevant event has not already occurred, and  
7                   then the past event that did occur has to be  
8                   material, if the Court so held, I think that  
9                   would be fine.

10                  The SEC could always say more about  
11                  this, provide more guidance, but that would be  
12                  true in any kind of case involving a half-truth.

13                  JUSTICE ALITO: Well, under what  
14                  circumstances does a statement that is framed  
15                  like this, if X event occurs, then our business  
16                  will be hurt, under what circumstances does a  
17                  statement that is framed like that imply that  
18                  the event is not going to happen?

19                  MR. BARBER: So, when the relevant  
20                  risk is something that any reasonable person  
21                  would expect to have occurred and would have  
22                  expected the company to confront in the past,  
23                  then you wouldn't have that kind of implication.

24                  JUSTICE ALITO: Well, it's -- so it's  
25                  a -- it's -- it isn't a -- a false implication

1 if the risk of the thing happening in the past  
2 is more than some quantity, it's more than X,  
3 the risk has to be more than X in order for  
4 that -- a statement like that to be misleading?

5 MR. BARBER: Are you positing that  
6 that's what the statement itself says?

7 JUSTICE ALITO: I'm positing that the  
8 statement says exactly what I said it says. It  
9 says that if -- if there is a fire in the plant,  
10 our operations will be disrupted. It's framed  
11 like that. Under what circumstances is that  
12 misleading?

13 MR. BARBER: I think that would be  
14 misleading if the company, the manufacturer, had  
15 recently suffered a significant fire that, you  
16 know, would be implicitly interpreted as in  
17 conflict with the representation that the issuer  
18 was making.

19 JUSTICE ALITO: Okay. Well, I don't  
20 want to dwell on things that fall out of the  
21 sky, but what about the situation where the fire  
22 is caused by something that's utterly freakish?  
23 Something fell -- a meteor -- a meteorite fell  
24 out of the sky or some crazy person who was  
25 hearing voices decided that that person was



1 going to go throw a Molotov cocktail in the  
2 window of this plant.

3 MR. BARBER: I don't know if the  
4 source of the fire in particular matters. If  
5 the company is warning a risk of fire may affect  
6 our business negatively and then a devastating  
7 fire had just affected the business and had  
8 these serious implications for the business's  
9 ability to compete going forward, I think that  
10 could well be --

11 JUSTICE ALITO: So even --

12 MR. BARBER: -- misleading.

13 JUSTICE ALITO: -- even in those  
14 situations, it's caused by a meteorite or it's  
15 caused by the crazy Molotov cocktail thrower,  
16 you would say you've got to disclose that  
17 because a reasonable investor would want to  
18 know?

19 MR. BARBER: A reasonable investor --

20 JUSTICE ALITO: Maybe because the  
21 investor would think the place is haunted or  
22 it's cursed because this happened in the past.

23 JUSTICE KAGAN: Well, isn't what the  
24 reasonable investor would want to know in that  
25 situation -- and I agree these are two different

1 situations, but, in that situation, what the  
2 reasonable investor would want to know is that  
3 there wasn't any plant. No matter, you know,  
4 what had caused the fact there wasn't any plant,  
5 there wasn't any plant, so there wasn't going to  
6 be any output, so there wasn't going to be any  
7 business.

8 JUSTICE ALITO: Well, that's -- I  
9 mean, what I'm talking about is not -- it's  
10 not -- it doesn't wipe out the plant. It causes  
11 a certain amount of damage, and then it's  
12 brought under control.

13 JUSTICE KAGAN: No. So, still, what  
14 the reasonable investor would want to know is --  
15 we enjoy this sometimes.

16 (Laughter.)

17 MR. BARBER: Please.

18 CHIEF JUSTICE ROBERTS: Only -- only  
19 sometimes.

20 JUSTICE KAGAN: Is that, you know,  
21 50 percent of the capacity had been wiped out,  
22 right?

23 MR. BARBER: Right.

24 JUSTICE KAGAN: Now there are other  
25 cases where what the reasonable investor would

1     want to know is, oh, my gosh, there appear to  
2     be -- there's -- appears to be insufficient,  
3     inadequate management, operational controls,  
4     such that the same thing could happen again.

