No. 21-594

In the Supreme Court of the United States

ALPHABET INC., ET AL.,
PETITIONERS

v.

STATE OF RHODE ISLAND, ET AL.,

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND BUSINESS ROUNDTABLE AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of securities firms, banks, and asset managers across the globe. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA regularly files amicus briefs in cases such as this one that have broad implications for financial markets, and frequently has appeared as amicus curiae in this Court.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that

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* Under Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties received notice of amici's intention to file this brief at least 10 days prior to the due date, and have consented to this filing.

together have $9 trillion in annual revenues and nearly 20 million employees. BRT was founded on the belief that businesses should play an active and effective role in the formulation of public policy. It participates in litigation as amicus curiae in a variety of contexts where important business interests are at stake.

Many of the amici's members are companies subject to U.S. securities laws, and will be harmed both by the theory of liability adopted by the court of appeals in this case and by the uncertainty and division among the circuits regarding liability for risk disclosures.

INTRODUCTION

This case presents a compelling opportunity to resolve a growing and important issue in securities law that has divided the lower courts. The SEC requires companies to disclose *future* risks, so that investors are aware of "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105. But in cases like this one, plaintiffs have argued that those forward-looking disclosures are misleading unless they also include information about *past* events that relate to those future risks. In allowing that type of purely backward-looking claim to proceed, the Ninth Circuit has opened courthouse doors to the latest wave of event-driven and hindsight securities litigation. As soon as there is news of some past misfortune (like a cyber incident), plaintiffs (and their counsel) bring the inevitable claim under Section 10(b) and Rule 10b-5 that the company should have disclosed it or done so sooner.

To stave off liability, public companies will need to disclose information about any past events that might with hindsight be even arguably related to future risks. Here, it is a past security bug that Google had identified and fixed. But no major industry will be spared the consequences of the decision below. Will a retailer that warns of supply-chain disruptions have to disclose past product delays? Will a manufacturer that warns of COVID-19 fallout have to disclose the vaccination rate of its employees? Plaintiffs will surely say so under the decision below, and the net effect of those suits will be to inundate investors with a slew of information about past events rather than future risks. Neither Congress nor the SEC has established that type of "gotcha" regime, and it should not come to pass without this Court's review.

DISCUSSION

A. Risk-Disclosure Omission Claims Are The Latest Breed Of Event-Driven Securities Litigation

1. Since 2005, the SEC has required public companies to disclose "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105 (Item 105). Companies must disclose those risk factors in both their annual 10-K reports and their quarterly 10-Q reports. See 70 Fed. Reg. 44,722, 44,786 (Aug. 3, 2005). The SEC has directed companies to focus on material risks to their particular businesses (rather than generic risks that threaten the entire market), and to explain those risks in a concise, readable way (so that they may be readily understood by ordinary investors). See *ibid.*; see also 85 Fed. Reg. 63,726, 63,745-63,746 (Oct. 8, 2020). Item 105 does not require companies to attempt to quantify risks or predict the likelihood they will occur.

As much as companies may try to keep risk disclosures brief and easily digestible, they have come to constitute a major part of public companies' filings. The risk-factor discussion in a Fortune 100 company's

10-K may run dozens of pages, with paragraphs devoted to each risk. In practice, companies often identify many of the same risks—for example, a discussion of the risks posed by the COVID-19 pandemic is now commonplace. And as especially relevant here, every Fortune 100 company that files an annual 10-K lists cybersecurity as a material risk, explaining how a future cybersecurity incident could destabilize operations, harm consumer confidence, and invite regulatory scrutiny. See Stephen Klemash, *How Cybersecurity Risk Disclosures and Oversight Are Evolving in 2021*, Ernst & Young 2 (Oct. 4, 2021), https://tinyurl.com/EY-RiskDisclosures.

