

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OMNICARE, INC, ET AL., :

4 Petitioners :

5 v. : No. 13-435.

6 LABORERS DISTRICT COUNCIL :

7 CONSTRUCTION INDUSTRY :

8 PENSION FUND, ET AL. :

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10 Washington, D.C.

11 Monday, November 3, 2014

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:04 a.m.

16 APPEARANCES:

17 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf
18 of Petitioners.

19 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of
20 Respondents.

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22 General, Department of Justice, Washington, D.C.; on
23 behalf of United States, as amicus curiae, supporting
24 Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 13-435, Omnicare, Incorporated
5 v. the Laborers District Council Construction Industry
6 Pension Fund.

7 Mr. Shanmugam.

8 ORAL ARGUMENT OF KANNON SHANMUGAM

9 ON BEHALF OF THE PETITIONERS

10 MR. SHANMUGAM: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Like other provisions of the Federal
13 Securities laws, Section 11 of the Securities Act
14 imposes liability only for untrue or misleading
15 statements of material fact. The only fact conveyed by
16 a statement of opinion or belief is the fact that the
17 speaker held the stated belief.

18 As this Court concluded in Virginia
19 Bankshares v. Sandberg, a statement of opinion or belief
20 can, therefore, be actionable only if the speaker did
21 not actually hold the stated belief.

22 In the decision under review, the Sixth
23 Circuit, alone among the courts of appeals, concluded
24 that this Court's reasoning in Virginia Bankshares did
25 not apply to a claim under Section 11, even though

1 Section 11 contains a materially identical falsity
2 requirement to the provision at issue there. Neither
3 the Sixth Circuit's interpretation, nor those of
4 Respondents or the government, can be reconciled either
5 with the plain language of Section 11 or with this
6 Court's decision in Virginia Bankshares.

7 CHIEF JUSTICE ROBERTS: So if I say or the
8 company says in a prospectus, we believe that we have
9 3.5 million units of inventory in our secret inventory
10 warehouse, so long as they say we believe, they can't --
11 you know, it turns out they have none, that's all right?
12 They're still protected?

13 MR. SHANMUGAM: I think that that would
14 probably be a statement of opinion, but it is much
15 closer to the line between statements of opinion and
16 statements of fact. Let me explain --

17 CHIEF JUSTICE ROBERTS: Really, you think
18 it's an open question if they say it's a very precise
19 number for something that only they know anything about,
20 and it's wildly off, you think they're protected or may
21 be simply by saying "We believe"?

22 MR. SHANMUGAM: Well, I -- I think that --
23 the reason why I think it's a close question as to
24 whether or not that would be a statement of opinion is
25 simply because the second restatement's definition of

1 what constitutes a statement of opinion, which we think
2 is a useful guide, includes not just statements on
3 matters of judgment, like the statements we have at
4 issue here, but also statements that express uncertainty
5 about factual matters.

6 And I think in your hypothetical, Mr. Chief
7 Justice, you can view that statement as being the
8 equivalent of a factual statement that along the lines
9 of, we have approximately 3 million units or widgets in
10 our inventory, such that if they had nowhere near that,
11 that statement would be an objectively false statement
12 of fact and, therefore, actionable.

13 JUSTICE BREYER: But suppose it is actually
14 disputed, an expert -- expert -- a museum expert on an
15 archaeological mission says, it is my opinion that those
16 bones in that mountain are of a diplodocus and not a
17 Trisopterus. Now, wouldn't you have thought that at
18 least he'd looked into it, that at least he'd seen the
19 bones? You see, it's absolutely open, it is a matter of
20 opinion, but there's some things implied.

21 If you had learned later he'd been in a bar
22 all night and had never even seen or heard one word
23 about what the bones were like, wouldn't you think he
24 had issued a misrepresentation?

