No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., JOEL F. GEMUNDER, DAVID W. FROESEL, JR., CHERYL D. HODGES, THE ESTATE OF THE LATE EDWARD L. HUTTON, AND SANDRA E. LANEY,

Petitioners,

v.

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND AND THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,

Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, contributed money to fund its preparation or submission. All parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases involving the federal securities laws, such as *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317; *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); and *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market, and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders annually and give more than $9 billion per year in combined charitable contributions. BRT's member companies have a significant interest in public policy regarding securities fraud and class action litigation.

The Chamber and BRT have a substantial interest in this case because of the significant burdens imposed on their members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of

all sizes. In particular, the Chamber and BRT are concerned that the Sixth Circuit's decision, by erroneously holding that truthful, genuinely held statements of belief and opinion may constitute misstatements of fact under Section 11 of the Securities Act of 1933, will compound these burdens in a manner inconsistent with this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), and Section 11's text.

SUMMARY OF ARGUMENT

A private startup technology company develops a new consumer-electronics product, NeckWidget. It is worn like a necklace, and immediately proves a hit. To raise the capital to expand NeckWidget production to meet the explosion in demand, NeckWidget Inc. decides to go public. It files a registration statement with the SEC under Section 5 of the Securities Act of 1933. The registration statement contains extensive and accurate disclosure about NeckWidget Inc.'s business and finances. And the registration statement truthfully expresses management's genuinely held opinion and belief: "We believe that a necklace-style e-widget such as the NeckWidget is superior in convenience, utility, and value to other kinds of widgets currently in the market or under development, and that the necklace style of our e-widget product gives us a competitive advantage." NeckWidget Inc.'s offering is priced at an unexpectedly strong $35 per share, and even at that lofty price, the issue is oversubscribed.

But NeckWidget Inc.'s opinions turn out to be wrong on all counts. The very week the NeckWidget offering is conducted, BigTech Corp. publicly announces what had until then only been rumored—that it is launching a competing product. Called WristWidget, it is worn

on the wrist. It turns out to be lighter, more powerful, easier to use—and cheaper—than NeckWidget. Contrary to the belief expressed in the registration statement, consumers find NeckWidget to be inferior, not superior, in convenience, utility, and value, and they strongly prefer WristWidget to NeckWidget. And so NeckWidget Inc. finds itself at a severe competitive *dis*advantage. WristWidget immediately begins taking market share away from NeckWidget. Within six weeks, sales of NeckWidget fall by 70 percent. And NeckWidget Inc.'s stock drops by over 95 percent, to $1.25 per share.

Under the Sixth Circuit's holding in this case, the hypothetical startup company would be subject to potentially devastating liability under Section 11 of the Securities Act of 1933 for expressing its genuinely held belief. The company's statement of belief was unquestionably true—the company *did* believe its product to be superior, and *did* believe it had a competitive advantage. But in the Sixth Circuit, no matter: a good-faith statement of sincerely held opinion and belief constitutes "'an untrue statement of a material fact'" simply because the opinion or belief turns out to be wrong. Pet. App. 11a (quoting 15 U.S.C. § 77k(a)).

Worse yet, the company would face "strict liability" for the truthful expression of its genuinely held opinion and belief. *Id*. at 12a. As this Court has said, Section 11 "places a relatively minimal burden on a plaintiff," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983): it does not require scienter, or even negligence, and certainly not reliance. The courts have essentially required purchasers in securities offerings to plead and prove one thing—a false statement of fact. As a result, under the decision below, a

company faced with a Section 11 class action for expressing a genuine but misguided opinion would have little chance on a motion to dismiss, and—given the inherently "*in terrorem*" nature of a securities class action, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)—a strong incentive to settle otherwise "weak claims" in order to avoid the significant expense of "extensive discovery and the potential for uncertainty and disruption in a lawsuit," *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

The Sixth Circuit's decision cannot be squared with precedent, statutory text, or logic. This Court has already spoken on when an opinion or belief can constitute a false statement of material fact under the federal securities laws. In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), the Court addressed a claim that a statement of opinion violated Rule 14a–9, a regulation promulgated under Section 14(a) of the Securities Exchange Act of 1934. Rule 14a–9 deals with proxy statements instead of registration statements, but like Section 11, its core element is a misstatement of fact—that the "proxy statement … contain[] [a] 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." 501 U.S. at 1087 n.2 (quoting 17 C.F.R. § 240.14a–9).

