No. 23-980

In the Supreme Court of the United States

FACEBOOK, INC., ET AL.,

Petitioners,

v.

AMALGAMATED BANK, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

Salvatore J. Graziano
Jeremy P. Robinson
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020

Luke O. Brooks
Joseph D. Daley
Darryl J. Alvarado
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Kevin K. Russell
Counsel of Record
Daniel H. Woofter
GOLDSTEIN, RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue NW
Suite 200
Washington, DC 20006
(202) 240-8433
kr@goldsteinrussell.com

Jason C. Davis
ROBBINS GELLER RUDMAN & DOWD LLP
One Montgomery Street
Suite 1800
San Francisco, CA 94104

QUESTION PRESENTED

Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?

RULE 29.6 STATEMENT

Respondent Amalgamated Bank is wholly owned by Amalgamated Financial Corp., a publicly traded public benefit corporation. Respondent Public Employees' Retirement System of Mississippi is a public pension plan; no publicly held corporation holds 10 percent or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. The Ninth Circuit properly recognized that risk disclosures are not rendered misleading by failing to disclose immaterial events that risk no business harm. 12

II. The Court should reject Facebook's request for a categorical rule that risk-factor statements can never mislead investors about past events. 18

A. Reasonable investors do not view risk-factor statements as categorically incapable of conveying information about past adverse events. 19

1. As a matter of plain English, discussions of hypothetical risks can imply information about past events. 20

2. This commonsense understanding has long been recognized by the common law and the courts. 23

3. Nothing in Item 105 justifies Facebook's contrary rule. 25

B. This Court has consistently refused to adopt categorical rules about when classes of statements can be materially misleading. 34

C. Facebook's proposed rule would do violence to the statutory scheme. 36

D. Facebook's policy arguments are misdirected and have no merit. 38

III. The Court should reject Facebook's "virtual certainty" rule as well. 43

A. Facebook's "virtually certain" rule is meritless. 45

B. There is no point in remanding to apply Facebook's "virtually certain" rule. 48

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013) 41

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 36

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 15, 34, 35, 39, 40, 45, 46, 48

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 36

Berson v. Applied Signal Tech., Inc.,
527 F.3d 982 (9th Cir. 2008) 13, 14

City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.,
319 A.3d 271 (Del. 2024) 14

Dolphin & Bradbury, Inc. v. SEC,
512 F.3d 634 (D.C. Cir. 2008) 40

Facebook, Inc. v. Amalgamated Bank,
144 S. Ct. 2629 (2024) (mem.) 7

FindWhat Inv. Grp. v. FindWhat.com,
658 F.3d 1282 (11th Cir. 2011) 14

Ganino v. Citizens Utils. Co.,
228 F.3d 154 (2d Cir. 2000) 50

Glazer Capital Mgmt., L.P. v. Forescout Techs., Inc.,
63 F.4th 747 (9th Cir. 2023) 14

Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.,
594 U.S. 113 (2021) 18

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 38, 41

Huddleston v. Herman & MacLean,
640 F.2d 534 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983) 14, 15

In re Allstate Corp. Sec. Litig.,
966 F.3d 595 (7th Cir. 2020) 49

In re Alphabet, Inc. Sec. Litig.,
1 F.4th 687 (9th Cir. 2021) 14, 19

In re Apple Comput. Sec. Litig.,
886 F.2d 1109 (9th Cir. 1989) 14

In re CenturyLink Sales Practices & Sec. Litig.,
403 F. Supp. 3d 712 (D. Minn. 2019) 14

In re Harman Int'l Indus., Inc. Sec. Litig.,
791 F.3d 90 (D.C. Cir. 2015) 14

In re Marriott Int'l, Inc.,
31 F.4th 898 (4th Cir. 2022) 14, 42

Ind. Pub. Ret. Sys. v. Pluralsight, Inc.,
45 F.4th 1236 (10th Cir. 2022) 14, 41, 42, 44

Junius Constr. Co. v. Cohen,
178 N.E. 672 (N.Y. 1931) 21

Karth v. Keryx Biopharmaceuticals, Inc.,
6 F.4th 123 (1st Cir. 2021) 14, 42, 44

Kisor v. Wilkie,
588 U.S. 558 (2019) 33

Kohl v. Loma Negra Compañía Indus. Argentina Sociedad Anónima,
195 A.D.3d 414 (N.Y. App. Div. 2021) 14

Lormand v. US Unwired, Inc.,
565 F.3d 228 (5th Cir. 2009) 14

Macquarie Infrastructure Corp. v. Moab Partners, L. P.,
601 U.S. 257 (2024) 13, 14, 19, 21, 36, 39, 42

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 13, 15, 35, 36, 47

Meyer v. Jinkosolar Holdings Co., Ltd.,
761 F.3d 245 (2d Cir. 2014) 14

Omnicare, Inc. v. Laborers Dist. Council Constr. Indust. Pension Fund,
575 U.S. 175 (2015) 23, 24, 35, 38

Paskowitz v. Arnall,
2019 WL 3841999 (W.D.N.C. 2019) 14

Provenz v. Miller,
102 F.3d 1478 (9th Cir. 1996) 48

Rombach v. Chang,
355 F.3d 164 (2d Cir. 2004) 14

Rubinstein v. Collins,
20 F.3d 160 (5th Cir. 1994) 14

SEC v. Terry's Tips, Inc.,
409 F. Supp. 2d 526 (D. Vt. 2006) 14

Set Capital LLC v. Credit Suisse Grp. AG,
996 F.3d 64 (2d Cir. 2021) 14, 44, 45

Slack Techs., LLC v. Pirani,
598 U.S. 759 (2023) 38

Slayton v. Am. Exp. Co.,
604 F.3d 758 (2d Cir. 2010) 14, 38

Tellabs Inc. v. Makor Issues & Rts.,
513 U.S. 308 (2007) 41

Toussaint v. Care.com Inc.,
490 F. Supp. 3d 341 (D. Mass. 2020) 42

Universal Health Servs., Inc. v. United States ex rel. Escobar,
579 U.S. 176 (2016) 13, 14, 21

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 35

Williams v. Globus Medical, Inc.,
869 F.3d 235 (3d Cir. 2017) 14, 42

Statutes

Private Securities Litigation Reform Act of 1995,
Pub. L. No. 104-67, 109. Stat. 737 37

Securities Exchange Act of 1934,
15 U.S.C. §§ 78a-78qq 6
15 U.S.C. § 78j(b) 6, 36
15 U.S.C. § 78m(a) 40
15 U.S.C. § 78t(a) 6
15 U.S.C. § 78t-1 6
15 U.S.C. § 78u-5(b) 37
15 U.S.C. § 78u-5(c)(1)(A)(i) 37
15 U.S.C. § 78u-5(g) 37
15 U.S.C. § 78u-5(i) 37

Regulations And Regulatory Materials

17 C.F.R. § 229.101 30
17 C.F.R. § 229.103 31
17 C.F.R. § 229.105 ..... 2, 10, 20, 25, 26, 27, 29, 30, 33, 36, 37, 39, 40, 42, 43
17 C.F.R. § 229.105(a) 10, 27, 39
17 C.F.R. § 229.105(b) 27

17 C.F.R. § 229.106 31
17 C.F.R. § 229.303 ..... 31, 35, 36
17 C.F.R. § 229.503(c) (2005) 29
17 C.F.R. § 240.10b-5(b) 13, 15, 47
17 C.F.R. § 240.3b-6(a) 38
Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8,166 (Feb. 26, 2018) 31, 32, 40, 46
Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51,896 (Aug. 4, 2023) 32
FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674 (Apr. 2, 2019) 29, 30
Guides for Preparation and Filing of Registration Statements, 33 Fed. Reg. 18,617 (Dec. 17, 1968) 29
Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726 (Oct. 8, 2020) 39
Sec. Offering Reform, 70 Fed. Reg. 44,722 (Aug. 3, 2005) 29

Other Authorities

Cease and Desist Order, *Altaba, Inc.*, Release No. 10485 (Apr. 24, 2018) 33
Black's Law Dictionary (10th ed. 2014) 13
Cease and Desist Order, *Blackbaud, Inc.*, Release No. 11165 (Mar. 9, 2023) 33

Costco Wholesale Corporation Reports July Sales Results, Costco (Aug. 7, 2024), https://investor.costco.com/news/news-details/2024/Costco-Wholesale-Corporation-Reports-July-Sales-Results/default.aspx 22

Cease and Desist Order, *First Am. Fin. Corp.*, Release No. 92176 (June 14, 2021)..... 33

37 Am. Jur. 2d *Fraud and Deceit* § 18 34

H.R. Rep. No. 104-369 (1995) (Conf. Rep.) 38

3 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 10.77 (8th ed. 2023) 34

Edward A. Morse et al., *SEC Cybersecurity Guidelines: Insights Into the Utility of Risk Factor Disclosures for Investors*, 73 Bus. L. 1 (2017) 28, 29

Cease and Desist Order, *Pearson plc*, Release No. 10963 (Aug. 16, 2021) 33

Restatement (Second) of Torts § 525(e) (1977)..... 23

Restatement (Second) of Torts § 525(f) (1977).... 23, 24

Restatement (Second) of Torts § 539 (1977) 24

Intellectual Property and Technology Risks Associated with International Business Operations, SEC (Dec. 19, 2019), https://www.sec.gov/rules-regulations/staff-guidance/disclosure-guidance/risks-technology-intellectual-property 32

Complaint, *SEC v. Mylan N.V.*, No. 1:19-CV-2904 (D.D.C. Sept. 27, 2019) 33

Amended Complaint, *SEC v. SolarWinds Corp.*, No. 23-cv-9518 (S.D.N.Y. Feb. 16, 2024)..... 33

INTRODUCTION

This Court granted certiorari limited to the question: "Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?" Pet. i. The answer is "no." If a past event presents no risk of ongoing or future harm to the business and, as a result, is immaterial to investors, failing to disclose that immaterial event does not make a risk disclosure misleading.

