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.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, provides a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the registration statement "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." The question presented is as follows:

For purposes of a Section 11 claim, whether a plaintiff may plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, or whether the plaintiff must also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. (Omnicare); Joel F. Gemunder; David W. Froesel, Jr.; Cheryl D. Hodges; Sandra E. Laney; and the Estate of Edward L. Hutton. Omnicare has no parent corporation, and no publicly held company owns 10% or more of Omnicare's stock.

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

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 35-59) is reported at 719 F.3d 498. The opinion and order of the district court granting petitioners' motion to dismiss (Pet. App. 28a-41a) is unreported. An earlier opinion of the court of appeals (Pet. App. 42a-67a) is reported at 583 F.3d 935.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2013. A petition for rehearing was denied on July 23, 2013 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 4, 2013, and was granted on March 3, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, is reprinted in an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

Section 11 of the Securities Act of 1933 imposes civil liability when a registration statement for a securities offering "contain[s] an untrue statement of a material fact or omit[s] 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). This case presents the question whether a statement of opinion or belief constitutes an "untrue statement of a material fact" when the stated belief, although actually held, turns out to have been mistaken. The statutory text and basic logic dictate the answer to that question: a statement of opinion or belief is an "untrue statement of a material fact" only if it misstates the "fact" that the speaker actually held the stated belief.

The question presented here is not a new one. This Court answered it more than two decades ago in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991). In that case, brought under Section 14(a) of the Securities Exchange Act of 1934, the Court held that a statement of opinion or belief is an untrue statement of material fact only insofar as it misstates "the psychological fact of the speaker's belief in what he says." *Id.* at 1095. For a claim based on such a statement, then, the Court required a showing that the speaker "did not believe" what he was saying. *Ibid.* (citation omitted).

Here, respondents asserted a claim against petitioners under Section 11 based on statements of opinion in a registration statement. But they did not allege, and in fact disclaimed any allegation, that the issuer did not

hold the stated belief. The district court granted petitioners' motion to dismiss, Pet. App. 28a-41a, but the Sixth Circuit reversed in relevant part, J.A. 35-59. Departing from all of the other courts of appeals to have considered the question, the Sixth Circuit concluded that the reasoning of *Virginia Bankshares* does not apply in an action brought under Section 11. J.A. 47-51. That conclusion was incorrect as a matter of text and logic, and the judgment below should therefore be reversed.

1. a. Petitioner Omnicare, Inc. (Omnicare), is the largest provider of pharmacy-related services for the elderly and other residents of long-term care facilities in the United States. The remaining petitioners were officers or directors of Omnicare at the relevant time. J.A. 37.

In December 2005, Omnicare offered 12.8 million shares of common stock for sale. In connection with that offering, Omnicare filed a registration statement with the Securities and Exchange Commission (SEC). See 15 U.S.C. 77e. The registration statement consisted of a prospectus and a prospectus supplement, each of which incorporated other documents already on file with the SEC. The registration statement was signed by Omnicare and the other petitioners. J.A. 187-188.

b. As Omnicare has stated in its public filings, "[i]nstitutional pharmacies, as well as the long-term care facilities they serve, are subject to extensive federal, state and local regulation." J.A. 88. As it comes to the Court, this case concerns statements regarding Omnicare's compliance with certain legal and regulatory requirements.

In its registration statement, Omnicare informed the market of a list of "[r]isks, uncertainties, [and] contingencies" that could "cause actual results, performance or achievements to differ materially from those stated."

J.A. 149. Among those risks were "new legislation, government regulations * * * and changes in the interpretation and application of such policies; * * * the outcome of litigation; * * * [and] the outcome of audit, compliance, and administrative or investigatory reviews." J.A. 150-151. In sections entitled "Risk Factors," Omnicare stated that "[f]ederal and state healthcare legislation has significantly impacted our business, and future legislation and regulations are likely to affect us." J.A. 156. And Omnicare's 2004 Form 10-K, which the registration statement incorporated by reference, dedicated nearly half of its section about Omnicare's business to explaining "[g]overnment regulation." J.A. 88-107.

In discussing those risks, Omnicare also expressed its belief that its practices complied with the law. In its 2004 Form 10-K, for example, Omnicare stated as follows:

> We have to comply with federal and state laws which govern financial and other arrangements between healthcare providers. These laws include the federal anti-kickback statute[.] * * * 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. These laws may, however, be interpreted in the future in a manner inconsistent with our interpretation and application.

J.A. 94-96; see J.A. 89, 104-105. The registration statement itself contained similar statements. See J.A. 137 (stating that "[w]e 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. 164 (stating

that "[w]e believe that we are in compliance in all material respects with state and federal regulations applicable to our business").

2. Respondents, plaintiffs in this lawsuit, are two pension funds that purchased approximately 2,000 shares of Omnicare stock in the December 2005 offering. J.A. 187. After the offering, they bought additional shares in the open market. Both respondents sold all of their shares on January 30 and 31, 2006. J.A. 37.

On February 2, 2006, this lawsuit was filed against petitioners Omnicare, Gemunder, and Froesel in the United States District Court for the Eastern District of Kentucky on behalf of a putative class of investors in Omnicare stock. The initial complaint alleged that defendants had violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder by, *inter alia*, making public statements falsely representing that Omnicare was in compliance with the Medicare laws. The complaint was later amended to add another individual defendant and to allege that defendants had also violated Section 10(b) by falsely representing that Omnicare's financial statements complied with Generally Accepted Accounting Principles (GAAP). The complaint was then amended again to add more individual defendants and to add a claim under Section 11, based solely on the alleged misstatements concerning GAAP.[1]

Petitioners moved to dismiss the complaint for failure to state a claim. The district court granted the motion. 527 F. Supp. 2d 698 (E.D. Ky. 2007). With regard to the legal-compliance statements, the court held that re-

[1] One of the individual defendants, Edward L. Hutton, died during the pendency of the lawsuit. See D. Ct. Dkt. 113, at 1 n.1 (Nov. 10, 2010).

spondents' Section 10(b) claim failed because Omnicare had no duty to disclose "soft" information about the company's belief in the legality of its own actions, *id.* at 709-710, and because respondents had failed to "plead facts which support an inference that defendants knew [the statements] to be false at the time they were made," *id.* at 710-711. The court dismissed the remainder of respondents' claims, including the Section 11 claim, for failure to plead facts demonstrating loss causation. *Id.* at 704-709 & n.8.[2]

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 42a-67a. It agreed with the district court that respondents' Section 10(b) claim failed insofar as it rested on Omnicare's statements concerning legal compliance, because the complaint did not "specifically * * * allege that [petitioners] knew their statements of 'legal compliance' were false when made." *Id.* at 62a. The court of appeals also affirmed the dismissal of the remainder of respondents' Section 10(b) claim. *Id.* at 55a-60a.

