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*

## REPLY BRIEF FOR THE PETITIONERS

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**REPLY BRIEF FOR THE PETITIONERS**

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To read respondents' and the government's briefs, one could be forgiven for forgetting that this is a case about interpreting the language of a statute: the language in Section 11 of the Securities Act of 1933 that prohibits untrue "statement[s] of * * * material fact." That language, which appears in materially identical form in numerous provisions of the federal securities laws, has a plain meaning; indeed, this Court has already provided it. In *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), the Court held that a statement of opinion or belief is actionable "solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095. That is for the simple reason that the only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief.

The Sixth Circuit erred in this case when it refused to follow *Virginia Bankshares* in construing the language of Section 11.

Faced with the obvious flaws in the court of appeals' reasoning, respondents do not even attempt to defend it. Instead, they seek to transform the case from one about misstatements to one about omissions, under which a supposedly misleading statement of opinion can give rise to liability based on the omission of other statements. But that effort founders on the text of the statute and on this Court's reasoning in *Virginia Bankshares*. In Section 11, as in other provisions of the federal securities laws, Congress provided liability only for false or misleading statements of material fact. An opinion is not itself a fact. And a statement of opinion can be false or misleading only with respect to the fact expressed therein: the speaker's belief.

For its part, the government does not defend the Sixth Circuit's reasoning either. Instead, it offers still another alternative, under which a statement of opinion can be actionable if the speaker lacked a reasonable basis for the stated belief, even where the speaker actually held the belief. But that interpretation suffers from all of the same flaws as respondents' and would be hopelessly amorphous in its application besides. And while the government seeks deference for the SEC's "longstanding" practice of imposing liability under a "reasonable basis" standard, the government cites only the thinnest evidence of that purported practice. Because the government's interpretation, like respondents', cannot be reconciled with the plain language of Section 11, the Court should reject it and reverse the judgment below.

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

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 material fact * * * necessary to make the *statements therein* not misleading." 15 U.S.C. 77k(a) (emphases added). As with other provisions of the federal securities laws, therefore, Section 11 imposes liability not for a "statement of opinion," but rather for a "statement of a material fact." It is the "statement of a material fact" that must itself be untrue or misleading.

As petitioners have explained (Br. 14-16), the only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. As a result, the statement that the speaker held the stated belief can be untrue only if the speaker did not actually hold the belief. And such a statement can be misleading only insofar as it conveys the incorrect impression that the speaker held a particular belief.

1. Respondents and the government do not dispute that, as an uncertain or subjective assessment, an opinion is not itself a "fact." See Restatement (Second) of Torts § 538A (1977) (defining a statement of opinion). Yet each of their more expansive interpretations rests on the proposition that the word "opinion" can be substituted for "fact" in Section 11, such that an untrue or misleading *opinion* can give rise to liability. See, *e.g.*, Resp. Br. 22 (contending that "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"); U.S. Br. 13 (asserting that "[a] statement of opinion can be misleading either because of what it expressly states or because of what it omits").

That is simply not what Section 11 says: Section 11 imposes liability only for untrue or misleading "statement[s] of * * * material fact."

Of course, Congress could readily have used broader language in Section 11 if it wished to impose broader liability. Indeed, Congress did so in other provisions of the federal securities laws. For example, whereas Section 8(d) of the Securities Act authorizes the SEC to issue stop orders in language materially identical to Section 11, see 15 U.S.C. 77h(d), Section 8(b) gives the SEC broader authority to prevent a registration statement from becoming effective if the statement is "incomplete or inaccurate in any material respect," 15 U.S.C. 77h(b). Congress chose to use narrower language in Section 11, and that choice should be given effect.

2. Neither respondents' nor the government's interpretation can be reconciled with the plain language of Section 11.

a. Respondents contend (Br. 23-29) that a statement of opinion or belief can be actionable simply because the belief turns out to be "objectively incorrect," on the theory that the statement of opinion "may be misleading with respect to its *subject matter*." Br. 23. As noted above, however, that theory rests on the erroneous proposition that Section 11 imposes liability for a misleading *opinion*, rather than a misleading "statement of a material fact." See pp. 3-4, *supra*. And as the government correctly explains, it would defy "ordinary parlance" to say that a statement of opinion necessarily comprises not only a statement of fact as to the speaker's belief, but also a statement of fact as to the underlying subject matter of the statement. Br. 14. For example, "the statement 'I believe X to be true' would not naturally be characterized as an 'untrue statement of * * * fact' simply because X was later determined to be false." Br. 14-15.

b. The government contends (Br. 10-16) that a statement of opinion or belief can be actionable if the speaker lacked a reasonable basis for the stated belief, even where the speaker actually held the belief. But that interpretation has no more of a footing in the statutory language than respondents'.