2. Accompanying this increasing prevalence of risk disclosures is the ever-present threat of a securities fraud claim. As a general matter, the pace of securities litigation has spiked over the past decade, with nearly 9 percent of U.S.-listed companies subject to securities suits in 2019—more than 2.5 times the rate from 1997 to 2018. See Kevin LaCroix, *Federal Court Securities Suit Filings Remain at Elevated Levels*, D&O Diary (Jan. 1, 2020), https://www.dandodiary.com/2020/01/articles/securities-litigation/federal-court-securities-suit-filings-remain-at-elevated-levels. "To put this in the simplest terms, the likelihood of a U.S.-listed company getting hit with a securities suit is the highest it has ever been." *Ibid.*; see U.S. Chamber Institute for Legal Reform, *An Update on Securities Litigation*, ILR Briefly 3 (March 25, 2020), https://instituteforlegalreform.com/research/ilr-briefly-an-update-on-securities-litigation/ (noting records in filing activity in each of the three years 2017 to 2019).

A growing proportion of those suits stem from so-called event-driven litigation. Plaintiffs seize on a headline-grabbing negative event that harms a company (and its stock price) and allege that the company misled investors about some aspect of the event. See U.S. Chamber Institute for Legal Reform, Petition to U.S. Securities and Exchange Commission for Rulemaking on COVID-19 Related Litigation 3 (Oct. 30, 2020) (Petition for Rulemaking); see also Matt Levine, *Everything Everywhere Is Securities Fraud*, Bloomberg (Jan. 26, 2019), https://www.bloomberg.com/opinion/articles/2019-06-26/everything-everywhere-is-securities-fraud. That type of event-driven litigation accounts for an increasing number of securities lawsuits every year—involving everything from data privacy to the environment, opioids, and COVID-19. See Elisa Mendoza & Jeffrey Lubitz, *Event-Driven Sec. Litig.: The New Driver in Class Action Growth*, ISS Sec. Class Action Svcs. 3-4 (Dec. 1, 2020), https://www.issgovernance.com/file/publication-s/ISS-SCAS-Event-Driven-Securities-Litigation.pdf.

Unsurprisingly, cybersecurity incidents are on the leading edge of that wave. Cyberattacks, data breaches, and security bugs are an omnipresent risk for companies. Nearly every major business experiences some sort of cyber incident in a given year. See James A. Lewis et al., *The Hidden Costs of Cybercrime*, Ctr. for Strategic & Int'l Stud. 4 (Dec. 9, 2020), https://www.csis.org/analysis/hidden-costs-cybercrime (observing that only 4 percent of 1,500 companies surveyed did not report experiencing a cyber incident in 2019). As this case shows, the new model is for plaintiffs' counsel and their clients (like the institutional investors here) to await news of a cyber incident, and then bring suit claiming that the company failed to adequately disclose the incident itself or the risk it posed to the company. See, *e.g.*, *Hampton* v. *root9B Techs.*, *Inc.*, 897 F.3d 1291, 1301 (10th Cir. 2018) (affirming dismissal of complaint alleging misstatements in wake of hacking attack); *In re First Am. Fin. Corp.*, 2021 WL 4807648, at *12 (C.D. Cal. Sept. 22, 2021) (dismissing complaint filed after SEC enforcement action related to cyber risk disclosures); *In re Intel Corp. Sec. Litig.*, 2019 WL 1427660, at *2 (N.D. Cal. Mar. 29, 2019) (dismissing complaint that centered on identified security vulnerabilities but did not allege any breach).

Those claims virtually never take the form that the company's disclosures about the risks posed by a cyber incident were themselves inaccurate or misleading. This case is a prime example. Alphabet warned investors—accurately—that a breach of its cybersecurity measures might lead to a loss of consumer confidence and Alphabet might incur "significant legal and financial exposure" and "damage [to its] reputation." Pet. App. 55a. Those statements were true, and respondents do not appear to contend otherwise. An investor deciding whether to purchase Alphabet stock who read the relevant 10-K and 10-Qs was on clear notice that a security bug might cause the value of her stock to decline. Instead, plaintiffs in this and other cases have claimed that when a company truthfully discloses future risks, it must also disclose any *past or current* information about the company that purportedly bears on *whether those risks have materialized*. As explained below, the circuits have reacted to these materialization-of-risk claims with confusion.