As to the Section 11 claim, however, the court of appeals reversed. Pet. App. 66a-67a. The court reasoned that, although loss causation is an element of a Section 10(b) claim, it is only an affirmative defense to a Section 11 claim. *Id.* at 66a. Petitioners urged the court to affirm the dismissal of the Section 11 claim on the alternative ground that respondents had failed to plead that claim with particularity under Federal Rule of Civil Procedure 9(b). See *ibid.* The court of appeals agreed with

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[2] Because respondents did not otherwise state a valid claim, the district court also dismissed a claim against the individual defendants for control-person liability under Section 20(a). See 527 F. Supp. 2d at 711.

a number of other circuits that Section 11 claims that "sound in fraud" must meet the pleading requirements of Rule 9(b), *ibid.*, but it remanded the case for the district court to apply those requirements in the first instance, *id.* at 67a.

4. Respondents filed a petition for certiorari, challenging the court of appeals' holding that Rule 9(b) applies to Section 11 claims sounding in fraud. The Court called for the views of the Acting Solicitor General. Shortly thereafter, respondents withdrew their petition. 133 S. Ct. 21 (2010).

5. On remand in the district court, respondents again amended their complaint. The operative version of the complaint asserts only a Section 11 claim. In addition to alleging that Omnicare had substantially overstated its revenue in violation of GAAP, respondents added a new theory: namely, that, in the course of describing the risks of the legal and regulatory environment in which it operated, Omnicare had made misstatements when it expressed its belief that various business practices were in legal compliance. See, *e.g.*, J.A. 38, 42. Notably, in an apparent effort to avoid the application of Rule 9(b)'s heightened pleading standard, respondents "expressly exclude[d] and disclaim[ed] any allegation that could be construed as alleging fraud or intentional or reckless misconduct." J.A. 273.

Unlike the legal-compliance statements on which respondents had relied in their earlier Section 10(b) claim, the statements that formed the basis of respondents' Section 11 claim came from the December 2005 registration statement and the documents incorporated by reference therein. Respondents focused on the discussions in those documents of Omnicare's business, risks, and legal and regulatory environment. For example, respondents sought to impose Section 11 liability for the following

statement, as quoted above, from Omnicare's 2004 Form 10-K:

> *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.* These laws may, however, be interpreted in the future in a manner inconsistent with our interpretation and application.

J.A. 203 (emphasis in complaint); see J.A. 185-186, 191-192, 202, 226-227.

Respondents claimed that this statement of belief and others like it were false or misleading, not because Omnicare did not believe that it was in legal compliance, but rather because Omnicare had engaged in practices that, in respondents' view, were illegal. See J.A. 185-186, 191, 203-204, 227. In support of that proposition, respondents heavily relied on unproven allegations taken from complaints in several *qui tam* actions that had been filed against, and were later settled by, Omnicare. See J.A. 191, 231, 243-248. None of those actions had resulted in any finding or admission that Omnicare had engaged in illegal practices, nor has there been any such finding or admission since.

Petitioners again moved to dismiss the complaint for failure to state a claim, and the district court granted the motion. Pet. App. 28a-41a. With regard to the statements concerning legal compliance, the district court held that respondents had failed to plead a Section 11 claim because they had not sufficiently pleaded facts demonstrating that "[Omnicare's] officers knew they were violating the law": *i.e.*, that Omnicare did not believe that it was in legal compliance. *Id.* at 39a. With regard to the statements about GAAP, the district court held that respondents had failed to plead their claim with

particularity under Rule 9(b) (and that respondents' disclaimer was insufficient to avoid Rule 9(b)'s pleading requirements). *Id.* at 34a-37a & n.3.

6. The court of appeals affirmed in part, reversed in part, and remanded. J.A. 35-59. With regard to the statements about GAAP, the court of appeals agreed with the district court that respondents had failed sufficiently to plead their claim. J.A. 53-55.

As is relevant here, however, the court of appeals reversed the dismissal of respondents' Section 11 claim insofar as it rested on Omnicare's statements concerning legal compliance. J.A. 42-53. It rejected the district court's holding that "[respondents] were required to plead that [petitioners] knew that the statements of legal compliance were false at the time they were made." J.A. 43. In so doing, the court of appeals acknowledged that, in its earlier opinion, it had required respondents to plead such knowledge in order to assert a Section 10(b) claim based on the statements about legal compliance. J.A. 45-46.

But the court of appeals refused to apply the same reasoning to a claim under Section 11, on the ground that Section 11 imposes strict liability. J.A. 47. The court thus assumed that a statement of opinion or belief could be an untrue statement of material fact simply because the belief turned out to be objectively erroneous, even if the statement accurately conveyed the speaker's belief at the time. *Ibid.* "[O]nce a false statement has been made," the court asserted, "a defendant's knowledge is not relevant to a strict liability claim," and "a complaint may survive a motion to dismiss without pleading knowledge of falsity." *Ibid.*

The court of appeals acknowledged that it was creating a conflict with *Fait* v. *Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), and *Rubke* v. *Capitol Bancorp*

Ltd., 551 F.3d 1156 (9th Cir. 2009), which held that liability for a statement of opinion or belief under Section 11 lies "only to the extent that the statement was both objectively false *and disbelieved by the defendant* at the time it was expressed." J.A. 47-48 (emphasis added) (quoting *Fait*, 655 F.3d at 110). The court of appeals noted that those decisions had relied on this Court's decision in *Virginia Bankshares*, which held, in the context of a Section 14(a) claim based on a statement of opinion, that a plaintiff was required to allege both "objective falsity" and "a defendant's disbelief in his own statement." J.A. 48-49.

According to the court of appeals, however, this Court in *Virginia Bankshares* had "assumed the jury in the case had already found knowledge of falsity" and had "tied the knowledge of falsity requirement to scienter." J.A. 49. As a result, the court of appeals contended, "[t]he *Virginia Bankshares* discussion * * * has very limited application to § 11." J.A. 50. Based on that narrow reading of *Virginia Bankshares*, the court of appeals asserted that "[t]he Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this § 14(a) case into a § 11 context." J.A. 49. The court of appeals added that "[t]his is a context in which extension of dicta is most dangerous," and concluded that, "[i]n writing the opinion, the Court could not have intended that musings regarding the [subjective-falsity] requirement would later be applied to an unrelated statute." J.A. 51.

Having held that it was unnecessary for respondents to plead that Omnicare did not *believe* that it was in legal compliance, the court of appeals determined that respondents had sufficiently pleaded the falsity of the statements simply by alleging, based primarily on allega-

tions taken from *qui tam* complaints, that Omnicare was not *in fact* in legal compliance. J.A. 51-53.

7. The court of appeals subsequently denied rehearing. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

A. Like many other provisions of the federal securities laws that expressly or impliedly impose civil liability, Section 11 of the Securities Act prohibits the making of untrue or misleading statements of material fact. This case presents the question whether a statement as to a speaker's opinion or belief can be an untrue statement of material fact when the speaker actually held the stated belief. As a matter of text, logic, and precedent, the answer to that question is no.