The government seemingly offers two theories for reconciling its "reasonable basis" standard with the statutory language, each of which is flawed. *First*, the government suggests (Br. 11, 13) that a statement of opinion or belief is misleading if the registration statement omits to state that the speaker lacked a reasonable basis for the stated belief. Like respondents' theory, however, that theory fails because it rests on the erroneous proposition that Section 11 imposes liability for a misleading *opinion*. See pp. 3-4, *supra*.

*Second*, the government suggests (Br. 11) that every statement of opinion implies a statement that the speaker has a reasonable basis for the opinion. But as the Tenth Circuit explained in an opinion issued since petitioners' opening brief, that implication is not warranted for the simple reason that "people often hold and express opinions based on reasons they find sufficient, even though they lack objective proof sufficient to satisfy others." *MHC Mutual Conversion Fund, L.P.* v. *Sandler O'Neill & Partners, L.P.*, ___ F.3d ___, No. 13-1016, 2014 WL 3765717, at *5 (10th Cir. Aug. 1, 2014). In addition, whether a speaker's basis for an opinion is "reasonable" would itself be a matter of opinion, requiring a judgment-laden determination about how the speaker arrived at the stated belief. Accordingly, even if a statement of opinion implies a statement that the speaker has a reasonable basis for the opinion, the latter statement would also be a statement of opinion—and, as such, could

not give rise to liability under Section 11. See pp. 3-4, *supra*.

The government further suggests (Br. 13-14) that implying a statement about the speaker's basis for its opinion is justified by the role registration statements play in the offering of securities. On that view, however, materially identical statutory language would have a different meaning in Section 11 than in other provisions of the federal securities laws. See pp. 14-17, *infra*. The government's argument also fails because Section 11 "does[] [not] speak of implications imposed by law." *MHC*, 2014 WL 3765717, at *5. Instead, Section 11 provides liability only for untrue or misleading statements of fact that are "required to be stated" or otherwise "contained" in a registration statement: *i.e.*, statements within the four corners of the registration statement itself.

3. All of which is not to say that any statement that begins with "we believe" is automatically a statement of opinion, or that statements of opinion do not sometimes have embedded in them statements of fact. See *Virginia Bankshares*, 501 U.S. at 1109 (Scalia, J., concurring in part and concurring in the judgment); Restatement (Second) of Torts § 538A cmts. c-d. What type of statement is involved will naturally depend on the statement's content and surrounding context. See Pet. Br. 20-21. For example, a statement that "we believe that Meryl Streep will win the Best Actress Oscar next year" would arguably constitute a statement of opinion (*i.e.*, the opinion that Meryl Streep will win) with an embedded statement of fact (*i.e.*, the fact that Meryl Streep appeared in a movie this year).

Here, however, it could not be clearer that Omnicare's statements about legal compliance were pure statements of opinion. As petitioners have explained (Br. 35-

36), Omnicare's statements expressed its judgment that it was in material compliance with the law. At the same time, Omnicare explained in the surrounding context that it may 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.

Respondents seemingly do not dispute that statements about legal compliance generally constitute statements of opinion. Instead, they suggest (Br. 6-9) that the statements at issue here constitute (or contain) statements of fact because, they assert, Omnicare was unambiguously violating clearly established federal law. That assertion is as baseless as it is irrelevant.[1]

To take one example, consider respondents' allegation that Omnicare obtained "illegal kickbacks" (Br. 7) from drug companies that were proscribed by the Medicare and Medicaid anti-kickback statute, 42 U.S.C. 1320a-7b(b). From respondents' description, one would not realize that the Department of Health and Human Services has promulgated various "safe harbor" regulations concerning that statute, including safe harbors for discount arrangements and payments for bona fide services. See 42 C.F.R. 1001.952.[2] Nor would one realize

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[1] Oddly, respondents contend that "[a]t no point in this litigation" have petitioners defended the accuracy of its statements about legal compliance. Br. 19-20. That is because the litigation is still at the pleading stage. Omnicare has consistently defended its conduct, and no court has found its practices improper. The fact that Omnicare chose to settle certain cases (without any admission of liability) is probative of nothing except the risks companies face in litigating claims under the False Claims Act, which provides for treble damages.

