No. 24-4909

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONSTRUCTION LABORERS PENSION TRUST OF GREATER ST. LOUIS,

Plaintiffs-Appellees,

v.

FUNKO, INC., ET AL,

Defendants-Appellants.

On Appeal from the United States District Court
Western District of Washington
Case No. 2:23-cv-00824-JLR
Honorable James L. Robart

BRIEF FOR WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING & REHEARING EN BANC

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302

Lyle Roberts
ALLEN OVERY SHEARMAN STERLING US LLP
1101 New York Avenue NW
Washington, DC 20005
(202) 508-8108
lyle.roberts@aoshearman.com

William D. Marsh, Jr.
ALLEN OVERY SHEARMAN STERLING US LLP
2601 Olive Street, 17th Floor
Dallas, Texas 75201
(214) 271-5348

Counsel for Amicus Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Washington Legal Foundation (WLF) discloses that it has no parent corporation, issues no stock, and that no publicly held corporation has an ownership interest of ten percent or greater.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

WLF is a non-profit, public-interest law firm and policy center with supporters nationwide.[1] Founded in 1977, WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus in important disputes over the proper scope of federal securities laws. *See, e.g., Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023). WLF believes the Panel's decision merits *en banc* review because it undermines the purpose of the risk disclosures mandated by the Securities and Exchange Commission (SEC), harming investors and companies alike, and improperly applies the Private Securities Litigation Reform Act of 1995 (PSLRA) safe harbor for forward-looking statements.

SUMMARY OF ARGUMENT

WLF fully supports *en banc* review of the Panel's scienter analysis for the reasons stated in the Petition. In this brief, however, WLF focuses on two errors in the Panel's treatment of risk disclosures: (1) the failure to consider risk disclosure liability in the context of Item 105 of SEC Regulation S-K, and (2) the failure to apply the PSLRA "safe harbor" to the allegedly false or misleading risk disclosures.

First, the SEC's risk disclosure requirement is Item 105, which mandates the disclosure of only prospective risks. Because prospective risk disclosures are

[1] No party's counsel authored any part of this brief. Only WLF and its counsel contributed money to the preparation or submission of this brief.

inherently forward-looking, they "are not meant to educate investors on what harms are currently affecting the company." *In re Marriott Int'l, Inc.*, 31 F.4th 898, 904 n.2 (4th Cir. 2022). Indeed, there is no reason to infer anything about the past or present from a risk disclosure given Item 105's stated purpose. But relying on earlier panel decisions,[2] and without considering what Item 105's text requires, the Panel assumed that an investor understands risk disclosures to "*implicitly* serve[] as a comment on the present state of affairs." Pet. A32 (emphasis added). Nothing in law or logic supports that assumption.

As a result of this error, the Ninth Circuit stands alone in a three-way circuit split. Consistent with Item 105, the Fourth and Sixth Circuits correctly hold that risk disclosures generally need not disclose a prior or current materialization of the risk to avoid liability. The First, Second, Third, Fifth, and Tenth Circuits have held that a company need not disclose a materialization of the risk unless it is known and all but certain to have an imminent, material adverse impact on the company. Only the Ninth Circuit has allowed a company's failure to include a past or present materialization of the risk to support a securities fraud claim. The Court should take this case *en banc* to clarify that a risk disclosure is not rendered misleading by omitting information about the past or present.

[2] *See In re Facebook, Inc. Sec. Litig.,* 84 F.4th 844 (9th Cir. 2023); *In re Alphabet, Inc. Sec. Litig.,* 1 F.4th 687 (9th Cir. 2021).

Second, the PSLRA "safe harbor" precludes securities fraud liability for a forward-looking statement if the challenged statement includes "meaningful cautionary language" *or* is made without "actual knowledge" of its falsity. Several prior panels of this Court have held the safe harbor applies to risk disclosures, even if the plaintiff's theory is that the company failed to disclose risks that "had already been experienced," *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1190, 1195 (9th Cir. 2021); *see also Weston Fam. P'ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 623 & n.6 (9th Cir. 2022).