Respondents have never argued otherwise, and the Ninth Circuit held nothing to the contrary. The court of appeals recognized that the undisclosed event here—the misappropriation and misuse of over 30 million Facebook users' private data—was material because it risked harm to the company's reputation, bottom line, and stock price, as Facebook's own risk statements had warned. The only reason Facebook has ever given to explain why the misappropriation risked no harm was that the event was allegedly disclosed to the public in 2015 and no one cared. The Ninth Circuit rightly rejected that factual claim as unsupported by the allegations in the complaint, a fact-bound ruling Facebook does not ask this Court to review or even acknowledge. What the Ninth Circuit actually held was that publicly treating such a material adverse event as a merely hypothetical prospect can be misleading even if the event has not *yet* produced follow-on business harm because the company has kept the truth from the public.

Facebook acknowledges the judicial consensus that presenting a materialized risk as a hypothetical prospect can be misleading. But it asks the Court to create an exemption when the relevant statements about that risk are made in the Item 105 section of a 10-K report. If the Court entertains that argument (which bears little resemblance to the question presented and which was not advanced or considered below), the Court should reject it. Whether a statement is misleading is an inherently fact-dependent question, insusceptible to categorical pronouncements. The Court has therefore repeatedly denied requests for bright-line rules declaring that certain kinds of statements cannot be misleading.

Facebook's proposed rule is a particularly poor candidate for an exception to that consistent practice. Facebook's account of how reasonable investors read Item 105 statements has no basis in common English usage or the experience of real investors. For example, it would be misleading to warn potential investors in a letter that there was a risk of fire at a company's factory if, in fact, the factory had burned to the ground just the week before. Nothing in the underlying regulations warns investors to read Item 105 risk statements any differently. Moreover, the SEC has instructed issuers that risk-factor statements appropriately address both future and past events that make an investment risky and that treating a materialized risk as a merely hypothetical possibility can be misleading. Facebook's contrary rule would also do an end-run around the conditions Congress established for the statutory safe harbor for forward-looking statements.

As a back-up, Facebook claims it would prevail under a "virtually certain" rule it says most circuit courts have adopted. But no court applies the rule as Facebook portrays it. And even if some did, Facebook and respondents agree the rule is wrong. Moreover, Facebook would lose under that rule anyway. The warned-of risk of data misuse here was not virtually certain to occur; it *had* occurred. And even if the law allowed Facebook to continue to mislead investors about that occurrence until it was virtually certain to cause some other kind of follow-on "business harm," the only reason Facebook gives for why that harm was not certain to occur is its discredited claim that the public learned the truth in 2015 and shrugged, only to explode in anger when the misappropriation was revealed for a supposedly second time in 2018.

The court of appeals' judgment should be affirmed.

STATEMENT OF THE CASE

1. In July 2019, Facebook agreed to pay more than $5 billion in civil penalties to settle charges by the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) that it had misled its users and investors over the privacy and security of user data on its platform. *See* Pet. App. 8a; J.A. 669. The SEC charges stemmed from the same disclosures at issue here and the events that became known as the Cambridge Analytica scandal.

In December 2015, *The Guardian* reported that a British data analytics company, Cambridge Analytica, was using a database created from "unwitting" Facebook users' data to help the presidential primary campaign of Senator Ted Cruz

target voters for political advertisements. The Cruz campaign, however, insisted that "all the information [wa]s acquired legally and ethically with permission of the users." J.A. 618. The article also quoted Alexander Kogan, the researcher responsible for collecting the data for Cambridge Analytica, as insisting his company had "full permission to use the data and user contribution for any purpose." *Id.* 621. Kogan further stated that he "never collected more than a couple thousand responses . . . for a single client." *Ibid*.

In the article, Facebook did not confirm the misappropriation or dispute Kogan's and the Cruz campaign's denials. Instead, it stated only that it was "carefully investigating" the situation, that misusing user data would violate Facebook's policies, and that the Company would "take swift action" against any third party found to have violated those policies. J.A. 619.

In private, Facebook almost immediately confirmed that Kogan and Cambridge Analytica had, in fact, obtained the private information of more than 30 million Facebook users in violation of Facebook policies. Pet. App. 10a-11a; J.A. 84-86.[1] Facebook privately asked Kogan and Cambridge Analytica to delete the data. J.A. 87. Both initially said they had. However, when asked to confirm in writing that they had destroyed not only derivative data but also the

---

[1] Facebook claims that users "consented to share their data" and some of their friends' data with Kogan, if not Cambridge Analytica. Pet. 8. The complaint, however, explains that this is untrue. *See* J.A. 3-4, 49; *see also* Pet. App. 10a, 43a.

raw user data, Cambridge Analytica's CEO refused. Pet. App. 11a-12a; J.A. 109-11.

For the next two years, Facebook kept its findings to itself and took no public action against Cambridge Analytica or Kogan. Instead, Facebook collaborated with Cambridge Analytica to place millions of dollars' worth of political ads on its platform during the general election. J.A. 117-19, 144. At the same time, Facebook actively misled the public about its investigation, "represent[ing] that no misconduct had been discovered." Pet. App. 26a; *see also id*. 13a.

Facebook's deception extended to its public filings with the SEC as well. Long after it confirmed the misappropriation and misuse of its users' data, Facebook's annual 10-K reports continued to describe the prospect of improper third-party access and misuse of private user data as a merely hypothetical risk. For example, Facebook stated that "[a]ny failure to prevent or mitigate . . . improper access to or disclosure of our data or user data . . . could result in the loss or misuse of such data, which could harm our business and reputation and diminish our competitive position." J.A. 439. It also explained that it provided third parties access to some user information and that "*if* these third parties or developers fail to adopt or adhere to adequate data security practices . . . our users' data *may be* improperly accessed, used, or disclosed." *Id.* 440 (emphasis added).

The public finally learned the truth about the Cambridge Analytica scandal in the spring of 2018. On March 16 of that year, with investigative reporters closing in, Facebook published a preemptive article on its investor relations website, admitting it had known

of the misappropriation since 2015. J.A. 631-33. It also acknowledged that although Kogan had claimed in the *Guardian* article to have collected information from a few thousand people, he had, in fact, obtained data from some 270,000 users and their friends. *Id.* 632. Although Facebook did not do the math in its acknowledgment, media reports in the next few days figured this amounted to tens of millions of users' private data being transferred from Facebook to Cambridge Analytica. *See id.* 634-35, 640.

The public reaction was swift and furious. J.A. 14, 208-09, 371-74. Government officials here and in Europe called for investigations. Pet. App. 14a. And Facebook's stock price plummeted, shedding $100 billion in market capitalization within a week. *Id*. 15a.

In July 2019, the SEC sued Facebook, charging the Company with misleading investors by treating the prospect of data misuse as a merely hypothetical risk in its SEC filings, J.A. 642, and by reinforcing the deception by telling the public that its investigation had "not uncovered anything that suggests wrongdoing," *id.* 656.[2]

2. Shareholders filed the first suits against Facebook in the spring of 2018, seeking to recover damages for a class of injured investors under Sections 10(b), 20(a), and 20A of the Securities Exchange Act of 1934. Like the SEC, respondents

---

[2] The FTC separately filed charges relating to Facebook's secret "whitelisting" program for sharing user data with other companies in exchange for advertising revenue or access to the other companies' user data. J.A. 30. Facebook settled both sets of claims for a record-breaking $5.1 billion. *Id*. 10, 30.

alleged that Facebook misled investors by treating the possibility of misappropriation and misuse of its users' data as a hypothetical prospect in the Company's public risk disclosures despite knowing that a serious misappropriation and misuse of user data had recently occurred on a massive scale.[3]

The district court dismissed those claims for failure to establish falsity. Pet. App. 18a. It concluded that the "relevant risks" discussed in most of the risk disclosures related to "reputation, business, or competitive harm, *not* improper access to or the disclosure of user data." *Id.* 189a. The court further found that respondents did "not allege that, at the time the risk disclosure was made, the Cambridge Analytica scandal was harming Facebook's reputation, business, or competitive position." *Ibid*. The court acknowledged that in one statement "the risk identified is the improper use or disclosure of user data" without any mention of business harm. *Ibid*. But it held that made no difference because "[a]t the time these risk disclosures were made in February 2017, both Kogan's and Cambridge Analytica's misuse of user data were matters of public knowledge (with no alleged harm to Facebook's business, reputation, or competitive positions)." *Ibid*. (citing the 2015 *Guardian* story discussed *supra* pp. 3-4).

