No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., *et al.*,

Petitioners,

—v.—

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,

Respondents.

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

BRIEF FOR THE RESPONDENTS

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue NW,
Washington, DC 20015

KEVIN L. MURPHY
GRAYDON HEAD
& RITCHEY LLP
2400 Chamber Center Drive,
Suite 300
Fort Mitchell, Kentucky 41017

DARREN J. ROBBINS
ERIC ALAN ISAACSON
(*Counsel of Record*)
erici@rgrdlaw.com
HENRY ROSEN
JOSEPH D. DALEY
STEVEN F. HUBACHEK
AMANDA M. FRAME
SUSANNAH R. CONN
DAVID J. HARRIS, JR.
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway,
Suite 1900
San Diego, California 92101
(619) 231-1058

QUESTION PRESENTED

Whether an objectively incorrect statement of opinion is actionable under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, only if it was subjectively disbelieved by the defendant.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. ("Omnicare"), Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, the estate of the late Edward L. Hutton, and Sandra E. Laney.

Respondents are the Laborers District Council Construction Industry Pension Fund and the Cement Masons Local 526 Combined Funds.

In addition to the above-listed parties, Indiana State District Council of Laborers and Hod Carriers Pension Fund was originally a named plaintiff in the district court.

Pursuant to Supreme Court Rule 29.6, Respondents disclose that neither the Laborers District Council Construction Industry Pension Fund nor the Cement Masons Local 526 Combined Funds has a parent corporation, issues stock, or is owned or controlled by a publicly traded corporation.

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STATEMENT OF THE CASE

Petitioner Omnicare is the nation's largest provider of pharmaceutical-care services for elderly residents of long-term care facilities, serving more than 1.4 million patients nationwide. J.A. 180-81. From at least 2000, and until its scheme was revealed to state and federal authorities, Omnicare accepted unlawful kickbacks from drug companies for persuading doctors to switch patients to the companies' products. Omnicare also paid kickbacks itself in order to continue providing pharmacy services to certain nursing homes.

While the scheme was ongoing, Omnicare executed a December 2005 stock offering to raise more than three-quarters of a billion dollars from investors. In its registration statement, required to be filed with the Securities and Exchange Commission (SEC), Omnicare informed investors that accepting payments for persuading doctors to switch patients to a company's medications was illegal. It then insisted that it believed that its own relationships with drug companies complied with all applicable state and federal laws. Those statements naturally conveyed to potential purchasers of the shares the materially false and misleading message that Omnicare was not accepting payments in exchange for promoting particular medications.

The district court accepted petitioners' argument that their statements regarding legal compliance amounted to expressions of opinion that could be actionably false under Section 11 of the Securities Act of 1933 (the "1933 Act") only if petitioners did not subjectively believe their own claims. The Sixth Circuit rejected that categorical position and remanded for further proceedings.

I. Statutory Background

This case concerns liability under Section 11 of the 1933 Act, an integral part of a federal regulatory scheme enacted in the wake of the abuses of the 1920s and the stock-market crash of 1929. 15 U.S.C. § 77a, *et seq*. "The essential purpose of the statute is to protect investors by requiring publication of certain information concerning securities before offered for sale." *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40 (1941); *accord, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571-72 (1995); *Pinter v. Dahl*, 486 U.S. 622, 638 (1988); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 & n.10 (1953). Its provisions thus are specifically "designed to provide investors with full disclosure of material information concerning public offerings of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

A securities offering under the 1933 Act is a uniquely rigorous undertaking. The statute forbids issuance of securities in interstate commerce unless the issuer has registered its offering with the SEC. 15 U.S.C. § 77e. The registration statement is required to contain specified information material to investors. *See* 15 U.S.C. §§ 77g, 77aa. It must also at a minimum include certain opinions, including the opinion of an independent or certified accountant and the "opinions of counsel in respect to the legality of the issue." 15 U.S.C. §§ 77aa(25)-(27), 77aa(29); *see United States v. Arthur Young & Co.*, 465 U.S. 805, 810-11 & n.5, 818-19 nn.13-14 (1984). An issuer may, of course, choose to include additional opinions (either its own or of consenting professionals) that will be material to investors deciding whether to purchase its securities.

The registration statement is vetted by underwriters, and it must be personally "signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors." 15 U.S.C. § 77f(a)(1). It also must be accompanied by formal written consent of any professional identified as having prepared or certified any portion of it, or any "report or valuation" that it includes. 15 U.S.C. § 77g(a)(1).

The statute leaves compliance neither to chance nor to good intentions – nor indeed to implication. Section 11 creates an express cause of action for investors who purchased a security issued pursuant to any registration statement that, when it

> became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .

15 U.S.C. § 77k(a). The cause of action runs against "every person who signed the registration statement," as well as the issuer's directors, underwriters, and "every accountant, engineer, or appraiser" or other professional "who has with his consent been named as having prepared any part of the registration statement, or as having prepared any report or valuation which is used in connection with the registration statement." *Id.* § 77k(a)(1)-(5).

Under Section 11, "[l]iability against the issuer of a security is virtually absolute." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *see Hochfelder*, 425 U.S. at 208. The plaintiff need not prove that the false or misleading statement was intended to deceive or that the defendant otherwise acted with a bad purpose. *Huddleston*, 459 U.S. 382; *Hochfelder*, 425 U.S. at 208. Instead, the plaintiff "need only show a material misstatement or omission to establish his *prima facie* case." *Huddleston*, 459 U.S. at 382.

But while "Section 11 places a relatively minimal burden on a plaintiff," it also is quite "limited in scope," *id.*, with liability explicitly bound and carefully tempered in several respects.

First, Section 11 applies only to false or misleading statements and omissions in registration statements, which are documents containing "'the basic information by which the public is solicited.'" *Gustafson*, 513 U.S. at 581 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess., at 9 (1933)).

Second, Section 11 provides an affirmative due-diligence defense to every defendant *other* than the issuer itself. 15 U.S.C. § 77k(b)(3). The statute precludes liability when a non-issuer defendant proves that

> he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .

Id. § 77k(b)(3); *see Hochfelder*, 425 U.S. at 208 & n.26.[1] In determining "what constitutes reasonable

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[1] The precise wording of the defense varies depending on the type of defendant, and some defendants are offered other

investigation and reasonable ground for belief," Congress adopted the common-law standard applied to fiduciaries, requiring that the defendant act with the reasonableness "required of a prudent man in the management of his own property." 15 U.S.C. § 77k(c).[2]

"In effect," the statute subjects these non-issuers such as directors, underwriters, and auditors, to "a negligence standard," *Hochfelder*, 425 U.S. at 208, deliberately "'throw[ing] upon originators of securities a duty of competence as well as innocence.'" *Gustafson*, 513 U.S. at 581 (quoting H.R. Rep. No. 85, at 9).

Third, the statute provides limited remedies, akin to rescission, by sharply restricting damages to the difference between *the lower* of (1) the price paid or the offering price and (2) the value at the time of suit or the price at which the security was sold either prior to suit or after suit but prior to judgment (if this produces a smaller recovery). *See* 15 U.S.C. § 77k(e). Defendants may reduce the quasi-restitutionary award even further by showing "that any portion or

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defenses as well. *See* 15 U.S.C. § 77k(b); 9 Louis Loss, et al., *Securities Regulation* 319-24 (4th ed. 2013).

[2] As originally enacted, Section 11(c) provided that, "the standard of reasonableness shall be that required of a person occupying a fiduciary relationship." Pub. L. No. 73-22, §11(c), 48 Stat. 74, 83 (May 27, 1933). The Securities Exchange Act of 1934 (the "1934 Act") adopted the current text, which "removes possible uncertainties as to the standard of reasonableness by substituting for the [original] language the accepted common law definition of the duty of a fiduciary." H.R. Rep. No. 1838, 73d Cong., 2d Sess., at 41 (1934) (Conference Report); *see* 9 Loss, *Securities Regulation* at 321 & n.152.

all" of the investor's damages "represents other than the depreciation in value . . . resulting from" the misleading statements and omissions. 15 U.S.C. § 77k(e).

Section 11 thus contrasts starkly with Section 10(b) of the 1934 Act, which provides a catch-all proscription against "any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5(a), (b). Section 11's express (rather than implied) cause of action applies to a much narrower class of conduct and provides more limited remedies, but does not require proof of scienter (*i.e.*, the defendant's intent to deceive). *Huddleston*, 459 U.S. at 381-82; *Hochfelder*, 425 U.S. at 197; *see* 9 Loss, *Securities Regulation* at 393 ("Scienter, the hobgoblin of both common law deceit and Rule 10b-5, is foreign to the vocabulary of § 11 just as in the case of common law rescission . . . .").

II. Factual Background

A. The Scheme.

Between 2000 and 2005, while providing pharmacy services for nursing-home patients, Omnicare systematically reviewed patient records, looking for opportunities to switch patients to higher-profit medications. Complaint ¶¶ 27-45.[3] In some instances, the change was motivated by the difference in profit-margin for Omnicare between the drugs. For

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[3] The Complaint is reproduced at J.A. 177-275. The Complaint was entitled "Proposed Second Amended Complaint," but the district court and Sixth Circuit have referred to it as the "Third Amended Complaint." *See* J.A. 38 n.2. We simply refer to it in this brief as the "Complaint."

example, Omnicare instituted an initiative to move patients from the tablet to capsule form of a generic antacid in order to avoid Medicaid and Medicare price caps on the tablet form (there being no price limit for the capsules because, at the time, they were rarely prescribed and were generally reserved for intubated patients). Complaint ¶¶ 40-45.