[2] As for respondents' allegations regarding misbranding (Br. 7), respondents omit to mention that Omnicare, in its role as provider of pharmacy-related services, does not market or promote drugs such

that Omnicare explained in its registration statement both that it received rebates and other discounts from drug companies and that regulators had recently expressed concern about such arrangements. See J.A. 136. Especially given the surrounding context, Omnicare's statements that its contracts complied with the law constituted expressions of judgment in a complicated and nuanced area of overlapping statutory and regulatory law. See Pet. Br. 3-4.

In any event, respondents' appeal to the supposed equities should not obscure the fundamental flaw in their logic. A statement about legal compliance is not suddenly transformed into a statement of fact simply because a plaintiff alleges that the speaker committed a clear-cut legal violation. Nor does a general statement about compliance with a complex legal regime—like the statements at issue here—imply any facts about the speaker's underlying conduct. At most, the alleged obviousness of a legal violation "may supply some evidence speaking to the question whether the opinion was sincerely held at the time it was offered." *MHC*, 2014 WL 3765717, at *4 (emphasis omitted). In this case, however, respondents have "expressly * * * disclaim[ed] any allegation" of subjective disbelief. J.A. 273.

In sum, petitioners' statements concerning Omnicare's legal compliance were statements of opinion that are actionable only insofar as petitioners did not hold the stated belief. The court of appeals' contrary interpreta-

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that it could be culpable for "misbranding" them. See *United States* v. *Caronia*, 703 F.3d 149, 153-155 (2d Cir. 2012) (quoting 21 U.S.C. 331(a)). And as for respondents' allegations regarding therapeutic interchange (Br. 8), respondents fail to mention that such programs benefit patients by providing them—upon their physicians' approval—with efficacious and cost-effective care.

tion of Section 11 was erroneous, and, in light of respondents' disclaimer of subjective disbelief, their Section 11 claim should be dismissed.

### 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

In contending that statements of opinion can be actionable under Section 11 even where the stated belief is sincerely held, respondents and the government run headlong into this Court's decision in *Virginia Bankshares*, which construed materially identical text in another provision of the federal securities laws and held that statements of opinion are actionable "solely as a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. In attempting to avoid the logical implication of *Virginia Bankshares*, respondents and the government fundamentally misconstrue that decision.

1. Quoting a footnote in the Court's opinion, respondents claim that the Court decided *Virginia Bankshares* "on the assumption that 'scienter was necessary for liability generally under § 14(a)'"—apparently as a way of supporting the Sixth Circuit's conclusion that the holding of *Virginia Bankshares* was limited to securities claims that require scienter. Br. 41. But that claim is demonstrably false, as a quotation of the entire footnote makes clear:

> In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 444 n.7 (1976), we reserved the question whether scienter was necessary for liability generally under § 14(a). We reserve it still.

501 U.S. at 1090 n.5.

Respondents' misquotation points up a deeper flaw in their (and the government's) interpretation of *Virginia Bankshares*. The Court did not take "as a given the jury's finding that the directors 'did not hold the beliefs or opinions expressed.'" U.S. Br. 18 (quoting 501 U.S. at 1090); see Resp. Br. 41. In fact, the jury in *Virginia Bankshares* made no such finding. See J.A. at 526-527, *Virginia Bankshares*, *supra* (No. 89-1448) (verdict form). Instead, the Court "interpret[ed]" the jury's verdict of liability as finding a lack of belief precisely because Rule 14a-9 (like Section 11) prohibits only false or misleading statements of *fact*. 501 U.S. at 1087 & n.2, 1090. The Court explained that an opinion "by definition purports to express what is consciously on the speaker's mind." *Id.* at 1090.