3. The Ninth Circuit reversed in relevant part.

---

[3] Respondents also raised claims relating to whitelisting, but this Court denied review of Facebook's challenge to those counts. *See* Pet. i, 35-36; *Facebook, Inc. v. Amalgamated Bank*, 144 S. Ct. 2629 (2024) (mem.).

The panel majority (Judges McKeown and Bybee) rejected the district court's reading of the Company's risk statements as warning only of business harm, not misappropriation. *See* Pet. App. 24a. Properly read, Facebook's risk statements were misleading because they "represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired." *Ibid.* It was no defense that Facebook's concealment of the incident had forestalled the business harm that would later result when the truth was revealed. Falsely implying that a serious misappropriation had not occurred was misleading "even if the magnitude of the ensuing harm was still unknown." *Id.* 24a-25a.

The panel majority acknowledged Facebook's argument, embraced by Judge Bumatay in dissent, that the Company reasonably believed no harm of *any* magnitude was forthcoming because the improper access had been fully disclosed to the public in the original 2015 *Guardian* article with no serious public reaction. Pet. App. 26a. The majority did not dispute that if that were true, there would be no liability. *See id*. 22a, 26a. But rejecting Facebook's view of the facts, the majority found that "the extent of Cambridge Analytica's misconduct was *not* yet public when Facebook filed its" risk disclosures. *Id.* 26a (emphasis added); *see also id*. 35a. While the 2015 article included allegations of misconduct, those allegations were denied by those directly involved and Facebook simply said it would investigate the matter and take "swift action" if it found wrongdoing, *id.* 26a, something it never publicly did until years after its misleading SEC filings.

Judge Bumatay dissented in relevant part. He agreed with the district court that a "careful reading" of the specific statements showed that Facebook did not "represent that Facebook was free from significant breaches at the time of the filing," only that it was not currently suffering business harm because of any such breach. Pet. App. 44a.

This Court granted certiorari, limited to the first question presented.

SUMMARY OF ARGUMENT

I. Respondents agree with Facebook that the answer to the question presented is "no." Companies need not disclose the occurrence of events that are so lacking in risk to the business as to be immaterial.

The Ninth Circuit did not hold otherwise. The court recognized that the misappropriation and misuse of tens of millions of users' private data is obviously material to investors given its prospect for harming the business. And it rejected the only reason Facebook gave for why this particular incident supposedly posed no such risk—Facebook's implausible claim that the public had learned of the misappropriation in 2015 but was indifferent. In the passages of the court's opinion that Facebook cites, the Ninth Circuit correctly held that failing to disclose such an obviously material event was not excused simply because, at the time of its SEC filings, the Company had forestalled the inevitable follow-on harm by keeping the public in the dark about what had happened.

II. Facebook argues in the alternative that it doesn't matter whether the misappropriation risked business harm because risk statements in the

Item 105 section of an SEC filing are categorically incapable of misleading investors about the occurrence of past events. If the Court entertains that argument—which is not the law in any circuit and which Facebook never raised below—the Court should reject it.

In common usage and at common law, describing an event as a hypothetical risk can be reasonably understood to imply that the risk is just that—a future possibility, not a present reality. Telling a prospective land investor that there's a risk the government may put a road through the middle of a property, for example, is misleading if the speaker knows the land has already been condemned for that purpose. Saying an investment in a chemical company is risky because of the potential for fires would be misleading if the company's factory had already burned to the ground. The Restatement of Torts gives other examples in the investment context, consistent with the consensus circuit view that portraying a materialized risk as a hypothetical prospect can be materially misleading.

Nothing in the relevant SEC regulations warns investors to give Item 105 risk-factor statements anything other than this ordinary reading. To the contrary, Item 105 requires a "plain English" "discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a). The recent occurrence of a materially adverse event, like the data misappropriation here, is clearly a "factor" that can make investment in a company risky. In fact, Item 105 discussions often describe past events expressly. There is no reason an investor would

expect such discussions would never *imply* information about the past as well. If there were any doubt, the SEC itself has long instructed that past events can constitute risk factors requiring disclosure and that describing a recent adverse event as merely a hypothetical risk can be misleading.

The sweeping, unqualified safe harbor that Facebook seeks for risk-factor statements is also incompatible with Congress's decision to write its own statutory safe harbor for certain forward-looking statements, subject to multiple limitations and conditions Facebook's rule would evade.

Of course, whether a statement is misleading depends on the facts and context. But that is a reason to reject Facebook's proposed categorical rule, as the Court has repeatedly done when others have proposed bright-line rules declaring that certain kinds of statements are always incapable of being materially misleading.

Facebook's various policy objections are meritless. The rule it opposes has been the law in many circuits for years, without producing the over-disclosure of adverse events Facebook predicts. And regardless, if risk-factor statements can be materially misleading, as they clearly can be, Facebook cannot ask this Court to declare otherwise on policy grounds.

III. Facebook claims it would prevail under a supposed consensus circuit rule that risk disclosures can be misleading only "if the company knows that the warned-of risk is almost certain to materialize." Br. 39. But here, the Ninth Circuit found that the warned-of risk of data misappropriation and misuse was not only virtually certain to materialize, but

already had. Rather than contest that fact-bound finding, Facebook seems to claim that circuits hold that the adverse event must *also* be "virtually certain" to cause some undefined follow-on "business harm." But no court holds that, likely because there is no basis for adding that limitation on top of the existing requirement that the omitted event be material. Moreover, Facebook would lose even if that were the law—the only reason it gives for why business harm was not virtually certain to follow the misappropriation of millions of users' private data was that the public was told of the misappropriation in 2015 and didn't care. The Ninth Circuit squarely and rightly rejected that case-specific factual claim at this early stage, a ruling Facebook neither acknowledges nor asks this Court to review.

ARGUMENT

I. The Ninth Circuit Properly Recognized That Risk Disclosures Are Not Rendered Misleading By Failing To Disclose Immaterial Events That Risk No Business Harm.

The Court took this case to decide whether "risk disclosures [are] false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm." Pet. i. There is no real dispute over the answer. Facebook acknowledges that an issuer's knowledge has nothing to do with whether a statement is false or misleading. Br. 40. And respondents agree that companies do not materially mislead investors by failing to disclose the occurrence of events that are immaterial because they

present no risk of business harm. Because the Ninth Circuit did not hold otherwise, its judgment should be affirmed.

1. A statement is misleading "if it would give a reasonable investor the 'impression of a state of affairs that differs in a material way from the one that actually exists.'" *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008) (citation omitted); *see also Mislead*, Black's Law Dictionary 1151 (10th ed. 2014) (to mislead is to "cause (another person) to believe something that is not so, whether by words or silence, action or inaction"). One way a statement can mislead is by "omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b). Accordingly, while issuers have no general obligation to disclose an adverse event to investors just because the market would want to know about it, they *do* have a duty to disclose such information when necessary to prevent the statements they *have* made from being misleading. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44-45 (2011).

This Court recently applied these principles in *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*, 601 U.S. 257 (2024). Although the Court held there is no private right of action for a "pure omission" of information required by an SEC disclosure rule, it affirmed that in complying with those rules, issuers must tell the "whole truth." *Id.* at 263. A disclosure violates this obligation if it "state[s] the truth only so far as it goes, while omitting critical qualifying information." *Ibid.* (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188

(2016)). "A classic example of an actionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property." *Ibid*. (citation omitted).

Courts have widely recognized that a statement may also be a misleading half-truth when it portrays an adverse event as a hypothetical risk even though it has already transpired or is virtually certain to do so soon.[4] For example, a business owner soliciting an

---

[4] *See, e.g.*, *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*, 319 A.3d 271, 293-94 (Del. 2024); *Glazer Capital Mgmt., L.P. v. Forescout Techs., Inc*., 63 F.4th 747, 781 (9th Cir. 2023); *Ind. Pub. Ret. Sys. v. Pluralsight*, Inc., 45 F.4th 1236, 1255-56 (10th Cir. 2022); *In re Marriott Int'l, Inc.*, 31 F.4th 898, 904 (4th Cir. 2022); *Karth v. Keryx Biopharmaceuticals, Inc*., 6 F.4th 123, 137-38 (1st Cir. 2021); *Set Capital LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 85 (2d Cir. 2021); *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021); *Kohl v. Loma Negra Compañía Indus. Argentina Sociedad Anónima,* 195 A.D.3d 414, 416 (N.Y. App. Div. 2021); *Williams v. Globus Medical, Inc*., 869 F.3d 235, 243 (3d Cir. 2017); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 102-03 (D.C. Cir. 2015); *Meyer v. Jinkosolar Holdings Co., Ltd.*, 761 F.3d 245, 251 (2d Cir. 2014); *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1299 (11th Cir. 2011); *Slayton v. Am. Exp. Co*., 604 F.3d 758, 772 (2d Cir. 2010); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009); *Berson*, 527 F.3d at 989-90; *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004); *Rubinstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994); *In re Apple Comput. Sec. Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *In re CenturyLink Sales Practices & Sec. Litig.*, 403 F. Supp. 3d 712, 726 (D. Minn. 2019); *Paskowitz v. Arnall*, 2019 WL 3841999, at *8 (W.D.N.C. 2019); *SEC v. Terry's Tips, Inc.*, 409 F. Supp. 2d 526, 534-35 (D. Vt. 2006).

investment in a factory might warn that the investment may not pay off if the government were to condemn part of the property to put in a road or if the factory were to burn down. Those statements could be misleading half-truths if the company had already received a letter condemning the factory to build the new road or if the factory had, in fact, burned down just the week before. As the Fifth Circuit put it nearly half a century ago: "To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit." *Huddleston*, 640 F.2d at 544.