In other instances, Omnicare switched drugs in order to obtain illegal kickbacks from particular drug manufacturers in return for promoting their products. From 1997 until 2004, for example, Omnicare maintained a contract with Johnson & Johnson under which the drug manufacturer paid Omnicare millions of dollars to increase its "market share" of Omnicare's purchases for particular classes of drugs. One such medication was Risperdal, an antipsychotic medication approved by the Food and Drug Administration (FDA) to treat schizophrenia. Johnson & Johnson promised that if Omnicare increased Risperdal's share of its pharmacies' antipsychotic prescriptions from less than thirty-five percent to more than forty-two percent, Johnson & Johnson would make payments to Omnicare equal to eleven percent of the purchase price. Complaint ¶¶ 55, 67.

As only one percent of the elderly population has schizophrenia, Omnicare agreed with Johnson & Johnson to promote the drug to treat Alzheimer's disease and dementia, which were much more common in the facilities' population, even though the FDA had specifically rejected the drug for this use. *Id.* ¶¶ 7, 69. That was illegal. *See* 21 U.S.C. § 260aaa-6 (prohibiting promotion of drugs for off-label uses). It was also unsafe – Risperdal had been shown to increase the risk of stroke and death in dementia patients. Complaint ¶ 68. Nonetheless, Omnicare created a "Patient Specific Therapeutic Interchange Protocol" to justify its use as an alternative to other medications for treating dementia and related behavioral problems. *Id.* ¶¶ 67, 69. Omnicare then searched its records to identify patients taking other antipsychotic medications and contacted their physicians to recommend a switch to Risperdal. Omnicare admonished its employees not to take "no" for an answer. In an internal memo, management emphasized: "It is imperative that each and every resident on a conventional antipsychotic be re-evaluated for appropriate conversion to an atypical antipsychotic," with Risperdal being the "'preferred' alternative." *Id.* ¶ 70. Omnicare also asked physicians to give its pharmacists blanket pre-authorization to substitute Risperdal for competitor drugs whenever a prescription for a competitor was received. *Id.* ¶ 71.

Omnicare and Johnson & Johnson initially characterized the payments as "rebates." But Johnson & Johnson became concerned that this label might trigger its obligations under the Medicaid Drug Rebate Statute, 28 U.S.C. § 1296r-8, to provide rebates to the Medicaid program as well. Complaint ¶ 59 & n.17. So the parties agreed that Johnson & Johnson would pay Omnicare the same amount of money, with the nicety that it would now say that the payment was instead in exchange for certain data that Omnicare was already providing Johnson & Johnson without charge, as well as for "consulting" and other unspecified "services." *Id.* ¶¶ 60, 61.

The agreements were extraordinarily lucrative for both Johnson & Johnson and Omnicare. One Johnson & Johnson memo estimated that the agreement annually generated over $100 million for Johnson & Johnson. *Id.* ¶ 74. Other memos noted that Omnicare's pharmacists' recommendations to switch to Johnson & Johnson drugs were accepted "more than 80% of the time," a result that one executive described as "good for us but scary on the power to do this." *Id.* ¶¶ 75, 76. For its part in promoting Johnson & Johnson products – and delivering results – Omnicare was paid millions of dollars. *Id.* ¶ 62.

And that was just from one company. Omnicare negotiated similar arrangements with several other major pharmaceutical companies, inflating its revenue and profits by tens of millions of dollars. *Id.* ¶¶ 79-89, 115. Indeed, the arrangements were so profitable that Omnicare offered its pharmacy services to facilities at below-market rates and sometimes even paid facilities illegal kickbacks to retain the right to provide the facilities' pharmacy services. *See id.* ¶¶ 8, 93, 118-26; J.A. 339-42 (Department of Justice Press Release).

Taxpayers ultimately footed much of the bill. Omnicare submitted false claims for reimbursement from Medicaid and Medicare programs – in direct violation of both the federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and its state-law analogs. Complaint ¶¶ 11, 92, 96-97; J.A. 289-90, 297 (Kammerer *qui tam* complaint ¶¶ 10, 39).

B. The 2005 Securities Issuance.

In the midst of its scheme, Omnicare completed a December 2005 public offering of 12.8 million shares of common stock, raising more than $765 million dollars. Complaint ¶ 23.

As required by federal securities law, Omnicare registered the offering with the SEC. In its registration statement,[4] Omnicare explained that it was required to "comply with federal and state laws which govern financial and other arrangements between healthcare providers," including laws prohibiting filing of false claims with Medicaid or Medicare[5] and the "the federal anti-kickback statute," which it explained generally prohibits receiving payments to induce medical services or products paid for by the federal government. J.A. 94-95.[6] The

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[4] The registration statement incorporated by reference a number of documents already on file with the SEC, including, as relevant here, its 2004 Annual Report on Form 10-K. *See* Petr. Br. 4; J.A. 189-90.

[5] *See* False Claims Act, 31 U.S.C. §§ 3729 *et seq.*

[6] The federal Anti-kickback Statute authorizes criminal fines and imprisonment for anyone who:

> (1) . . . knowingly and willfully solicits or receives any remuneration (including any *kickback*, bribe, or *rebate*) directly or indirectly, overtly or covertly, in cash or in kind –
>
> * * *
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program . . . .

42 U.S.C. § 1320a-7b(b)(1) (emphasis added). The statute also prohibits the payment of any such "remuneration (including any *kickback*, bribe, or *rebate*)." *Id.* § 1320a-7b(b)(2) (emphasis added). The statute offers a limited exception for "a discount or other reduction in price" but only "if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under a Federal health care program." *Id.* § 1320a-7b(b)(3)(A).

registration statement acknowledged that Omnicare's "contractual relationships with pharmaceutical manufacturers can include rebates and other forms of price concessions on the products we purchase." J.A. 136. But it did not disclose that the "rebates" were being given *in exchange* for recommending drugs to patients and doctors (which would obviously violate the federal statute) rather than as ordinary quantity discounts (which would not).

Quite to the contrary, while it acknowledged that the federal Centers for Medicare and Medicaid Services had expressed "significant concerns about the continued payment of *certain* rebates by pharmaceutical manufacturers to long-term care pharmacies," Omnicare assured investors that it was not engaged in any such unlawful conduct. J.A. 136-37; Complaint ¶ 46 (emphasis added). Specifically, the registration statement stated:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.

J.A. 137 (registration statement); Complaint ¶ 46. Elsewhere, the registration statement reiterated:

Omnicare's rebates fall outside this exception because, among other things, Omnicare did not pass them on and concealed them from state and federal healthcare programs. Complaint ¶ 31 & n.9, ¶ 114; J.A. 302-03, 306-08, 310-12 (Kammerer *qui tam* complaint 282-314 ¶¶ 46, 51, 53-55, 58-60); *see* 42 C.F.R. §1001.952(h)(5)(i)-(iii).

> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.

J.A. 95-96 (10-K); Complaint ¶ 46.

The registration statement also included claims of legal compliance that were not cast as opinions. For example, petitioners asserted that "branded drugs are dispensed and generic drugs are substituted in accordance with applicable state and federal laws." J.A. 75 (10-K); Complaint ¶ 27. Petitioners also claimed that their pharmacy consulting services "help clients comply with the federal and state regulations applicable to nursing homes," including those that "pertain to drug use." J.A. 76-77 (10-K); Complaint ¶ 91.

C. The Scheme Exposed.

Omnicare's scheme subsequently came to light, with its misconduct fleshed out in suits filed against it and against Johnson & Johnson by *qui tam* relators, some taken over and litigated by the federal government or certain states.[7]

Among other things, the U.S. Department of Justice (DOJ) accused Johnson & Johnson of "causing Omnicare . . . to submit false claims to Medicaid as a result of numerous kickbacks that J&J paid to Omnicare in violation of the federal anti-kickback statute." J.A. 343. The DOJ also charged Omnicare

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[7] Complaints from several of these actions are incorporated in respondents' complaint as exhibits, excerpts from which appear in the Joint Appendix. *See* J.A. 282-314, 315-36, 343-79, 454-76.

itself with violating the Anti-Kickback Statute and the False Claims Act. *See* J.A. 339-42, 345-46.

To resolve the government's charges of systematic misconduct, Omnicare eventually entered into multiple settlements with federal and state authorities. *See, e.g.*, J.A. 339-42, 419-32, 433-38. One settlement required Omnicare to "pay $98 million plus interest . . . to the federal government and the participating states and the District of Columbia," J.A. 172-73 (Omnicare press release), to resolve claims arising from Omnicare's conspiracy with Johnson & Johnson to market Risperdal to patients with dementia. *See id.*; J.A. 339-42 (DOJ press release). Another made Omnicare pay $49.5 million to the United States and 43 states to resolve Medicaid-fraud claims related to improper drug-switching. J.A. 433; R59-18 (Omnicare press release); R59-20 at 38-39 (2006 10-K). Yet another settlement resolved "billing issues under the Michigan Medicaid program" by requiring Omnicare to "pay approximately $49.0 million to the State of Michigan." R59-17 (Omnicare press release); R59-20 at 38-39 (2006 10-K); *see* J.A. 419-32.

III. Procedural History

1. In 2006, investors filed class-action complaints against Omnicare, raising scienter-based securities-fraud claims under Section 10(b) of the 1934 Act for allegedly false and misleading statements made during a class period that included Omnicare's December 2005 public offering. With the cases consolidated, an amended complaint raised securities-fraud claims under Section 10(b) of the 1934 Act, challenging, as relevant here, certain claims of legal compliance that Omnicare made to the news media. It also alleged Section 11 violations arising from

alleged accounting irregularities in the registration statement.

After the district court dismissed the complaint, the Sixth Circuit affirmed in part, holding that each of Omnicare's challenged statements regarding legal compliance was actionable under Section 10(b) only if made "with knowledge of its falsity." Pet. App. 61a. Because the "complaint fail[ed] specifically to allege that defendants knew their statements of 'legal compliance' were false when made," the court affirmed dismissal of respondents' legal-compliance Section 10(b) claim. Pet. App. 62a. However, the court of appeals reversed the dismissal of respondents' Section 11 accounting claims, explaining that the district court had wrongly believed that the plaintiffs were required to plead "loss causation" when, in fact, loss causation is an affirmative defense. Pet. App. 66a-67a.