The Court in *Virginia Bankshares* thus faced the same question presented here—when are "statements of reasons, opinions, or beliefs . . . statements 'with respect to material fact[s]' so as to fall within the strictures of the [applicable] Rule" or statute? *Id.* at 1091 (citation omitted). The Court gave a clear

answer. "A statement of belief" or opinion can be false "as a misstatement of the psychological fact of the speaker's belief in what he says"—and is false if made "with knowledge that the [speaker] did not hold the beliefs or opinions expressed." *Id*. at 1095, 1090. The Court thus concluded: "We hold that *knowingly* false statements of reasons," opinions, or beliefs "may be actionable." *Id*. at 1087 (emphasis added). Plaintiffs must accordingly plead and prove that a defendant "misstate[d] the speaker's reasons" or belief or opinion. *Id*. at 1095.

As Justice Scalia's concurring opinion put it, "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*." *Id*. at 1108–09 (Scalia, J., concurring in part and in the judgment; emphasis added). In so holding, the Court followed what has long been the law in the securities realm and elsewhere—that "state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it," and that those who make such representations "may be held to good faith in their statements." *Seven Cases v. United States*, 239 U.S. 510, 517–18 (1916). "This approach makes logical sense," as "[r]equiring plaintiffs to allege a speaker's disbelief in, and the falsity of, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements." *Fait v. Regions Fin. Corp*., 655 F.3d 105, 112 (2d Cir. 2011).

There is no merit, moreover, to the court of appeals' and petitioners' assertions that *Virginia Bankshares*' statements about knowledge of an opinion's falsity were simply dicta, and merely reflected an assumption, for argument's sake, that Rule 14a–9 required

scienter. *See* Pet. App. 18a; Br. in Opp. 22, 25. There was no dicta: "We *hold* that knowingly false statements of reasons may be actionable," said this Court. 501 U.S. at 1087 (emphasis added). And there was no assumption about scienter: this Court expressly "*reserved* the question whether scienter was necessary for liability generally under § 14(a)." 501 U.S. at 1090 n.5 (emphasis added). As a result, the Court *held* that opinions and beliefs had to be knowingly, subjectively false in order to be actionable, and that holding stemmed from an element *other* than scienter. The Court's opinion makes repeatedly clear which element that was: a false "statement[] 'with respect to . . . material fact[]' . . . within the strictures of the Rule," *id*. at 1091 (quoting 17 C.F.R. § 240.14a–9)—an element likewise required under Section 11 here.

Finally, any departure from the *Virginia Bankshares* approach here would poorly serve both public companies and investors. Affirmance of the Sixth Circuit's holding would put securities issuers in grave peril of strict liability under Section 11 if their genuinely held opinions and beliefs turn out to be wrong. That, in turn, would deter issuers from engaging in public offerings in the United States. There is every reason to believe that the competitiveness of American capital markets has already been hobbled by the expansive liabilities imposed upon public securities issuers by our private securities litigation system. Holding issuers strictly liable for the sincerely held beliefs that they express in public offerings would only make matters worse. In addition, affirmance of the holding below would deter issuers from expressing their sincere beliefs, and thus would deprive investors of some of the most valuable insights they might obtain about the issuers' businesses. This Court should adhere to *Virginia Bankshares* here.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO *VIRGINIA BANKSHARES*.

A. *Virginia Bankshares* holds that opinions and beliefs constitute misstatements of fact only if they are subjectively false.

This case begins and ends with this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). That case, like this one, involved the question whether, and under what circumstances, a statement of opinion may constitute a false or misleading statement of fact under a provision of the federal securities laws.