5                 And -- and so those are two different  
6     hypotheticals, but I imagine your view would be  
7     on either event, if -- if -- you know, a  
8     reasonable investor might want to know that, and  
9     the -- and the hypothetical statement might  
10    suggest the contrary of what is true.

11                MR. BARBER: Right. My only point is  
12    that if you have a statement like our business  
13    is at risk of fire, and if that happens, our  
14    business would be negatively affected in all  
15    these ways, that can reasonably leave the --  
16    leave the implicit representation that the  
17    business had not just suffered a significant  
18    fire.

19                JUSTICE GORSUCH: Mr. Barber, on  
20    that --

21                MR. BARBER: Yes.

22                JUSTICE GORSUCH: -- it -- it -- it --  
23    it -- it does seem to me we're talking about two  
24    totally different things, risks in the future  
25    and damages from the past, and if we're talking

1     about damages from the past, how is that a risk  
2     factor that's clearly covered by one -- 105 as  
3     opposed to something that should be disclosed  
4     perhaps in 101 or 303, first of all?

5             And, second of all, if you want to  
6     cram in risks from past events into 105, why  
7     would we do that given the adoption of 106,  
8     which addresses these kinds of very problems and  
9     doesn't require that?

10            MR. BARBER:   So a few things on that,  
11     Justice Gorsuch.

12            We agree with Respondents that Item  
13     105 is not limited in its text to the disclosure  
14     of future events and future risks.  Facebook's  
15     own practices, as you can see in the 10-K at  
16     issue here, are consistent with that.  The  
17     entire 10-K is reproduced in Volume 2 of the  
18     Joint Appendix.  And literally every section of  
19     it or I think almost every section includes  
20     discussion of some past event, some present  
21     condition.  So Item 105 is not limited to those  
22     kinds of future-looking disclosures.

23            Item 106 did emphasize for issuers --  
24     and this was promulgated well after the events  
25     in this case and after the 10-K was filed

1     here -- it emphasized that issuers do sometimes  
2     have to disclose past cybersecurity incidents.  
3     That doesn't mean that there's never any  
4     obligation to discuss past events under Item 105  
5     when necessary to avoid a misleading impression  
6     in the statements that are made here.

7                 JUSTICE GORSUCH:   What do you say to  
8     the 101 and 30 -- 303?

9                 MR. BARBER:   I think the kind of  
10    disclosure that needed to happen here was much  
11    more at home in the risk factors section than in  
12    those sections.   So 303 is about the Management  
13    & Discussion -- Management Discussion &  
14    Analysis.

15                JUSTICE GORSUCH:   Known trends and  
16    uncertainties that have had, have had, a  
17    material unfavorable impact.   That would seem to  
18    me a heartland case for some destruction of  
19    your -- some portion of your facility, whether  
20    due to fire or meteorites or both.

21                And 101, information material to an  
22    understanding of the general development of the  
23    business.

24                MR. BARBER:   Yes.   I'm not saying that  
25    the information would be inappropriate in those

1 sections. I just think it's very telling that  
2 if you look, for example, at Facebook's first  
3 10-K after the news really came out in March  
4 2018, they discuss the Cambridge Analytica  
5 episode in multiple locations of that 10-K. It  
6 was all in the risk factors section. I think it  
7 was predominantly in the risk factors section.  
8 So this is where investors do look for this kind  
9 of information, so I think that's an important  
10 fact.

11 Another great example is in the actual  
12 10-K that was filed, if you look at page 464 of  
13 the Joint Appendix, they specifically disclosed  
14 having discovered a bug in one of their  
15 algorithms in late 2015, which is exactly the  
16 time when they discovered the Cambridge  
17 Analytica matter.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Justice Thomas?

21 Justice Sotomayor?

22 JUSTICE SOTOMAYOR: I'm listening to  
23 Justice Gorsuch go through 101 and 103, and they  
24 seem even less precise than what Justice  
25 Kavanaugh was seeking for the SG to do. It

1     seems like both are -- are asking for the SEC to  
2     anticipate every potential risk for any type of  
3     company and then spell out what they have to  
4     say.