2. On remand, respondents amended their complaint to drop the dismissed Section 10(b) claims and strengthen their Section 11 claims. The new complaint now asserted liability under Section 11 not only for alleged accounting violations but also for the registration statement's representations regarding legal compliance. *See* Complaint ¶¶ 46-92, 178.

The district court again dismissed. Pointing to the Sixth Circuit's dismissal of respondents' Section 10(b) legal-compliance claims, the court held that Section 11 similarly required the plaintiffs to plead that Omnicare disbelieved its claims of lawful conduct. Pet. App. 38a.

b. The Sixth Circuit again reversed, rejecting the district court's and petitioners' categorical claim that statements cast as opinions can be actionably false only if subjectively disbelieved.

The court explained that it had affirmed the dismissal of the Section 10(b) claims relating to Omnicare's legal-compliance statements to the media because Section 10(b) requires scienter, not because it concluded that a statement of opinion can be misleading only if disbelieved. J.A. 45-47. And, the court observed, Section 11 does not require scienter, but instead imposes strict prima facie liability. J.A. 43, 50.

The court also rejected Omnicare's assertion that this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), requires objectively misleading opinions to be subjectively disbelieved in order to support liability under Section 11. J.A. 48-51.

Having rejected Omnicare's contention that a statement of opinion is actionable under Section 11 only if subjectively disbelieved by the defendant, the court did not go any further to decide what else a plaintiff may or may not need to prove to establish a Section 11 violation arising from a statement of opinion. Instead, the court moved on to consider and reject the only other grounds that Omnicare offered for affirming dismissal of the "legal compliance" claims: (1) its assertion that the complaint failed to satisfy the particularity requirement of Rule 9(b) due to its "reliance on *qui tam* complaints and confidential sources," J.A. 51-53; and (2) its claim that "the affirmative defense of loss causation is evident on the face of the complaint." J.A. 55-56.[8]

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[8] The court affirmed the dismissal of respondents' accounting-related allegations, applying the particularity requirement of Federal Rule of Civil Procedure 9(b). J.A. 53-55. Whether Rule 9(b) applies to Section 11 claims is the subject of a circuit conflict and is not before this Court. *See Wagner v. First Horizon*

Judge Gwin concurred, writing separately to emphasize that "the district court retains the statutory and inherent discretion to resurrect previously dismissed claims and previously dismissed parties should later discovered evidence warrant it." *Id.* at 57.

3. Omnicare petitioned for rehearing en banc, but no member of the court requested a vote on the petition. Pet. App. 2a. This Court subsequently granted certiorari. 134 S. Ct. 1490 (2014).

SUMMARY OF ARGUMENT

I. Petitioners' assertion that statements of opinion can be false or misleading only if subjectively disbelieved defies tradition, common sense, and the unique liability regime Congress established in Section 11 for the special context of registration statements.

A statement of opinion can be false or misleading in at least three ways. First, as petitioners emphasize, the speaker may not actually hold the asserted view. Second, regardless of the speaker's subjective beliefs, a statement of opinion may mislead the listener to a false conclusion about the subject matter of the opinion. For example, saying "we believe we have a working prototype" naturally induces investors to think that the company has a working prototype. If it does not, then investors will be misled, even if the speaker genuinely believed what he said. Third, a statement of opinion in a registration statement may reasonably be understood to imply that the speaker had a reasonable basis for the opinion, and that it

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Pharm. Corp., 464 F.3d 1273, 1277 (11th Cir. 2006) (noting conflict).

disclosed any facts tending to seriously contradict his view, which implication would be false if the speaker has no such basis for his opinion.

Subjecting defendants to Section 11 claims for such incorrect or baseless opinions fits the statute's purpose and design. Section 11 applies only to the special context of securities-offering registration statements, which must be prepared with particular care and with the expectation that investors will rely heavily on their content. The statute's express liability provisions were designed specifically to relieve plaintiffs of the burden of proving the defendant's knowledge of falsity and to shift to the issuer the risk that a registration statement is materially inaccurate or misleading.

II. Petitioners wrongly insist that this Court has already accepted their position, plucking language out of *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). But the Court had no occasion to address the question presented here, even in dicta, having assumed that the statute at issue in that case, Section 14(a), required, and that the jury had found, intent to deceive. The Court *did* decide that apart from proving subjective disbelief, 1934 Act Section 14(a) plaintiffs must prove that a statement of opinion "expressly or impliedly asserted something false or misleading about its subject matter," beyond the fact that it was subjectively disbelieved. *Virginia Bankshares*, 501 U.S. at 1096. In doing so the Court necessarily rejected petitioners' premise here, that the only fact asserted by a statement of opinion is the fact that the speaker holds the purported belief.

Petitioners' complaints about subjecting defendants to liability "by hindsight" ignores the fact that Congress has provided every defendant except issuers an affirmative defense barring liability so long as the defendant acted in good faith and with due diligence. All defendants, including issuers, are protected from liability for many forward-looking statements and opinions by a special provision specifically designed to address concerns that petitioners raise.

To be sure, some statements of opinion involve exercises of judgment. But that does not mean that such opinions can never be proven false or misleading unless disbelieved. A company that claims to believe its conduct is lawful would plainly mislead investors if the company was operating as a Ponzi scheme, obtaining contracts through bribery of government officials, or lying to evade taxes. When the question is closer, issuers can avoid misleading investors by disclosing the basis of their opinion – here, for example, Omnicare could have disclosed that it was accepting payments to recommend particular drugs to its patients and explained why it thought this was lawful.

For that reason, rejecting petitioners' position will encourage *more* disclosure, even while ensuring that more of the information conveyed to investors in registration statements is reliable.

III. Petitioners' rule is also irreconcilable with the text and purposes of Section 11, and federal securities laws more generally.

Section 11 expressly puts the burden of proving the defendant's state of mind on defendants. On petitioners' view, however, the plaintiff bears the burden of proving subjective disbelief so long as the defendants preface contestable assertions in their registration statement with "we believe." At the same time, the statute's affirmative defense is available only if the defendant acted with due diligence in forming his beliefs; on petitioners' view, no such diligence is required – so long as an opinion is truly held, this genuine subjective belief is an absolute defense.

Petitioners' position would also render pointless the detailed exemptions and qualifications Congress placed on the statutory safe harbor for certain "forward-looking statements" expressing opinions about the future. Congress excluded from the safe harbor certain kinds of statements (*e.g.*, those in financial statements) from certain kinds of defendants (*e.g.*, those recently convicted of securities fraud). But those specifically excluded from the statutory safe harbor would nonetheless find shelter, on petitioners' theory, which would protect *all* genuinely held opinions, forward-looking and otherwise.

The harm of petitioners' rule would not be limited to private damages suits under Section 11. It also would prevent the SEC from using its administrative powers to require changes to grossly misleading statements of opinion in registration statements, so long as the issuer genuinely held its irresponsible beliefs. It would also prevent the Commission from seeking injunctive relief under other securities-law provisions that provide for liability without scienter, as well as under those that prohibit reckless conduct, since even reckless opinions can be genuinely held.

ARGUMENT

Petitioners issued a registration statement that assured potential investors, from whom they were soliciting hundreds of millions of dollars, that they believed Omnicare's contracts with drug companies were lawful. At no point in this litigation have they tried to show that this opinion had any merit. It did not. Although some legal questions are unclear, there is no reasonable dispute that the kickbacks Omnicare was receiving were illegal. Nor do petitioners contest that the lawfulness of the millions they received in kickbacks was material to investors. They insist instead that investors have no right to complain that the registration statement was misleading, no matter how baseless or irresponsible the opinions it expressed, so long as petitioners actually believed their own meritless claims. *See* Petr. Br. 18-19 n.4.

Specifically, petitioners assert, as a categorical matter, that a statement of opinion can never be false or misleading under any provision of the federal securities laws – including but not limited to Section 11 – unless the speaker subjectively disbelieves what he is saying.[9] Under that view, so long as a defendant prefaces a false or misleading statement with the words "we believe," it avoids the strict liability Congress chose to impose under Section 11.

Petitioners' argument is as wrong as it is broad: as a matter of text, logic, and legal tradition, a genuinely held statement of opinion can be misleading with respect to (1) its subject matter and/or (2) its implication that the speaker has a reasonable basis for his views, which is not seriously undermined by undisclosed facts. Applying that traditional understanding is particularly appropriate in the context of Section 11's protection against misleading registration statements, which are prepared with

[9] *See United States v. Wells*, 519 U.S. 482, 505 & nn.8-9 (1997) (Stevens, J., dissenting) (noting that "at least 100 federal false statement statutes may be found in the United States Code" and collecting citations).

great deliberation and to be relied upon by investors. As a consequence, a Section 11 plaintiff need only show that an issuer's opinion was objectively wrong at the time it was made or, at most, that it lacked a reasonable basis.

I. A Statement Of Opinion May Be Misleading, And Thus Actionable Under Section 11, If It Is Disbelieved, Objectively Wrong, Or Lacks A Reasonable Basis.

A. Petitioners' Argument Is Founded On Two False Premises.

Petitioners' argument is erected on the unsound foundation of two false premises: that Section 11's text always requires an "untrue statement of material fact," and that "[t]he only 'fact' conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief." Petr. Br. 11. From this they say it "naturally follows that such a statement can be 'untrue' as to a 'material fact' only if the speaker did not actually hold the stated belief." *Id*. at 11, 14. Both premises of the syllogism are incorrect.

First, petitioners ignore that Section 11's text prohibits not only "untrue," but also "misleading," statements and omissions. *See* 15 U.S.C. § 77k(a) (imposing liability if registration statement "contained an *untrue* statement of a material fact, *or* omitted to state a material fact . . . necessary to make the statements therein not *misleading*") (emphasis added).