The provision at issue in *Virginia Bankshares* was SEC Rule 14a–9, which makes it unlawful to solicit proxies "'by means of any proxy statement . . . containing 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.'" 501 U.S. at 1087 n.2 (emphases added; quoting 17 C.F.R. § 240.14a–9). The proxy statement in question involved a merger in which the minority stockholders of Virginia Bankshares would receive $42 per share. In that proxy statement, Virginia Bankshares' directors opined that the merger would provide the minority holders with "a 'fair' price" and "a 'high' value," and represented that this was why the directors had approved the merger. *Id*. at 1088. A jury found that the defendants did not hold these beliefs at the time they were expressed. The district court entered judgment against the defendants, and the court of appeals affirmed. *Id*. at 1089.

In this Court, the defendants, as petitioners, "argue[d] that statements of opinion or belief . . . cannot be actionable as misstatements of material fact within the meaning of Rule 14a–9." *Id*. at 1090. Accordingly, the Court faced the question of "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." *Id*. at 1091 (quoting 17 C.F.R. § 240.14a–9).

The Court held that reasons, opinions, and beliefs could indeed be statements of fact, and that they could be *mis*statements of fact if they were knowingly false. "[A] statement of belief" or opinion could constitute "a misstatement of the psychological fact of the speaker's belief in what he says," the Court reasoned, and a plaintiff could demonstrate the statement's falsity by proving the defendant's "*disbelief*" in it. *Id*. at 1095 (emphasis added). The plaintiff thus had to "prove a specific statement of reason [or belief, or opinion] knowingly false," *ibid*.—in other words, *subjective* falsity. "We hold that knowingly false statements of reasons may be actionable even though conclusory in form," stated this Court. *Id*. at 1087.

The Court went on to decide whether such subjective falsity sufficed to establish a *material* misstatement of fact, and held that it did not. The Court declined to "authorize § 14(a) litigation confined solely to . . . the 'impurities' of a director's 'unclean heart.'" *Id*. at 1096 (quoting *Stedman v. Storer*, 308 F. Supp. 881, 887 (S.D.N.Y. 1969)). "We think that proof of mere disbelief or belief undisclosed should not suffice for liability," the Court concluded, "and if nothing more had been required or proven in this case, we would reverse for that reason." *Ibid*. As a result, a plaintiff

must establish that the alleged misstatement not only "misstate[d] the speaker's reasons" or beliefs, but "also misle[d] about the stated subject matter." *Id*. at 1095. In other words, there must be "proof by . . . objective evidence . . . that the statement also expressly or impliedly asserted something false or misleading about its subject matter." *Id*. at 1095–96.

This additional requirement of objective falsity, the Court observed, would alleviate the danger of "strike suits," and neutralize the threat of "attrition by discovery" that this Court's decisions have repeatedly "sought to discourage." *Id*. at 1096 (citation omitted); *see*, *e.g*., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734–35, 739–44 (1975). The requirement plainly arose from Rule 14a–9's element of materiality: as the case quoted by this Court explained, it would be "bemusing, and ultimately pointless, to charge that directors perpetrated a '*material* omission'" unless the "impurities" of their "unclean heart[s]" "result[ed] [in] damage to plaintiffs." *Stedman*, 308 F. Supp. at 887 (emphasis added), *quoted in part in Virginia Bankshares*, 501 U.S. at 1096. If the merger price offered to Virginia Bankshares' minority shareholders had indeed been "high" and "fair" even though the directors believed that it wasn't, then their misstatements of belief could not have been material to those shareholders.

In short, the Court in *Virginia Bankshares*—in a portion of the opinion joined by seven Justices—held that, for a statement of opinion to constitute a false statement of fact, the statement had to be subjectively false. In fact, the Court was unanimous on the point. Justice Scalia, who concurred in the opinion in part

and in the judgment, also crisply expressed the requirement of subjective falsity:

> 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*.

501 U.S. at 1108–09 (Scalia, J., concurring in part and in the judgment; emphases added). A ninth Justice wrote that he, too, "agree[d] in substance" with this aspect of the Court's opinion. *Id*. at 1110 (Stevens, J., concurring in part and dissenting in part).