25 MR. SHANMUGAM: So, Justice Breyer, first,

1 that would be clearly a statement of opinion --

2 JUSTICE BREYER: Yes.

3 MR. SHANMUGAM: -- because it's a statement
4 on a matter of judgment.

5 JUSTICE BREYER: Yes.

6 MR. SHANMUGAM: Our view is that where the
7 speaker does not say anything about the basis for its
8 opinion, the only fact that is being conveyed is the
9 fact of the speaker's belief. The plaintiff --

10 JUSTICE BREYER: Yes. And I just produced
11 an example because I knew that was your view, and what I
12 looked for was an example where your view doesn't seem
13 quite so reasonable. And -- and that was why I said it
14 doesn't seem reasonable there because I think any
15 listener would think that the archaeologist had not been
16 spending all night in the bar, but, rather, had at least
17 looked at the bones or done some basic examination.

18 MR. SHANMUGAM: And so what I would --

19 JUSTICE BREYER: And that's -- now, that's
20 the point I want you to address yourself to, why is that
21 statement I just made wrong?

22 MR. SHANMUGAM: Sure.

23 JUSTICE BREYER: It is my opinion it is
24 right.

25 MR. SHANMUGAM: So notwithstanding -- so

1 notwithstanding the fact that it in our view, Justice
2 Breyer, there is no implied statement of fact there.
3 There may nevertheless be a claim, and that is for the
4 simple --

5 JUSTICE BREYER: There is an implied
6 statement, I think. The implied statement is that he's
7 done some work to figure this out.

8 MR. SHANMUGAM: Well -- and I think that we
9 may end up ultimately getting to the same place because
10 let me explain how we think the analysis would work in
11 that situation.

12 JUSTICE BREYER: Yeah.

13 MR. SHANMUGAM: In a situation like that, we
14 believe that the ultimate legal inquiry is whether the
15 speaker did not possess the stated belief. But a
16 plaintiff would be able to come forward with
17 allegations, in your hypothetical, that the
18 archaeologist spent the evening in the bar, that the
19 archaeologist had no basis for his or her opinion, and
20 in that circumstance, that would be circumstantial
21 evidence that the speaker, in fact, did not possess the
22 stated belief that the bones were those of a diplodocus.
23 And so --

24 JUSTICE GINSBURG: So you're saying that
25 this evidence, what we're -- we're talking about, the

1 evidence that the speaker didn't believe what he said,
2 that could be proved by showing he made no investigation
3 at all.

4 MR. SHANMUGAM: Yes. That is --

5 JUSTICE GINSBURG: So -- so you're saying
6 that the -- whether there was any investigation or
7 whether it was reasonable will factor into whether the
8 belief was honestly held.

9 MR. SHANMUGAM: Yes, that is correct.

10 And --

11 JUSTICE GINSBURG: But why -- and we're
12 dealing with a registration statement. Why isn't it, as
13 Justice Breyer suggested, implicit that when somebody --
14 when an issuer puts something in a registration
15 statement, that the issuer has acted with diligence in
16 making that statement?

17 MR. SHANMUGAM: Well, we don't believe that
18 there is any necessary implication from the statement,
19 and we think that that is true regardless of whether or
20 not it appears in a registration statement because,
21 after all, in Section 11, while Congress certainly
22 imposed a heightened obligation on issuers and did so by
23 relaxing other elements of liability, Congress included
24 exactly the same falsity element as it did in a variety
25 of other provisions of the Federal securities law --

1 laws.

2 But, again, our view is that for purposes of
3 pleading a claim, a plaintiff is not restricted to
4 smoking gun evidence that the speaker did not possess
5 the stated belief. And so, again, if a plaintiff is
6 able to come forward with allegations that cross the
7 pleading threshold of plausibility to suggest that the
8 speaker, in fact, did not hold the stated belief, that
9 will, in fact, be sufficient.

10 JUSTICE ALITO: Well, that may be true, but
11 do you deny the fact that there can be situations in
12 which a person makes a -- makes a statement of belief
13 and believes that to be true, but lacks a reasonable
14 basis for stating the belief? There is a difference
15 between those two situations, isn't there?

16 MR. SHANMUGAM: I think there is a
17 difference between those two situations, and I think
18 this illustrates an important conceptual distinction. I
19 think in a case where a speaker has no basis whatsoever
20 for the stated belief, there will be comparatively few
21 cases -- and I'm certainly not aware of any case from
22 the reported cases in this area -- where the speaker
23 held the stated belief but lacked any basis for it
24 whatsoever.