Yet the Panel here held that the safe harbor does not shield from liability a risk disclosure's "implicit assertion" of present fact that the identified risk has not occurred. Pet. A32. That holding not only conflicts with prior precedent, but it cannot be the right result. The failure to disclose the materialization of a risk is an alleged omission, and the safe harbor expressly applies to claims based on omissions. Moreover, a plaintiff could easily identify an "implicit assertion" of present fact in any forward-looking statement or projection, which would allow plaintiffs to always circumvent the safe harbor. That cannot be what Congress intended.

The Court should rehear the case *en banc* because these errors implicate important policy considerations. For years, the SEC has been trying to reduce the length of risk disclosures, which have become less useful to investors and needlessly burdensome for companies. If left unaddressed, the Panel's decision will cause

companies to include extensive, immaterial information about the materialization of stated risks in their risk disclosures. Similarly, Congress enacted the PSLRA safe harbor to reduce potentially frivolous, hindsight-driven securities litigation based on forward-looking statements like risk disclosures. But the Panel's decision invites just that type of meritless litigation.

ARGUMENT

I. The Court should grant the Petition to address a line of decisions that wrongly imposes Rule 10b-5 liability on risk disclosures.

Under Rule 10b-5, a company cannot make affirmative declarations that omit "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b). A statement is misleading, however, only if an omission of fact creates a false impression in the mind of a reasonable investor. *See Brody v. Transitional Hosp. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). Whether a statement is materially misleading to a reasonable investor "always depends on context." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 176 (2015).

Relying on *Facebook* and *Alphabet*, the Panel held that SEC-mandated risk disclosures are false and misleading, creating liability under Section 10(b) and Rule 10b-5, if they "warn[] that risks 'could' occur" but omit that those risks have already materialized. Pet. A30 (citing *Facebook*, 87 F.4th at 948-49 and *Alphabet*, 1 F.4th at 702-03). In doing so, the Panel failed to consider the type of information that risk

disclosures are intended to convey, and how a reasonable investor interprets a company's risk disclosures in context.

A. Risk disclosures are not rendered materially misleading by failure to disclose materialization of the risk.

A company is required to make risk disclosures under Item 105 of Regulation S-K. Item 105 is unlike SEC disclosure requirements that require the disclosure of past or present facts. *See, e.g.*, 17 C.F.R. § 229.303(a) (a company must provide "descriptions . . . of matters that *have had* a material impact on reported operations") (emphasis added). Instead, Item 105 calls only for the disclosure of "risk factors," requiring that the company identify "material factors that make an investment . . . speculative or risky." *Id.* § 229.105(a).

"Risk" is a forward-looking concept: one that concerns the "possibility of loss, injury, disadvantage, or destruction." *Bondali v. YUM! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015) (quoting Webster's Third New International Dictionary 1961 (1986)). "What makes an investment 'speculative or risky' is that it may lose value in the *future*." *Sodha v. Golubowski*, 154 F.4th 1019, 1042 (9th Cir. 2025) (emphasis added), *appeal docketed*, No. 25-944 (Feb. 9, 2026). Indeed, Item 105 "risk disclosures" are designed to alert investors to "what harms *may* come to their investment" in the future, not to what has happened or is happening. *Bondali*, 620 F. App'x at 491.

Because risk disclosures "are not meant to educate investors on what harms are currently affecting the company," the law assumes "'a reasonable investor would be unlikely to infer anything' from them about the company's current state of affairs." *Marriott*, 31 F.4th at 902 n.2 (quoting *Bondali*, 620 F. App'x at 491). Judge Bumatay aptly described this principle in *Facebook*, noting that if a reasonable investor believed Facebook's risk disclosure on data security meant the company had not experienced a significant data breach, then that investor "wasn't acting so reasonably." 87 F.4th at 869 (Bumatay, J., concurring in part and dissenting in part).