The foregoing statements, moreover, were not a passing aside. The Court stated that it was bound to "consider first the actionability *per se* of statements of reasons, opinion, or belief," 501 U.S. at 1090, because the case presented the question "whether statements of reasons, opinions, or beliefs are statements 'with respect to * * * material fact[s]' so as to fall within the strictures of [Rule 14a-9]," *id.* at 1091. The Court's answer to that question was that such a statement can be actionable, but "*solely* as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095 (emphasis added). And that answer applies with equal force to Section 11, because that provision, like Rule 14a-9, prohibits only false or misleading statements of fact.

2. Respondents contend (Br. 42-43) that, when the Court stated in *Virginia Bankshares* that a statement of opinion could be actionable "solely as a misstatement of the psychological fact of the speaker's belief," 501 U.S. at 1095, it was merely identifying *one way* in which such a statement could be actionable. But that contention can-

not be squared with the Court's opinion. After explaining that a statement of opinion could be actionable as a misstatement of the speaker's belief, the Court proceeded to consider whether such a statement would be actionable if it did not *also* "assert[] something false or misleading about its subject matter." See *id.* at 1096. That discussion would make no sense if a statement of opinion could be actionable simply because it is "misleading with respect to its subject matter," as respondents assert. Br. 23 (emphasis omitted).

For its part, the government contends (Br. 16-21) that *Virginia Bankshares* supports its position that a statement of opinion can be actionable *either* because the speaker did not actually hold the stated belief *or* because the speaker lacked a reasonable basis for that belief. But that contention cannot be squared with the Court's opinion either, for all the reasons already discussed. In the passage on which the government primarily relies, the Court merely considered whether allowing liability for subjectively disbelieved statements of opinion would present the risk of vexatious litigation and speculative proof. See 501 U.S. at 1091-1092. The Court concluded that it would not, explaining that the reasons for a speaker's actions could be proven or disproven by the same type of evidence that would be used to prove the speaker's state of mind. See *id.* at 1092-1093.

In the context of that discussion, the Court did state that an opinion expressed in conclusory terms is "reasonably understood to rest on a factual basis that justifies [it] as accurate, the absence of which renders [it] misleading." 501 U.S. at 1093. In so stating, however, the Court was merely explaining how a plaintiff would go about *proving* subjective disbelief; the Court immediately explained that "[p]rovable facts either furnish good reasons to make a conclusory commercial judgment, or

they count against it, and expressions of such judgments can be uttered *with knowledge of truth or falsity* just like more definite statements." *Ibid.* (emphasis added). The Court nowhere suggested that the lack of a reasonable basis would independently be actionable under Section 14(a); at most, the Court recognized that the absence of *any* basis for an opinion may be relevant in proving disbelief.

3. Justice Scalia's concurring opinion in *Virginia Bankshares* confirms that the Court's opinion stands for the proposition that a statement of opinion is false only insofar as it misrepresents the speaker's actual belief. See 501 U.S. at 1108-1109. Respondents' only answer is to observe that "[n]o other Justice joined the concurrence." Br. 43. True enough, but none of the other opinions in *Virginia Bankshares* took issue with Justice Scalia's characterization of the Court's holding. It is no accident that, until the Sixth Circuit's decision in this case, lower courts had similarly, and consistently, read *Virginia Bankshares* to require proof of both subjective disbelief and objective falsity before a statement of opinion could be actionable under the federal securities laws. See, *e.g.*, Pet. Br. 26-27 & n.7 (citing cases). The Sixth Circuit's outlying decision misreads *Virginia Bankshares*, and it should accordingly be reversed.

4. As petitioners have explained (Br. 21-23), the Court's holding in *Virginia Bankshares* comports with the common law's approach to statements of fact under the tort of misrepresentation, the most appropriate common-law analog. As a preliminary matter, it bears emphasizing that the question presented here is not what the common law required, but what the language of Section 11 dictates. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008).

Properly understood, however, the common law is consistent with Section 11. At common law, only statements of fact could be the basis for liability for misrepresentation, and "an expression of opinion * * * [was] not a statement of fact." *Southern Development Co.* v. *Silva*, 125 U.S. 247, 255 (1888). Not surprisingly, therefore, at least one member of Congress took the position that the Securities Act did not reach opinions at all, see 77 Cong. Rec. 2913 (1933) (Rep. Mapes), and commentators (including future SEC Chairman and Justice Douglas) did the same, see, *e.g.*, William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 190 n.97 (1933); Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 235-236, 249, 251 (1933). Respondents do not cite a single case holding that a statement of a sincerely held opinion constituted common-law fraud. Instead, at common law, a statement of opinion could be actionable only insofar as it misstated the speaker's opinion, see, *e.g.*, 37 C.J.S. *Fraud* § 45 (West 2014), or contained embedded factual statements, see, *e.g.*, Restatement (First) of Torts § 545 cmt. c (1938).