Second, a statement of opinion can *mislead* investors not only about the psychological state of the speaker, but also about the subject matter of the opinion and its basis. Indeed, this Court made that clear in the principal case upon which petitioners rely. In *Virginia Bankshares*, corporate directors asserted in a proxy solicitation that they had approved a merger because they believed that the price offered for minority shareholders' stock was "high" and "fair." 501 U.S. at 1088. In a unanimous decision, this Court explained that such statements, while undoubtedly "statements of reasons or belief," were nonetheless "factual in *two* senses." *Id*. at 1092 (emphasis added). First, they were factual in the sense petitioners emphasize: they were "statements that the directors do act for the reasons given or hold the belief stated." *Id*. Second, they were factual in the sense petitioners claim is impossible: as "statements about the subject matter of the reason or belief expressed" – *i.e.*, "whether $42 was 'high,' and the proposal 'fair'" under the circumstances. *Id*. at 1092, 1094.

Petitioners' contrary assertion – that a statement of opinion conveys only the fact of subjective belief – fails the test of simple logic and is incompatible with over a century of legal tradition in a broad range of contexts. As explained below, expressing even a genuine opinion that something is true, when it is not, can be seriously misleading in two ways.

B. Statements Of Opinion That Are Objectively Incorrect Can Be Misleading As To Their Subject Matter Even If Subjectively Believed.

First, an incorrect statement of opinion may be misleading with respect to its *subject matter*. That is, saying "we believe X is true" has the tendency to persuade the listener that X is in fact true, not just that the speaker believes it to be true. If X is not true, the statement of opinion can be misleading, even if genuinely held.

For example, the statement "we believe we have 10,000 pounds of tomatoes on hand for sale" would naturally mislead listeners regarding the amount of the speaker's inventory if, in fact, there were only 5,000 pounds in the warehouse. That misleading effect would exist even if the speaker genuinely believed what he said. In the language of Section 11, the speaker would have "omitted to state a material fact . . . necessary to make the statements therein not misleading," 15 U.S.C. § 77k(a), namely, that there are only 5,000 pounds of marketable tomatoes.

It thus is no answer to argue that "an opinion is not a 'fact.'" Petr. Br. 15. An opinion may mislead listeners regarding matters that are indisputably factual (like the size of the company's inventory).

The same would be true of any number of statements of opinion: "We believe we have a final contract with the Government to supply the Army with boots"; "We believe we have a working prototype"; "We believe that our car gets more miles per gallon than any other production vehicle sold in America"; "We believe that none of our employees is paying bribes to obtain government contracts." Although cast as opinions, they lead the listener to a reasonable understanding about underlying facts (the probable existence of a signed contract or working prototype, the extent of a vehicle's gas efficiency, or the non-existence of bribes) that may or may not be true. And if the opinion is likely to lead listeners to a *counterfactual* understanding of those matters, any normal speaker of English would say that the statement of opinion was misleading.

This Court's decisions are in accord. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), for example, Chief Justice Rehnquist explained that the statement "'In my opinion John Jones is a liar' . . . implies a knowledge of facts which would lead to the conclusion that Jones told an untruth." *Id.* at 18. And "if those facts are either incorrect or incomplete, or if the speaker's assessment of them is erroneous, the statement may still imply a false assertion of fact," even if the opinion is genuinely held. *Id.* at 19. "Simply couching such statements in terms of opinion does not dispel th[e] implication[]" that Jones is, in fact, a liar. *Id.* Precisely because the listener may be misled into thinking that Jones is a liar, "the statement 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement 'Jones is a liar.'"[10] And this is true whether or not the speaker subjectively believed that Jones is in fact a liar.

Indeed, in the very case petitioners say establishes their rule, *Virginia Bankshares*, this Court explained

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[10] *Id.*; *see* Restatement (First) Torts §567 & cmt. a (1938) ("A defamatory communication may consist of a statement of opinion upon undisclosed facts. . . . Thus, to call a man a thief implies the commission of some act or acts of thievery.").

that the directors' statements of opinion regarding the fairness of a stock offer could be proven "misleading about its subject matter *and* a false expression of the director's reasons." 501 U.S. at 1094 (emphasis added). Proving that the statements were misleading as to their subject matter, the Court explained, did not turn on the directors' state of mind, but rather "depended on whether provable facts about the Bank's assets, and about actual and potential levels of operation, substantiated a value that was above, below, or more or less at the $42 figure, when assessed in accordance with recognized methods of valuation." *Id.* at 1094. If, in light of those considerations, the stock offer was not high as an objective matter, then claiming to believe that the price was high would be misleading.

2. The same principle applies to legal opinions.[11] Incorrect legal-compliance opinions do not simply risk misleading investors about the content of the law. They also can mislead investors with respect to the company's underlying conduct.

For example, a company that stated an opinion that its sales practices were lawful could mislead investors into believing that the company was not engaged in illegal practices if, in fact, the company was obtaining many of its contracts with foreign governments through bribes, in violation of the

[11] *See* Restatement (First) Torts §545(2) cmt. c on Subsection(1) ("[I]f a representation concerns the legal effect of facts not disclosed or not otherwise known to the recipient, it may justifiably be interpreted as implying that there are facts which substantiate the statement (see § 539)."); *see, e.g.*, *Hoyt Properties, Inc. v. Prod. Resource Grp.*, 736 N.W.2d 313, 318 (Minn. 2007); *Miller v. Osterlund*, 191 N.W. 919, 919 (Minn. 1923).

Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1(a). Because paying such bribes is plainly illegal, when a company says (incorrectly) that it believes its sales force is obeying the law, investors are likely to be misled into believing that the company is not generating a major portion of its business by paying bribes. That misleading effect would arise even if the issuer's top brass had not yet discovered that their deputies were securing many of the company's most significant contracts via under-the-table payments.

The statement would be equally liable to mislead investors about the factual details of the business's practices if the company knew its staff was paying bribes but had an undisclosed meritless (though genuinely believed) theory that the FCPA was unconstitutional.

3. To say that a statement of opinion *may* be actionably false or misleading, even if subjectively believed, does not mean that every incorrect or unfounded statement of opinion produces liability.

To start with, not every opinion has the capacity to be materially misleading. Some statements of opinion address matters of judgment that cannot be proven right or wrong. A beverage company's assertion "We believe our product compares favorably with Coca Cola," is unlikely to mislead because the subject matter of the opinion relates to a matter of personal taste not ordinarily susceptible of being proven true or false. *See* Restatement (Second) Contracts § 168 cmt. b; *Milkovich*, 497 U.S. at 20 (noting that the statement "'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,'" may convey no provably true or false fact other than that the speaker holds those views).

Moreover, whether any particular statement (of opinion or otherwise) is misleading depends on context and content. An opinion offered in casual conversation will be understood differently than an opinion offered in return for compensation, or one included in a securities offering's registration statement and prospectus.[12] In addition, some statements couched as opinions may convey sufficient uncertainty to permit more leeway before they could be deemed misleading. A statement might, for example, clearly indicate that it is only tentative, and it might include qualifying considerations by identifying the salient countervailing factors that investors need to know in order to evaluate and appropriately discount the opinion's reliability. *See Virginia Bankshares*, 501 U.S. at 1097.

Often, an incorrect opinion can be rendered non-misleading simply by fully disclosing its underlying basis. *See, e.g.,* Restatement (Second) Torts § 539(1) (1977). In this case Omnicare might have avoided giving investors a misleading impression of the nature of the payments it was receiving from drug companies by disclosing the relevant terms of its contracts and its theory about why those payments were lawful.

Moreover, to conclude that a statement of opinion is false or misleading is not always sufficient to establish liability under the securities laws – or

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[12] For that reason, the Court's decision in this case need not necessarily control the treatment of false or misleading statements in other contexts, such as investor conference calls. *See* Wash. Leg. Found. Br. 10-11.

otherwise. Some provisions, like Section 10(b), require proof of scienter, which effectively requires showing that the defendant knew his statement was misleading. Section 11 does not require scienter, but does provide most defendants an affirmative defense if they genuinely and reasonably believed their opinions were true and exercised due diligence in forming them. And Congress has provided a special safe-harbor defense for forward-looking statements, encompassing many opinions – and subjecting only those covered by the safe harbor to a subjective-disbelief "actual knowledge" standard. 15 U.S.C. § 77z-2; *see infra* § III.B., at 53-54.

The point here is simply that statements of opinion are not *categorically* incapable of being misleading unless disbelieved; in appropriate circumstances, they may be misleading because they are incorrect.

4. In this case's present posture, petitioners do not contest respondents' allegation that their legal-compliance opinion was objectively wrong – Omnicare's contracts with drug companies plainly violated the federal anti-kickback statute, among other laws.[13] That objectively erroneous opinion was also misleading. Its natural effect was to lead investors to the mistaken belief that Omnicare's practices were lawful. Moreover, because investors would understand that accepting kickbacks would violate federal law (the registration statement said as much, *see* J.A. 94-95), the legal-compliance opinion was factually misleading because it was reasonably

[13] *See* Petr. Br. 18-19 n.4 ("as this case comes to the Court, it is undisputed that the stated belief must be objectively erroneous in order to give rise to liability, and the only issue in dispute is whether, in addition, the stated belief must not have been actually held").

understood to imply that the company was not receiving payments to promote particular drugs.

C. Incorrect Statements Of Opinion Can Falsely Imply That The Speaker Has A Reasonable Basis For His Views.

As the United States argues, even if honestly held, statements of opinion also may falsely or misleadingly imply that the speaker both has a reasonable basis for his views and is not aware of any undisclosed facts incompatible with his opinion. *See* U.S. Br. 11-12.

1. In *Virginia Bankshares*, for instance, the Court explained that directors' statements that they believe a stock price to be "high" and "fair" are "reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." 501 U.S. at 1093. Accordingly, if the objective facts about a company's finances and operations justified a price much higher than the one the directors believed "fair" or "high," then the factual implications of their statements would be false or misleading, regardless of whether the opinion was genuinely (if irresponsibly) held. *Id*. at 1094.