25 However, I think that the government's

1 reasonable basis standard, the position of the Solicitor
2 General here, suggests, I think, something more. And,
3 quite frankly, it's not entirely clear how much more
4 that position would require. It seems to focus on how
5 the speaker actually arrived at its opinion, and that
6 suggests that the focus may be on the diligence that the
7 speaker conducts.

8 But our view is that once you start getting
9 into a lack of a reasonable belief, you're really
10 getting into a matter of opinion. And I really do think
11 that however the government's test operates in
12 practice -- and, again, I think the government's brief
13 provides --

14 JUSTICE SOTOMAYOR: What's wrong with that?
15 There's an assumption that there's something wrong with
16 that. But if what one wants is honesty in -- in
17 securities statements of any kind, wouldn't one want
18 boards, issuers, others to have some sort of reasonable
19 basis -- I'm borrowing the government's words -- before
20 it goes about making predictive -- even predictive
21 statements?

22 MR. SHANMUGAM: So two points in response to
23 that, Justice Sotomayor. First of all, at the risk of
24 being glib, we simply don't think that that is the
25 statute that Congress enacted. And certainly, if

1 Congress had wanted to impose an obligation on issuers
2 of essentially providing an implied warranty for any
3 statement of opinion that issuers make in their
4 registration statements, it could have done so, and
5 there are other statutes that impose liability where
6 there is an absence of a reasonable basis.

7 Let me explain why it's problematic as a
8 matter of policy. We believe that a reasonable basis
9 standard, that is to say, a standard that goes further
10 than the standard that I think Justice Breyer was
11 suggesting, that goes beyond simply saying that you have
12 to have some basis, but that looks at the reasonableness
13 of the basis, opens up issuers to after-the-fact second
14 guessing on matters of judgment.

15 JUSTICE BREYER: Well, what about on a
16 factual basis?

17 MR. SHANMUGAM: I'm sorry?

18 JUSTICE BREYER: Factual basis. There has
19 to be a factual basis for making --

20 MR. SHANMUGAM: Well, again, I think there's
21 a meaningful difference. And I think in your
22 hypothetical --

23 JUSTICE BREYER: No, no. I mean why
24 wouldn't that work as the standard? You're worried
25 about the standard reasonableness is too open to

1 speculation. Okay. What about just saying there has to
2 be a factual basis for it?

3 MR. SHANMUGAM: Well, as a practical matter,
4 I think that where you have no factual basis whatsoever
5 and where a plaintiff is able to so allege, that will be
6 sufficient to allow the plaintiff to go forward even
7 under our legal standard.

8 JUSTICE BREYER: The person did have the
9 opinion about the diplodocus, it was his opinion. He's
10 an archaeologist. He, you know, looks around, sees the
11 sky, the mountains. There's some basis. People all the
12 time say it's my opinion. Really, they haven't looked
13 into it and so forth.

14 MR. SHANMUGAM: And as I --

15 JUSTICE BREYER: A registration statement,
16 you ought to have looked into it.

17 MR. SHANMUGAM: And as I indicated earlier,
18 Justice Breyer, I'm really not aware of any cases that
19 involve that precise fact pattern. And --

20 JUSTICE BREYER: I'm sure there are none
21 involving the diplodocus. But the -- the --

22 MR. SHANMUGAM: Or any other case where the
23 speaker has no factual basis for the statement.

24 JUSTICE BREYER: Well, don't say no. Say --
25 don't say no. You -- you leave it up to the judge or

1 the -- depending on the factfinder to say, is there a
2 factual basis? And just his opinion is something that
3 depends on context, whether something is an opinion. So
4 factual basis in support will have, to some extent,
5 depend on context.