Until the Sixth Circuit's decision here, the lower courts had no difficulty applying the Court's unanimous judgment. On remand in *Virginia Bankshares* itself, the Fourth Circuit recognized that this Court had held that "opinions" and "'statements of reasons'" had to be "'knowingly false [to] be actionable.'"[2] Over the next twenty-plus years, other courts of appeals likewise concluded that this Court had required plaintiffs to show that "the speaker did not actually hold the opinion expressed,"[3] that "the statement [of opinion] was . . . disbelieved by the defendant at the time it was expressed,"[4] that "the defendants . . . did

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[2] *Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 341 (4th Cir. 1992) (quoting 501 U.S. at 1087).

[3] *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 47 (1st Cir. 2005).

[4] *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011).

not hold those opinions or beliefs,"[5] that a statement of opinion was "disbelieved by its maker,"[6] "that the speaker did not in fact hold [the] belief" expressed,[7] that the statement "was not made in good faith,"[8] that it was "subjectively false,"[9] that it was "known by the speaker at the time it [was] expressed to be untrue,"[10] and that it was "issued without good faith."[11] Indeed, even the Sixth Circuit recognized that a plaintiff must show that "the speaker does not believe the opinion."[12]

B. *Virginia Bankshares*' subjective-falsity holding derived from the requirement that plaintiffs prove a misstatement of fact, and accordingly applies here.

The Sixth Circuit's conclusion that it would be a "stretch[]" to apply *Virginia Bankshares* in a Section 11 case, Pet. App. 18a, was based upon its reading of a single sentence in *Virginia Bankshares*—and a single footnote to that sentence. These tiny snippets

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[5] *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, 543 F.3d 150, 166 (3d Cir. 2008).

[6] *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004).

[7] *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 670 (5th Cir. 2004).

[8] *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1333 (7th Cir. 1995).

[9] *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009).

[10] *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 n.6 (10th Cir. 1997).

[11] *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1277 (D.C. Cir. 1994).

[12] *Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993).

of this Court's opinion cannot bear the weight the court of appeals placed on them.

The sentence cited the *Virginia Bankshares* jury's "'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.* (quoting 501 U.S. at 1090). As for the "footnote to this sentence," it "reserve[d] 'the question whether scienter [is] necessary for liability . . . under § 14(a).'" *Ibid.* (quoting 501 U.S. at 190 n.5). According to the court below, "[t]he connection of these two statements indicates that the *Virginia Bankshares* Court . . . tied the knowledge of falsity requirement to scienter . . ." *Ibid.* "Since the Supreme Court assumed knowledge of falsity for the purposes of the discussion in *Virginia Bankshares*," the court of appeals reasoned, "§ 14(a) was effectively treated as a statute that required scienter," and, "therefore, has very limited application to § 11" here. *Ibid.* Thus, in the view of the court of appeals, the extended discussion of "the knowledge of falsity requirement" in *Virginia Bankshares* was merely this Court's roundabout way of assuming *arguendo* that scienter was required under Section 14(a).

This reinterpretation of *Virginia Bankshares* is self-contradictory and wrong. This Court did indeed impose, as the court of appeals recognized, a "knowledge of falsity requirement," Pet. App. 18a—but that requirement had nothing to do with scienter. It could not have, because the Court did not hold that Section 14(a) requires scienter, and did not even assume it. The Court simply "*reserved* the question whether scienter [is] necessary for liability *generally* under § 14(a)," 501 U.S. at 1090 n.5 (emphases added)—and, as the court of appeals recognized,

"explicitly declined to address the issue further," Pet. App. 18.

The knowledge of falsity requirement, discussed at length by the Court, 501 U.S. at 1092–96, necessarily flowed from some element other than scienter. And the Court's opinion repeatedly makes clear what that other element was: that of a "misstatement[] of material *fact* within the meaning of Rule 14a–9." 501 U.S. at 1090 (emphasis added). Again, "the question [was] 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." *Id*. at 1091 (quoting 17 C.F.R. § 240.14a–9). The answer was yes—*if* the statements were "knowingly false." *Id*. at 1087, 1095.

This holding on the element of a false or misleading material *fact* therefore fully applies under Section 11 as well. The rule that "[g]enerally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning,'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)), also commands force when there is "similar[] . . . language" in "two statutes [that] share a common *raison d'etre*," *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam); *accord Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion). Here, just as a violation of Rule 14a–9 requires proof that a proxy solicitation contained a "statement which . . . is false or misleading with respect to any material fact," 17 C.F.R. § 240.14a–9, Section 11 proscribes registration statements that "contain[] an untrue statement of a material fact or omit[] to state a material fact . . . necessary to make the statements therein not misleading," 15 U.S.C. § 77k(a).