The common law is in accord. It is true, as Lord Bowen once famously remarked, that "'the state of a man's mind is as much a fact as the state of his digestion.'" Petr. Br. 21 (quoting *Edgington v. Fitzmaurice*, (C.A. 1885) 29 Ch.D. 459, 483).[14] More pertinent here, though, is Lord Bowen's holding, in another prominent opinion, that in business

[14] The quote is from Lord Bowen, not Lord Cotton. *Contra* Petr. Br. 21.

transactions if "the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." *Smith v. Land and House Prop. Corp.*, (C.A. 1884) 28 Ch. D. 7, 15.

Lord Bowen's holding on this point is well-established in the American common law.[15] The Restatement (Second) Contracts explains that a "statement of opinion is also a statement of fact" not only that the speaker "has a particular state of mind concerning the matter to which his opinion relates," but also that the speaker "knows of no facts incompatible with the belief or that he knows of facts that justify him in holding it." Restatement (Second) Contracts § 168 & cmt. a (1979). For example:

> A, who is knowledgeable in financial matters, seeking to induce B, who is also knowledgeable in such matters, to make a contract to buy A's shares of stock in C Corporation, tells B that within five years the shares will pay dividends that will amount to the purchase price of the

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[15] *See, e.g.*, Restatement (Second) Torts § 539 cmt. a on Subsection (1) (1977); Restatement (First) Torts § 539 cmt. a on Subsection (1) (1938); Fowler V. Harper & Mary Coate McNeely, *A Synthesis of the Law of Misrepresentation*, 22 Minn. L. Rev. 939, 951 & n.26 (1938); 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* 562 (1956); *Shepherd v. Kendrick*, 181 So. 782, 784 (Ala. 1938); *Haserot v. Keller*, 228 P. 383, 388 (Cal. App. 1924); *Eastern States Petr. Co. v. Universal Oil. Prod. Co.*, 3 A.2d 768, 776 (Del. Ch. 1939); *Fox v. Cosgriff*, 159 P.2d 224, 228 (Idaho 1945); *Pound v. Clum*, 170 N.W. 41, 42-43 (Mich. 1918); *McDonald v. Smith*, 102 N.W. 668, 672 (Mich. 1905); *Whitehurst v. Life Ins. Co.*, 62 S.E. 1067, 1068 (N.C. 1908).

> stock. Neither A nor B has information about the finances of C, which is, in fact, hopelessly insolvent.

Id. § 168 illus. 6. On petitioners' view, because A did not know that his opinion was wrong, he cannot have misled B – the only fact conveyed by his opinion was that A held it, and that was true. But the Restatement explains that the law is otherwise:

> B interprets A's statement of opinion as an assertion that A knows facts sufficient to justify him in forming that opinion and is induced by this assertion to make the contract. B's interpretation is reasonable, the assertion is a fraudulent misrepresentation, and the contract is voidable by B.

Id.

The Restatement (Second) Torts gives another example from the securities context that is flatly incompatible with petitioners' basic premise:

> [W]hen an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion. The opinion thus becomes in effect a short summary of those facts. When he is reasonably understood as conveying such a statement, he is subject to liability if he has not made the examination, or if

> he has not found facts that justify the opinion, on the basis of his misrepresentation of the implied facts.

Restatement (Second) Torts § 539 cmt. b on Subsection (1) (1976).[16]

Following this tradition, until very recently the federal securities precedents similarly regarded it as well-settled that "[a]n opinion or projection, like any other representation, will be deemed untrue for purposes of the federal securities laws if it is issued without reasonable genuine belief or if it has no basis."[17]

2. Again, the same rules apply to opinions of law.[18] Investors will understand a legal-compliance opinion

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[16] The same principles are applied with respect to a number of torts. *See* Restatement (Second) Torts §§ 538A (tort of misrepresentation), 539 & cmts. a-b (same); 542 cmt. b (same); 566 & cmt. b (defamation); 623A & cmt. e (injurious falsehood); *see also* Restatement (Third) of Unfair Competition § 3 cmt. d & illus. 9 (unfair competition) (1995).

[17] *Herskowitz v. Nutri/Sys., Inc.*, 857 F.2d 179, 184 (3d Cir. 1988); *see, e.g.*, *Franklin Sav. Bank v. Levy,* 551 F.2d 521, 527 (2d Cir. 1977) ("where a broker-dealer makes a representation as to the quality of the security he sells, he impliedly represents that he has an adequate basis in fact for the opinion he renders," and if he "failed to exercise reasonable professional care in assembling and evaluating" the salient data, then his statement of opinion "was untrue in fact and misleading no matter how honestly but mistakenly held"); *accord Alton Box Board Co. v. Goldman, Sachs & Co.*, 560 F.2d 916, 922-23 (8th Cir. 1977).

[18] *See* Restatement (Second) Torts § 545(1) ("If a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact."); *see also*

to imply that the company conducted a reasonable investigation into the law and the facts, and exercised reasonable legal judgment. This Court applied a similar insight in *Virginia Bankshares*, in which it held that a director's opinion that a proffered stock price was "high" should be assessed "in accordance with recognized methods of valuation." 501 U.S. at 1094. An opinion regarding value, like a legal opinion, often requires an exercise of judgment. But listeners expect that such opinions will be based on methods of analysis that are recognized as reasonable in the field.

In addition, the *factual* implications of a legal claim necessarily depend on the listener's reasonable understandings about the law. Unless told otherwise, investors will assume, for example, that when a company says it believes its sales practices are legal, it is not obtaining contracts by bribing foreign officials, because they will reasonably assume that the FCPA prohibits that conduct.

3. In this case, in addition to pleading that Omnicare's legal-compliance opinion was wrong, the Complaint alleged that none of the defendants had "made a reasonable investigation or possessed reasonable grounds" to believe that the challenged statements were truthful or complete. Complaint ¶¶ 179, 183. Petitioners have not challenged that allegation in this Court. Nor could they. Even if Omnicare had some novel theory about why the kickbacks were lawful, its statements were misleading in failing to disclose to investors facts that would contradict its opinion: namely, the fact that

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Restatement (First) Torts § 545(1) (same); Restatement (Second) Contracts § 170 (same).

Omnicare was contracting to receive payments for promoting specific medications. *See* Restatement (First) Torts §§ 539(1) & cmt. a on Subsection (1), 552 & cmt. b; Restatement (Second) Torts §§ 539(1)(a), 552 & cmt. b; Restatement (Second) Contracts § 168(2)(a). Had Omnicare made that disclosure, and explained the basis of any theory it had why those payments were legal, investors could have judged for themselves the riskiness of their investment in a company engaged in such practices.

D. The Common Law's Treatment Of Statements Of Opinion Supports Section 11 Liability For Misleading Statements Of Opinion, Even If Subjectively Believed.

As just shown, the common law has long rejected petitioners' basic premise that a statement of opinion conveys only the fact of the speaker's belief. Petitioners insist, however, that "honest but ultimately erroneous statements of opinion are typically not actionable as false statements of fact under the common law of misrepresentation." Petr. Br. 22. But that claim is misleading.

1. Honest opinions generally are not actionable as common-law fraud because the tort requires proof of scienter, which is obviously absent if a statement is honestly believed. *See, e.g.,* Restatement (Second) Torts § 528; W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 107, at 741-45 (5th ed. 1984). But the "antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud." *Huddleston*, 459 U.S. at 388-89. Instead of requiring plaintiffs to prove scienter, Section 11 imposes strict prima facie liability, subject to an

affirmative "due diligence" defense for some defendants. *Id*. at 382.

Some common-law decisions are premised, moreover, on the idea that "where the facts are equally known to both parties," each stands on an equal footing, and being fully informed may freely form his own opinion – so that the other's "is of no consequence." *Smith, supra*, 28 Ch. D at 15 (Bowen, L.J.). In such cases "[i]t is more correct to say . . . that a statement of opinion is a representation of a fact, but of an immaterial fact, on which the law will not permit the opposing party to rely. When, for any reason, such reliance is regarded as reasonable and permissible, a misstatement of opinion may be a sufficient basis for relief." William Prosser, *Law of Torts*, § 89, at 754 (1st ed. 1941); *accord* Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 109, at 755.

Without doubt, the common-law requirement of justifiable reliance sometimes limited liability for opinions by circumscribing the situations in which a listener could reasonably rely on a statement of opinion, often under the doctrine of *caveat emptor*. *See* U.S. Br. 21 (collecting cites). Yet a "fundamental purpose" of federal securities law is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963); *accord Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972); *Santa Fe Indus. v. Green*, 430 U.S. 462, 476-77 (1977). And Section 11 specifically departs from the common law by eliminating the requirement of proving justifiable reliance, on the premise that investors are entitled to trust what the registration statement says. *See Huddleston*, 459 U.S. at 382; 2

Thomas Lee Hazen, The Law of Securities Regulation § 7.3[4], at 220-21 (6th ed. 2009).

2. Petitioners' description of the common law also fails to account for distinctions that, when considered in the context governed by Section 11, render liability for misleading statements of opinion entirely unremarkable.

Section 11's closest common-law analog is the contract-law right of rescission for contracts induced by innocent misrepresentation. *See* Restatement (Second) Contracts § 164(1); *see also id.* § 168 illus. 6 (applying rule to contract to purchase securities); 15 U.S.C. § 77k(a) (providing cause of action for misrepresentations in registration statement, a document used to induce purchase of securities); *id.* § 77k(e) (providing rescission-like remedies).

At common law, a party induced to enter a contract by a "material misrepresentation by the other party" may void the contract. Restatement (Second) Contracts § 164(1). Like Section 11, and in contrast with the general rule of common-law fraud, this contract-law principle does not require proof of fraudulent intent. *See id.* cmt. b; *see also, e.g.*, 3 Samuel Williston, *The Law of Contracts* § 1500, at 2668 (1920); Prosser, *Law of Torts*, § 89, at 755-56; *Chandler v. Satchell*, 168 S.E. 744, 748 (Va. 1933); *Grim v. Byrd*, 73 Va. 293, 300-03 (1879). It is enough that the statement constituted a "material misrepresentation . . . upon which the recipient is justified in relying." Restatement (Second) Contracts § 164(1).