6 MR. SHANMUGAM: And as a practical matter,
7 Justice Breyer, I really do think that our legal
8 standard takes care of that situation because in a
9 situation where the plaintiff is able to make that
10 allegation -- and I would note parenthetically that the
11 plaintiffs certainly haven't made that allegation
12 here -- it would likely be sufficient to surmount the
13 pleading for --

14 JUSTICE KAGAN: Well, Mr. Shanmugam,
15 suppose --

16 JUSTICE SCALIA: Do you think that --

17 CHIEF JUSTICE ROBERTS: Justice Scalia.

18 JUSTICE SCALIA: Do you think there's a
19 difference between a factual basis and a reasonable
20 factual basis? I mean, if we adopted a factual basis,
21 would we accept an unreasonable factual basis?

22 MR. SHANMUGAM: Well, I think that really
23 depends on what the reasonable basis stated in the
24 standard actually means.

25 JUSTICE SCALIA: I mean, I think it's --

1 it's just the same rule in -- in disguise really.

2 MR. SHANMUGAM: Well, I think that in the
3 context of legal compliance, if statements of the sort
4 that we have at issue here, I think that -- that that
5 context in many ways illustrates the potential
6 difference.

7 So suppose you had an issuer who had two
8 separate legal opinions, one suggesting that a
9 particular practice was legal and the other one was not.
10 Certainly there, I think you would say that the issuer
11 has at least some basis, but it may be open to
12 after-the-fact determination as to whether or not that
13 was a reasonable basis in light of the fact that there
14 was a competing opinion.

15 Again, it's entirely unclear exactly what
16 that standard means, I think, in part because.

17 JUSTICE BREYER: I think Justice Scalia is
18 right there, and there would be something like that,
19 but -- and so your point is a -- is a good point, that
20 it isn't so easy to figure this out exactly what the
21 standard is. The alternative, of course, is to issue
22 registration statements that have statements in them of
23 opinion, very detailed, very fact-based, and where
24 people would think some work was being done, and, in
25 fact, far less work has been done than anybody would

1 think was plausible, and they just float right by
2 without attack. Now, isn't the law designed to catch
3 those things?

4 MR. SHANMUGAM: Well, I would say this,
5 Justice Breyer. I mean, again, the statute itself does
6 not contain any reasonable basis requirement, and
7 nothing in this Court's decision in Virginia Bankshares,
8 in our view, suggests such a requirement. So we really
9 don't think that there is any support --

10 JUSTICE GINSBURG: You say that about
11 Bankshares, which contains the statement that the
12 Government refers to; conclusory opinions in a
13 commercial context are reasonably understood to rest on
14 a factual basis that justifies them as accurate.

15 MR. SHANMUGAM: Yes. And, Justice Ginsburg,
16 that's a statement at page 1093 of the Court's opinion
17 in Virginia Bankshares, and we think that in context
18 that statement stands for the proposition that I've been
19 articulating this morning, namely that where a speaker
20 makes a statement of opinion and has no basis for that
21 statement, that may be relevant in showing disbelief.
22 That may be relevant in showing what the Court went on
23 to say was legally required, namely both subjective
24 disbelief and objective falsity.

25 And before the Sixth Circuit's opinion in

1 this case, that was the consistent understanding of
2 lower courts in construing this Court's opinion in
3 Virginia Bankshares, and so we certainly think that
4 Virginia Bankshares does not stand for the proposition
5 that an issuer -- whenever an issuer makes a statement
6 of opinion, somehow includes in that statement an
7 implied warranty that the speaker has a reasonable basis
8 for that statement.

9 JUSTICE KENNEDY: If we adopt your position,
10 which I take it to be that the lack of reasonable basis
11 for a statement can be evidence that the belief was not
12 sincerely held, in this case do we still have to remand
13 or did I understand you to say that the plaintiffs below
14 did not specifically allege that there was no reasonable
15 basis at all for the statement?

16 MR. SHANMUGAM: So two things. Two things
17 on that point, Justice Kennedy. If you adopt our view
18 that the legal standard here turns on subjective
19 disbelief, which again we believe was the holding of
20 this Court in Virginia Bankshares, then the plaintiffs
21 here are foreclosed because the plaintiffs disclaimed
22 any allegation based on a state of mind, which is to say
23 that the plaintiffs in this case, in an effort to
24 exclude -- to avoid being subject to the heightened
25 pleading standard of Rule 9(b) --

1 JUSTICE GINSBURG: Mr. Shanmugam, I thought
2 that the complaint alleged that the defendants had no --
3 that no defendant had a reasonable ground to believe
4 that Omni shares arrangements were lawful.