The word "fact" conveys an element of certainty. Opinions and beliefs, by contrast, are inherently subjective assessments. The only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. 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.

B. The Court's decision more than two decades ago in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), confirms that common-sense proposition. There, the Court addressed the question whether a statement of opinion or belief could *ever* be "actionable as [a] misstatement[] of material fact." *Id.* at 1090. The Court held that it could be, but only if it constitutes "a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095. To establish that such a statement was false or misleading, therefore, the plaintiff must show that the speaker "did not believe" what he was saying. *Ibid.* (citation omitted).

The Court's holding in *Virginia Bankshares* flowed from the text of the substantive provision of federal securities law at issue, Rule 14a-9—which, like Section 11, confines liability to false or misleading statements of material fact. The Court's holding is also consistent with the common law of misrepresentation, under which statements of opinion or belief are actionable only insofar as they misstate the speaker's actual belief.

C. The Sixth Circuit erred in refusing to follow *Virginia Bankshares* in construing materially identical language in Section 11. It concluded that, simply because Section 11 is a strict-liability statute, a court assessing a claim under Section 11 may not take into account the defendant's subjective belief. Under the Sixth Circuit's view, a plaintiff may state a claim under Section 11 based on a statement of opinion or belief merely by alleging (with the benefit of hindsight) that the stated opinion turned out to be wrong.

The Sixth Circuit's approach flouts the presumption of consistency, which calls for the same language to be given the same meaning wherever it appears in a similar statutory provision. Neither the absence of a scienter requirement nor any other feature of Section 11 requires departing from the reasoning of *Virginia Bankshares* in this case. The Court's explanation in *Virginia Bankshares* of what it means for a statement of opinion to be actionable had nothing to do with scienter; the Court expressly declined to decide whether scienter is even required in an action under Section 14(a). And construing the "untrue statement of a material fact" element of Section 11 consistently with *Virginia Bankshares* does not conflict in any respect with the strict nature of Section 11 liability.

D. The decision below would create serious practical problems. For a start, it would expose issuers and other

Section 11 defendants to strict liability for inherently subjective judgments that later events show were mistaken. That liability-by-hindsight approach would turn Section 11 into a vehicle for after-the-fact second-guessing by plaintiffs and their lawyers. Such an approach would contravene this Court's instruction to construe strict-liability statutes such as Section 11 in a way that provides "predictive value," *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988), so that issuers can predict at the time whether their statements may subject them to liability. Legal-compliance statements, which by definition depend on the speaker's judgment as to unknowable future events, would be especially vulnerable to challenge. A rule that permitted liability based solely on objective falsity would chill the voluntary disclosure of information by issuers regarding their legal and regulatory environments—information that may be useful to investors. And it would discourage issuers from settling related cases, like the *qui tam* actions whose unproven allegations formed the basis for the claim here.

E. Should this Court agree with petitioners that a statement of opinion or belief is actionable under Section 11 only if the speaker did not hold the stated belief, it should reverse the court of appeals' judgment and thereby reinstate the district court's dismissal of respondents' Section 11 claim. In the operative version of the complaint, respondents expressly disclaimed any allegation of subjective disbelief. That disclaimer compels dismissal in the event the Court concludes, as it should, that the court of appeals' interpretation of Section 11 was erroneous.

ARGUMENT

A STATEMENT OF OPINION OR BELIEF IS ACTIONABLE AS AN 'UNTRUE STATEMENT OF A MATERIAL FACT' UNDER SECTION 11 ONLY WHEN THE SPEAKER DID NOT HOLD THE STATED BELIEF

Section 11 of the Securities Act of 1933 imposes civil liability when a registration statement "contain[s] an untrue statement of a material fact or omit[s] 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 question presented by this case is whether, and under what circumstances, a statement of opinion or belief can be an "untrue statement of a material fact" under Section 11.

The only *fact* conveyed by a statement of opinion or belief, which reflects an inherently uncertain assessment, is the fact that the speaker held the stated belief. As a matter of logic, that fact is untrue only if the speaker did not hold the stated belief. In *Virginia Bankshares*, this Court construed materially identical language in an action brought under Section 14(a) of the Securities Exchange Act of 1934 in precisely that manner. The Sixth Circuit erred by refusing to follow the reasoning of *Virginia Bankshares* in an action brought under Section 11.

A. Like Other Provisions Of The Federal Securities Laws, Section 11 Imposes Liability Only For Untrue Statements Of Material Fact

"[T]he starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (citation omitted). Section 11 creates a private right of action in cases where a registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a ma-

terial fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). In construing that language, the Court must "give effect, if possible, to every clause and word of [the] statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citation omitted). Section 11 does not impose liability for all untrue statements; instead, it imposes liability only for untrue statements of material *fact*. The word "fact" thus limits the types of statements that can give rise to liability under Section 11.

As a matter of common sense, an opinion is not a "fact." The word "fact" conveys, and conveyed at the time of the Securities Act, an element of certainty. See, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 813 (2002) (defining "fact" as, *inter alia*, "a thing done," "something that has actual existence," and "a verified statement or proposition"); *Webster's New International Dictionary of the English Language* 782 (1930) (defining "fact" as, *inter alia*, "[a] thing done," "[a]n actual happening in time or space," and "an occurrence, quality, or relation, the reality of which is manifest in experience or may be inferred with certainty"). An opinion, by contrast, is an inherently uncertain assessment. See, *e.g.*, Restatement (Second) of Torts § 538A (1977) (defining statement of opinion as a statement of "the belief of the maker, without certainty, as to the existence of a fact" or of "his judgment as to quality, value, authenticity, or other matters of judgment").

A statement of opinion or belief, however, does convey one fact: the fact that the speaker actually held the stated belief. In the context of this case, when Omnicare stated that "[w]e believe that we are in compliance in all material respects with state and federal regulations applicable to our business," J.A. 164, it conveyed the fact

that it held the stated belief. If that fact was true—if Omnicare did in fact hold the stated belief—then the statement did not contain an "untrue statement of a material fact." 15 U.S.C. 77k(a). Nor would there be any other "fact" that would need to be disclosed in order to render the statement "not misleading." *Ibid.* To survive a motion to dismiss, therefore, respondents would have to plead facts plausibly demonstrating that Omnicare did not actually believe that it was in legal compliance.[3]

B. In *Virginia Bankshares*, This Court Correctly Held That A Statement Of Opinion Or Belief Is Actionable Only As A Statement Of The 'Psychological Fact' Of The Speaker's Belief

This Court's decision in *Virginia Bankshares*, which construed materially identical text in another provision of the federal securities laws, confirms the foregoing reading of Section 11.