That does not mean that every statement portraying a recent event as a hypothetical risk is always actionably misleading. For example, a misstatement must be material. *See* 17 C.F.R. § 240.10b-5(b); *Matrixx*, 563 U.S. at 37. A misstatement is material only if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (citation omitted). If an event does not risk what might casually be called "business harm," and there was no other reason why the event would alter the total mix of information, then its occurrence would be immaterial and failing to disclose it would not be materially misleading.

Given these principles, the answer to the question presented is that risk disclosures are not materially false or misleading when they fail to disclose that a risk has materialized in the past if the

past event is immaterial because it presents no known risk of ongoing or future business harm.

2. The Ninth Circuit did not hold otherwise.

The panel explained that the district court had held "that the risk statements were not actionably false" for two reasons: "[1] because Cambridge Analytica's misconduct was public knowledge at the time the statements were made and [2] because, while the 10-K warned of risks of harm to Facebook's business, reputation, and competitive position, the shareholders failed to allege that Cambridge Analytica's misconduct was causing such harm when the statements were made." Pet. App. 21a. The court of appeals rejected the first ground as factually unsupported: The initial news reports "did not reveal that Cambridge Analytica had misused Facebook users' data." *Id.* 34a; *see also supra* pp. 3-5, 8; *infra* § III.B.

The Ninth Circuit rejected the second rationale because implying that Facebook had not suffered a material misappropriation was misleading "even if Facebook did not yet know the extent of the reputational harm it would suffer as a result of the breach." Pet. App. 24a. "The mere fact that Facebook did not know whether its reputation was already harmed when filing the 10-K does not avoid the reality that it created an impression of a state of affairs that differed in a material way from the one that actually existed." *Id*. 25a (cleaned up).

Facebook portrays this section of the opinion as holding that failing to disclose a transpired risk is materially misleading "even if" the event poses "no known risk of ongoing or future business harm."

Pet. i; *see* Br. 13. Not so. There was no question *whether* the misappropriation and misuse of 30 million users' private data posed a material risk of harm to the company. Facebook's risk disclosures themselves stressed that such an event risked harm to the business. *See* J.A. 439-40. And Facebook does not even try to deny that a data misappropriation on the scale of the Cambridge Analytica scandal could easily be devastating to its business. This portion of the opinion instead addressed a separate question of *timing*: Was it a defense that although there was an undeniable risk of harm, Facebook "did not *yet* know the extent of the reputational harm it would suffer as a result of the breach" when it filed its risk disclosures? *See* Pet. App. 24a (emphasis added). The panel correctly held that the "mere fact that Facebook did not know whether its reputation was *already* harmed when filing the 10-K does not" make the statement non-misleading. *Id*. 25a (emphasis added). The court explained that "[o]ur case law does not require harm to have materialized for a statement to be materially misleading." *Id*. 24a. Instead, "[b]ecause Facebook presented the prospect of a breach as purely hypothetical when it had already occurred, such a statement could be misleading even if the magnitude of the ensuing harm was still unknown." *Id*. 24a-25a. In other words, it was "the fact of the breach itself, rather than the anticipation of reputational or financial harm" that "caused [the] anticipatory statements to be materially misleading." Br. 13 (quoting Pet. App. 25a).

If the court had held that it made no difference whether the misappropriation presented *any* risk of harm *ever* occurring, there would have been no need

to discuss Facebook's claim that the event posed no risk in this case because the public already knew the truth from the 2015 *Guardian* article. Pet. App. 26a. In addressing that argument, and in describing the legal framework, the Ninth Circuit fully recognized that companies need not disclose immaterial events that pose no risk of business harm. *See id.* 22a, 26a.

* * *

Because the Ninth Circuit did not adopt the erroneous rule of law Facebook attributes to it, this Court should affirm.[5]

II. The Court Should Reject Facebook's Request For A Categorical Rule That Risk-Factor Statements Can Never Mislead Investors About Past Events.

Facebook's argument for certiorari focused on its claim that the Ninth Circuit had "adopted an extreme, outlier rule: companies must disclose past instances when a risk materialized *even if* those events pose no known threat of business harm." Pet. 2 (emphasis in original). Having gotten its foot in the door with that argument, Facebook now pivots to an outlier position of its own, urging the Court to hold that risk-factor statements are categorically incapable of misleading reasonable investors about

---

[5] If the Court is substantially uncertain whether the Ninth Circuit applied a rule everyone agrees would be wrong, it should confirm that risk-factor statements are not materially misleading simply because they fail to disclose the occurrence of an immaterial event and remand for reconsideration. *See Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 123-24 (2021) (vacating and remanding in similar circumstances).

past events, Br. 19, a position for which it cites one unpublished decision of a single circuit, *id.* 22.

That argument bears only passing resemblance to the question presented. And although Facebook briefly discussed the theory in its petition, it does not deny that it never made this argument below or claim that the Ninth Circuit considered it.[6] The Court could thus decline to consider the matter as "tangential to the question presented" and "not passed upon below." *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*, 601 U.S. 257, 266 n.2 (2024). If the Court elects to address the argument, the Court should find it has no merit.

A. Reasonable Investors Do Not View Risk-Factor Statements As Categorically Incapable Of Conveying Information About Past Adverse Events.

Facebook's argument for a categorical safe harbor for risk statements rests on two basic claims. First, Facebook asserts that risk-factor statements take a particular form, identifying a potential future adverse event and explaining that if it occurs, it may damage the business. Br. 2. Such statements, Facebook

---

[6] *See* BIO 19-20 & n.6; *compare* Cert. Reply 10-11 (disputing preservation point with respect to second question presented) *with id*. 2-7 (not contesting failure to raise this risk-factor argument to panel). Indeed, before the panel, Facebook agreed that a "risk disclosure can be misleading if it 'speaks entirely of as-yet-unrealized risks and contingencies and does not alert the reader that some of these risks may already have come to fruition.'" Pet. C.A. Br. 25 (citing *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021)) (cleaned up).

argues, are "obviously forward-looking and probabilistic." *Ibid*. And, it says, a reader of a forward-looking, probabilistic statement would not feel misled if it turned out that the warned-of "triggering event" had already occurred. *Id*. 4. Facebook further argues that no matter how people would interpret such statements in other settings, reasonable investors would understand from the wording and context of the underlying regulations that investors should not draw any inference about past events from a discussion of risks in an Item 105 disclosure. *Id.* 21-24.

Facebook's first argument conflicts with common sense, the common law, and a longstanding consensus in the lower courts. Its interpretation of the regulations is contradicted by the text and the consistent interpretation of the agency that wrote it. And the resulting rule would also do violence to the congressional scheme, which already includes a safe harbor for forward-looking, probabilistic statements—a defense whose limitations Facebook's rule would evade.

1. As A Matter Of Plain English, Discussions Of Hypothetical Risks Can Imply Information About Past Events.

Facebook claims that a "typically worded" risk disclosure "states that, if some triggering event occurs, some consequence . . . could or may occur" and harm the business. Br. 2. Even if that were right, that kind of statement is not unique to Item 105 disclosures. And it takes but a moment's reflection to realize that this formulation can mislead a reasonable person into thinking that the identified hypothetical

risk was only that—a *hypothetical* prospect, not something that had already happened.

For instance, warning that the children might eat the whole cake before anyone else can have a slice would be misleading if one knows the cake is already gone. *Cf. Macquarie*, 601 U.S. at 264 (giving similar example of a half-truth). It likewise would be misleading for a teenager to tell his parents there is a risk that he may fail one of his finals and have to retake a class when he has already taken one of his finals and failed it.

The same is true of risk disclosures in business transactions. This Court has illustrated the prohibition against half-truths using the example of a property seller misleading a potential buyer about a hypothetical risk by representing that the government may build "two new roads near a property he is selling" while failing to disclose "that a third potential road might bisect the property." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188-89 (2016) (citing *Junius Constr. Co. v. Cohen*, 178 N.E. 672, 674 (N.Y. 1931) (Cardozo, J.)); *see also Macquarie*, 601 U.S. at 263-64. It would be just as misleading to say that a third road "might" be planned if the land for the road had already been condemned.

Other examples come easily to mind. It would be misleading to tell potential investors there's a risk the venture could fail if the government revokes its license when the license had already been revoked. Warning a potential investor in a chemical plant that its facilities are particularly at risk of fire is a misleading half-truth if a significant fire recently occurred but is not disclosed. A broker would mislead

her client if she said that an investment in a baby formula company could be lost if significant food safety issues were discovered when the company's plant was already closed due to a serious E. coli outbreak.

These examples are misleading even though the speaker talks in terms of "risks" and what "could" or "may" happen in the future. *Contra* Petr. Br. 22, 30. The deception arises not because listeners misunderstand the subject matter of the literal statement (hypothetical occurrences) but because reasonable people in these contexts expect that the speaker would not talk in hypothetical terms if, in fact, the risk had already materialized. In that way, a statement can *be* about the future but *imply* facts about the past.