B. The Courts Of Appeals Are Confused Over How To Approach Materialization-Of-Risk Claims

The courts of appeals have diverged in their treatment of materialization-of-risk claims, but the problem here is about more than the usual circuit split: courts are generally confused about how to approach such claims. See U.S. Br. at 17-18, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (No. 15-1439) (arguing for review in light of the substantial confusion in the lower courts). The decision below only adds to the confusion. It adopts the most extreme position to date by allowing a claim that a company misled investors by not disclosing a past event that allegedly relates to an identified future risk. No other circuit has permitted that type of purely backward-looking claim to proceed.

1. At one end of the spectrum, the Sixth Circuit has rejected arguments that Item 105 risk disclosures—which by definition inform investors about *future risks*—can mislead reasonable investors about what occurred *in the past*. Because "[r]isk disclosures like the ones accompanying 10-Qs and other SEC filings are inherently prospective in nature," the Sixth Circuit has reasoned, they inform investors about "what harms may come to their investment," not "what harms are currently affecting the company." *Bondali* v. *Yum! Brands, Inc.*, 620 Fed. Appx. 483, 491 (2015). The Fourth Circuit has affirmed a district court that adopted the same reasoning. *Dice* v. *ChannelAdvisor Corp.*, 671 Fed. Appx. 111 (2016).

2. By contrast, the First, Third, and D.C. Circuits allow some materialization-of-risk claims where the identified risk is imminent or already materializing. The First Circuit, for instance, has held that a company's disclosure of a "merely hypothetical" future risk is misleading if, at the time the statement was made, the company understood that "the alleged risk had a 'near certainty' of causing 'financial disaster' to the company." *Karth* v. *Keryx Biopharmaceuticals*, 6 F.4th 123, 137-138 (2021). In that situation, the company "is at the edge of the Grand Canyon and must warn investors of an imminent cliff." *Id.* at 138. The

First Circuit further held that a company must also "disclose a relevant risk if that risk had already begun to materialize." *Ibid.*

The Third Circuit has also adopted that latter approach. In *Williams* v. *Globus Med., Inc.*, a company that relied in part on independent contractors warned that terminating those relationships could harm its sales. See 869 F.3d 235, 241 (3d Cir. 2017). What the company did not disclose is that it was already shifting business from independent contractors to its in-house sales team. But the Third Circuit nevertheless held that the company's identification of that risk was not misleading because the shift had not yet affected the company's sales. In other words, the company's disclosure remained true at the time it was made: terminating contractor relationships might hurt the company's bottom line in the future (but had not yet begun to do so). The company had not misled investors about any future risk, because the risk had not already begun to materialize.

Like the Third Circuit, the D.C. Circuit has held that a company may be liable if, at the time of disclosure, a company knew a risk "was materializing." *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104, 106 (2015). The court addressed the issue in the context of the PSLRA's safe-harbor provision, which guards against liability for forward-looking statements that are accompanied by "meaningful" cautionary language. 15 U.S.C. 78u-5(c)(1)(A)(i). The D.C. Circuit reasoned that "cautionary language cannot be 'meaningful' if it is 'misleading in light of historical fact[s].'" *In re Harman*, 791 F.3d at 102. Although the disclosures there covered the risk that the company's products could become obsolete, they "did not convey that inventory was [already] obsolete." *Id.* at 104. The D.C.

Circuit also borrowed the First Circuit's Grand Canyon analogy, *id.* at 103, suggesting that it might deem relevant whether a risk was imminent, even if the risk had not yet begun to materialize.