As discussed, a party generally may justifiably rely on an opinion's factual implications. *Id.* § 168(2). In addition, a party may justifiably rely on a "pure" statement of opinion, when he (a) "stands in such a relation of trust and confidence to the person whose opinion is asserted that the recipient is reasonable in relying on it" or (b) "reasonably believes that, as compared to himself, the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter." Restatement (Second) Contracts § 169. In crafting Section 11, Congress intended to treat issuers, officers, and experts as having fiduciary-like obligations to investors with respect to the content of registration statements. *See* 15 U.S.C. § 77k(c) (1933) (as originally enacted, providing that in applying Section 11 affirmative defenses, "the standard of reasonableness shall be that required of a person occupying a fiduciary relationship"); H.R. Rep. No. 85 at 9 (explaining that the "responsibility thus imposed" under Sections 11 and 12 "is no more or less than that of a trust").[19]

Against this backdrop, the fairest conclusion is that Congress intended that investors should be entitled to rely on the statements of opinion offered in the special context of registration statements, given the fiduciary-like expectations for the issuer. Nor is it surprising that Congress would provide investors rescission-like remedies when those opinions, though genuinely believed, are objectively erroneous or lack a reasonable foundation; the right of rescission for innocent misrepresentations has long existed at common law. *See, e.g.*, *Chandler*, 168 S.E. at 748.

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[19] Congress subsequently amended this language to refer to a "prudent man" standard, but that amendment was simply intended to "remove[] possible uncertainties as to the standard of reasonableness by substituting for the [original] language the accepted common law definition of the duty of a fiduciary." H.R. Rep. No. 1838, at 41.

In addition, the liability of non-issuers, like auditors, is similar to what already existed at common law for experts paid for their opinions. At common law, one "who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions" is subject to liability "if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) Torts § 552(1); *accord* Restatement (First) Torts § 552(a). This rule "applies not only to information given as to the existence of facts but also to an opinion given upon facts equally well known to both the supplier and the recipient." *Id.* § 552 cmt. b. The quintessential example is an audit opinion.[20] Section 11 approximates these

[20] Restatement (Second) Torts § 552 illus. 14-15. Despite some restrictions on who may sue, *see id.* § 552(2), auditors have long been held liable for negligent audit opinions. *See Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 114-15 (N.Y. 1985) (applying *Ultramares Corp. v. Touche*, 174 N.E. 441, 442 (N.Y. 1931) (Cardozo, J.) (defining class of potential plaintiffs where accountants negligently certified that a corporation's financial statement "in our opinion, presents a true and correct view of the financial condition of Fred Stern & Co., Inc.," and recovery was sought "for misrepresentations that were merely negligent"); *see also, e.g.*, *Touche Ross & Co. v. Comm. Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987); *White v. Guarente*, 372 N.E.2d 315, 319-20 (N.Y. 1977); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 874-80 (Tex. Civ. App. 1971); *see also Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP*, 542 F.3d 475, 481-84 (5th Cir. 2008) (Mississippi law); *Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs*, 455 F.2d 847, 851-52 (4th Cir. 1972) (Rhode Island law); *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85, 91-93 (D.R.I. 1968) (Rhode Island law); *Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394, 1395-96 (10th Cir. 1990) (Utah law).

standards by providing auditors and other non-issuer defendants with a due-diligence defense that effectively subjects them to liability only if negligent. *See Hochfelder*, 425 U.S. at 208.

E. Subjecting Defendants To Section 11 Claims For False Or Misleading Statements Of Opinion Without Proof Of Disbelief Is Consistent With The Statute's Purposes.

Acknowledging the possibility of Section 11 liability for some good-faith, but nonetheless erroneous and misleading opinions is entirely consistent with the statute's purposes.

Section 11 applies a particularly rigorous standard of liability in the uniquely important context of registration statements. Congress intended registration statements to be prepared with particular care, vetted by the issuer, its lawyers, and its underwriters, and reviewed in relevant part by expert independent auditors, prior to filing with the SEC. Congress intended Section 11 to assure investors that they can place unreserved confidence in the accuracy of the information conveyed in registration statements, thereby creating an efficient market environment that benefits investors and issuers alike.

Section 11 is premised on the view that in this context, it is fair and reasonable to put the risk of error in a registration statement on the shoulders of those responsible for what it says, and on the company that stands to financially benefit from investors' misunderstanding of material facts relating to the company or its securities. *See, e.g.*, S. Rep. No.

47, 73d Cong., 1st Sess., at 4-5 (1933); H.R. Rep. No. 85, at 9-10. While individuals may avoid liability by showing good faith and due diligence, Congress determined that issuers ultimately should bear the risk of misleading error, at least to the extent of giving investors their money back, even when the error is unintentional.

In light of this rationale and these purposes, there is no reason to treat erroneous opinions as fundamentally different from any other false or misleading statement. Because the purpose of Section 11 is not to punish wrongful conduct, but to provide full disclosure and apportion risk of error, the fact that an erroneous opinion is genuinely believed does not distinguish it from any other mistakenly false or misleading statement. As discussed, a genuinely believed, but erroneous, opinion can mislead, and do as much damage to investors, as any other false statement. Giving issuers virtual immunity from strict liability for misleading statements, so long as they preface their claims with "we believe," would unravel the carefully crafted apportionment of risk and responsibility that Congress established in Section 11.

II. Petitioners' Objections Are Unfounded.

Petitioners' various objections to applying Section 11 to genuinely believed statements of opinion are unfounded.

A. *Virginia Bankshares* Did Not Hold That Statements Of Opinion Must Be Disbelieved In Order To Be False Or Misleading.

Petitioners argue *Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991), holds that an opinion cannot be false or misleading unless the defendant subjectively disbelieved what he said. Not so. *See* U.S. Br. 16-21.

In *Virginia Bankshares*, the Court considered, in relevant part, "whether a statement couched in conclusory or qualitative terms purporting to explain directors' reasons for recommending certain corporate action can be materially misleading within the meaning of Rule 14a-9" and subject to suit under the "implied private right of action for the breach of § 14(a)" of the 1934 Act. 501 U.S. at 1087. The Court took the case on the understanding that the jury had found "that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, *and we confine our discussion to the statements so made*." *Id.* at 1090 (emphasis added). In the footnote that immediately followed, the Court explained that it therefore resolved the case on the assumption that "scienter was necessary for liability generally under § 14(a)." *Id*. at 1090 n.5.

The Court thus had no occasion to consider the question presented here: whether liability will lie under a statute that does *not* require scienter, when the defendants perhaps *did* believe the objectively erroneous opinions that they expressed but for which they had no reasonable basis.

Petitioners nonetheless point to certain sentences in the opinion that they say adopted a categorical rule that applies to every false statement of opinion under any conceivable statute. But those sentences cannot bear the weight petitioners place on them.

Petitioners point to the Court's statement that it interpreted "the jury['s] verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions" because "such a statement by definition purports to express what is consciously on the speaker's mind." *Id.* at 1090. That inference was perfectly reasonable in the case before the Court, given that the plaintiff had "alleged, among other things, that the directors had not believed" the opinions they expressed, *id.* at 1088, and that the jury was "instructed to consider whether [the directors'] statement 'was false or misleading, *because* the claimed high values for the shares *was not the reason* for [the board's] approval.'"[21] Given this Court's assumption that scienter was required, *Virginia Bankshares*, 501 U.S. at 1090 n.5, it had no reason to give any substantial thought to the broader epistemological claim (not made in the case) that a statement of opinion can *never* be false or misleading so long as subjectively believed.

Petitioners also misconstrue the Court's observation that a "statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095; *see* Petr. Br. 18. Again, the Court was not asserting that a statement of belief or opinion

[21] Brief for the SEC & FDIC, at 34 n.25, *Virginia Bankshares, Inc. v. Sandberg*, No. 89-1448 (emphasis added).

can be misleading *only* if it misstates the speaker's actual belief. Rather, the Court was simply noting the possibility that a litigant might object to a statement of opinion solely on the basis of the defendant's subjective disbelief without asserting that the substance of the opinion was misleading in any other respect. That possibility gave rise to the question "whether disbelief, or undisclosed belief or motivation, standing alone, should be a sufficient basis to sustain an action under § 14(a), absent proof by the sort of objective evidence described above that the statement also expressly or impliedly asserted something false or misleading about its subject matter." *Virginia Bankshares*, 501 U.S. at 1095-96. As discussed, the Court's resolution of that question – holding that a subjectively disbelieved statement of opinion is actionable under Section 14 only if it is also "false or misleading in what the statement expressly or impliedly declared about its subject," *id.* at 1096 – is irreconcilable with petitioners' basic premise that statements of opinion convey only facts about the speaker's mind, not the opinion's subject matter.

Finally, petitioners cite a sentence in Justice Scalia's concurrence, in which he read the majority opinion to preclude Section 14 liability "if in fact [the stock at issue] was not a high value but the directors honestly believed otherwise." *Id.* at 1109. No other Justice joined the concurrence, and Justice Scalia did not say that he read the opinion to so hold because the Court had adopted the implausible conclusion that a statement of opinion can be misleading only if disbelieved. It is just as likely that Justice Scalia, like the majority, was operating on the assumption that Section 14(a) requires scienter, which in itself would preclude liability unless the directors intended to deceive. *See id.* at 1090 & n.5. Or, perhaps he believed that intent to deceive should be required in order to narrow "the federal cause of action . . . never enacted by Congress." *Id.* at 1110. Either way, his reasoning would not apply to the strict-liability express right of action embodied in Section 11.