Of course, whether any given statement is materially misleading depends on all the facts. Speaking generically about fire risks having the potential to disrupt a business, without mentioning a recent fire at a warehouse, might not be materially misleading if the company is Costco, with hundreds of warehouses around the world.[7] But it likely would be a different matter if the fire had destroyed the company's headquarters or a particularly important warehouse. Moreover, noting the risk of natural disasters may not be understood "to suggest that natural disasters had *never* caused business

---

[7] *See Costco Wholesale Corporation Reports July Sales Results*, Costco (Aug. 7, 2024), https://investor.costco.com/news/news-details/2024/Costco-Wholesale-Corporation-Reports-July-Sales-Results/default.aspx (Costco has 884 warehouses worldwide); Petr. Br. 30.

disruptions." Petr. Br. 30 (emphasis added). But it could well be understood to convey that one had not just destroyed the company's only factory when the public had no other way of knowing that fact.

In this case, it would not have been misleading for Facebook to omit mention of a minor incident of improper access to user data. But particularly when, as here, the event is extraordinary in scale and potential for harm, concerns events generally hidden from public view, and was not already known to the public, a jury could reasonably conclude that failing to disclose it would render Facebook's risk-factor statements materially misleading.

2. This Commonsense Understanding Has Long Been Recognized By The Common Law And The Courts.

The insight that statements about future possible events can mislead about the present and past has a long pedigree in the common law. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indust. Pension Fund,* 575 U.S. 175, 191 & n.9 (2015) (noting relevance of common law in interpreting securities laws).

The Restatement of Torts, for example, recognizes that a "statement about the future may imply a representation concerning an existing or past fact." Restatement (Second) of Torts § 525(e) (1977). For example, "a statement that is in the form of a prediction or promise as to the future course of events may justifiably be interpreted as a statement that the maker knows of nothing which will make the fulfillment of his prediction or promise impossible or improbable." *Id*. § 525(f). The Restatement provides

this illustration: "A, knowing that the X Corporation is hopelessly insolvent, in order to induce B to purchase from him shares of its capital stock[,] assures B that the shares will within five years pay dividends that will amount to the purchase price of the stock." *Id*. illus. 3. Although Facebook might call this a forward-looking, probabilistic statement, the Restatement explains that "B is justified in accepting these statements as an assurance that A knows of nothing that makes the corporation incapable of making earnings sufficient to pay the dividends." *Ibid*. That is, the statement is reasonably understood to imply facts about the present and the past.

A statement of opinion, likewise, may imply facts about the past and present, even if it might also be characterized as addressing a future prospect. *See* Restatement (Second) of Torts § 539; *Omnicare*, 575 U.S. at 188-92. For example, "a statement that a bond is a good investment," even if viewed as expressing an opinion about its future performance, "is a fraudulent misstatement of the actual character of the bond if the vendor knows that the interest on the bond has for years been in default and the corporation which issued it is in the hands of a receiver." Restatement (Second) of Torts § 539 cmt. a.

Courts have applied these insights in the securities context for decades, repeatedly holding that treating a recent, materially adverse event as a merely hypothetical possibility can be misleading. *See supra* p. 14 n.4. Facebook provides no basis for thinking all those courts are mistaken.

3. Nothing In Item 105 Justifies Facebook's Contrary Rule.

Facebook nonetheless insists that reasonable investors interpret such statements differently when they are included in the Item 105 section of a 10-K report. Br. 21-24. But its attempts to prove that claim by pointing to the typical content of Item 105 disclosures and to the regulations themselves show the opposite is true.

Typical Content. What Facebook describes as the typical formulation of a risk statement in an Item 105 disclosure—identifying some potential "triggering" event and warning that it could harm the business if it occurs—does not distinguish Item 105 statements from any of the examples or cases discussed above. Warning a land buyer that the government may decide to build a road across the property may well be "forward-looking and probabilistic," Br. 21, but it is also misleading if the speaker knows the decision has already been made. That is true whether the statement is made in a person-to-person solicitation, on an investor call, or in the Item 105 section of an annual report.

Moreover, Facebook admits that typical risk-factor statements are not limited to discussing hypothetical future "triggering" events and their potential consequences but often expressly discuss past events. For example, Facebook concedes (Br. 27-28) that its own statement in this case disclosed that "general hacking ha[s] . . . *occurred on our systems in the past*." *See* J.A. 439 (emphasis added). Such backward-looking statements are common even in Facebook's own disclosures. *See, e.g.*, *id.* 435 (Facebook noting it "is possible that

governments of one or more countries may seek to censor content available on Facebook" and disclosing that "access to Facebook has been or is currently restricted in whole or in part in China, Iran, and North Korea"); *id.* 446-47 (discussing risks of legal challenges to Company's transnational data transfers, then disclosing that "the Irish Data Protection Commissioner is investigating and has challenged the legal grounds for transfers of user data to Facebook").

Facebook cannot explain why a reasonable investor, used to reading express discussions of past events relevant to an investment's risk, would nonetheless refuse to believe that a risk-factor section could provide similar information by implication. Indeed, when, as here, an Item 105 statement expressly discloses the past materialization of one kind of risk (*e.g.*, a hacking event), it is particularly reasonable for investors to infer that describing a closely related risk (*e.g.*, misuse of data by third parties) as a purely hypothetical prospect in the very next paragraph means that the risk has not yet materialized, otherwise the firm would have disclosed it. Facebook says investors would draw the opposite inference about whether a misappropriation had occurred. Br. 24. That is highly implausible, but the more important point for present purposes is that Facebook admits that reasonable investors *do* draw inferences about the occurrence of past events based on what companies say in their Item 105 disclosures.

Regulatory Text. Facebook says that Item 105 itself warns reasonable investors not to draw such inferences. Br. 21-22. But even assuming the reasonable investor reviews the regulations

governing each section of a 10-K report, rather than just giving the report its natural meaning, nothing in Item 105's text, context, or history supports Facebook's position.

Item 105 requires a "discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a). The regulation directs that the disclosures must be made in "plain English," *id*. § 229.105(b), and discourages the inclusion of "risks that could apply generically to any registrant or any offering," *id*. § 229.105(a).

Straight away then, any investor who looked up the regulation would expect to be able to give the disclosure a "plain English" reading, not the restrictive, unnatural one Facebook proposes. Moreover, the investor would learn that risk-factor statements are *supposed* to convey real information pertinent to the company, not boilerplate generalities that could be true of any firm. Given this, it is only natural to read such statements as implying relevant information about the company's present and recent experiences when such an inference is warranted as a matter of plain English usage.

Facebook counters that the reference to "risk" makes clear that Item 105 "covers events that might occur in the future, not those that have occurred in the past." Br. 21. That argument fails first because, as discussed, even when a statement is directed at a future prospect, it can reasonably imply facts about the past. It also fails because what the regulation requires is the disclosure of "*factors* that make an investment . . . speculative or risky." 17 C.F.R. § 229.105(a) (emphasis added). And the recent

occurrence of an adverse event is indisputably a "factor" that could make an investment risky. To use the earlier examples, the fact that a city has recently condemned land to build a road through the middle of a company's factory is surely a factor that makes an investment risky, as would a recent fire, an E. coli outbreak, or, as here, the misappropriation of 30 million social media users' private data.

Such events can make an investment risky because of the harm they have already caused or the follow-on harm that may be on the horizon (loss of a factory, damage to reputation, liability for damages or fines, and so on). Here, the misappropriation created the risk of reputational harm, user disengagement, and consequent loss of advertising revenue, just as Facebook warned could happen if such an event were to occur and just as *did* happen when the truth was eventually revealed. *See* J.A. 439-40; Pet. App. 15a-17a.

Past events can also make an investment risky because of what they reveal about the extent and nature of a particular risk. The recent occurrence of a fire or E. coli outbreak may cast doubt on a firm's fire or food safety practices and suggest a significant risk of recurrence. In this case, one commentator noted that "[i]f Cambridge Analytica was able to acquire information on tens of millions of Facebook users so quickly and easily . . . then that shows a serious flaw in Facebook's ability to keep exclusive control over its information." Pet. App. 15a. More broadly, past adverse events can draw into question the competence, efficiency, or integrity of a company and its officials, critical information to the assessment of an investment's risk. *See* Edward A. Morse et al.,

SEC Cybersecurity Guidelines: Insights Into the Utility of Risk Factor Disclosures for Investors, 73 Bus. L. 1, 2 (2017).

Given this, it is no surprise that for over 50 years the SEC risk-factor regulations included sample risk factors that concerned past and present circumstances, not just disclosures of hypothetical "triggering" events that could cause business harm if they were to occur in the future. Item 105 arises from the SEC's decision in 2005 to extend a then-existing risk-factor requirement for registration statements (Item 503(c)) to annual 10-K reports. *See* Sec. Offering Reform, 70 Fed. Reg. 44,722, 44,786 & n.591 (Aug. 3, 2005). At the time, that regulation, like Item 105 today, required a discussion of "any factors that make the offering speculative or risky." 17 C.F.R. § 229.503(c) (2005). It then gave examples that had been included in Item 503(c) since the 1960s and addressed both past occurrences and future possibilities: "Your lack of an operating history"; "Your lack of recent profits from operations"; "Your poor financial position"; "Your business or proposed business." *Ibid*.; *see* Guides for Preparation and Filing of Registration Statements, 33 Fed. Reg. 18,617, 18,619 (Dec. 17, 1968) (original version of what became Item 503(c)).[8]

---

[8] In 2019, the SEC consolidated the risk disclosure requirements for registration statements and annual reports in what is now Item 105. *See* FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674, 12,688 (Apr. 2, 2019). The SEC explained that it was eliminating the specific examples as "inconsistent with the Commission's emphasis on principles-based requirements that encourage

Accordingly, Facebook's central premise—that risk-factor discussions address only future hypothetical events—is false. And if investors expect that Item 105 disclosures may include express discussions of past events, there is no reason they would fail to draw ordinary inferences about what even forward-looking statements on potential risks imply about the materialization of those risks in the past.