3. In the decision below, the Ninth Circuit went much further than the First, Third, and D.C. Circuits. Alphabet warned investors that "[i]f our security measures are breached resulting in the improper use and disclosure of user data," "customers may curtail or stop using our products and services, and we may incur significant legal and financial exposure." Pet. App. 55a. The Ninth Circuit held that Alphabet's warning "of risks that 'could' or 'may' occur is misleading to a reasonable investor when Alphabet knew that those risks had materialized." Pet. App. 25a. But unlike the First, Third, and D.C. Circuits, the Ninth Circuit did not even ask whether some harm from the past security bug was imminent or coming to fruition at the time of the disclosure. After all, the security bug had been fixed. The Ninth Circuit instead held that a company may be liable for the failure to disclose any past event related to a risk discussed in a forward-looking disclosure—regardless of whether harms to the company are imminent or already materializing.

4. To be sure, the Sixth Circuit's decision in *Bondali*, though well reasoned, is unpublished (as is the Fourth Circuit's decision in *Dice*). Respondents may therefore try to minimize the extent of the disagreement in the circuits. But there is no reason to believe the Sixth Circuit (or the Fourth Circuit) will change course. And even if there were, that would not affect the need for review here. Alphabet also would have prevailed under the approach taken by the First, Third, and D.C. Circuits. Moreover, the Ninth Circuit's extreme position will affect securities filings for

any major American business, which itself warrants this Court's review. See *infra*, Part D. And perhaps more importantly, for the reasons explained below, the Sixth Circuit's approach is the correct one. Item 105 disclosures notify investors about "factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105. Their express purpose is to notify investors about future risks. Hence, those disclosures are misleading only when a reasonable investor would not understand "what harms *may* come to their investment." *Bondali*, 620 Fed. Appx. at 491.

C. The Decision Below Is Incorrect

Securities law imposes no "general duty on the part of a company to provide the public with all material information." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997). That is true even for material information that "a reasonable investor would very much like to know." *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993). Absent an affirmative duty to disclose, a securities plaintiff basing its claims on the contention that a company impermissibly failed to share information with the public must identify a particular statement that was rendered misleading by that omission. *See Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44-45 (2011). "Whether a statement is misleading depends on the perspective of a reasonable investor." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186 (2015) (internal quotation marks omitted).

Here, Item 105 required Alphabet to concisely discuss—not quantify or attempt to predict— "material factors that make an investment in the [company] speculative or risky." 17 C.F.R. 229.105. Alphabet complied with Item 105. It disclosed both the risk of a future security bug and the harms (financial and reputational) that could cause. See Pet. App. 22a. What plaintiffs claim—and the Ninth Circuit accepted—is that Alphabet had to disclose more in order to avoid running afoul of Section 10(b) and Rule 10b-5. The Ninth Circuit's reasoning for that conclusion is not entirely clear. But its opinion could be read to suggest that Alphabet's failure to disclose the Google+ software bug was misleading about one of three different things: (1) the past state of affairs at the company (by implying no security bug had yet occurred), see *id.* at 25a; (2) the current state of affairs (because the problems with security controls were ongoing), see *id.* at 26a; or (3) the future state of affairs (by understating the risks that a significant security bug would pose), see *id.* at 26a-27a. None of those theories is correct.

1. Alphabet's disclosures about future risks did not mislead reasonable investors about what had happened in the past or was then happening in the present. Forward-looking statements necessarily differ from representations about the present or past. See generally *Slayton* v. *American Express*, 604 F.3d 758, 765 (2d Cir. 2010) (discussing the PLSRA "statutory safe-harbor for forward-looking statements"). Saying that a person's valuables may be stolen if her house is burgled in the future communicates nothing about the home's current level of security or whether it has been broken into before. Given that commonsense distinction, no reasonable investor would consult a forward-looking risk disclosure to understand a company's past or current operations.

That is precisely the reasoning adopted by the Sixth Circuit. As that court has explained, "[r]isk disclosures * * * are inherently *prospective* in nature. They warn an investor of what harms *may* come to their investment. They are not meant to educate investors on what harms are currently affecting the company." *Bondali*, 620 Fed. Appx. at 491; see *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 2021 WL 2407518, at *25 (D. Md. June 11, 2021) ("To the extent Plaintiff alleges that Marriott's risk disclosures were misleading about its *current* state of cybersecurity, those allegations fail because the risk factor disclosures are not intended to educate investors about harms currently affecting the company."); *In re ChannelAdvisor Corp. Sec. Litig.*, 2016 WL 1381772, at *6 (E.D.N.C. April 6, 2016) ("[I]t is unlikely that a reasonable investor would, from that cautionary [risk disclosure], infer anything about ChannelAdvisor's current contracts."), aff'd *sub nom. Dice* v. *ChannelAdvisor Corp.*, 671 Fed. Appx. 111 (4th Cir. 2016) (per curiam).