5 MR. SHANMUGAM: Yes, and that was going to
6 be my second point, Justice Ginsburg. So just to be
7 clear, there are two paragraphs of the complaint that we
8 think are relevant here. The first is Paragraph 178,
9 which is the paragraph in which the plaintiffs
10 disclaimed any allegation relying on fraud or
11 intentional misconduct. And we think that under our
12 legal standard that forecloses plaintiffs in this case
13 from going forward. I would note that plaintiffs don't
14 really dispute that under our legal standard their claim
15 is foreclosed. They make no effort in their brief to
16 suggest that their claim could nevertheless go forward.

17 Now, if this Court were to adopt the
18 Solicitor General's legal standard and to say that the
19 legal standard here is whether or not there was a
20 reasonable basis for the opinion, this Court would
21 obviously have to vacate and remand because that was not
22 the legal standard that the Sixth Circuit applied. We
23 think that we would have a very strong argument on
24 remand that we should, nevertheless, prevail because the
25 plaintiffs in this case have pointed only to the

1 conclusory allegation that you identified,
2 Justice Ginsburg, and that is the allegation in
3 Paragraph 183 that says that none of the defendants had
4 a reasonable ground to believe in the statements in the
5 registration statement.

6 If the inquiry in this case focuses on how
7 the speaker arrived at its opinion, this complaint is
8 really threadbare in terms of allegations that relate to
9 that issue, and so we've -- but that would be an issue
10 for the Sixth Circuit on remand.

11 JUSTICE ALITO: If the test is subjective as
12 you claim, with respect to the issuer, whose subjective
13 state of mind should -- must the Court look at? Would
14 it be solely the person who signs on behalf of the
15 issuer, or would it be everyone else who is required by
16 law to sign the registration statement?

17 MR. SHANMUGAM: So I think that the inquiry
18 would be much the same as the inquiry with regard to
19 claims that have a scienter requirement, such as claims
20 under Section 10(b). I would note that there is a
21 little bit of disagreement in the lower courts about how
22 broad the category of individuals at an issuer is, whose
23 state of mind is relevant, but the inquiry generally
24 focuses on those who either made or approved the
25 statement at issue.

1 JUSTICE KAGAN: Mr. Shanmugam, suppose that
2 in a particular registration statement there was a
3 statement that said a particular kind of transaction was
4 lawful, all right, and the person who makes that
5 statement, whoever it is, really believes it. But, in
6 fact, that person knows that the Government is breathing
7 down his neck, that the Government seems to have a
8 different view. That person knows that its competitors
9 have a different view. And that person has also
10 consulted three lawyers, and two of them have given a
11 different view. But he still believes what he believes.
12 He believes that the Supreme Court is going to vindicate
13 his legal position.

14 But the only thing he says is, I think this
15 is lawful. Now, why isn't that something where there is
16 an omission that makes the statements misleading?

17 MR. SHANMUGAM: So we don't think that there
18 is an omission under that circumstance because we think
19 that the only fact that is being disclosed by the
20 statement is the fact of the speaker's belief, and if
21 you look at the relevant language on which respondents
22 and the Government really focus, it is that language
23 concerning omissions. It's not the language concerning
24 falsity. And that language focuses time and time again
25 on the fact at issue. So it refers to omissions,

1 omission to state a material fact. And so what is
2 omitted has to be a fact necessary to make the
3 statements therein, and I think that's a reference back
4 to statements of material fact --

5 JUSTICE KAGAN: Well, it just says
6 statements therein. It doesn't actually say statements
7 of material fact or not.

8 MR. SHANMUGAM: I think that's most
9 naturally a reference back to the language a couple
10 volumes earlier about statements of material fact, and I
11 think this all just underscores the fact that Congress
12 in this provision did not impose a broad affirmative
13 duty to speak, nor did it impose liability on untrue or
14 misleading statements.