Employing similar reasoning, many courts have held that risk disclosures are not actionable under Rule 10b-5 absent an affirmative statement within the risk disclosure that brings the past or present into play. *Marriott*, 31 F.4th at 902 n.2 (risk disclosures generally "lack materiality" for an investor's understanding of the company's current state); *Kolominsky v. Root, Inc.*, 100 F.4th 675, 689 (6th Cir. 2024) (affirming dismissal of a claim alleging that risk disclosure should have said "marketing strategy was affecting" the business rather than "it *could*"); *Heavy & Gen. Laborers' Loc. 472 & 172 Pension & Annuity Funds v. Fifth Third Bancorp*, 2022 WL 1642221, at *17 (N.D. Ill. May 24, 2022) ("No reasonable investor would conclude that . . . [Defendant] promised that no employee misconduct had ever occurred."); *Chapman v. Mueller Water Prods., Inc.*, 466 F. Supp. 3d 382, 405, 406 (S.D.N.Y. 2020) (risk disclosure that "new products may have quality or other

defects" could not "be understood as a guarantee" that previously shipped products did not have defects); *In re ChannelAdvisor Corp. Sec. Litig.*, 2016 WL 1381772, at *6 (E.D.N.C. Apr. 6, 2016) (risk disclosures were not misleading because "it is unlikely that a reasonable investor would . . . infer anything about [defendant's] current contracts"), *aff'd*, 671 F. App'x 111 (4th Cir. 2016); *In re Noah Educ. Holdings, Ltd. Sec. Litig.*, 2010 WL 1372709, at *7 (S.D.N.Y. Mar. 31, 2010) (risk factors could not be read "to imply that . . . cost of raw materials had not increased . . . in the current quarter").

The Panel failed to appreciate the limited scope of Item 105 when it held that a risk disclosure "implicitly serves as a comment on the present state of affairs," and "suggests that the circumstance posing the risk has not yet occurred" unless otherwise disclosed. Pet. A32. Nothing in Item 105 would lead a reasonable investor to conclude that a company has never encountered a risk unless the risk disclosure says so. Nor has the SEC ever issued guidance directing companies to provide backward-looking risk disclosures or to comment on the "present state of affairs" through its risk disclosures.

Accordingly, a reasonable investor should take an Item 105 risk disclosure at face value: the stated risk makes an investment in the company speculative and risky. Unless a company specifies the likelihood of a risk (something Item 105 does not

require),[3] a court should not assume a reasonable investor believes that any disclosed risk is less meaningful or less likely than any other. Risk disclosures do not "allay[] concerns" about the identified risk. Pet. A35. Quite the contrary, a risk disclosure "is not a sham warning," and the law assumes that a "reasonable investor would understand as much." *Kolominsky*, 100 F.4th at 689. "[W]here a company's filings contain abundant and specific disclosures regarding the risks . . . the investing public is on notice of these risks and cannot be heard to complain that the risks were masked as mere contingencies." *Sundaram v. Freshworks Inc.*, 2023 WL 6390622, at *8 (N.D. Cal. Sept. 28, 2023) (citation omitted).

B. In no other Circuit are risk disclosures actionable under Rule 10b-5 for mere failure to disclose that a risk has materialized.

No other Circuit Court has held that failure to disclose that a risk has materialized by itself renders a risk disclosure materially misleading for purposes of Rule 10b-5. The Fourth and Sixth Circuits correctly have recognized that a company need not recount current or past events in its risk disclosures to avoid Rule 10b-5 liability because a reasonable investor infers nothing about the past or present from a risk disclosure. *See supra* I.A. And the First, Second, Third, Fifth, and Tenth

[3] *See* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 991 (2019) ("[Item 105] . . . requires describing kinds of risk but does not explicitly require discussion of either the probability that the risks described will come to pass or the impact on the company if they do.").

Circuits have held that a risk disclosure is not rendered materially misleading by the failure to disclose the materialization of a risk unless the company knows with "near certainty" that the materialized risk will have an imminent, material adverse effect on the company. *See Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 137-38 (1st Cir. 2021); *Set Cap. LLC v. Credit Suisse Group AG*, 996 F.3d 64, 85-86 (2d Cir. 2021); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 241-242 (3d Cir. 2017); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 248-49 (5th Cir. 2009); *Indiana Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1255-57 (10th Cir. 2022).