This case is an excellent example. Alphabet cautioned investors that "[i]f our security measures are breached * * * , or if our services are subject to attacks * * * , users may curtail or stop using our products and services, and we may incur significant legal and financial exposure." Pet. App. 55a. Alphabet further explained that "[a]ny systems failure or compromise of our security that results in the release of our users' data * * * could seriously harm our reputation and brand and, therefore, our business." *Id.* at 56a. Alphabet even warned that "[w]e experience cyber attacks of varying degrees on a regular basis" and "[i]f an actual or perceived breach of our security occurs, the market perception of the effectiveness of our security measures could be harmed and we could lose users and customers." *Id.* at 56a-57a. Every word of those disclosures about future risks is true—and not a single word communicates anything about past security bugs or present security.

At bottom, respondents' and the Ninth Circuit's approach rests on the faulty premise that a company commits fraud when an investor forms a mistaken impression of the company's past or current operations after reading a forward-looking risk disclosure. Securities law is focused on specific statements made by a company, not vague impressions a litigant later claims to have gleaned from those statements. That is why securities plaintiffs must "specify each statement alleged to have been misleading" at the outset of their case, 15 U.S.C. 78u-4(b)(1), and why a successful omission claim requires pointing to specific statements that were misleading without the undisclosed information. *Matrixx Initiatives*, 563 U.S. at 44. Here, Alphabet's actual statements about the future risks of a security bug could not have misled any reasonable investor about whether the company had suffered attacks in the past or was vulnerable to attacks at the time of the disclosures.

2. To the extent respondents are claiming (or the Ninth Circuit accepted) that Alphabet's disclosures were misleading about the *future* risks facing the company, that theory too is wrong. A forward-looking discussion of a specific risk is not misleading solely because it does not also include all information detailing the company's vulnerability to that risk. "Rule 10b-5 'prohibit[s] *only* misleading and untrue statements, not statements that are incomplete.'" *Employees' Ret. Sys. of R.I.* v. *Williams Cos., Inc.*, 889 F.3d 1153, 1164 (10th Cir. 2018) (quoting *Brody* v. *Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)). As a result, companies need not "dump all known information with every public announcement." *In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 898 (8th Cir. 2002). Put simply,

"Rule 10b-5 does not contain a 'freestanding completeness requirement' because 'no matter how detailed and accurate disclosure statements are, there are likely to be additional details that could have been disclosed but were not.'" *In re Intuitive Surgical Sec. Litig.*, 65 F. Supp. 3d 821, 836 (N.D. Cal. 2014) (quoting *Brody*, 280 F.3d at 1006).

The question is therefore not whether the undisclosed Google+ software bug related to Alphabet's cyber-related risks, see Pet. App. 26a, or whether disclosure would have "significantly altered the total mix of information" available to investors, *id.* at 27a (internal quotation marks omitted). Rather, the question is whether Alphabet's specific statements regarding its future risk were inaccurate or misleading. As explained above, they were not. Alphabet accurately described the risks to consumers' confidence and the company's financial health from a security bug. See *supra*, p. 13. In making those disclosures, Alphabet did not take on a duty to provide the investing public with all of the information on which its assessment was based. There is nothing inconsistent or misleading about identifying risks associated with security bugs while possessing information about an earlier, remedied bug or the firm's vulnerabilities to such bugs.