1. *Virginia Bankshares* involved a proxy solicitation in which a company's directors stated that they had approved a merger proposal "because of its opportunity for the minority shareholders to achieve a 'high' value [or] a 'fair' price[] for their stock." 501 U.S. at 1088. Section 14(a) of the Securities Exchange Act of 1934, as implemented by Rule 14a-9 thereunder, prohibits the solicitation of proxies by means of statements that are "false or misleading with respect to any material fact." 17 C.F.R. 240.14a-9(a). In *Virginia Bankshares*, several minority shareholders brought suit under Section 14(a), alleging that the directors did not in fact "believe[] that the price

[3] Of course, a plaintiff must also demonstrate that the fact at issue was "material." 15 U.S.C. 77k(a). As with statements of fact, not all statements of opinion rise to the level of materiality. See *Virginia Bankshares*, 501 U.S. at 1097.

offered was high or that the terms of the merger were fair." 501 U.S. at 1088-1089. After a jury trial, the district court entered judgment for the plaintiffs, and the court of appeals affirmed. *Id.* at 1089.

In an opinion written by Justice Souter, this Court reversed. 501 U.S. at 1108. As is relevant here, the Court considered "the actionability *per se* of statements of reasons, opinion, or belief." *Id.* at 1090. The Court observed that such statements "by definition purport[] to express what is consciously on the speaker's mind." *Ibid.* As a result, the Court construed 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 expressed." *Ibid.* Because a statement of opinion "by definition" is a statement about what the speaker believes, the jury could have found the statements at issue to be false as to a "material fact" only insofar as the statements falsely conveyed the directors' actual opinion. *Ibid.*

The defendants contended that statements of reasons, opinions, or beliefs could not be actionable as statements of material fact as a categorical matter, because statements like the ones at issue fell "outside the readily provable realm of fact." 501 U.S. at 1091. The Court, however, disagreed, explaining that the reasons for a speaker's actions were facts that could be proven or disproven by evidence reflecting the speaker's state of mind. *Id.* at 1092-1093; see also *id.* at 1093 (stating that "expressions of [conclusory] judgments can be uttered *with knowledge of truth or falsity* just like more definite statements" (emphasis added)).

Having rejected the defendants' arguments in support of a categorical rule, the Court held that statements of reasons, opinions, or beliefs can be actionable under Section 14(a) as statements that are false as to a material

fact. 501 U.S. at 1095. Critically, however, the Court returned to the principle that, for a statement of opinion to be false, it must be made "with knowledge that the [speaker] did not hold the beliefs or opinions expressed." *Id.* at 1090. The Court stated 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": that is, because that "psychological fact" is the only "fact" that a statement of opinion or belief conveys. *Id.* at 1095.

The Court then addressed what it described as the "rare" case that involved "evidence solely of disbelief or undisclosed motivation without further proof that the statement was defective as to its subject matter." 501 U.S. at 1096. The Court was contemplating a situation in which the speaker did not hold the stated belief (or was not motivated by the stated reason), but the stated belief or reason turned out to be objectively correct. See *id.* at 1095. Unsurprisingly, the Court concluded that an objectively correct statement cannot give rise to liability in an action brought under Section 14(a). *Id.* at 1096. Instead, a plaintiff must prove that the statement *both* "misstate[d] the speaker's reasons [or belief]" and also "misle[d] about the stated subject matter." *Id.* at 1095.[4]

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[4] The requirement that the stated belief be objectively erroneous naturally stems from the materiality element: that is, the requirement that the statement at issue be a false statement of *material* fact. In *Virginia Bankshares*, the Court suggested that, as long as the belief was objectively correct, the mere fact that the speaker did not hold the stated belief—what the Court called "the impurities of a director's unclean heart"—would be immaterial. 501 U.S. at 1096 (internal quotation marks and citation omitted). This case does not present any issue concerning the validity or source of that requirement: as this case comes to the Court, it is undisputed that the stated belief must be objectively erroneous in order to give rise to liabil-

Justice Scalia concurred in part and concurred in the judgment. 501 U.S. at 1108-1110. In a short separate opinion, he agreed that a statement of opinion is false only insofar as it misrepresents the speaker's actual opinion:

> As I understand the Court's opinion, the statement, "In the opinion of the Directors, this is a high value for the shares" would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise.

Id. at 1108-1109.

Although Justice Scalia agreed with the Court that the statement at issue did not give rise to liability, he questioned whether the statement constituted a pure statement of opinion. 501 U.S. at 1109. Instead, Justice Scalia construed the statement at issue to be making two factual assertions: first, that "the board of directors acted for a particular reason," and second, that "that reason is correct." *Ibid.* As to the latter, Justice Scalia read the statement to be asserting that the merger proposal in fact achieved a "high" value for shareholders. *Ibid.* By contrast, he noted, if the stated reason had been preceded by the words "in [the directors'] estimation," it "would have set forth nothing but an opinion." *Ibid.* (emphasis and internal quotation marks omitted).

2. The Court's holding in *Virginia Bankshares* flowed from the text of Rule 14a-9, which (like Section 11 and other provisions of the federal securities laws) pro-

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ity, and the only issue in dispute is whether, in addition, the stated belief must not have been actually held. If the latter is also required, petitioners are entitled to dismissal. See pp. 38-39, *infra*.

hibits the making of any "statement which * * * is false or misleading with respect to any material fact" or which "omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. 240.14a-9(a).

As discussed above, the only *fact* conveyed by a statement of opinion is the "psychological fact" that the speaker held the stated opinion. 501 U.S. at 1095; see pp. 14-16, *supra*. If the statement accurately conveys the speaker's actual belief, the statement is not "false or misleading with respect to any material fact." 17 C.F.R. 240.14a-9(a). And because such a statement is not "false or misleading" with respect to the fact that the speaker held the stated belief, the speaker cannot be liable for failing to "state any material fact necessary in order to make the statements therein not false or misleading." *Ibid.*

To be sure, as Justice Scalia noted in his concurring opinion in *Virginia Bankshares*, there may be cases in which a statement of opinion or reason conveys more than the mere fact that the speaker held the stated opinion or was motivated by the stated reason. See 501 U.S. at 1109. For example, a statement of opinion may expressly disclose the basis for the opinion, such as where the opinion was formed as a result of an investigation. See, *e.g.*, *Deephaven Private Placement Trading, Ltd.* v. *Grant Thornton & Co.*, 454 F.3d 1168, 1175-1176 (10th Cir. 2006). In such a case, the statement would convey two facts: that the speaker held the stated opinion and that the opinion was formed as a result of the investigation. As Justice Scalia noted, moreover, in the particular context of a statement of reasons (as opposed to a pure statement of opinion or belief), the stated reason may itself constitute a statement of fact. Consider, for example, a statement that directors decided to buy a target

company because that company's revenues last year were $1 billion. That statement would convey both the psychological fact of the directors' motivation and the factual premise that the target company's revenues were $1 billion.