Simply put, *Alphabet*, *Facebook*, and the Panel's decision here represent a clear departure from other circuits, even those that have held Rule 10b-5 can apply to risk disclosures in certain circumstances. *See* Henry B. Blaikie, Note, *Litigating Corporate Risk*, 93 FORDHAM L. REV. 2109, 2120 (2025) (discussing the Ninth Circuit's "depart[ure] from the circuit majority"). The Supreme Court granted certiorari in *Facebook* to address this Court's split from all other Circuit Courts on this issue, but later dismissed the appeal due to a vehicle problem. This case presents an opportunity for the Court to examine this issue *en banc*, correct an error that started with *Alphabet*, and bring this Circuit's treatment of risk disclosures in line with the Fourth and Sixth Circuit (preferably as a matter of good law) or at least impose the prudential limits embraced by the other Circuits.

II. The Court should grant the Petition because the Panel failed to faithfully apply the PSLRA safe harbor.

As the Petition notes, the Panel separately erred in holding that the PSLRA safe harbor did not apply. *See* Pet. 3, 6-7, 13, 18-19. The safe harbor applies to any claim "that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading." 15 U.S.C. § 78u-5(c)(1). The safe harbor insulates a "forward-looking statement" from Rule 10b-5 liability, even if it is allegedly false or misleading, unless (1) the forward-looking statement was not "accompanied by a meaningful cautionary statement" *and* (2) the plaintiff proves that the forward-looking statement was made "with actual knowledge" that the statement "was false or misleading." *Twitter*, 29 F.4th at 620 (quoting 15 U.S.C. § 78u-5(c)). The Court should grant *en banc* review to correct the Panel's safe-harbor decision, which contradicts prior precedent from this Court and guts the safe harbor's protection for forward-looking statements.

A. The Panel's failure to apply the safe harbor conflicts with prior precedent.

This Court has repeatedly found that risk disclosures qualify as "forward-looking statements" that should be analyzed through the lens of the safe harbor, even where the plaintiff's theory is that the company failed to disclose that the stated risk previously materialized. *See Wochos*, 985 F.3d at 1195 (risk disclosure fell "squarely within the statute's definition of a forward-looking statement" despite allegation that

"these types of risks had *already* been experienced"); *Twitter*, 29 F.4th at 621, 623 n.6 (noting that "risk warnings . . . were protected under the safe harbor provision" despite allegation that "the risk had materialized by then").

In *Wochos*, the panel held that a risk disclosure receives safe harbor protection and only "concrete factual assertion[s] about a specific present or past circumstance" embedded within a risk disclosure would fall outside the safe harbor's scope. 985 F.3d at 1192. Stated another way, "because some statements about the future may combine non-actionable forward-looking statements with separable—and actionable—non-forward-looking statements . . . only the forward-looking aspects could be immunized from liability." *Id.* at 1190 (citation omitted).

To drive home the point, the *Wochos* panel contrasted the plaintiffs' theory there—a risk disclosure misleadingly omitted that the "risks had already been experienced"—against the plaintiffs' theory in *Berson v. Applied Signal Technologies, Inc.*—a risk disclosure's "affirmative statements" about "backlog" misleadingly omitted that the calculations included work "halted due to stop-work orders." *Wochos*, 985 F.3d at 1195-96 (citing *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985-87 (9th Cir. 2008)). *Wochos* explained that "unlike the affirmative statements" challenged in *Berson*, which concerned past and present calculation of backlog, the challenged risk disclosures in *Wochos* "contain[ed] no explicit or

implicit representation" about past or present materialization of the identified risks and thus were covered by the safe harbor. *Id.*

The Panel's decision here cannot be reconciled with *Wochos*. According to the Panel, a risk disclosure "does not fall under the safe harbor for forward-looking statements because its falsity lies . . . in the *implicit* assertion about the present that the risk identified has not happened yet." Pet. A32 (emphasis added). In other words, and directly contrary to *Wochos*, the Panel found that no affirmative misstatement is needed.

B. The Panel's classification of Plaintiffs' theory as one of "affirmative misrepresentation" was flawed and guts the safe harbor.