Accordingly, given that Section 11 of the 1933 Act and Section 14(a) of the 1934 Act were "enacted by the same Congress . . . and form[ed] part of the same comprehensive regulation of securities trading," *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 268 (2010), the Court should define a misstatement of fact identically under both provisions—just as it has held, for example, that the concepts of materiality,[13] manipulation,[14] territoriality,[15] and "in connection with"[16] should be construed identically across the federal securities laws. If a statement of opinion can only constitute a misstatement of fact under Section 14(a) because the speaker did not in fact "hold the belief stated," *Va. Bankshares*, 501 U.S. at 1092, the same rule governs under Section 11 here.

Although "§ 11 is a strict liability statute" and thus does not "require a plaintiff to prove scienter," Pet. App. 15a, that does not change the requirements of the "fact" element. The same could be said about Section 14(a) and Rule 14a–9: The lower courts have held that Section 14(a) does *not* require

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[13] *See*, *e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) (Section 10(b) of the 1934 Act and Rule 10b–5); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (Section 14(a) of the 1934 Act and Rule 14a–9).

[14] *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 6 (1985) (Section 14(e) of the 1934 Act); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (Section 10(b)).

[15] *See Morrison*, 561 U.S. at 268 (noting "[t]he same focus on domestic transactions is evident" in both the 1933 and 1934 Acts).

[16] *See Dabit*, 547 U.S. at 85–86 (Section 10(b) of the 1934 Act and Section 101(b) of the Securities Litigation Uniform Standards Act of 1998).

scienter,[17] yet have nonetheless held that *Virginia Bankshares* imposes a subjective disbelief/knowledge-of-falsity requirement to statements of opinion challenged under Rule 14a–9.[18] Thus, even if Section 11 and Rule 14a–9 do not require scienter, they both still require misstatements of fact—and thus both require subjective disbelief for a statement of opinion to constitute a misstatement of fact.

Finally, it makes no difference here that "liability under § 14(a)" is "implied," whereas liability under Section 11 is based upon "clear text." Br. in Opp. 26. For *Virginia Bankshares* addressed the scope of the conduct prohibited by Section 14(a) and Rule 14a–9, and not "the additional 'elements of the . . . private liability scheme'" that this Court "'ha[s] had to infer'"

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[17] "[U]nlike Section 10(b), Section 14(a) lacks any reference to a manipulative device or contrivance … to indicate a requirement of scienter," *Knollenberg v. Harmonic, Inc.*, 152 F. App'x 674, 682 (9th Cir. 2005) (citation and internal quotation marks omitted), language that led this Court to find scienter to be required under Section 10(b), *Ernst & Ernst*, 425 U.S. at n.28, 197, 199. "Based in large part on … textual analysis, the weight of authority [in the lower courts] rejects a scienter standard for claims under Section 14," and, "[i]ndeed, with respect to defendants who directly solicited proxies, it appears that no reported opinion requires [a] plaintiff to plead or prove scienter." *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1263 (N.D. Cal. 2000); *see*, *e.g.*, *Knollenberg*, 152 F. App'x at 682; *SEC v. Das*, 723 F.3d 943, 953–54 (8th Cir. 2013); *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *In re Exxon Mobil Sec. Litig.*, 500 F.3d 189, 196 (3d Cir. 2007); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1298–1301 (2d Cir. 1973) (Friendly, J.).

[18] *E.g.*, *Knollenberg*, 152 F. App'x at 682; *Hayes v. Crown Cent. Petroleum Corp.*, 78 F. App'x 857, 864 (4th Cir. 2003); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 372 (3d Cir. 1993); *Mendell v. Greenberg*, 938 F.2d 1528, 1529 (2d Cir. 1991) (per curiam).

when it, and not Congress, has created the right to sue. *Morrison*, 561 U.S. at 261 n.5 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (internal quotation marks and citation omitted)). And this Court has repeatedly made clear that, "'when it comes to the scope of . . . the conduct prohibited'" by a statute or rule, "'the text . . . controls [this Court's] decision.'" *Id*. (quoting *Cent. Bank*, 511 U.S. at 173). The text construed in *Virginia Bankshares*—the phrase "statement which . . . is false . . . with respect to any material fact," 17 C.F.R. § 240.14a–9—is substantively identical to the text at issue here—"untrue statement of a material fact," 15 U.S.C. § 77k(a). This Court's interpretation of the text in *Virginia Bankshares* accordingly controls here.