Regulatory Context. Facebook says that investors would not only research Item 105 but conduct a sophisticated comparison between that regulation and those governing other parts of the 10-K report. Br. 23. And it suggests that this lawyerly analysis would lead the lay investor to understand that because other Items require disclosure of facts about the past, Item 105 must be limited to conveying information exclusively about potential future events. *See ibid*. Not so.

As discussed, consistent with the regulation's focus on factors that make investments risky, Item 105 disclosures can and do expressly discuss past events, just like other disclosure sections governed by other rules. At the same time, each of the rules Facebook identifies can require disclosures about both past events and future prospects. *See* 17 C.F.R. § 229.101 (requiring description of the "general

---

registrants to provide risk disclosure that is more precisely calibrated to their particular circumstances" and because the SEC was concerned that "the inclusion of any examples . . . could anchor or skew the registrant's risk analysis in the direction of the examples." *Id*. at 12,689. The revision thus did not call into question that risk factors can include past events.

development of the business" as well as "a description of the registrant's plan of operation for the remainder of the fiscal year"); *id*. § 229.103 (requiring disclosure of "any material pending legal proceedings" as well as "any such proceedings known to be contemplated by government authorities"); *id.* § 229.106 (requiring disclosure of past cybersecurity events and future threats); *id.* § 229.303 (requiring "descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations"). The natural inference from such a comparison is that no Item is limited to only the past or the future.

SEC Interpretation. If Facebook presumes that a reasonable investor would review the regulations underlying 10-K reports, it must also presume that the investor would be aware of the SEC's interpretation of those regulations. Indeed, it is far more likely that an investor seeking guidance on how to read a 10-K would turn to the SEC's guidance than conduct an independent legal analysis of the regulations. And such an investor would find that the SEC has repeatedly warned issuers that describing an already transpired event as a hypothetical risk can be misleading if the event is not disclosed.

For example, the SEC has warned that "if a company previously experienced a material cybersecurity incident involving denial-of-service, it likely would not be sufficient for the company to disclose that there is a risk that a denial-of-service incident may occur." Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8,166, 8,170 (Feb. 26, 2018)

("SEC Cybersecurity Guidance"). "Instead, the company may need to discuss the occurrence of that cybersecurity incident and its consequences as part of a broader discussion of the types of potential cybersecurity incidents that pose particular risks to the company's business and operations." *Ibid*.[9] In other guidance, the SEC has advised that "where a company's technology, data or intellectual property is being or previously was materially compromised, stolen or otherwise illicitly accessed, hypothetical disclosure of potential risks is not sufficient to satisfy a company's reporting obligations."[10]

The SEC has repeatedly acted on this understanding in administrative and judicial enforcement actions, including in a suit against Facebook for the very disclosures at issue. In that complaint, the SEC charged that these same risk statements were materially misleading because they "suggested that the company faced merely the risk of such misuse [of user data] and any harm to its business that might flow from such an incident." J.A. 653. "This hypothetical phrasing," the Commission continued, "repeated in each of its

---

[9] The SEC subsequently created a separate disclosure rule for cybersecurity risks but did not retreat from its prior guidance that it can be misleading to describe a material, recent cybersecurity event as a merely hypothetical future risk. *See* Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51,896, 51,897, 51,921 (Aug. 4, 2023).

[10] *Intellectual Property and Technology Risks Associated with International Business Operations*, SEC (Dec. 19, 2019), https://www.sec.gov/rules-regulations/staff-guidance/disclosure-guidance/risks-technology-intellectual-property.

periodic filings during the relevant period, created the false impression that Facebook had not suffered a significant episode of misuse of user data by a developer." *Id.* 653-54. For that reason, "Facebook knew, or should have known, that its Risk Factors disclosures . . . were materially misleading." *Id.* 655. The SEC has taken the same position in other administrative[11] and judicial enforcement actions[12] as well.

The Court need not give the SEC's interpretation any particular form of deference to recognize the implausibility of Facebook's claim that reasonable investors would have a radically different understanding of Item 105 disclosures than the regulation's author.[13]

---

[11] *See, e.g.*, Cease and Desist Order, *Blackbaud, Inc.*, Release No. 11165 (Mar. 9, 2023); Cease and Desist Order at 2, *Pearson plc*, Release No. 10963 (Aug. 16, 2021); Cease and Desist Order, *First Am. Fin. Corp.*, Release No. 92176 (June 14, 2021); Cease and Desist Order ¶ 2, *Altaba, Inc.*, Release No. 10485 (Apr. 24, 2018).

[12] *See* Amended Complaint ¶ 252, *SEC v. SolarWinds Corp.*, No. 23-cv-9518 (S.D.N.Y. Feb. 16, 2024); Complaint ¶¶ 5, 43, 47, *SEC v. Mylan N.V.*, No. 1:19-CV-2904 (D.D.C. Sept. 27, 2019).

[13] In fact, if the Court believes the regulation is ambiguous, the SEC's reasonable, consistent, longstanding, and authoritative construction would be due controlling weight. *See Kisor v. Wilkie*, 588 U.S. 558, 574-80 (2019).

B. This Court Has Consistently Refused To Adopt Categorical Rules About When Classes Of Statements Can Be Materially Misleading.

Facebook's proposed categorical rule suffers from another fundamental defect as well. Whether a particular statement or omission is materially misleading is an "inherently fact-specific" question, ill-suited to categorical rules. *Basic Inc. v. Levinson*, 485 U.S. 224, 236 (1988); *see also* 37 Am. Jur. 2d *Fraud and Deceit* § 18 ("[F]raud . . . assumes so many different hues and forms that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat.") (citation omitted); 3 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 10.77 (8th ed. 2023) ("[M]ateriality does not lend itself to a bright-line test as it is a highly factual determination based on a wide spectrum of surrounding circumstances . . . ."). Recognizing this, the Court has repeatedly rebuffed requests to declare certain types of statements categorically incapable of materially misleading investors, a practice it should maintain.

In *Basic*, for example, the Court refused to adopt a bright-line rule that "preliminary merger discussions do not become material until 'agreement-in-principle' as to the price and structure of the transaction has been reached between the would-be merger partners." 485 U.S. at 233. "After much study, the Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula," the Court noted, and it held that courts "would do well to follow this advice." *Id*. at 236. "Any

approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Ibid*. Because investors may sometimes reasonably view preliminary merger discussions as material, and because those occasions turn on the facts of each case, the Court found "no valid justification" for the defendants' "artificial[]" proposed rule. *Ibid*.

More recently, the Court declined to adopt a categorical rule that failure to disclose adverse drug reports can be materially misleading only if the reports show a statistically significant link to a firm's product. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39-40 (2011). The Court noted that "[l]ike the defendant in *Basic*, Matrixx urges us to adopt a bright-line rule." *Id*. at 39. The Court demurred because, as "in *Basic*, Matrixx's categorical rule would artificially exclude information that would otherwise be considered significant to the trading decision of a reasonable investor." *Id*. at 40 (cleaned up). Instead, the question must be decided by "[a]pplying *Basic*'s 'total mix' standard" to the allegations in each case. *Id*. at 45.

The Court has likewise rejected a proposed bright line rule that statements of opinion cannot mislead as to historical facts, *Omnicare*, 575 U.S. at 187-89, and that statements of "reasons, opinions, or belief" cannot be misleading "when placed in a proxy solicitation incorporating statements of fact sufficient to enable readers to draw their own, independent conclusions," *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 (1991). In a similar vein, the Court refused in *Macquarie* to rule that Item 303

violations are categorically incapable of misleading investors. The Court held that although "pure omissions" of information required by the rule are not sufficient to state a claim under Section 10(b), "private parties remain free to bring claims based on Item 303 violations that create misleading half-truths." 601 U.S. at 266.

The Court should reject Facebook's proposed categorical rule as well. Facebook has not shown Item 105 risk statements can *never* mislead reasonable investors about the occurrence of adverse events in the past, without regard to anything else about the statements' content or context.

To be clear, respondents do not propose the opposite categorical rule—*i.e.*, that treating an adverse event as a purely hypothetical risk *always* leads a reasonable investor to infer that the risk has not yet materialized. But circuits are correct in finding that such statements *can* be misleading, depending on the facts, and in often declining to dismiss such claims at the motion-to-dismiss stage, where the allegations need only "'raise a reasonable expectation that discovery will reveal evidence' satisfying the" elements of the claim and to "'allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Matrixx*, 563 U.S. at 46 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), respectively).