B. Applying Section 11 To Genuinely Believed, But Incorrect, Opinions Does Not Authorize Liability By Hindsight.

Petitioners are also wrong to insist that accepting respondents' position would subject companies to Section 11 liability based on "hindsight" and "later events that were unknowable to the issuer at the time." Petr. Br. 32. Petitioners' argument ignores that many statements of opinion (including the ones alleged in this case) express views about present or past events, like the nature of a company's present contracts, the contents of its bank accounts, or its sales and other financial performance data from the past year. Petitioners offer no reason why Congress would have intended to hold a company strictly liable for accidently misstating last year's profits, but provide it absolute immunity so long as it prefaced the same statement with the words "we believe."

It is therefore no accident that petitioners focus on opinions regarding future events and other kinds of predictions. It is also no help, for Congress has already provided defendants significant protection from liability by "hindsight" for opinions about future events.

First, every defendant except the issuer is entitled to the due-diligence defense that precludes liability so long as the defendant, after a reasonable investigation, had reasonable grounds to believe his opinion was correct, even if it turned out to be wrong. *See* 15 U.S.C. § 77k(b)(3).

To be sure, issuers themselves have no such defense. But Congress has expressly dealt with their concerns as well, not by requiring proof of subjective disbelief in all opinion cases, but instead with a 1995 amendment to the 1933 Act providing a safe harbor for "forward-looking statements" expressing opinions about the future, such as revenue projections, sales objectives, economic forecasts, and product plans. *See* 15 U.S.C. § 77z-2; *id.* § 77z-2(i)(1). Issuers can avoid liability for covered forward-looking statements if their statements were not made with "actual knowledge . . . that the statement was false or misleading." *Id.* § 77z-2(c)(1)(B). That is effectively the protection petitioners seek here, but Congress chose to limit it to forward-looking statements, not the statements concerning past or present conduct (like the legal compliance statements at issue in this case), and only if the statements meet certain criteria. *See infra* § III.B., at 53-54.

If defendants consider these collective protections insufficient, they remain free to seek more from Congress, which has shown itself particularly attentive to such concerns in this area. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014).

C. A Statement Of Opinion Can Be False Or Misleading Even If It Involves An Exercise Of Judgment.

Petitioners insist that it makes no sense to hold issuers liable for incorrect opinions, particularly regarding the lawfulness of their business practices, because statements "concerning legal compliance" are "necessarily infused with the issuer's judgment as to uncertain future events." Petr. Br. 32-34. Notably, petitioners do not ask for a special rule limited to legal opinions, or to opinions that involve exercises of judgment. But even if they did, the request would lack merit.

Petitioners are right in part. A statement must be false or misleading at the time it is made – that is, "when" it "became effective." *See* 15 U.S.C. § 77k(a). That means that a legal-compliance opinion is not rendered retrospectively misleading simply because a statute was amended, a regulation was invalidated, or a court decision overruled several years later.

But the fact that an opinion requires an exercise of judgment does not mean it is incapable of being false or misleading. In *Virginia Bankshares*, for example, this Court held that the question of whether a stock price is high or low, although indisputably one requiring an exercise of expert judgment, is a fact that can (and, in the context of a Section 14 claim, must) be proven false. 501 U.S. at 1093-94. The fact that the question involves judgment may lead to greater leeway before one would say that the valuation judgment was false or misleading. But a company's value is not unknowable.

Neither is the content of the law. Our legal system is premised on the presumption that the law is knowable to those who must obey it. And, indeed, while some issues of law may be unclear, many others are not. A company that said it believed it was complying with the law would plainly mislead investors if the company operated as little more than a Ponzi scheme, was obtaining contracts by bribing government officials, or lying to evade taxes. Petitioners cannot seriously contest that Omnicare's statement of legal compliance would be at the very least misleading if its contracts with drug companies called for substituting placebos for penicillin or stealing medications from other companies' warehouses.

Of course, some legal questions are closer. But defendants do not claim that legal opinions can never be proven false. To the contrary, they seemingly insist that Section 11 *requires* a plaintiff to prove that a legal opinion was both false when given, *and also* disbelieved. Petr. Br. 18-19 n.4. Their complaint is that in some instances, legal mistakes are understandable, so that it is unfair ever to hold issuers responsible unless their statement of opinion was both incorrect and culpable because disbelieved. But, as discussed, the same could be said of many other misstatements (like the valuation of a stock in *Virginia Bankshares*). Congress determined that in the special context of registration statements, issuers generally should bear the risk of even reasonable mistakes.

Of course, defendants can avoid the prospect of liability by declining to venture legal opinions on substantially uncertain subjects. When they nonetheless offer an opinion, it is likely because they believe that the opinion will influence the views of potential investors, increase the amount they are willing to pay for the issuer's stock, thereby enriching the issuer. It is not unfair, unprecedented in the law, or contrary to Section 11's scheme to require issuers to bear some financial risk in return for that financial benefit. *See supra* § I.D., at 34-39.

That said, as noted earlier, defendants can guard against the potential to mislead by disclosing the underlying basis of an opinion they express, and the important qualifying or countervailing factors needed to evaluate the opinion's reliability. *See Virginia Bankshares*, 501 U.S. at 1097.

D. Applying Section 11 To False Or Misleading Statements Of Opinion Will Not Unduly Discourage Valuable Disclosures.

Petitioners complain that holding issuers liable for false statements of opinion will deter them from offering opinions, thereby making "less information, not more, available to investors." Petr. Br. 37. Not so. Issuers have powerful economic incentives to provide information that potential investors view as important to deciding whether to purchase an offered security. Indeed, by making clear that issuers can best avoid liability by fully disclosing the factual or legal basis of their opinions, *see supra* at 26-27, respondents' position is likely to produce *more* valuable information for investors, not less.

More information is only a good thing if it is truthful and reliable. The 1933 Act was enacted precisely because investors were getting too much false and misleading information, and because Congress recognized that issuers have enormous financial incentives to provide investors with information that will make their securities more attractive while withholding truthful information that would undermine the securities' price.

Thus, the fact that investors do indeed rely on issuers' statements of opinion, *see Virginia*

Bankshares, 501 U.S. at 1090-91, provides an important reason to reject petitioners' request for immunity for even grossly misleading opinions so long as they are genuinely held.

III. Petitioners' Contrary Rule Is Irreconcilable With The Text And Purposes Of Federal Securities Law.

Petitioners do not claim that their rule is justified by anything in particular about Section 11. To the contrary, petitioners take pains to emphasize that their argument would apply to any statute that prohibits false or misleading statements of fact. *See* Petr. Br. § C.1. They examine Section 11 only to argue that there is no basis in the provision's text or purposes to warrant a departure from ordinary principles governing false or misleading statements.

Because petitioners misunderstand the ordinary rule, their arguments regarding Section 11 in particular get them nowhere. In fact, petitioners' interpretation is *particularly* inapt for Section 11 and cannot be squared with its text, structure, or purposes. And petitioners' position would do damage to a number of important federal securities provisions that prohibit false or misleading statements.

A. Petitioners' Rule Conflicts With Section 11's Allocation Of Burdens And Defenses.

Petitioners' interpretation makes hash out of Section 11's careful calibration of the plaintiffs' prima facie case and the defendants' affirmative defenses.

Congress intended Section 11 to "throw[] upon originators of securities a duty of competence as well as innocence which the history of recent spectacular failures overwhelmingly justifies." H.R. Rep. No. 85, at 9. The provision's central innovation was to relieve plaintiffs of the burden of proving intentional misconduct, providing strict liability for all false or misleading statements unless the *defendant* is eligible and able to prove: (a) that he conducted a "reasonable investigation"; (b) that he had "reasonable ground to believe"; and (c) that he "did believe" that the statements were true and not misleading. 15 U.S.C. § 77k(b)(3)(A).

Congress viewed this allocation of burdens as "indispensable to make the buyer's remedies under these sections practically effective." H.R. Rep. No. 85, at 9. The House Report explained that "[e]very lawyer knows that with all the facts in the control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of defendant." *Id.* Thus, "[u]nless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omissions or commission on those who purport to issue statements for the public's reliance." *Id.*[22]

On petitioners' view, however, so long as defendants preface their statements with "we believe," they cast the burden of proving knowledge of falsity on the plaintiff. Even worse, petitioners insist on "factual allegations and proof that the *speaker* of

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[22] The Conference Report adopted the standard of the House bill, with its due-diligence defense, which "measured liability . . . in terms of reasonable care, placing upon the defendants the duty, in case they were sued, of proving that they used reasonable care to assure the accuracy of these statements." H.R. Rep. No. 152, 73d Cong., 1st Sess. (Conf. Rep.) at 26 (1933); *see* 77 Cong. Rec. 3891, 3901 (May 22, 1933).

the statement (usually the issuer) did not hold the stated belief," Petr. Br. 30, never explaining exactly how a plaintiff would prove the subjective state of the issuing corporation, which has no actual mind or beliefs, as expressed in a document ordinarily developed through the collective action of many individuals.

Even more, on petitioners' theory defendants would evade entirely the requirement that the opinion be based on a reasonable investigation; an honestly (but irresponsibly) held opinion based merely on a hunch would be absolutely immune no matter how unreasonable and groundless.

That consequence is particularly anomalous because the statute expressly contemplates Section 11 suits against defendants who, as a practical matter, will *only* be sued on the basis of an opinion. For example, the statute requires the registration statement to include a balance sheet and a profit and loss statement, both of which must be "certified by an independent public or certified accountant." 15 U.S.C. § 77aa(25); *see also id.* § 77aa(26). As petitioners' *amici* explain, that certification constitutes "an opinion, based on professional judgment, on the issuer's financial statements." *Amicus* Br. Center for Audit Quality, at 1-2. Specifically, it constitutes "an opinion as to whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period." *Arthur Young & Co.*, 465 U.S. at 811 (footnotes omitted). Congress then expressly authorized suits against auditors, 15 U.S.C. § 77k(a)(4), but provided them (and similar experts) their own specific "due diligence" defense, *id.* § 77k(b)(3)(B). *See Hochfelder*, 425 U.S. at 208.