In discussing the common law, respondents focus on other, less apposite causes of action. Respondents contend the "closest common-law analog" to a claim under Section 11 is a contract claim for rescission. Br. 36. But a claim for rescission could be based on "any manifestation by words or other conduct * * * that * * * amounts to an assertion not in accordance with the facts." Restatement (First) of Contracts § 470 (1932). In any event, respondents' analogy to rescission is misplaced, because Section 11, as amended, does not provide for any form of rescissionary remedy, such as requiring defendants to return plaintiffs' money; instead, it provides only for compensatory damages to make plaintiffs whole for their losses. See 15 U.S.C. 77k(e). The latter

remedy, which Section 11 imposes, is a traditional remedy in tort, not contract. See Restatement (First) of Torts § 901 & cmt. a.

Respondents veer even further afield when they invoke the common law of defamation. See Br. 24. Like a claim for rescission, a claim for defamation does not require an untrue or misleading statement of fact, but instead can be based on a broader category of "defamatory" statement. See, *e.g.*, Restatement (First) of Torts § 558. That distinction is more than just semantic: at the time Section 11 was enacted, statements of opinion and fact alike could give rise to defamation claims. See *id.* §§ 566-567. Respondents cite no evidence that Congress intended that the common law of defamation inform the interpretation of Section 11—or any of the other provisions of the federal securities laws containing materially identical language.

### 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 a claim under Section 11. Respondents and the government do not dispute that the language of Section 11 is materially identical to the language of Rule 14a-9—and numerous other provisions of the federal securities laws. Nor do they dispute that, when Congress uses materially identical language in related statutory provisions, it is presumed that Congress intended that language to have the same meaning. Respondents and the government nevertheless highlight various aspects of Section 11 in an effort to give the falsity element of a Section 11 claim a broader meaning. The Court should reject that profoundly atextual effort.

1. Respondents and the government cannot overcome the clear language of Section 11, which imposes the same falsity requirement that appears throughout the securities laws. To the extent that Congress took a different approach in Section 11 than in other provisions, it did so by adjusting other elements of liability—for example, by eliminating the scienter requirement and making loss causation an affirmative defense—not by imposing liability for a broader category of statements or omissions.

Respondents (Br. 39-40) and the government (Br. 29) focus on the first of those adjustments, emphasizing that Section 11 imposes strict liability. But the presence or absence of a scienter requirement was irrelevant in *Virginia Bankshares*, which rested on the textual requirement that there be a false or misleading statement of fact. See pp. 9-10, *supra*. Requiring proof that the speaker did not actually hold the stated belief ensures that liability is limited to false or misleading statements of material fact, because a statement of opinion itself conveys only the fact of the speaker's psychological belief.

Respondents (Br. 37) and the government (Br. 28-29) also suggest that Section 11 imposed heightened duties of disclosure on issuers in the context of registration statements. The government goes so far as to compare issuers to fiduciaries. Br. 29-30. Again, however, Section 11 provides liability for untrue or misleading statements of material fact; it does not impose a general fiduciary duty to disclose *all* material nonpublic information. See, *e.g.*, *MHC*, 2014 WL 3765717, at *6; *Oxford Asset Management, Ltd.* v. *Jaharis*, 297 F.3d 1182, 1190 (11th Cir. 2002); *Cooperman* v. *Individual, Inc.*, 171 F.3d 43, 49-50 (1st Cir. 1999).

2. Respondents contend that petitioners' interpretation of the falsity element would "make[] hash out of" the affirmative defense in Section 11 for defendants other than the issuer. Br. 49. But it is respondents who misapprehend the interplay between the standard for liability and the affirmative defense. The affirmative defense "protect[s] even statements already proven false—statements that would otherwise be sufficient to trigger section 11 liability." *MHC*, 2014 WL 3765717, at *4. Where a statement is false, defendants other than the issuer can avoid liability by showing that they "had, after reasonable investigation, reasonable ground to believe and did believe" that the statement was true. 15 U.S.C. 77k(b)(3). Accordingly, the good-faith affirmative defense allows defendants other than the speaker to avoid liability for a statement of opinion by showing that they *believed* the speaker held the stated belief, even if the speaker actually did not. So understood, the affirmative defense does meaningful work in cases involving statements of opinion.