Apart from its failure to adhere to binding precedent, the Panel erred by treating Plaintiffs' theory as one of "affirmative misrepresentation" (an "untrue statement of material fact"), rather than as "an omission theory" ("a failure to state a material fact necessary . . . to make the statements made . . . not misleading"). *Wochos*, 985 F.3d at 1188 (quoting 17 C.F.R. § 240.10b-5). Plaintiffs' claims here clearly concerned an omission—the failure to disclose that a risk had materialized. But the Panel treated this omission as an "implicit assertion" about the present giving

rise to an "affirmative misrepresentation theory" falling outside the safe harbor. There is no legal basis for that holding.

First, there is no existing case law supporting it. While the Panel cited *Alphabet* and *Facebook*, neither *Alphabet* nor *Facebook* say that a risk disclosure's "implicit assertions" provide a basis for an "affirmative misrepresentation" claim that falls outside the safe harbor's scope. Both cases framed the plaintiffs' claims as theories of omission. *See Alphabet*, 1 F.4th at 703 ("The complaint also plausibly alleges that Alphabet's omission was misleading."); *Facebook*, 87 F.4th at 861 ("Facebook's omission that the risk of improper access and disclosure had occurred" was "materially misleading."). And neither case held the safe harbor does not apply. *Alphabet* never mentioned the safe harbor at all. And *Facebook* held that the safe harbor did not protect the challenged risk disclosures only because the risk disclosures did not provide enough cautionary language given "what Facebook allegedly knew." 87 F.4th at 862.

Second, if an omission can create an "implicit assertion" not covered by the safe harbor, a plaintiff could convert almost any omission into an "implicit assertion" about the present in almost every case, which would eviscerate the safe harbor's protection for forward-looking statements altogether. *See Wochos*, 985 F.3d at 1192. In contrast to the Panel's decision, this Court consistently has applied the safe harbor to allegations that a forward-looking statement was misleading based on an omission

of present fact. *See, e.g.*, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1109 (9th Cir. 2010); *Golub v. Gigamon Inc.*, 847 F. App'x 368, 372 (9th Cir. 2021).

For example, in *Cutera*, the Court applied the safe harbor to revenue projections allegedly rendered misleading by the omission of "material information about the weakness of [the company's] junior sales force." 610 F.3d at 1109. And in *Golub*, this Court applied the safe harbor to a plaintiff's claim that the company's forward-looking statements were allegedly misleading because they omitted details about a certain set of updated projections to the board. 847 F. App'x at 372. The purported omissions in *Cutera* and *Golub* were subject to the safe harbor, even though they easily could have been framed as "implicit assertions" about the present.

Third, the Panel suggested that the safe harbor protects forward-looking statements only if their alleged "falsity lies . . . in the failure to predict the future." Pet. A32. By limiting the reach of the safe harbor to claims based on a forward-looking statement's failure to predict the future, however, the Panel effectively eviscerated the "actual knowledge" prong of the safe harbor. As a matter of common sense, a defendant cannot have "actual knowledge" that a truly forward-looking statement is false or misleading because the future is inherently unknowable. For that reason, courts have held that a plaintiff establishes a defendant's "actual knowledge" of the falsity of a forward-looking statement for purposes of the safe harbor by showing that the defendants "(1) did not genuinely believe the . . .

statement, (2) actually knew that they had no reasonable basis for making the statement, or (3) were aware of undisclosed facts tending to seriously undermine the accuracy of the statement." *Slayton v. Am. Express Co.*, 604 F.3d 758, 775 (2d Cir. 2010); *see also In re Apple Comp. Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989). That formulation recognizes that these are "three implicit factual assertions" of a "projection" that can render a forward-looking statement actionable if any one of them is untrue. *Apple,* 886 F.2d at 1113 ("A projection . . . may be actionable to the extent that one of these implied factual assertions is inaccurate."). Plaintiffs satisfy none of those criteria here.

Even assuming that risk disclosures could ever be materially misleading based on a failure to disclose the materialization of the risk (*see supra* I.A.), that type of omission would appear to fall into the category of an "undisclosed fact tending to seriously undermine the accuracy of the statement." But a plaintiff still must prove the defendant had "actual knowledge" of the undisclosed fact to overcome the safe harbor's protection against liability. *See Slayton*, 604 F.3d at 775-78 (dismissing claims because plaintiff failed to plead "actual knowledge" of "undisclosed facts"

regarding "the extent of the deterioration" of the debt portfolio at time statement was made). The Panel's decision runs roughshod over all this precedent.