As petitioners' auditor *amici* point out with hopeful anticipation, on petitioners' view an auditor should never need to prove that defense. *Amicus* Br. Center for Audit Quality, at 15-16. Instead, it would be the *plaintiff*'s burden to prove that the defendant disbelieved his own audit opinion. Moreover, the defense will never have a meaningful role to play, because in establishing a prima facie case, the plaintiffs will as a practical matter have defeated in advance any assertion of the affirmative defense by showing that the auditor did not "believe . . . that [his] statements therein were true," 15 U.S.C. § 77k(b)(3)(B).

Petitioners' interpretation thus does violence not only to the language and logic of the statute, but also to its effectiveness. The damage done in the audit context is emblematic. This Court has recognized that corporate "financial statements are one of the primary sources of information available to guide the decisions of the investing public." *Arthur Young & Co.*, 465 U.S. at 810. Requiring audit opinions was intended to provide investors with assurance that they can safely rely on those statements without having to undertake the massive investment of time and resources to verify for themselves the financial statements' accuracy. But audit opinions can serve that function only if investors can, in turn, have confidence in the "*competence* as well as innocence" of a firm's auditors. H.R. Rep. No. 85, at 9 (emphasis added). If petitioners' interpretation is accepted, all Section 11 would guarantee is that the opinion is subjectively believed, which is small comfort if the opinion is honest rubbish.

B. Petitioners' Rule Cannot Be Squared With The Safe-Harbor Defense For Forward-Looking Statements.

Petitioners' notion that statements of opinion cannot be deemed misleading unless subjectively disbelieved similarly conflicts with the "safe harbor" defense provided for forward-looking statements.

As noted, the safe-harbor provision excludes liability for certain kinds of "forward-looking statements," under certain conditions, *see* 15 U.S.C. § 77z-2, unless the forward-looking statement "was made with actual knowledge . . . that the statement was false or misleading." *Id.* § 77z-2(c)(1)(B)(i). But almost every forward-looking statement can be characterized as an opinion about the future. Under petitioners' view that no opinion is actionable for being false or misleading unless it is disbelieved, the safe-harbor "actual knowledge" defense merely replicates what the 1933 Act already required.

On the other hand, addition of the safe harbor in 1995 makes perfect sense if Congress believed that some 1933 Act provisions, like Section 11, subject issuers to liability for false or misleading statements of opinion (including forward-looking opinions) without proof that the defendant knew the statement of opinion was false or misleading.

Petitioners' view is also difficult to reconcile with the safe harbor's many limitations. The defense does not apply to every forward-looking statement, but instead has detailed exemptions and limitations regarding the kinds of defendants who can claim the defense and the kinds of statements that are protected. For example, the safe-harbor defense is withheld from issuers that have been convicted of certain securities-related offenses, or have been found in violation of antifraud provisions of the securities laws, within the preceding three years. *See* 15 U.S.C. § 77z-2(b)(1)(A). But those same defendants *do* enjoy protection for their projections and forward-looking opinions if the Court accepts petitioners' position. Likewise, Congress expressly excluded from the safe-harbor defense statements made in financial statements, tender offers, and initial public offerings. *Id.* § 77z-2(b)(1)(A), (C), (D). Petitioners' interpretation effectively erases those limitations from the statute.

C. Petitioners' Rule Would Undermine Enforcement Of Other Important Securities Provisions.

The harm petitioners' rule would inflict is not limited to Section 11 private suits.

For example, if the SEC determines that a proposed registration statement includes a false or misleading statement, it is empowered to issue a "stop order" to delay the effectiveness of the registration statement until the problem is corrected. 15 U.S.C. § 77h(d). If petitioners' view is accepted, however, the SEC lacks the power to issue a stop order in response to a statement of opinion that is *clearly* incorrect and *exceedingly* likely to mislead investors without first determining whether the issuer disbelieves its opinion. Beyond imposing the additional administrative burden and cost, petitioners' rule would preclude the SEC from requiring any revision to the registration statement if, upon review, it determined that the grossly misleading statement of opinion was genuinely (if irresponsibly) held. Relatedly, the Commission would lack the power to issue cease-and-desist orders to rectify any statement of opinion that was genuinely believed, regardless of how many investors were being misled or how unreasonable the issuer's beliefs. *See* 15 U.S.C. § 77h-1.

The same would be true of other provisions designed to protect investors from false and misleading statements, not just fraud. For example, in *Aaron v. SEC*, 446 U.S. 680 (1980), the SEC brought an enforcement action against a securities broker whose salesmen had been telling prospective investors that a lawn-care equipment manufacturer "was planning or in the process of manufacturing a new type of small car and tractor, and that the car would be marketed within six weeks," when that just was not true. *Id*. at 682. The SEC brought claims under Sections 17(a)(2) and (3), which prohibit a securities dealer from "obtain[ing] money or property by means of" an untrue or misleading statement, or engaging in a transaction that "would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(2), (3). The broker defended on the ground that the SEC had not proven that he knew that the statements his salesmen were making were false. But this Court held that the provision requires no proof of scienter and, accordingly, affirmed judgment against him. *Aaron*, 446 U.S. at 697.

On petitioners' view, so long as brokers cast their statements in terms of opinions – *e.g.*, that they *believe* the company is developing a particular product, and that in their *opinion* it is ready for market – they may avoid liability unless the SEC is able to prove that they subjectively disbelieved what they were saying. Indeed, it is arguable that on petitioners' view, *Aaron* was wrongly decided because the statement that the new car "would be marketed within six weeks" might be viewed as a statement of opinion or projection about the future.

It is no answer that the SEC may explain to the issuer the unreasonableness of its opinion and then take action if it does not see the error of its ways. On petitioners' view, even *reckless* opinions are immunized because the only "fact" conveyed by a statement of opinion is that the issuer genuinely holds it. Petitioners' position would eliminate liability for genuinely held reckless statements under provisions requiring scienter, in contravention of the commonly accepted view that recklessness is sufficient to establish liability under provisions like Section 10(b).[23]

IV. This Court Should Affirm.

In light of the foregoing, this Court should affirm. In this Court, petitioners give only one reason why respondents' Complaint should be dismissed: they say that plaintiffs are required in every Section 11 case to plead that the defendants did not believe a challenged statement of opinion, which respondents did not do. Because that categorical assertion is wrong, the Court should simply affirm.

The United States (but not petitioners) urges the Court to vacate and remand because, it says, the court of appeals "erred in *suggesting* that a statement of opinion is actionably false whenever the stated

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[23] This Court has repeatedly held open the question of whether recklessness is enough to prove a Section 10(b) violation, while noting the lower court opinions holding that it is. *See Aaron*, 446 U.S. at 686 n.5; *Hochfelder*, 425 U.S. at 193 n.12; 4 Thomas Lee Hazen, *The Law of Securities Litigation* § 12.8[3], at 12-18 (6th ed., 2009).

opinion is ultimately found to be incorrect." U.S. Br. 14 (emphasis added). That recommendation lacks merit because, as argued above, a statement of opinion *can* be misleading because it is incorrect.[24]

Accepting the United States' position that a statement of opinion is actionable if it lacks a reasonable basis, moreover, there would be no basis for a remand. The United States seemingly agrees that the Sixth Circuit's *judgment* is correct – it does not dispute that the only relevant argument petitioners made below for dismissal was that respondents failed to plead subjective disbelief, and it agrees that the court of appeals "correctly held that a plaintiff need not allege subjective disbelief to recover under Section 11 for a statement of opinion." *Id.* at 10. Because "this Court reviews judgments, not opinions," the Government's dissatisfaction with the opinion the Sixth Circuit wrote in the course of reaching the correct judgment is not a basis for

[24] In fact, the Sixth Circuit did not suggest (much less hold) that a "plaintiff need only allege that the opinion was 'objectively false.'" U.S. Br. 5. The passages to which the United States cites were responding to the district court's reliance on the Sixth Circuit's prior Section 10(b) precedents to hold that subjective disbelief was required under Section 11. The court of appeals explained that those precedents were inapplicable because their results were driven by the scienter requirement of Section 10(b), which is absent from Section 11. Pet. App. 13a-14a. In other words, because "§ 11 provides for strict liability and it was therefore inappropriate for the district court to require [respondents] to plead knowledge in connection with their § 11 claim." Pet. App. 11a. The question of what *else* the plaintiff must prove was simply not before the Sixth Circuit because the district court had not reached that question, petitioners having raised the absence of an allegation of disbelief as the sole relevant basis for dismissal.

reversal or vacatur. *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842 (1984).

A remand to apply the United States' proposed rule is particularly unwarranted because it has no prospect of changing the result. The Complaint specifically alleges that none of the defendants had "made a reasonable investigation or possessed reasonable grounds" to believe that the challenged statements were truthful or complete. Complaint ¶¶ 179, 183. Even if allowed to controvert those allegations in a motion to dismiss, petitioners have made no attempt to do so. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 732 (2013) (rejecting Government's suggestion of remand in similar circumstances).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
GOLDSTEIN &
RUSSELL, P.C.
5225 WISCONSIN AVE NW,
WASHINGTON, DC 20015

KEVIN L. MURPHY
GRAYDON HEAD &
& RITCHEY LLP
2400 CHAMBER CENTER
DRIVE, SUITE 300
FORT MITCHELL, KY 41017

DARREN J. ROBBINS
ERIC ALAN ISAACSON
(*COUNSEL OF RECORD*)
erici@rgrdlaw.com
HENRY ROSEN
JOSEPH D. DALEY
STEVEN F. HUBACHEK
AMANDA M. FRAME
SUSANNAH R. CONN
DAVID J. HARRIS, JR.
ROBBINS GELLER RUDMAN
& DOWD LLP
655 WEST BROADWAY,
SUITE 1900
SAN DIEGO, CA 92101
(619) 231-1058

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