5             You can't do that. So point out to  
6     what in 105 -- what in the -- in the language of  
7     105 suggests that it covers this.

8             MR. BARBER: Sure. So Item 105 speaks  
9     to material factors that render an investment in  
10    the offering or the registrant risky or  
11    speculative. So I think it's perfectly natural  
12    to say that not only the potential future  
13    occurrence of incidents like cyber -- Cambridge  
14    Analytica would be such a material factor but  
15    also --

16            JUSTICE SOTOMAYOR: This wasn't a  
17    cyber attack, as Respondents said.

18            MR. BARBER: Correct.

19            JUSTICE SOTOMAYOR: This was misuse by  
20    the -- by a user who was given permission --

21            MR. BARBER: Correct.

22            JUSTICE SOTOMAYOR: -- by Meta. Okay.  
23    Go ahead.

24            MR. BARBER: Correct. So I think this  
25    kind of event is comfortably encompassed by the

1 language of Item 105. We're not saying they had  
2 to get into the specifics of Cambridge  
3 Analytica, but they at least had to acknowledge  
4 that events of this nature had previously  
5 occurred in order to avoid leaving the kind of  
6 misleading impression that was left here.

7 And I don't think, as Your Honor was  
8 suggesting, there's no basis in this Court's  
9 case law for the idea that the SEC has to  
10 specifically lay out the particular kind of  
11 half-truths that a disclosure may make to the  
12 investing public in order for those to be  
13 actionable under Rule 10b-5.

14 JUSTICE SOTOMAYOR: Or exactly what  
15 won't previously --

16 MR. BARBER: Right. The fact that  
17 this -- the elements of this cause of action  
18 require what a reasonable investor would think,  
19 that is enough of a protection. So I don't  
20 think there's any kind of fair notice issue  
21 here.

22 JUSTICE SOTOMAYOR: And in terms of  
23 this question, you say it fits, and I agree with  
24 you, under 105 because of what could -- they  
25 knew they had a 30 million user misuse. They



1 knew that it had not been erased by the company.  
2 And when they sought Cambridge's assurances that  
3 they had destroyed the data, they were told  
4 nothing. So they knew there was a risk to their  
5 reputation at that point.

6 MR. BARBER: Yes. The way we know  
7 that this belonged under Item 105 is that the  
8 very risk statement that was rendered misleading  
9 by the omission of this information was made in  
10 the risk factors section of the 10-K.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: I thought that Justice  
14 Alito, one of the questions he was interested  
15 in, and if not, I'll just say I'm interested in  
16 it, is how do we know when it is that you have  
17 to put in these past events. And you and Mr.  
18 Russell have said don't -- you know, you don't  
19 have to put in anything that's not material.

20 MR. BARBER: Correct.

21 JUSTICE KAGAN: But, as to things that  
22 are material, you don't seem to be imposing any  
23 higher bar. In other words, that seems to be  
24 your only dividing line, is it material or is it  
25 not.

1                   And I guess maybe this goes back to  
2     Justice Barrett's question too. Is there some  
3     higher standard that we might use in this area  
4     to prevent a mass of cases that are perhaps less  
5     viable, less meritorious than this one might be  
6     thought?

7                   MR. BARBER: Yes, but I think that bar  
8     is what we've been discussing, which is the need  
9     to show not just that the omitted fact is  
10    material but that the omission rendered the  
11    affirmative statement that's made misleading  
12    because the statement implicitly misrepresents  
13    that the event never occurred.

14                  I think that's a requirement with real  
15    teeth because, if you have a statement, say,  
16    that is phrased in very general terms like, our  
17    business may struggle with users trusting us in  
18    the year ahead, that may harm our business  
19    because we depend on ad revenue, that kind of  
20    general statement is much less likely to lead a  
21    reasonable invest -- investor to think anything  
22    in particular about the past occurrence of  
23    misappropriation of user data.