In short, like virtually every other public company, Alphabet recognized that it faces risks from cybersecurity incidents. It thus informed investors of its accurate assessment of the consequences such an incident could have for its business. The mere fact that respondents, with the benefit of hindsight, would have wanted to know about Alphabet's past security bugs does not make Alphabet's actual risk disclosures misleading. The Ninth Circuit's contrary view effectively converts the duty not to mislead investors into a duty to provide past and present information that is somehow related to every future risk disclosed to the public. Securities law imposes no such requirement, and as explained below, imposing it through the courts will have a host of negative consequences.

D. The Decision Below Warrants This Court's Review

The Ninth Circuit's approach will harm both investors and companies. Start with the fact that it is not necessary. If the SEC believes that a company has violated Item 105 or other disclosure provisions of the securities laws, it may levy civil monetary penalties. See *In re First American Fin. Corp.*, Release No. 92176 (SEC June 14, 2021) (concluding that First American had failed to maintain adequate disclosure controls and procedures). And of course if a statement in a company's risk disclosures is itself inaccurate, the SEC may enforce or plaintiffs may bring suit. But where a company has accurately disclosed future risks, that provides potential investors with the basic information they need to decide whether "an investment in the [company is] speculative or risky." 17 C.F.R. 229.105. Detailing past or current events would not advance Item 105's purpose of educating investors about possible future harms. But it would impose a number of specific harms of its own.

First, to stave off liability under the Ninth Circuit's approach, public companies would need to disclose information about past events even remotely related to future risks. Keep in mind that companies already list a host of well accepted risks in their 10-K and 10-Qs—cyberattacks, supply chain disruptions, litigation, and the COVID-19 pandemic. Now companies will often need to disclose whether and when any events bearing on those risks have occurred prior to the filing. The net effect is a *de facto* continuing reporting requirement for certain types of events, even though "[Section] 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives*, 563 U.S. at 44. The federal securities laws are not meant to enshrine a policy of "continuous disclosure." *Gallagher* v. *Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001).

Second, those disclosures will hardly be costless for companies or investors. Suppose that, unlike in this case, a company discovered a cyber vulnerability that could not be fixed before the relevant securities filing. Is the company required to report the discovery and "tip[] off the bad guys" that the company is vulnerable to attack? Craig A. Newman, *When to Report a Cyberattack? For Companies, That's Still A Dilemma*, N.Y. Times (March 5, 2018). The SEC does not think so. See SEC Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8,166, 8,169 (Feb. 26, 2018) (advising against "detailed disclosures that could compromise [companies'] cybersecurity efforts"). Would a company that warns against the risk that COVID-19 poses to its operations need to disclose an internal study showing a low rate of vaccination among employees? Would a government contractor that warns against the risk of losing certain contracts need to disclose the state of negotiations?

Nor will the harms be limited to companies. Investors are harmed by disclosure regimes that "bury [them] in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988). Item 105 expressly seeks to avoid that scenario by discouraging the "presentation of risks that could apply generically" and directing companies to "[c]oncisely explain" each risk "in plain English." 17 C.F.R. 229.105. The SEC recently reiterated the importance of succinct, clear disclosures, highlighting "the importance of organized and concise risk factor disclosure." SEC, Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,745 (Oct. 8, 2020). The decision below turns that system on its head by effectively requiring companies to inundate investors with information about the past.

Third and finally, even when companies err on the side of excessive disclosure, it will never be enough to fill plaintiffs' maw. Plaintiffs inevitably will claim that if only they had known about some other past event, or the details of a past event, they would have better understood the true nature or degree of the risks facing the company. And the Ninth Circuit's approach will make dismissing those claims difficult, at least where plaintiffs can plausibly allege that the omissions "significantly altered the total mix of information made available" to investors. Pet. App. 27a. The decision will also pressure the SEC to take a backward-looking enforcement approach in what should be a forward-looking regime. All told, the decision below will only exacerbate the worsening trend of event-driven securities litigation. See Petition for Rulemaking at 4 ("This new barrage of lawyer-driven lawsuits is characterized by the very same rapid filing of claims with little or no investigation, designed to force defendants in to settlements regardless of the merits * * * that Congress enacted the PSLRA to prevent.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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