3. In a similar vein, respondents contend (Br. 53-54) that petitioners' interpretation conflicts with the statutory 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). As with the affirmative defense, however, the Court faces here "the antecedent question what it takes for an opinion to be false or misleading—what it takes to trigger section 11 in the first place." *MHC*, 2014 WL 3765717, at *4. Congress specifically noted that the safe harbor should not affect the analysis on that antecedent question. See Conf. Rep. No. 369, 104th Cong., 1st Sess. 43, 46 (1995). Instead, the safe harbor simply provides substantive and procedural protections for forward-looking statements. See 15

U.S.C. 77z-2(c)(1)(A), 77z-2(e)-(f), 78u-5(c)(1)(A), 78u-5(e)-(f).

Congress's enactment of the safe harbor, like its inclusion of the affirmative defense, thus provides no justification for construing the falsity element of Section 11 more broadly than the identically worded falsity elements of other federal securities laws—including the provision at issue in *Virginia Bankshares*. Because the Sixth Circuit erred by refusing to apply the reasoning of *Virginia Bankshares* in the Section 11 context, its judgment should be reversed.

**D. Like Respondents' 'Objective Falsity' Standard, The Government's 'Reasonable Basis' Standard Would Have Adverse Policy Consequences**

As petitioners have explained (Br. 32-38), respondents' "objective falsity" standard would lead to after-the-fact second-guessing, chill the voluntary disclosure of information, and discourage settlements. The government's "reasonable basis" standard would have policy consequences that are at least as pernicious, if not more so.

1. The government's standard would subject issuers and other defendants to the risk of classwide liability whenever a plaintiff could allege that the speaker lacked a reasonable basis for the stated belief, even if the belief was sincerely held. That standard would turn each case into an "ad hoc" inquiry into the reasonableness of a speaker's basis for its opinion. *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988). If anything, that standard would provide even less clarity to issuers than respondents' "objective falsity" standard, because whether a speaker possessed a *reasonable* basis for its opinion is itself a matter of judgment. See pp. 5-6, *supra*. Indeed, under the government's standard, even a statement of opinion that ultimately turns out to be correct could give rise to liabil-

ity, as long as the speaker lacked a reasonable basis at the time the statement was made. See Br. 15, 19 n.4.

As this Court has explained in the context of Rule 10b-5 claims, "such a shifting and highly fact-oriented disposition * * * is [not] a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975). If anything, Section 11 demands even more "certainty and predictability," not less, because it is a strict-liability statute. *Pinter*, 486 U.S. at 652. That is particularly true because Section 11 deals with registration statements, and the requirements for registration statements directly affect issuers' decisions as to whether to raise capital in American markets or elsewhere. See Chamber of Commerce Br. 19-26.

2. Under the government's "reasonable basis" standard, most issuers would take one of two courses, each of which would harm investors. The first course would be to flood a registration statement with minutiae to avoid any argument that the issuer has omitted facts necessary to avoid misleading investors about the basis for its stated opinion. But an issuer could not comply with the government's standard simply by disclosing that it had *some* basis for its opinion. Instead, in order to show that its basis was reasonable, an issuer would presumably have to disclose not only the information that supported its opinion (including commercially sensitive or even privileged information), but also any information that would potentially undermine it. While encouraging disclosure is a central purpose of the securities laws, the government's standard would put issuers in the absurd position of having to make statements with which they disagree and create the risk that issuers would "bury" investors in an "avalanche of trivial information"—an outcome that would disserve, rather than

promote, "informed decisionmaking." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448-449 (1976).

Given the complexities that disclosure would present under the government's standard, it is inevitable that many companies would choose a second course: silence. 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, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1321-1322 (2011). But that outcome would also disserve investors, by depriving them of potentially helpful information that could be gleaned from statements of opinion. See *Virginia Bankshares*, 501 U.S. at 1090-1091.