24                  But the problem with the statements  
25    here is that they were reasonably specific and

1     they were talking about a specific category of  
2     risk, which invites the reasonable investor to  
3     think no significant episode of that kind of  
4     risk has already materialized.

5                 So I think it's -- I think it's a real  
6     limit on our position, and I think the Court  
7     could well make that clear, that you have to  
8     look at the generality of the statement. If the  
9     statement does acknowledge that events of this  
10    kind have occurred, even if you don't get into  
11    the specifics of the relevant event, it's going  
12    to avoid the kind of misleading impression that  
13    could otherwise be left. So it's not just  
14    materiality.

15                JUSTICE KAGAN: Thank you.

16                CHIEF JUSTICE ROBERTS: Justice  
17    Gorsuch?

18                JUSTICE GORSUCH: Sorry to prolong  
19    this, but to what extent does that incentivize  
20    companies to just be more general in their  
21    disclosures?

22                I mean, you said, if they raise it up  
23    a level of generality, it's less likely to be  
24    misleading, so you're going to have more -- more  
25    useless disclosures, potentially, out -- out of

1     this.  Is the SEC concerned about that?  I mean,  
2     you know, our -- our -- our -- our ad revenue  
3     might be harmed if our reputation's at risk from  
4     anything we do.

5                 MR. BARBER:  I don't think that that's  
6     a major concern for us just because this has  
7     been the law, for example, in the Ninth Circuit  
8     since at least 2008 with the Berson case.  We  
9     haven't seen this kind of danger arise.  That's  
10    Facebook's home circuit.  And they provided a  
11    lot of very helpful, detailed risk-factor  
12    statements in the relevant 10-K at issue here.

13                JUSTICE GORSUCH:  Now -- but now they  
14    may not.

15                MR. BARBER:  Well, that's -- that is  
16    the kind of issue that I think the SEC is well  
17    equipped to deal with.

18                JUSTICE GORSUCH:  Yeah.

19                MR. BARBER:  If that, you know, were  
20    to result from affirming the court of appeals'  
21    judgment, then the SEC could look at that.  It's  
22    tinkered with Item 105 before to change the  
23    standard for what needs to be disclosed, and it  
24    could well do so again.  Yes.

25                CHIEF JUSTICE ROBERTS:  Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: You said there's  
3 no fair notice issue here. I guess -- guess I'm  
4 not really seeing that, because all the  
5 hypotheticals have illustrated a lot of  
6 uncertainty about when a company would be  
7 required to disclose and why not.

8 But that blends back into the question  
9 I raised earlier and the Chief raised, which is:  
10 Why can't the SEC just write a reg? It's very  
11 simple, I think, to add to 105 something like:  
12 When the company discloses the risk of a future  
13 event that could cause harm, also disclose any  
14 past occurrences of that event.

15 MR. BARBER: I think --

16 JUSTICE KAVANAUGH: Why -- could the  
17 SEC do that?

18 MR. BARBER: -- the SEC could always  
19 be clearer in this regard, and maybe it could  
20 someday, but I don't think the SEC feels that it  
21 hasn't already written the regs.

22 JUSTICE KAVANAUGH: Well, why -- I  
23 mean, why does the judiciary have to walk the  
24 plank on this and -- and answer that question  
25 when the SEC could do it with all the

1     uncertainty and all the hypotheticals that have  
2     arisen, which, in turn, at least as I see it,  
3     just speaking for myself, raises a lot of  
4     questions for companies about what they have to  
5     disclose and what they don't?

6             And they're, of course, going  
7     forward -- going -- looking backward, they're  
8     going to be stuck with liability. Going  
9     forward, they're just going to disclose  
10    everything --

11            MR. BARBERT: Right.

12            JUSTICE KAVANAUGH: -- which defeats  
13    the whole -- well, at least as I understand it,  
14    the whole purpose. So --

15            MR. BARBER: Right.

16            JUSTICE KAVANAUGH: -- attack any one  
17    of those premises or -- or -- that you want.

18            MR. BARBER: So, Justice Kavanaugh, a  
19    few things on that.

20            I think one of the signs of a weak  
21    policy argument is that you could make it in  
22    either direction equally. You could equally  
23    argue that issuers will be disincentivized --  
24    kind of what Justice Gorsuch was getting at --  
25    they would be disincentivized to make risk

1 disclosures because of fear of liability.