II. THIS COURT SHOULD ADHERE TO *VIRGINIA BANKSHARES*.

A. *Virginia Bankshares* correctly interpreted the meaning of "false statement of fact."

This Court's holding in *Virginia Bankshares* rested upon a simple, indisputable proposition: that an opinion can be factually false if it is a "misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. "This approach makes logical sense," as "[r]equiring plaintiffs to allege a speaker's disbelief in, and the falsity of, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements." *Fait v. Regions Fin. Corp*., 655 F.3d 105, 112 (2d Cir. 2011).

The Court's commonsensical understanding of what is a "fact" also has a long lineage in the law. "Of course, by 'fact' the courts probably meant, originally, facts of the external world existing outside of the

person's mind, and having material substance . . ."[19] "But at least by the nineteenth century it had become a familiar notion that 'the state of a man's mind is as much a fact as the state of his digestion.'"[20] By the time the securities laws were enacted, it was already well accepted that "state of mind is itself a fact, and may be a material fact, and [that] false and fraudulent representations may be made about it . . ." *Seven Cases v. United States*, 239 U.S. 510, 517 (1916). As Judge Learned Hand observed, the cases had "often pointed out" that an "opinion . . . involves at least . . . the belief of the utterer in the truth of what he says," and in that "sense . . . is a statement of fact." *Taylor v. Burr Printing Co*., 26 F.2d 331, 334 (2d Cir. 1928). And as he put it in a passage quoted in *Virginia Bankshares*, 501 U.S. at 1094: "An opinion is a fact, and it may be a very relevant fact; the expression of an opinion is the assertion of a belief . . ." *Vulcan Metals Co. v. Simmons Mfg. Co*., 248 F. 853, 856 (2d Cir. 1918). It was thus "well settled that fraud may consist in asserting a belief or an opinion, when such belief or opinion is not entertained and the assertion is made in bad faith, with a design to mislead and deceive." *Keeler v. Fred T. Ley & Co*., 49 F.2d 872, 874 (1st Cir. 1931).

As the *Restatement (First) of Torts* put it: "Strictly speaking, 'fact' includes not only the existence of a tangible thing or the happening of a particular event . . ., but also the state of mind, such as the entertaining

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[19] W. Page Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 633, 644 (1937).

[20] 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 7.8, at 505 n.12 (3d ed. 2006) (quoting *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459, 483 (A.C.) (Bowen, L.J.)).

of an intention or the holding of an opinion, of any person . . .” RESTATEMENT (FIRST) OF TORTS § 525 cmt. c, at 60 (1938); *accord* RESTATEMENT (SECOND) OF TORTS § 525 cmt. d, at 56 (1977). And so “a statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion . . . is a misrepresentation if the person in question does not hold the opinion . . .” RESTATEMENT (FIRST) OF TORTS § 525 cmt. b, at 60; *accord* RESTATEMENT (SECOND) OF TORTS § 525 cmt. c, at 56. That unimpeachable proposition is exactly what *Virginia Bankshares* holds.

B. Failure to apply *Virginia Bankshares* would harm American capital markets and investors.

From a policy standpoint, it is critically important to the securities markets that Section 11’s reference to “untrue” or “misleading” “statement of material fact,” when the fact is an opinion or belief, be construed to refer only to opinions and beliefs not genuinely held by the statement’s maker. To hold otherwise would mean virtually absolute liability for defendants who express opinions and beliefs that turn out, in hindsight, to be wrong. That result would deter issuers from engaging in public offerings in the United States, and would thus significantly diminish the competitiveness of American capital markets, which are already disadvantaged by the expansive liabilities imposed upon issuers by our private securities litigation system. In addition, imposing liability for genuinely held beliefs under Section 11 would significantly lessen the quality of disclosure to investors: it would deter issuers from expressing genuinely held opinions and beliefs about their businesses, including opinions and beliefs that turn out to be correct.