C. Facebook's Proposed Rule Would Do Violence To The Statutory Scheme.

Facebook's request for a categorical safe harbor for risk-factor statements also cannot be reconciled

with Congress's decision to provide a more limited and nuanced statutory safe harbor for certain forward-looking statements and to charge the SEC with responsibility for creating new ones.

The PSLRA creates a safe harbor for a defined set of forward-looking statements, such as "a projection of revenues," a "statement of the plans . . . for future operations," and a "statement of future economic performance." 15 U.S.C. § 78u-5(i); *see id*. § 78u-5(b). Congress included a detailed list of exclusions, *e.g.*, for those recently convicted of fraud and issuers of penny stocks. *Id*. § 78u-5(b). And it established certain prerequisites for complete immunity, such as proof that the forward-looking statement was "accompanied by meaningful cautionary statements." *Id*. § 78u-5(c)(1)(A)(i).

Facebook's proposal would do an end-run around those limitations by allowing companies to claim the same protection without satisfying the statutory requirements in cases like this. For example, Facebook would claim safe-harbor protection for its risk-factor statements even though they fall outside the statutory definition of "forward-looking statements." *See* 15 U.S.C. § 78u-5(i). And it would have a complete defense regardless of whether, as the Ninth Circuit found, it failed to provide the "meaningful cautionary statements" the PSLRA requires for such immunity. *See* Pet. App. 28a.

If a special Item 105 safe harbor is warranted, Congress has directed that the SEC, not the courts, create it. *See* 15 U.S.C. § 78u-5(g). That process would allow the SEC to decide whether any safe harbor for risk-factor statements was needed and adopt appropriate prerequisites and limitations. *E.g.*,

17 C.F.R. § 240.3b-6(a) (SEC-developed safe harbor excluding from protection any statement that was "made or reaffirmed without a reasonable basis or was disclosed other than in good faith").

Facebook contends that unless risk-factor statements are declared categorically incapable of misleading investors about the past, "most forward-looking risk disclosures" will be ineligible for the safe-harbor defense. Br. 38. But accepting Facebook's rule doesn't preserve that eligibility; it makes eligibility irrelevant and the statutory defense unnecessary. And in all events, Facebook does not contest the settled rule that forward-looking statements only qualify for immunity if accompanied by meaningful cautionary language that is not itself misleading. *See, e.g.*, *Slayton v. Am. Express Co.*, 604 F.3d 758, 770 & n.5 (2d Cir. 2010) (citing, *e.g.*, H.R. Rep. No. 104-369, at 44 (1995) (Conf. Rep.) ("A cautionary statement that misstates historical facts is not covered by the Safe harbor . . . ."). If statements treating materialized risks as merely hypothetical are misleading, then there is nothing concerning about denying them safe-harbor immunity.

D. Facebook's Policy Arguments Are Misdirected And Have No Merit.

Facebook complains that the long-accepted majority view creates incentives for over-disclosure and subjects issuers to unwarranted litigation. Br. 32-38. "These concerns are more appropriately addressed to Congress." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014); *see also Slack Techs., LLC v. Pirani*, 598 U.S. 759, 769 (2023); *Omnicare*, 575 U.S. at 193. If Facebook's statements

are misleading, this Court cannot declare them truthful on policy grounds. Regardless, Facebook's policy objections have no merit.

1. Facebook says a safe harbor for risk-disclosure statements is needed to prevent companies from over-disclosing information that is not useful to investors. Br. 32. This speculation is unfounded. The rule Facebook opposes has been the law in many circuits for many years, yet Facebook does not point to any evidence that it has caused excessive disclosure of adverse events. On the contrary, if there is a problem with risk disclosures, it is their "lengthy and generic nature," not too much detail about the occurrence of actual, material events. *See* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,742 (Oct. 8, 2020); 17 C.F.R. § 229.105(a).

Moreover, Facebook's over-disclosure objection does not turn on anything unique in Item 105. Requiring issuers to tell the whole truth in complying with SEC disclosure rules inevitably raises the specter of over-disclosure. But that has never been thought to be a reason to create exceptions to the prohibition against half-truths. *See Macquarie*, 601 U.S. at 266. Facebook points out that this Court noted the potential harm of over-disclosure in *Basic*. Br. 34. But it acknowledges that the Court responded to that concern by "tak[ing] care 'not to set too low a standard of materiality.'" *Ibid*. (quoting *Basic*, 485 U.S. at 231). The Court rejected the notion that concerns about over-disclosure should lead it to adopt categorical exceptions to the general prohibition against material omissions. "Disclosure, and not paternalistic withholding of accurate information, is

the policy chosen and expressed by Congress." *Basic*, 485 U.S. at 234.

Under established materiality standards, companies are not required to disclose "every instance of the triggering event having occurred in the past, without regard to the usefulness of that information to investors." Br. 32. Issuers need not disclose events that are immaterial because their effect on the business is minor, because they happened too long ago to matter, or because the public already knows about them. Nor must companies disclose every occurrence of an acknowledged risk to avoid the misleading impression that the risk is merely a hypothetical prospect. As the D.C. Circuit has observed, the "enormous significance" of the adverse event to investors is an important consideration in this context. *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008).

If more is needed, Congress has charged the SEC with balancing the benefits of disclosure against the risks and harms of potential over-disclosure. *See* 15 U.S.C. § 78m(a). Facebook acknowledges that the SEC has been attentive to that responsibility. Br. 32 & n.3; *see also, e.g.*, SEC Cybersecurity Guidance, *supra*, at 8,168-69 (guidance on when cybersecurity events are material). Here, the SEC has reasonably concluded that the benefits of wholly truthful Item 105 disclosures are worth the costs. Markets can evaluate and process even significant amounts of information, assisted by well-resourced and sophisticated market analysts and journalists. While having to wade through immaterial information is undesirable, if that is the cost of obtaining important, highly material insight into a company's true value—

such as the occurrence of an event that will reduce the company's market capitalization by tens of billions of dollars—it is a price investors are willing to pay.

2. Facebook also repeats the securities defense bar's common refrain that a narrow reading of the statute is required to protect companies from meritless suits alleging "fraud by hindsight." Br. 35. But its proposed rule is not tailored to that objection—it would bar SEC enforcement actions as well as private litigation, including the Commission's suit against Facebook over these very statements.

Moreover, as discussed, the materiality requirement provides companies substantial protection against unwarranted private actions. Plus, as this Court has noted many times, Congress has given considerable attention to concerns over abusive private litigation and enacted what it concluded were sufficient reforms. *See, e.g.*, *Halliburton*, 573 U.S. at 276-77 (Congress has "sought to combat perceived abuses in securities litigation with heightened pleading requirements, limits on damages and attorney's fees, a 'safe harbor' for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss"); *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 475-76 (2013); *Tellabs Inc. v. Makor Issues & Rts.*, 513 U.S. 308, 320-21 (2007).

Applying those protections and the inherent limits of the materialization-of-the-risk theory, courts routinely "weed out meritless claims" in risk-factor cases "as early as possible." Br. 37; *see, e.g.*, *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1257

(10th Cir. 2022); *In re Marriott Int'l, Inc.,* 31 F.4th 898, 904 (4th Cir. 2022); *Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138-39 (1st Cir. 2021); *Williams v. Globus Medical, Inc.*, 869 F.3d 235, 243 (3d Cir. 2017); *Toussaint v. Care.com Inc.*, 490 F. Supp. 3d 341, 350-51 (D. Mass. 2020).

Facebook argues it "makes little sense that Meta would be at greater risk of private liability from complying with Item 105 than from not disclosing the risk at all." Br. 37. But that, again, is a complaint about disclosure rules in general, not just Item 105—complying with *any* disclosure rule puts a company in jeopardy if it fails to tell the whole truth. This Court nonetheless reaffirmed in *Macquarie* that the obligation to tell the whole truth is part and parcel of every disclosure rule, enforceable by those misled and injured by its breach. *See* 601 U.S. at 266.

3. Even if the Court shared some of Facebook's policy concerns, Facebook's proposed solution is far worse than any perceived problem. Facebook's rule does not simply deprive investors of material information—it provides a license to *intentionally* mislead investors about the occurrence of hugely material events by describing those events as purely hypothetical prospects. Indeed, under Facebook's rule, a company aware of a recent adverse event that will diminish its stock price can try to forfend that price drop by adding a risk disclosure that treats the event as a purely hypothetical possibility, suggesting no such event has happened. It might then seek to defend itself from allegations of fraud once the truth becomes known by pointing to the disclosure as warning investors that the adverse event was a possibility. In that way, Facebook's rule would

subvert the purpose and value of Item 105 disclosures by giving companies an incentive to stuff their annual reports with boilerplate, generic warnings that reveal little about the company's actual business and to cover up events that could give rise to corporate scandals, as Facebook did here.

III. The Court Should Reject Facebook's "Virtual Certainty" Rule As Well.

Facebook ends its brief by claiming that it would "prevail even under the mistaken view that a risk disclosure can be misleading when the company knows that the warned-of risk is almost certain to materialize." Br. 39. Just what Facebook is asking the Court to do with this argument is unclear. Facebook insists this rule is wrong. *Ibid*. And because it thinks the rule is wrong, Facebook makes no effort to defend it other than to say it is better than the rule it (wrongly) attributes to the Ninth Circuit. *Ibid.* At the same time, respondents have made clear that they agree that the rule Facebook attributes to these circuits is incorrect. BIO 21-22. This Court does not ordinarily decide the correctness of a supposed consensus circuit rule when no one in the case defends it.