2           The likeliest scenario here is that  
3 risk disclosures would remain about the same  
4 length. Issuers would just be a little bit more  
5 careful about disclosing past materializations  
6 of the risk.

7           I think the SEC did write the  
8 regulations that it needed to write here,  
9 writing Item 105, writing Rule 10b-5, writing  
10 Rule 12b-20, saying that not only do you have to  
11 disclose the things that are directly required  
12 to be disclosed by Regulation S-K, but you also  
13 have to disclose whatever else is necessary to  
14 avoid those statements being misleading.

15           That is enough. This Court -- this is  
16 a bread-and-butter half-truth case. In  
17 half-truth cases, this Court and other courts  
18 don't constantly ask: Has the SEC or has the  
19 regulator directly said that this kind of  
20 falsity is -- is required or is -- is  
21 prohibited?

22           And to that point as well --

23           JUSTICE KAVANAUGH: I -- I guess the  
24 problem there -- and last question, sorry.

25           But the -- there's not one reasonable

1 person -- reasonable people are going to have  
2 different views about what -- whether the lack  
3 of disclosure of the past event occurring makes  
4 the current statement misleading. I mean,  
5 you're going to get wildly different answers, as  
6 you've heard from the questions from the nine of  
7 us. So that's -- that's the concern.

8 MR. BARBER: I appreciate that. I  
9 think I would go back to the Omnicare case again  
10 and just say, in that case, the Court said:  
11 Whenever you have a -- a provision that  
12 prohibits half-truths, not just outright lies,  
13 you're going to have some uncertainty and it's  
14 not going to be completely cut and dry.

15 That was a case involving a provision  
16 that's strict liability, Section 11 of the  
17 Securities Act. Here, we have a provision that  
18 requires scienter. The PSLRA requires strong  
19 pleading, strong inference of scienter. So  
20 that's another protection against limitless  
21 liability of the kind Petitioners fear.

22 JUSTICE KAVANAUGH: Okay. Thank you  
23 very much.

24 MR. BARBER: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice



1 Barrett?

2 JUSTICE BARRETT: Mr. Barber, I think  
3 I heard you tell Justice Gorsuch that your  
4 position is -- has been the settled law. Did I  
5 hear you correctly?

6 MR. BARBER: Yes. In the Ninth  
7 Circuit, it has for many years, I think --

8 JUSTICE BARRETT: Outside of the Ninth  
9 Circuit? I mean, what I'm getting at is I'm  
10 wondering how your position differs from the  
11 virtual certainty test that several other  
12 circuits apply. Is it different?

13 MR. BARBER: Well, so I think that the  
14 problem with that, Justice Barrett, is that the  
15 other circuits don't apply the virtual certainty  
16 rule in the way that Petitioners say they do.

17 What the other circuits say -- what  
18 most circuits say is: A risk statement can be  
19 false or misleading if either, A, the risk has  
20 already materialized, which is our case, or, B,  
21 the risk hasn't materialized, but it's virtually  
22 certain to do so. And that's fine. I don't  
23 think anybody has a quarrel with that at least  
24 for purposes of this case.

25 What Petitioners are saying is that

1 the virtual certainty rule says: Even in that  
2 Category A, this kind of case, the statement is  
3 only misleading if the undisclosed past event is  
4 virtually certain to harm the business.

5 That's wrong. I don't think any  
6 circuit applies that rule.

7 There's one case from the Tenth  
8 Circuit that if you look at the end of the  
9 relevant section of the court's opinion, the  
10 Indiana Public Retirement case, the court does  
11 seem to apply it that way, and we think that's  
12 wrong. But, even above that, in that opinion,  
13 the court describes the rule correctly, the way  
14 I just described it.

15 The problem with the virtual certainty  
16 rule as Petitioners imagine it is that it would  
17 distort the materiality standard because it's  
18 never been thought that the omission of a  
19 particular fact is only actionable if it's  
20 virtually certain to harm the business.