As the foregoing examples demonstrate, whether a statement of opinion or belief discloses more than just the psychological fact of the belief will turn on the nature and content of the statement. But where a statement of opinion or belief does not contain an explicit representation about the factual basis for the belief, the only fact conveyed by the statement is the fact that the speaker possessed the stated belief. Accordingly, as *Virginia Bankshares* held, such a statement cannot be "false or misleadingly incomplete" if the speaker actually possessed the belief. 501 U.S. at 1095.

3. The principle that a statement of opinion or belief is actionable only insofar as it misrepresents the speaker's actual belief is also consistent with the common law of misrepresentation. "As a general rule, in order to constitute actionable fraud, a false representation must relate to a past or present * * * material fact." 37 Am. Jur. 2d *Fraud & Deceit* § 63 (West 2014) (footnotes omitted). The common law has long recognized that a statement of opinion or belief may be "factual" in the narrow sense that it conveys the "fact" that the speaker held the stated belief. See, *e.g.*, Restatement (First) of Torts § 525 cmt. c (1938) (noting that a person's "state of mind, such as * * * the holding of an opinion," is a "fact"). In the famous words of Lord Justice Cotton, "the state of a man's mind is as much a fact as the state of his digestion." *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483 (U.K. 1885); accord *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir.) (Hand, J.), cert. denied, 247 U.S. 507 (1918).

Because statements of opinion are factual only insofar as they convey the fact of the stated opinion, honest but ultimately erroneous statements of opinion are typically not actionable as false statements of fact under the common law of misrepresentation. See, *e.g.*, 37 C.J.S. *Fraud* § 45 (West 2014). That was true when the Securities Act was enacted, see, *e.g.*, *Seymour* v. *Chicago & N.W. Ry. Co.*, 164 N.W. 352, 354 (Iowa 1917), and it remains true today, see, *e.g.*, *Taylor* v. *AIA Services Corp.*, 261 P.3d 829, 843 (Idaho 2011).[5]

Indeed, even *dishonest* statements of opinion are not always actionable under the common law. In the context of ordinary arm's-length transactions, courts have frequently held that it was unreasonable for buyers to rely on sellers' statements of opinion. See, *e.g.*, *Howard* v. *Riggs National Bank*, 432 A.2d 701, 706 (D.C. 1981); *Deshatreaux* v. *Batson*, 131 So. 346, 348 (Miss. 1930). As a result, even if a plaintiff can prove that a statement of opinion is untrue because the speaker did not hold the opinion, the plaintiff may well be unable to prove that it was reasonable for him to rely on the statement. Before *Virginia Bankshares*, some commentators interpreted the federal securities laws to incorporate the same prin-

[5] In some jurisdictions, statements of opinion are actionable at common law under the law of negligent misrepresentation. See, *e.g.*, *State College Area School District* v. *Royal Bank of Canada*, 825 F. Supp. 2d 573, 585-587 (M.D. Pa. 2011); *Lawyers Title Insurance Corp.* v. *Baik*, 55 P.3d 619, 624-625 (Wash. 2002) (en banc). Critically, however, in those jurisdictions, a claim for negligent misrepresentation does not require a false statement of material fact but could be based on "false information" or some broader category of statement. See, *e.g.*, *id.* at 624-625; see generally Restatement (Second) of Torts § 552 (1977). As a result, cases from those jurisdictions provide only limited guidance in applying the federal securities laws to statements of opinion.

ciple. See, *e.g.*, Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 249 (1933).

In discussing the materiality element of a federal securities claim in *Virginia Bankshares*, the Court implicitly departed from the common-law position, noting that "a statement of belief by corporate directors about a recommended course of action * * * can take on * * * importance." 501 U.S. at 1090-1091. In construing the falsity element, however, the Court expressly accepted the common-law principle that a statement of opinion is an assertion of fact only insofar as it misrepresents the "psychological fact" of the speaker's actual opinion. *Id.* at 1095.

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In sum, the Court's holding in *Virginia Bankshares* accords not only with the plain text of the provision of federal securities law that the Court was construing, but also with the common-law understanding of what it means for a statement of opinion to constitute an untrue statement of material fact. As we will now explain, the Sixth Circuit offered no valid justification for its refusal to construe materially identical language in Section 11 in the same manner, and its judgment should therefore be reversed.

C. The Sixth Circuit Erred By Refusing To Follow The Reasoning Of *Virginia Bankshares* In An Action Brought Under Section 11

In the decision below, the Sixth Circuit refused to apply *Virginia Bankshares*' construction of the falsity element of a Section 14(a) claim to materially identical language in Section 11. That holding defies the fundamental principle of statutory interpretation that the same term or phrase should be given a consistent meaning across related provisions. Nothing about Section 11,

including the absence of a scienter element, justifies departing from *Virginia Bankshares*' common-sense reasoning about what it means for a statement of opinion to constitute an untrue statement of material fact.

1. The Phrase 'Untrue Statement Of A Material Fact' Should Be Construed Consistently Across The Federal Securities Laws

a. As discussed above, in *Virginia Bankshares*, the Court construed the language in Rule 14a-9 that prohibits the making of any "statement which * * * is false or misleading with respect to any material fact" or which "omits to state any material fact necessary in order to make the statements therein not misleading." 17 C.F.R. 240.14a-9(a). Materially identical language prohibiting the making of "false" or "untrue" statements of material fact pervades the federal securities laws, including not just Section 11 but numerous other provisions of the Securities Act and the Securities Exchange Act and the regulations implementing those statutes.[6]

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[6] See, *e.g.*, 15 U.S.C. 77d-1(c)(2)(A) (Section 4A(c)(2)(A) of the Securities Act); 15 U.S.C. 77*l*(a)(2) (Section 12(a)(2) of the Securities Act); 15 U.S.C. 77q(a)(2) (Section 17(a)(2) of the Securities Act); 15 U.S.C. 77x (Section 24 of the Securities Act); 15 U.S.C. 78i(a)(4) (Section 9(a)(4) of the Securities Exchange Act); 15 U.S.C. 78n(e) (Section 14(e) of the Securities Exchange Act); 15 U.S.C. 78*o* (b)(4)(A) (Section 15(b)(4)(A) of the Securities Exchange Act); 15 U.S.C. 78r(a) (Section 18(a) of the Securities Exchange Act); 15 U.S.C. 78ff(a) (Section 32(a) of the Securities Exchange Act); 17 C.F.R. 240.10b-5(b) (Securities Exchange Act Rule 10b-5(b)); 17 C.F.R. 240.13e-4(j)(1)(ii) (Securities Exchange Act Rule 13e-4 (j)(1)(ii)); 17 C.F.R. 240.14c-6(a) (Securities Exchange Act Rule 14c-6(a)); see also 15 U.S.C. 77p(b) (Section 16(b) of the Securities Act); 15 U.S.C. 77z-2(c)(1) (Section 27A(c)(1) of the Securities Act); 15 U.S.C. 78u-5(c)(1) (Section 21E(c)(1) of the Securities Exchange

"A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994); see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005). Moreover, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion); see *United States* v. *Castleman*, 134 S. Ct. 1405, 1417 (2014) (Scalia, J., concurring in part and concurring in the judgment). The principle of consistent interpretation carries special weight when the provisions at issue are "interrelated components" of an integrated "regulatory scheme"—here, the laws that govern the nation's securities markets. *Hochfelder*, 425 U.S. at 206. And in this very context, the Court has repeatedly recognized the need to construe provisions of the federal securities laws with the goal of ensuring consistency between the Securities Act and the Securities Exchange Act and their implementing regulations—and across the securities laws more generally. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179 (1994); *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 6-8 (1985); *Hochfelder*, 425 U.S. at 206-211.