1. The courts have held that Section 11 requires little more than the pleading and proof of an untrue or misleading statement of fact. "Although limited in scope, §11 places a relatively minimal burden on a plaintiff." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). There is no element of scienter, no element of causation, and no element of reliance: Section 11 does not "'require[] that plaintiffs allege the scienter or reliance elements of a fraud cause of action,'" *In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70, 73 n.1 (2d Cir. 2006) (citation omitted); to the contrary, "in a Section 11 case, 'the general rule [is] that an issuer's liability . . . is absolute.'" *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir. 2011) (citation omitted).

These minimal pleading requirements, combined with virtually strict liability against the issuer, make Section 11 an attractive vehicle for shareholder plaintiffs and their lawyers. Indeed, "the weapon of choice for class action plaintiffs' lawyers is to allege, whenever possible, violations of Sections 11 and 12(a)(2) of the Securities Act of 1933,"[21] the latter being a provision that similarly focuses on public offerings, and likewise requires the pleading of little more than an "untrue" or "misleading" "statement of a material fact," 15 U.S.C. § 77*l*(a)(2); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 567–68, 584 (1995). The absence of any requirement of reliance makes it easy for claims under Sections 11 and 12(a)(2) to be litigated as class actions.[22]

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[21] Joel G. Chefitz & Andrew B. Kratenstein, *A Winning Strategy for Beating IPO Class Actions*, LAW360 (Apr. 4, 2011), http://bit.ly/TNx2os.

[22] *Cf.*, *e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) ("requir[ing] . . . plaintiffs [to] establish

As a result, what this Court has repeatedly said of claims under the judicially implied right under Section 10(b) and Rule 10b–5 is at least as true, if not more so, under the express right of Section 11: Such "'litigation . . . presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general,'" *Dabit*, 547 U.S. at 80 (quoting *Blue Chip Stamps*, 421 U.S. at 739), and through "extensive discovery and the potential for uncertainty and disruption in a lawsuit," may "allow plaintiffs with weak claims to extort settlements from innocent companies," *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008); *accord Blue Chip Stamps*, 421 U.S. at 741 (broad liability under Rule 10b–5 may "permit[] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value").

2. Moreover, imposing strict liability under Section 11 for truthful opinions and beliefs that turn out to be wrong would compound a major problem faced by America's capital markets: the negative impact that expansive securities-law liability has had on public companies' willingness to offer securities in the United States. It is beyond cavil, of course, that "U.S.-listed companies face the potential of extraordinary litigation costs that companies listed abroad do not,"[23]

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reliance would ordinarily preclude certification of a class action seeking money damages").

[23] FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY 7 (2007), http://bit.ly/1wicO52; *see also* COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 78 (2006) (hereinafter "INTERIM REPORT") (noting that director and officer

as "[s]ecurities class actions do not exist in the United Kingdom or in the markets of other major competitor[]" nations.[24] As a result, as this Court has itself observed, expansive liability under the federal securities laws "may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Stoneridge*, 552 U.S. at 164.

And there is good reason to believe that, in fact, this has been happening. According to a study released in May 2014 by the Committee on Capital Markets Regulation, a prominent group of capital-markets experts, "a number of key measures of market competitiveness" for American capital markets have "showed dramatic declines over previous years."[25] In particular, the U.S. share of global IPOs by foreign companies in 2013 and the first quarter of 2014 was 7.0% and 5.4%, respectively—substantially lower than the 26.8% share that the United States had enjoyed between 1996 and 2007.[26] In the first quarter of 2014,

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"insurance costs for a Fortune 500 company are over six times higher in the United States than in Europe"), http://bit.ly/2nLtP.

[24] INTERIM REPORT, *supra*, at 11; *see also*, *e.g.*, Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT'L L. 157, 157–58 (2001) ("few other nations have adopted the class action device even to a limited extent"); *cf. Morrison*, 561 U.S. at 269 (citing foreign-government amicus briefs, and noting that "regulation of other countries differs from ours as to . . . what individual actions may be joined in a single suit").