21 The standard under this Court's cases  
22 is: Would a reasonable person view the  
23 information as significantly altering the total  
24 mix of information bearing on the investment  
25 decision?

1 JUSTICE BARRETT: Does the  
2 government's position differ from the virtual  
3 certainty rule as it already exists? I mean as  
4 it exists? You're -- you're saying that Mr.  
5 Shanmugam has mischaracterized what the virtual  
6 certainty rule requires.

7 But, as the law actually exists, as  
8 you described it, does the SEC's position differ  
9 from that? Would we be shifting the law if  
10 we -- if we go your way, do -- do -- do those  
11 circuits now have it wrong?

12 MR. BARBER: I don't think we have a  
13 firm position on that for purposes of this case  
14 because, again, we're not in that second  
15 category of cases where we're just dealing with  
16 a potential future event and the likelihood of  
17 it.

18 Given the fact that, as has been  
19 discussed, Item 105 doesn't require specific  
20 quantification of the risk, you don't need to  
21 say, like, 70 percent or whatever, then  
22 probably, in most cases, to show that that is  
23 false based on the understatement of the risk,  
24 you would probably have to show something like  
25 virtual certainty to actually make that

1     actionable.

2                   JUSTICE BARRETT:   Okay.   Thank you.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4     Jackson?

5                   JUSTICE JACKSON:   So I think what's a  
6     little tough for your position is that I don't  
7     know that this is a bread-and-butter half-truth  
8     case, as you've said, because I would think that  
9     a bread-and-butter half-truth case exists  
10    against the backdrop of a duty to disclose the  
11    information.

12                   And what Petitioner says is there is  
13    no standalone obligation to talk about past  
14    events, and it's not rendered misleading if we  
15    have this purely futuristic statement.

16                   So it seems to me to be different than  
17    the standard half-truth.   And the way I'm  
18    thinking that it might still trigger liability  
19    is that it becomes potentially misleading in a  
20    continuing harm scenario, the kind that Justice  
21    Alito keeps pointing to, that you didn't have to  
22    say originally that you -- that this past thing  
23    happened, but if the past thing happens and  
24    before the harm completely materializes, before  
25    the harm completely happens, you have to make a

1 disclosure statement that maybe there's  
2 something misleading about making your statement  
3 purely futuristically in that situation because  
4 it leads -- investors to underestimate the risk  
5 or the potential for the future harm.

6 MR. BARBER: So, Justice Jackson, a  
7 couple of things on that.

8 I -- I disagree that you only have a  
9 half-truth if you're under some kind of  
10 regulatory disclosure requirement. Half-truth  
11 claims are not limited to that particular  
12 context.

13 The reason why we're in that situation  
14 here is that if a company isn't subject to a  
15 disclosure requirement like Item 105, then they  
16 don't have much incentive to go around the  
17 markets telling people how risky their  
18 investments might be in the company. So I think  
19 that's important.

20 But I also do disagree at a second  
21 level that Item 105 just doesn't ever require  
22 disclosure of past events, because what it  
23 requires disclosure of is material factors that  
24 render an investment in the company risky or  
25 speculative, and that can readily encompass past

1 events, present conditions, and potential future  
2 events.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 MR. BARBER: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Shanmugam,  
8 rebuttal?

9 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM  
10 ON BEHALF OF THE PETITIONERS

11 MR. SHANMUGAM: Thank you, Mr. Chief  
12 Justice. Four points.

13 First, let me start with Respondents'  
14 and the government's test. Mr. Russell said  
15 that under their test, risk disclosures can and  
16 frequently do imply something about the past.  
17 But, as Justice Kagan asked, the devil is in the  
18 details. How do you determine when risk  
19 disclosures fall on that side of the line?

20 From Respondents' and the government's  
21 brief, it seemed like their answer was the  
22 materiality requirement. If omitted information  
23 is important to a reasonable investor, then the  
24 risk disclosure contains an implication about  
25 that.