The Sixth Circuit's decision flouts that principle of statutory interpretation. Under the Sixth Circuit's approach, the meaning of the phrase "untrue statement of a material fact" would vary across the securities laws, depending on whether the provision at issue contains a

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Act); 17 C.F.R. 240.3b-6(d) (Securities Exchange Act Rule 3b-6(d)); 17 C.F.R. 240.15c1-2(b) (Securities Exchange Act Rule 15c1-2(b)).

scienter requirement. That approach is both illogical and impractical. Where scienter is an element of liability under the securities laws, it is distinct from the element of falsity. See, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1317 (2011) (listing the elements of a Section 10(b) claim). The Sixth Circuit's approach conflates those elements by allowing the meaning of the latter element to fluctuate depending on whether a plaintiff must prove the former. As a result, where, as here, a plaintiff brings claims under multiple provisions of the securities laws, the same statutory phrase would have different meanings under different provisions. The securities laws contain no hint that Congress intended that peculiar outcome.

b. Petitioners have been unable to identify any other case in which a court has held that the phrase "untrue statement of a material fact" should be given a different meaning for purposes of Section 11. Lower courts have routinely applied the reasoning of *Virginia Bankshares* to claims involving statements of opinion or belief not only under Section 11, but across the securities laws.[7]

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[7] See, *e.g.*, *City of Omaha Civilian Employees' Retirement System* v. *CBS Corp.*, 679 F.3d 64, 67-68 (2d Cir. 2012) (per curiam) (Sections 10(b) and 20(a) of the Securities Exchange Act); *Fait* v. *Regions Financial Corp.*, 655 F.3d 105, 111 (2d Cir. 2011) (Sections 11 and 12(a)(2) of the Securities Act); *Rubke* v. *Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (Section 11 of the Securities Act and Section 10(b) of the Securities Exchange Act); *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 49 (1st Cir. 2005) (Sections 10(b) and 20(a) of the Securities Exchange Act); *Nolte* v. *Capital One Financial Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (Section 10(b) of the Securities Exchange Act); *Greenberg* v. *Crossroads Systems, Inc.*, 364 F.3d 657, 670 (5th Cir. 2004) (same); *In re Donald J. Trump Casino Securities Litigation*, 7 F.3d 357, 368 (3d Cir. 1993) (Sections 11 and 12 of the Securities Act and Sections 10(b), 15, and

Relying on *Virginia Bankshares*, those courts have held that a statement of opinion constitutes an untrue statement of material fact only if it was "disbelieved by the defendant at the time it was expressed." *Fait* v. *Regions Financial Corp.*, 655 F.3d 105, 110 (2d Cir. 2011) (Section 11 and Section 12(a)(2) claims); see, *e.g.*, *Rubke* v. *Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (Section 11 claim). Consistent with *Virginia Bankshares*, those courts have also required plaintiffs to plead and prove that the stated belief was erroneous as an objective matter. See, *e.g.*, *Fait*, 655 F.3d at 110; *Rubke*, 551 F.3d at 1162.

In short, courts considering claims based on statements of opinion, whether under Section 11 or under other provisions of the securities laws, have correctly read *Virginia Bankshares* to hold that "liability lies only to the extent that the statement was both objectively false *and* disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110 (emphasis added). Among those decisions, the Sixth Circuit's decision stands as a conspicuous outlier.

2. There Is No Valid Justification For Giving The Phrase 'Untrue Statement Of A Material Fact' A Different Meaning In An Action Under Section 11

In deviating from this Court's understanding in *Virginia Bankshares* of what it means for a statement of opinion to be an untrue statement of material fact, the Sixth Circuit relied on the strict-liability nature of Section 11. Specifically, the Sixth Circuit reasoned that,

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20(a) of the Securities Exchange Act), cert. denied, 510 U.S. 1178 (1994); *Bricklayers & Masons Local Union No. 5 Ohio Pension Fund* v. *Transocean Ltd.*, 866 F. Supp. 2d 223, 244 (S.D.N.Y. 2012) (Section 14(a) of the Securities Exchange Act).

"[n]o matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim"—and, for that reason, it concluded that *Virginia Bankshares* has "very limited application" to an action under Section 11. J.A. 47, 50. But Section 11 requires an untrue statement of a material *fact*, and a statement of opinion satisfies that requirement only if it misstates the speaker's belief. Neither the absence of a scienter requirement nor any other feature of Section 11 requires departing from *Virginia Bankshares* in this case.

a. The absence of a scienter requirement in an action under Section 11 does not affect the meaning of the distinct statutory requirement of an "untrue statement of a material fact."

i. The Sixth Circuit fundamentally erred when it concluded that this Court's holding in *Virginia Bankshares* was limited to securities claims that require scienter. In *Virginia Bankshares*, the Court based its subjective-disbelief requirement not on the scienter element of liability under Rule 14a-9, but rather on the falsity element: *i.e.*, the requirement that there be a false statement of material fact. See, *e.g.*, 501 U.S. at 1091 (stating that "the question remains whether statements of reasons, opinions, or beliefs are statements 'with respect to * * * material fact[s]' so as to fall within the strictures of the Rule" (alterations in original)). Indeed, the Court expressly *reserved* the question whether scienter was a required element of a Section 14(a) claim, *id.* at 1090 n.5—thus belying the proposition that the Court was re-

lying on the presence of a scienter element in holding that a showing of subjective disbelief was required.[8]

Ultimately, whether Section 14(a) requires scienter is wholly irrelevant here. This Court did not decide that question in *Virginia Bankshares*—and it had no reason to. Instead, the Court required a showing of subjective disbelief because that is what makes a statement of opinion "false" or "misleading" under Rule 14a-9. The Court's holding applies with equal force in actions under Section 11.

ii. Construing the "untrue statement of a material fact" element of Section 11 to require a showing that the speaker did not actually hold the stated belief would not somehow import a scienter requirement into that section. The Sixth Circuit reasoned that, because the honesty of the speaker's stated belief would be relevant to the scienter requirement of Rule 10b-5, that fact could not be relevant to any element of Section 11. As a matter of law and logic, however, that is simply not so: the same facts may be relevant to multiple elements of a claim. See, *e.g.*, *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

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[8] The Sixth Circuit's reading of *Virginia Bankshares* seems to have been driven, at least to some extent, by its own view that Section 14(a) requires scienter. See J.A. 50 (citing *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980), for the proposition that "§ 14(a) does in fact require proof of scienter"). In this respect as well, however, the Sixth Circuit is an outlier: since *Virginia Bankshares*, most courts of appeals to have considered the issue have concluded that Section 14(a) does *not* require scienter. See, *e.g.*, *Beck* v. *Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *California Public Employees' Retirement System* v. *Chubb Corp.*, 394 F.3d 126, 143-144 (3d Cir. 2004).