III. The Court should grant the Petition because the Panel's decision, and the line of cases on which it relies, undermine important policy goals.

The Court should grant *en banc* review to clarify that a risk disclosure is (1) not rendered misleading by omission of information about the past or present, and (2) protected by the PSLRA safe harbor, absent an express representation about the past or present. Such a ruling would serve important public policy goals that the SEC and Congress have both sought to achieve.

A. The Panel's decision undermines the SEC's longstanding efforts to simplify risk disclosures.

In 2020, the SEC amended Item 105 to make it less prescriptive, finding that "prescriptive requirements result in disclosure that is not material to an investment decision and is costly to provide." Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63746 (Oct. 8, 2020). The amendments were meant to "discourage . . . the disclosure of information that is not material," *id.* at 63726, and "to improve disclosures for investors and to simplify compliance efforts for registrants." Press Release, *SEC Proposes to Modernize Disclosures of Business, Legal Proceedings and Risk Factors under Regulation S-K*, SEC (Aug. 18, 2019), https://tinyurl.com/y5phuhrt. These amendments were lauded as good news for investors and companies alike because investors would no longer "need to wade

through as much material to find key points," and companies would not be "required to list everything but the proverbial kitchen sink when describing their businesses, their liability exposures, and their risks." *See* Alexandra R. Lajoux, *SEC's New Reg S-K is Good News for Investors and Directors Alike*, NAT'L ASSOC. OF CORP. DIRECTORS (Aug. 31, 2020), https://tinyurl.com/3uz8jpy5.

If the Court does not address *en banc* the line of decisions that wrongly imposes Rule 10b-5 liability on a company's risk disclosures, the expanding law in this Circuit will eliminate the positive gains the SEC hoped to achieve by its amendment. And it will set the stage for an unworkable disclosure regime, one that forces companies to lard their risk disclosures with extraneous details about the past and present, rather than focus on providing investors with information about the most significant risks facing the company.

This lack of clarity would continue a troubling trend of court decisions unwittingly incentivizing "lengthy, non-specific, and standardized risk factor disclosures" that are "associated with more favorable judicial and regulatory assessments." Richard A. Cazier et al., *Are Lengthy and Boilerplate Risk Factor Disclosures Inadequate? An Examination of Judicial and Regulatory Assessments of*

Risk Factor Language, Kelley Sch. of Bus. Res. Paper Series No. 18-43, at 1, 2-3 (Dec. 2019).

B. The Panel's decision undermines the Congressional policy goals behind the PSLRA safe harbor.

Congress enacted the safe harbor to "enhance market efficiency by encouraging companies to disclose forward-looking information" by reducing "[t]he muzzling effect of abusive securities litigation." H.R. Rep. No. 104-369, at 42-43 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731, 741; *see also Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007) (one of the PSLRA's primary goals was "to curb frivolous, lawyer-driven litigation").

If left unaddressed, the Panel's errors in its cramped view of the safe harbor will materially expand the scope of Rule 10b-5 liability and usher in a new wave of abusive lawsuits based on a company's failure to disclose past incidents alongside risk disclosures. This outcome would run contrary to Congress's stated desire to limit the proliferation of meritless securities litigation.

Dated: April 13, 2026

Respectfully submitted,

/s/ Lyle Roberts

Lyle Roberts
ALLEN OVERY SHEARMAN STERLING US LLP
401 9th Street NW
Washington, DC 20004
(202) 508-8108
lyle.roberts@aoshearman.com

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington DC 20036
(202) 588-0302

William D. Marsh, Jr.
2601 Olive Street, 17th Floor
Dallas, Texas 75201
(214) 271-5777

Attorneys for Amicus Curiae Washington Legal Foundation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 24-4909

I am the attorney or self-represented party.

This brief contains 4,199 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Lyle Roberts **Date** April 13, 2026

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2026, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served via CM/ECF.

/s/ Lyle Roberts
Lyle Roberts