1                   But there are a couple of problems  
2     with that. The first is the one that we  
3     discussed in my opening argument, which is that  
4     that conflates and collapses the elements of  
5     falsity and materiality. And, second,  
6     materiality really doesn't provide a great deal  
7     of protection because it is a relatively low  
8     bar. And so I think, as it stands, that rule  
9     would be a categorical rule by any other name.

10                  Now Mr. Russell also suggested in  
11     points of his argument that it's really all  
12     about the intuition as to whether or not the  
13     event is of the sort that has occurred in the  
14     past. And so bad publicity would presumably  
15     fall on the side of the line of something a  
16     reasonable investor would understand has  
17     occurred in the past, and Justice Alito's meteor  
18     strike or Molotov cocktail would not.

19                  I would submit that we would prevail  
20     under such a standard because a reasonable  
21     investor would think that Facebook had suffered  
22     episodes of data misuse in the past. But I  
23     think the problem with an intuition-based test  
24     is it's not really an administrable standard and  
25     it's not an objective one. And I would submit

1     that it's a very difficult one for a defendant  
2     to prevail on on a motion to dismiss.

3             Most of the cases in the circuit  
4     conflict have come up on and been resolved on a  
5     motion to dismiss. And remember that we're not  
6     just dealing with the ordinary Twombly/Iqbal  
7     standard here. We're dealing with the  
8     heightened pleading standard of the PSLRA under  
9     which both the statements themselves and the  
10    reasons why the statements are misleading must  
11    be pleaded specifically.

12            Second, the wording of the statements  
13    here. Mr. Russell said that what we should have  
14    said was such improper data misuse has occurred  
15    in the past, including recently on a substantial  
16    scale. The problem with that formulation is  
17    that all of that was in the public domain. This  
18    Court can judge that for itself. The articles  
19    that were in the public domain before the 10-K  
20    are at Joint Appendix 616 to 630. It was public  
21    that millions of users' data were in play as a  
22    result of what took place here.

23            And to the extent that Mr. Russell  
24    relies on the hundred billion dollar alleged  
25    drop in the stock price, that took place after



1 the continued misuse became public, but it is  
2 clear that that continued misuse is no longer in  
3 the case. It was waived below, and that was for  
4 good reason because the district court said that  
5 no responsible person at Meta was aware of that  
6 continued misuse at the time of the 10-K in  
7 early 2017.

8           What should this Court do here? Well,  
9 I think that this Court should write an opinion  
10 that simply says that statements like this one  
11 and others like it contain no implied  
12 representation that the previous triggering  
13 event had never occurred, and this Court should  
14 rely on the context of Item 105, where I would  
15 note parenthetically the SEC requires  
16 disclosures to be concise, not voluminous.

17           And the Court can make clear, as it  
18 did in Omnicare, that the answer naturally  
19 depends on the wording or the context in which  
20 the statement was made. So, if you have a  
21 defendant that says something about the  
22 probability of the event occurring or said  
23 something like if this event were ever to incur,  
24 thereby implying that it had not occurred in the  
25 past, the outcome could be different.

1                   Finally, just a word about the  
2     implications of this case. The effect of  
3     accepting either Respondents' or the  
4     government's position would be to hold a company  
5     liable for securities fraud precisely because it  
6     warned of the specific risk at issue, presumably  
7     on the theory that a company failed to catalogue  
8     all of the prior episodes of the event  
9     occurring.

10                  That would create a regime that is  
11     effectively a regime of omissions liability  
12     because what you would be saying is that if a  
13     company warns about a genus of risk, it is on  
14     the hook for any previous episode that has not  
15     been disclosed. That would place an onerous  
16     obligation on companies not only to disclose  
17     initially but continually to update its risk  
18     disclosures in its quarterly reports, and it  
19     would penalize companies for doing the right  
20     thing and what Item 105 requires, which is to  
21     identify risks that may affect the company's  
22     business.

23                  The Ninth Circuit's formulation of  
24     this standard here cannot stand, and for that  
25     reason, we would submit its judgment should be

1 reversed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

4 (Whereupon, at 11:47 a.m., the case  
5 was submitted.)

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