More broadly, even if it is true that the same facts might be relevant to both the "untrue statement of a material fact" element and the scienter element of some *other* claim (such as a claim under Rule 10b-5), requiring a plaintiff to prove that the speaker did not possess the stated belief does not eliminate the strict-liability nature of Section 11. For one thing, that requirement applies only to statements of opinion or belief; it has no application in garden-variety cases involving ordinary statements of fact.

Even in the context of statements of opinion, moreover, requiring a plaintiff to prove subjective disbelief is entirely consistent with the imposition of strict liability. Section 11 imposes liability on a number of specifically enumerated defendants beyond the issuer, including underwriters, the issuer's directors, and persons who sign or certify the registration statement. See 15 U.S.C. 77k(a). The element of falsity will require factual allegations and proof that the *speaker* of the statement (usually the issuer) did not hold the stated belief.[9] If the plaintiff satisfies this burden, a Section 11 defendant may be strictly liable, whether or not the defendant is the speaker that held the expressed belief. The statute thus retains its strict-liability nature, even in the context of statements of opinion.

b. Nor would construing Section 11's "untrue statement of a material fact" element consistently with *Virginia Bankshares* render the section's affirmative defenses superfluous in cases involving statements of opinion.

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[9] By contrast, a scienter element would require factual allegations and proof related to the state of mind of the *defendant*, who may or may not be the speaker of the statement.

Section 11 permits defendants other than the issuer to avoid liability by proving, as an affirmative defense, that they "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." 15 U.S.C. 77k(b)(3). In the context of an ordinary statement of fact, this defense permits defendants to show that they believed, and had reasonable grounds to believe, that the asserted fact was true.

The defense operates in the same manner in the context of a statement of opinion. As discussed above, all Section 11 defendants are strictly liable for a statement of opinion where the statement misstates the speaker's belief. In such cases, the good-faith affirmative defense allows defendants other than the speaker to avoid liability by showing that they believed the speaker held the stated belief (and had reasonable grounds to do so)—even if the speaker actually did not. In other words, the element of falsity relates to the subjective belief of the speaker, but the affirmative defense involves the subjective belief of a defendant who may not be the speaker.

c. In a related vein, respondents argued below that statements of opinion are actionable under Section 11 notwithstanding *Virginia Bankshares* because, as part of the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress created a safe harbor for some forward-looking statements made without knowledge of their falsity. See 15 U.S.C. 77z-2(c)(1)(B), 78u-5(c)(1)(B). According to respondents, Congress' adoption of this safe harbor, which applies to actions brought under Section 11, would have been meaningless if forward-looking statements made without knowledge of their falsity were not "untrue statements of a material fact" in the first place.

In enacting the safe harbor, however, Congress specifically noted that it did not intend for the safe harbor to displace judicial efforts to construe the affirmative elements of the securities laws. See Conf. Rep. No. 369, 104th Cong., 1st Sess. 43, 46 (1995). Instead, the primary innovation of the PSLRA was its creation of procedural mechanisms for ensuring the prompt dismissal of claims based on certain forward-looking statements. See 15 U.S.C. 77z-2(e)-(f), 78u-5(e)-(f). It thus does not follow from the enactment of the safe harbor either that statements protected by the safe harbor were actionable before the PSLRA, or that statements not protected by the safe harbor were actionable after it.

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In short, there is no valid justification for refusing to construe Section 11 in the same way that the Court construed Rule 14a-9 in *Virginia Bankshares*. The Court should hold that statements of opinion or belief are actionable under Section 11 only if they misstate the speaker's belief, and reverse the Sixth Circuit's contrary holding.

D. The Sixth Circuit's Interpretation Would Lead To After-The-Fact Second-Guessing, Chill The Voluntary Disclosure Of Information, And Discourage Settlements

Under the Sixth Circuit's approach, liability for a statement of opinion or belief under Section 11 would turn solely on a hindsight determination of objective "correctness." That view would turn Section 11 into a vehicle for plaintiffs and their lawyers to second-guess subjective opinions expressed in registration statements, often based on later events that were unknowable to the issuer at the time. The prospect of liability by hindsight is particularly acute in the context of statements con-

cerning legal compliance, which are necessarily infused with the issuer's judgment as to uncertain future events.

To avoid the prospect of such liability, issuers may simply stop providing voluntary disclosures about their legal and regulatory environments like the ones at issue here. The Sixth Circuit's approach thus threatens to undermine a foundational principle of the securities laws: that the markets function best when investors have access to more, not less, information.

1. The "practical consequences" of reading Section 11 to impose liability based on unpredictable future events that render a belief objectively erroneous provide an additional reason to reject the Sixth Circuit's approach. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Even more than other provisions of the securities laws, provisions that impose strict liability "demand[] certainty and predictability." *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988) (discussing Section 12 of the Securities Act). This Court has warned that strict-liability provisions should be construed to provide "predictive value to participants in securities transactions." *Ibid.*

The Sixth Circuit's interpretation of Section 11, however, would do just the opposite. Under that interpretation, an issuer could be strictly liable for a stated belief based entirely on future developments, no matter what the issuer actually believed at the time. So long as a plaintiff could show, with the benefit of hindsight, that the issuer's belief was mistaken, the issuer would be strictly liable. This reading would improperly "introduce[] an element of uncertainty" and unpredictability into Section 11. *Pinter*, 486 U.S. at 652.

It is no answer to say, as the Sixth Circuit did, that Congress did not include a scienter element in Section 11. Congress confined liability under Section 11 (and

other securities provisions) to untrue statements of material *fact*. It is one thing to hold issuers strictly liable for untrue statements of present or historical fact. Consider, for example, a statement that an issuer purchased an asset for a certain amount. That amount is objectively verifiable, both at the time the issuer makes the statement and in subsequent litigation. Imposing strict liability for such statements does not render an issuer's liability unpredictable.

But it is quite another thing to hold issuers strictly liable for mistaken statements of opinion on matters of judgment. Under the Sixth Circuit's approach, an issuer's liability for statements of opinion would often turn on future events that reveal the judgment to have been incorrect when made. That would amount to liability by hindsight. Cf. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.) (rejecting a claim of "fraud by hindsight" that alleged the defendants should have had "greater clairvoyance" at the time of the challenged statements). If anything, the strict-liability nature of Section 11 counsels against permitting such liability, not in favor of it, because of the heightened importance of certainty and predictability in strict-liability regimes.