3. Like the Sixth Circuit's standard, the government's standard would also discourage issuers from settling litigation. Under the government's standard, an issuer would be faced with the prospect that a future plaintiff might try to use the fact of settlement to allege that the issuer lacked a reasonable basis for prior statements that the issuer made about legal compliance. It bears underscoring that that is precisely what has taken place here: respondents' allegations about the statements at issue here were taken from complaints in *qui tam* actions that had been filed against Omnicare and were later settled (without any finding or admission of liability). See J.A. 191-231, 243-248.

4. Respondents contend (Br. 54-56) that petitioners' interpretation would hamper the SEC's enforcement regime. Conspicuously, however, while the government argues that the SEC has applied a "reasonable basis" standard under other provisions, see U.S. Br. 31-33, it does not affirmatively argue that such a standard is necessary in order to aid the SEC's own enforcement efforts. That is not surprising, both because Section 11

creates only a private right of action, see *id.* at 1, and because the SEC has other tools to prevent statements of opinion in registration statements that it views as misleading—including statements that are "incomplete or inaccurate in any material respect," 15 U.S.C. 77h(b). And under a whole range of provisions of the securities laws, the SEC may take action where the evidence indicates that the speaker did not actually hold the stated belief. Even from the government's own perspective, therefore, its proposed standard is a solution in search of a problem.

**E. The SEC Is Not Entitled To Deference For The 'Reasonable Basis' Standard**

Finally, to the extent that the government contends (Br. 31-33) that the SEC should receive deference for the "reasonable basis" standard, that contention lacks merit.

1. The government asserts that the SEC has "consistently" taken the position that, under other provisions of the federal securities laws, a statement of opinion can give rise to liability where the speaker lacked a reasonable basis for the stated belief. See Br. 31. In support of that proposition, however, the government cites only four adjudications in the eighty years since the Securities Act and the Securities Exchange Act were enacted—only one in the last forty years, and none in the last twenty. Those exceedingly rare examples are hardly evidence of a "consistent" practice.

And by the government's own admission (Br. 33), even those few adjudications bear little resemblance to the facts of this case. Only one of the adjudications involved a statement of opinion in a registration statement—and the SEC seemingly concluded that the statement was so farfetched that the stated belief could not have been sincerely held (as well as concluding that oth-

er statements made outside the registration statement were false or misleading). See *Hamilton Oil & Gas Corp.*, No. 24D-2258, 1961 WL 61074, at *8, *14 (July 25, 1961). Two other adjudications involved SEC enforcement actions against broker-dealers under Section 15(b) of the Securities Exchange Act. See *Richard J. Buck & Co.*, No. 3-417, 1968 WL 86080 (Dec. 31, 1968); *Alexander Reid & Co.*, No. 8-7105, 1962 WL 68464 (Feb. 8, 1962). Those adjudications are especially inapposite, because brokers have long been recognized to be fiduciaries by virtue of their special relationship to their customers. See, *e.g.*, *Conway* v. *Icahn & Co.*, 16 F.3d 504, 509 (2d Cir. 1994); *Hanly* v. *SEC*, 415 F.2d 589, 596 (2d Cir. 1969). As discussed above, no such fiduciary relationship exists between issuers and prospective shareholders in the context of registration statements. See p. 15, *supra*. And the fourth adjudication relied on lower-court case law that *Virginia Bankshares* effectively overruled. See *Gold Properties Restoration Co.*, No. 3-7735, 1992 WL 211480, at *5 & n.4 (Aug. 27, 1992).

2. Even if the SEC had consistently taken the position that a statement of opinion can give rise to liability where the speaker lacked a reasonable basis for the stated belief, it would be entitled to no deference because the "reasonable basis" standard contradicts the plain language of Section 11 (and other provisions of the federal securities laws). This Court has frequently refused to afford deference to the SEC's interpretations, including where an interpretation is contrary to the unambiguous language of a statute or rule. See, *e.g.*, *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2303 n.8 (2011) (citing cases).

For the reasons discussed above, and as this Court has already held in *Virginia Bankshares*, a statement of opinion necessarily conveys only the fact that the speak-

er held the stated belief, and it is therefore actionable only if the speaker did not actually hold the belief. Neither respondents' nor the government's standard can be reconciled with the plain language of Section 11, which is materially identical to the language the Court was construing in *Virginia Bankshares*. Accordingly, the Court should reverse the judgment below and reinstate the district court's dismissal of respondents' Section 11 claim.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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