[25] Committee on Capital Markets Regulation, Continuing Competitive Weakness in U.S. Capital Markets (May 1, 2014) (hereinafter "Competitive Weakness"), http://bit.ly/1jZBB8G.

[26] *Id.*; Committee on Capital Markets Regulation, Continuing Competitive Weakness in U.S. Capital Markets Data Summary Chart (May 1, 2014), http://bit.ly/1jZ36AA.

moreover, over 91% of initial offerings conducted by foreign companies in the United States were private offerings, rather than public offerings—a figure that "stands significantly higher than the historical average," and reflects substantial "aversion to U.S. public equity markets."[27] And the level of cross-listing by foreign companies in the United States in the most recent quarter is likewise low by historical standards, a reflection that the United States legal "climate is not attractive" to foreign companies.[28]

A major reason why the United States legal climate is so unattractive is securities class action litigation. "One of the most dominant criticisms of U.S. capital markets is that the heavily litigious environment imposes significant costs disproportionate to its benefits."[29] Indeed, "[f]oreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market."[30] As explained several years ago in a joint report by New York City Mayor Michael Bloomberg and Senator Charles Schumer, surveys have indicated that "the high legal cost of doing business in the US financial services industry is of real concern to corporate executives," with the executives

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[27] Competitive Weakness, *supra*.

[28] *Id.*

[29] COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS 29 (2007), http://bit.ly/1hReApN.

[30] INTERIM REPORT, *supra*, at 11, 71.

citing "propensity toward legal action [as] the predominant problem."[31]

In particular, and "[w]orryingly" for American capital markets, the executives overwhelmingly believed that "London was preferable" to New York because the United Kingdom was "less litigious" than the United States.[32] Similarly, a survey conducted by the Financial Services Forum reflected that "[o]ne out of three companies . . . that considered going public in the United States rated litigation as an 'extremely important' factor in their decision, and nine out of 10 companies who de-listed from a U.S. exchange . . . said the litigation environment played some role in that decision."[33] To impose liability on issuers for their good-faith statements of belief or opinion under Section 11 would discourage them from ever listing in the United States in the first place.

3. Finally, the potential for issuers to be held liable under Section 11 for truthful statements of belief or opinion would chill corporate disclosures of information that investors find useful, and would thus frustrate the disclosure objectives of the federal securities laws. In particular, "litigation severely affects the willingness of corporate managers to disclose information to the marketplace";[34] firms that disclose their opinions and beliefs "inevitably take[] the risk of excessive optimism and excessive pessimism," and "[a]

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[31] MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP 75 (2007), http://bit.ly/dA2kU.

[32] *Id.* at 75, 85.

[33] FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY 8 (2007), http://bit.ly/1wicO52.

[34] H.R. CONF. REP. 104–369, at 42 (1995).

rule that penalizes excesses in either direction would lead to quiet, not (necessarily) to an increase in the world's portion of truth."[35] Alternatively, to the extent disclosure is compelled by rule, "management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976).

These effects would be bad for investors. "[T]he unique insights of companies and their officers and directors are essential to market efficiency."[36] Indeed, as a former SEC chairman once testified before Congress, "'[u]nderstanding a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm.'"[37] As a result, to the extent that liability rules have a "'chilling effect … on the robustness and candor of disclosure,'" "'[s]hareholders are . . . damaged.'"[38]

In short, to hold securities issuers strictly liable for expressing their sincerely held beliefs and opinions not only would deter some issuers from participating in the American capital markets at all, but would also deter issuers who do participate in those markets

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[35] Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 640 (1985).

[36] Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381, 406 (2013).

[37] H.R. CONF. REP. 104-369, at 43 (1995) (quoting testimony of Richard C. Breeden, Hearing on Securities Litigation Reform Proposals: Subcommittee on Securities, Senate Committee on Banking, Housing, and Urban Affairs, Apr. 6, 1995).

[38] *Id.* at 42–43 (quoting Breeden testimony).

from providing investors with valuable insights about their businesses. This Court should apply *Virginia Bankshares*' sensible rule to Section 11, and should reject the contrary holding below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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