2. The practical problems arising from the Sixth Circuit's holding are particularly acute in the context of statements concerning legal compliance, such as the ones at issue here. A statement can express an opinion in one of two ways: it can state "(a) the belief of the maker, without certainty, as to the existence of a fact," or "(b) his judgment as to quality, value, authenticity, or other matters of judgment." Restatement (Second) of Torts § 538A (1977).

Legal compliance is undeniably a "matter of judgment." A legal opinion given today could change or be rendered obsolete tomorrow. An assertion of legal com-

pliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled on the legality of the issuer's actions. The ultimate accuracy of the stated belief hinges on future events and the decisions of judges, juries, and regulators. Assessing legal compliance thus calls for an exercise of judgment about unknowable future events. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 Va. L. Rev. 965, 968-969 (1984).[10]

This case amply proves the point. Omnicare repeatedly emphasized that its statements depended on certain assumptions. For example, it stressed that its statements were "made on the basis of management's views and assumptions regarding business performance as of the time the statements [we]re made." J.A. 145. At the same time, Omnicare disclosed that its business may be affected by "known and unknown risks, uncertainties, contingencies and other factors that could cause actual results, performance or achievements to differ materially from those stated." J.A. 149. Those risks included the

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[10] Although statements about legal compliance are by their very nature statements of opinion, Omnicare explicitly signaled to readers that its statements reflected its subjective belief by using the introductory phrase "we believe." See, *e.g.*, J.A. 202. That phrase naturally signals an opinion, rather than a fact. As the Restatement explains, "'I believe that there are ten acres here,' is a different statement, in what it conveys, from 'The area of this land is ten acres.'" Restatement (Second) of Torts § 538A cmt. c (1977). While the latter statement conveys a fact, the former puts the listener on notice that the speaker is uncertain and is conveying only his own subjective belief. *Ibid.*; see *Virginia Bankshares*, 501 U.S. at 1109 (Scalia, J., concurring in part and concurring in the judgment) (explaining that a statement prefaced by "*in their estimation*" "set[s] forth nothing but an opinion").

possibility that the relevant "laws may * * * be interpreted in the future in a manner inconsistent with our interpretation and application," J.A. 95-96, as well as "the effect of new legislation, government regulations, and/or executive orders," and "the outcome of litigation," J.A. 150-151. When read in context, therefore, the statements at issue stand only for the proposition that, although Omnicare believed it was in material compliance with the law, it might be wrong; the government may interpret the law differently; it might be sued; and if it were found to have violated the law, the consequences could be severe.

As this case illustrates, statements such as Omnicare's about legal compliance are necessarily subjective and will be especially vulnerable to second-guessing by plaintiffs. The Sixth Circuit's approach would hold issuers strictly liable for those inherently uncertain statements, even when the opinions contained in the statements were actually held at the time they were stated. And the risk of liability by hindsight would only be heightened for companies such as Omnicare that operate in highly regulated and rapidly changing industries.

Given the potential for massive liability based on nothing more than an issuer's genuinely expressed beliefs about its legal compliance, adopting the Sixth Circuit's approach would inevitably chill such disclosures. Because there is no categorical "affirmative duty to disclose" even "material information," "companies can control what they have to disclose * * * by controlling what they say to the market." *Matrixx Initiatives*, 131 S. Ct. at 1321-1322. Under the Sixth Circuit's approach, voluntary disclosures about an issuer's legal and regulatory environment would become "rite[s] of confession" in which issuers would not be able to express their belief that they are in legal compliance without disclosing the

many ways in which they might not be. See *City of Pontiac Policemen's & Firemen's Retirement System* v. *UBS AG*, ___ F.3d ___, No. 12-4355, 2014 WL 1778041, at *5 (2d Cir. May 6, 2014) (citation omitted). The more likely alternative to such self-flagellation is that issuers would simply say less, or nothing, about the legal environment and accompanying risks.

As both this Court and the SEC have recognized, a statement of management's subjective opinions may be valuable to the investing public. See *Virginia Bankshares*, 501 U.S. at 1090-1091; Securities and Exchange Commission, Statement on the Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, 1 SEC Docket 4 (Feb. 2, 1973). In such cases, disclosing statements of opinion advances a central goal of the securities laws: to give investors helpful information. See *Central Bank*, 511 U.S. at 171 (stating that the securities laws "embrace a fundamental purpose * * * to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*" (alteration in original) (citation omitted)); *Hochfelder*, 425 U.S. at 195 (noting that "[t]he Securities Act of 1933 * * * was designed to provide investors with full disclosure of material information concerning public offerings of securities" (citation omitted)). The Sixth Circuit's approach would make less information, not more, available to investors.

Finally on this score, imposing Section 11 liability for opinions concerning legal compliance would also discourage issuers from settling litigation. Whenever an issuer has previously expressed an opinion about legal compliance in a registration statement, the Sixth Circuit's approach would necessarily prompt the issuer to weigh the value of settlement against the very real risk that the settlement could prompt a claim, even years later, for strict liability based on its previous statements. That

would undermine the longstanding judicial policy of encouraging resolution by compromise. See, *e.g.*, *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 215 (1994); *Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910). This case amply illustrates that proposition: in support of their contention that petitioners' statements concerning Omnicare's legal compliance were false, respondents heavily relied on unproven allegations taken from complaints in several *qui tam* actions that had been filed against, and were later settled by, Omnicare (with no finding or admission of liability). See J.A. 191-231, 243-248.

E. Because Respondents Disclaimed Any Allegation of Subjective Disbelief, They Failed To State A Claim Under Section 11

Should this Court agree with petitioners that a statement of opinion or belief is actionable under Section 11 only if the speaker did not hold the stated belief, the Court should reverse the court of appeals' judgment and thereby reinstate the district court's dismissal of respondents' Section 11 claim.

In the operative version of the complaint, respondents stated as follows: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." J.A. 273. Because respondents expressly disclaimed any allegation of knowing misconduct, they necessarily disclaimed an allegation that Omnicare (or any of the other petitioners) did not hold the stated beliefs about legal compliance.

Respondents made a strategic decision to include this disclaimer in an effort to circumvent the court of appeals' earlier holding that, because their allegations sounded in fraud, they were subject to the heightened pleading re-

quirements of Rule 9(b). See Pet. App. 66a. Rather than attempting to satisfy those heightened pleading requirements, respondents opted instead to include the disclaimer and to argue that subjective disbelief is not required, as a matter of law, to establish that a statement of opinion or belief is untrue under Section 11.

If this Court rejects the court of appeals' interpretation of Section 11, it should hold respondents to their strategic gambit and conclude that respondents' disclaimer compels dismissal. And because the court of appeals' interpretation cannot be sustained, the Court should reverse its judgment and reinstate the district court's dismissal of respondents' Section 11 claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

15 U.S.C. 77k provides:

Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part 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, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the regis-

tration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, 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; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) 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, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert

(other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has

become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any

suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.