It is also unclear what Facebook thinks the rule means. Here, the Ninth Circuit held that the "warned-of risk," Br. 39, included the possibility of a misappropriation or misuse of user data, *see* Pet. App. 24a; J.A. 440. That possibility was not only "virtually certain" to materialize—it already *had*. Facebook does not ask this Court to revisit that fact-bound ruling, and there's no reason it should. Facebook instead appears to claim that it would

prevail under the "virtually certain" rule because it did not know that the warned-of misappropriation would cause follow-on "business harm." It previously argued that this was a defense because of how its risk-factor statements were worded—it said that the disclosures warned only of business harm, not misappropriation. Pet. App. 189a. But the Ninth Circuit rejected that reading, *id.* 24a, and Facebook does not ask this Court to review that fact-bound determination either.

Instead, Facebook has seemingly pivoted to insisting that even if it had independently warned of the risk of misappropriation or misuse of user data, and even if that risk had already materialized, most circuits would hold that Facebook was entitled to continue to mislead investors about the occurrence of that event unless Facebook knew the misappropriation was "virtually certain" to cause follow-on "business harm." Br. 41. No circuit applies that rule. *See* BIO 14-16. The "virtual certainty" language comes from cases in which a company's statement was misleading because, even though the warned-of risk had not yet materialized, it was so likely to happen that treating it as a mere possibility would be misleading. *See, e.g.*, *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1255 (10th Cir. 2022); *Set Capital LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 85 (2d Cir. 2021). But those same cases recognize that "risk factors have been found materially misleading" when "the risk had materialized *or* was virtually certain to occur." *Pluralsight*, 45 F.4th at 1255 (emphasis added); *see, e.g.*, *Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 137-38 (1st Cir. 2021) (a "company must *also* disclose a relevant risk

if that risk had *already* begun to materialize") (emphasis added); *Set Capital*, 996 F.3d at 85 & n.92 (similar).

In any event, the rule Facebook attributes to various circuits has no merit. And even if it did, there would be no point in remanding this case to the Ninth Circuit to apply it because that court has already rejected the only reason Facebook gives about why "business harm" was not virtually certain to follow the misappropriation and misuse of tens of millions of its users' private data.

A. Facebook's "Virtually Certain" Rule Is Meritless.

Facebook's proposed rule—that a company can portray the occurrence of an adverse event as a merely hypothetical prospect unless it knows the event will cause follow-on "business harm"—could make sense only if one of two things were true. First, it might make sense if reasonable investors did not view a warned-of event like a data breach as *material* unless it is "virtually certain" to cause follow-on "business harm." Alternatively, even if an event like a data breach *is* material under *Basic*, the rule might apply if there is some legal reason why a company can mislead investors into thinking that the materially adverse event has not yet occurred until the event is virtually certain to cause something courts would consider "business harm." Facebook doesn't say which rationale it thinks justifies the rule or if there is some other possibility (again, Facebook does not defend the rule). But neither has any merit.

1. The first theory is plainly wrong. The occurrence of adverse events can be material to

investors even if the events are not "virtually certain" to cause whatever it is that Facebook believes "business harm" entails.

For example, in *Basic*, this Court rejected the argument that a company could falsely deny engaging in merger discussions until it was virtually certain that they would produce an agreement. The Court acknowledged that the existence of preliminary merger talks only made the occurrence of what investors cared about (a merger) "contingent or speculative in nature." 485 U.S. at 232. But it nonetheless recognized that the merger talks could be material to investors precisely because they raised the prospect of business harm (or benefit) if the negotiations were successful. *Id*. at 236, 238. The Court did not require that the company know that the merger or its consequent effects were virtually certain to occur.

The same reasoning applies here—a major misappropriation of user data is material to investors because it poses a significant risk to the company's reputation, user engagement, revenues, and, ultimately, the value of the company's stock. *See, e.g.*, J.A. 439-40. That is true even if those harms are "contingent or speculative." *Basic*, 485 U.S. at 238. And like the business consequences of a merger, the follow-on business harm from a mass misappropriation of user data need not be "virtually certain" for the event to be material. *See* SEC Cybersecurity Guidance, *supra*, at 8,168-69.

2. The second possibility—that the law permits a company to mislead investors about the occurrence of even a *material* adverse event unless that event is

"virtually certain" to cause follow-on "business harm"—is even less plausible.

Rule 10b-5, like the common law and every anti-fraud law of which respondents are aware, treats misleading investors about material facts to be actionable deception. *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011). There is no additional requirement that the deception be "virtually certain" to cause something that qualifies as "business harm." That phrase has no meaning in the law. It is not used (much less defined) in the statute, the regulations, or the common law. Adopting a "business harm" element on top of what materiality already requires would force courts to develop an entirely new body of law, unguided by anything in the statute, regulations, case law, or tradition.

And it would not be easy. For example, Facebook never explains why the misappropriation of tens of millions of its users' data—the lifeblood of its business model—is not itself a form of "business harm." It seems to admit that reputational harm counts, even though it harms revenues and profits only indirectly and over time. *See, e.g.*, Br. 16. Why is the misappropriation that causes the reputational harm any different? Even if Facebook had a response, a court evaluating it would have nowhere to turn for guidance in deciding who was right.

B. There Is No Point In Remanding To Apply Facebook's "Virtually Certain" Rule.

Even if Facebook's "virtually certain" rule were the law, there would be no point in remanding to the Ninth Circuit to apply it.

The only reason Facebook gives for allegedly believing that business harm was not virtually certain to follow from the misappropriation and misuse of its users' private data was that "Cambridge Analytica's use of the data in support of the Cruz campaign had been publicly known since late 2015, and Meta experienced no drop in stock price or other material business harm after the news broke." Br. 41. But the Ninth Circuit considered and rejected that disputed factual claim. Pet. App. 26a. Facebook does not acknowledge, much less rebut, the panel's reasoning and should not be allowed to attempt to do so for the first time in its reply brief.

In any event, the Ninth Circuit rightly rejected Facebook's fanciful story. A defendant cannot escape liability for its misrepresentations under this kind of truth-on-the-market theory unless the truth was "transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression." *Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996) (citation omitted); *see also Basic*, 485 U.S. at 249 (truth must have "credibly entered the market").

Here, all the market had in 2015 were allegations of misappropriation that were denied by those directly involved. The researcher who collected the data insisted he obtained it from only a few thousand

users, and both he and the Cruz campaign independently insisted they did so with permission. Rather than confirm the allegations, Facebook said it would investigate them. Facebook cannot explain how *it* could have viewed the allegations as too uncertain to confirm, yet the public somehow would have known that they were true. Moreover, reasonable investors would expect that Facebook would have taken the "swift action" it promised had it confirmed the allegations. Its years-long silence could only reflect that Facebook had found no material misappropriation or misuse. And Facebook solidified that impression by misleading reporters that "no misconduct had been discovered." Pet. App. 26a.

Facebook also has no answer to the obvious question of why the market reacted so violently to Facebook's 2018 acknowledgment of the misappropriation if the public had known about it since 2015 and didn't care. *Cf. In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 613 (7th Cir. 2020) (defendant's claim that the market already knew the truth "is difficult for us to square with the 10 percent price drop" that followed a later disclosure of the allegedly already-known truth). Facebook suggests that while the public was indifferent to the initial misappropriation, it was furious to find out that the data had been used a second time. Br. 36. That facially implausible theory is belied by the contemporaneous evidence cited in the Complaint, which shows the public was reacting to the newly disclosed misappropriation. *See, e.g.*, Pet. App.

14a-15a; J.A. 204-08, 368-74.[14] The district court was not free to resolve this factual dispute on the pleadings. *See, e.g.*, *Ganino v. Citizens Utils. Co*., 228 F.3d 154, 167 (2d Cir. 2000) ("The truth-on-the market defense is intensely fact-specific and is rarely an appropriate basis for dismiss[al].").

[14] Facebook disputes the Ninth Circuit's conclusion that it knew the misappropriation would cause business harm, claiming that the court "seemed" to be talking about Facebook's knowledge not only of the harm that would arise from the initial misuse but also from its subsequent re-use. Br. 41 n.4. But everyone agrees that Facebook's knowledge has nothing to do with falsity, the only issue before the Court. *See id*. 40. And even if the Ninth Circuit concluded that Facebook knew that both the misappropriation and the re-use would harm the company, that hardly shows that Facebook did not know that the misappropriation would be harmful. Nor does Facebook explain how it could have failed to realize that the misappropriation of millions of users' data would harm the company, aside from its rejected and meritless truth-on-the-market defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Kevin K. Russell
Counsel of Record
Daniel H. Woofter
GOLDSTEIN, RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue NW
Suite 200
Washington, DC 20006
(202) 240-8433
kr@goldsteinrussell.com

Jason C. Davis
ROBBINS GELLER RUDMAN & DOWD LLP
One Montgomery Street
Suite 1800
San Francisco, CA 94104

Salvatore J. Graziano
Jeremy P. Robinson
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020

Luke O. Brooks
Joseph D. Daley
Darryl J. Alvarado
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

September 24, 2024