15 JUSTICE KAGAN: Well, it didn't -- it didn't
16 impose an obligation to speak, but once you speak, it
17 said that you're -- that you can't make omissions that
18 make your speech -- your statements misleading. And I
19 guess what I'm saying is, you know, what I've given you
20 is a case where this is a judgment call, whether you
21 think something is legal or not.

22 But what you know -- and after all you're in
23 the position to know and all your readers are not in the
24 position to know. What you know is that the Government
25 seems to disagree, that your competitors seem to

1 disagree, and that most of the lawyers seem to disagree.
2 And still you're going to put this in your statement and
3 say, oh, no problem, that's not misleading.

4 MR. SHANMUGAM: Well, in your hypothetical,
5 Justice Kagan, you know, I think -- there are two points
6 I would make about it. The first is that, again, the
7 fact that it's being conveyed is the fact of the
8 speaker's belief, and that is what makes the statement
9 material, which is to say that when you have statements
10 of opinion in a registration statement, the reason that
11 they are material is precisely because it is
12 management's view on a particular question.

13 And so when you have a statement of that
14 variety, that is the fact that has to be shown to be
15 either false or misleading. Obviously if the speaker
16 does not possess the stated opinion, the statement is
17 false. But we don't normally --

18 JUSTICE KAGAN: But don't you think a
19 reasonable reader would look at that statement and say
20 two things actually: Both, he's done something to try
21 to check as to whether the transaction is legal, and he
22 doesn't know anything that's very dispositive going the
23 other way. And both of those things, I mean, could be
24 false.

25 MR. SHANMUGAM: I think where a speaker says

1 nothing about the basis for the opinion, there are
2 obviously a spectrum of potential bases for the opinion
3 that the speaker could have, and so, again, we don't
4 think that there is any necessary implication about the
5 scope of the basis for the opinion.

6 Now, again, if it's a case where the speaker
7 truly has no basis for the opinion, we believe it will
8 be quite possible for a plaintiff to include all of
9 these underlying allegations about the basis as a way of
10 showing subjective disbelief.

11 And so what that really leaves you with, we
12 would respectfully submit, is the hypothetical situation
13 in which a speaker in the face of overwhelming contrary
14 evidence and no basis nevertheless adheres to a genuine
15 belief, and the question of whether or not liability
16 should lie in those circumstances.

17 And our view is simply that it is not worth
18 the candle to frame the legal standard in a way as to
19 cover that entirely hypothetical situation.

20 And in part, to get back to
21 Justice Sotomayor's question from the beginning of the
22 argument, that is because it is important to underscore
23 the fact that this is a statute that imposes strict
24 liability. And as this Court explained in *Pinter versus*
25 *Dahl*, when it comes to statutes that impose strict

1 liability, issuers really need to have certainty and
2 predictability.

3 And a legal standard that focuses on a
4 reasonable basis is going to open up issuers to
5 after-the-fact second-guessing by jurors about whether
6 or not a particular basis is reasonable.

7 JUSTICE KAGAN: But I don't think,
8 Mr. Shanmugam, that the fact that the statute has -- is a
9 strict liability statute might cut the other way. Why
10 is it a strict liability statute? Because Congress had
11 some understanding, number one, that it was the issuer
12 who knows the facts, not the readers; and number two,
13 that it is awfully hard to show subjective intent.

14 MR. SHANMUGAM: Well, Congress dealt with
15 the context of registration statements precisely by
16 relaxing the other elements of liability that of course
17 exist under other provisions of the securities laws.
18 And what that leaves us with is a statute where this
19 falsity element is really the entire ball game because
20 elements such as reliance and loss causation are no
21 longer affirmative elements of liability.

22 And, of course, what that means is not only
23 is it easier for plaintiffs ultimately to prove
24 liability but it is also easier for plaintiffs to plead
25 a claim under this provision. And I do think that a

1 reasonable basis standard, depending on how that
2 standard is framed, could make it very difficult for
3 issuers to avoid liability at the pleading stage.

4 And as, of course, this Court has recognized
5 in the securities context, obtaining resolution of these
6 claims on a dispositive motion is often, as a practical
7 matter, the only way in which defendants can avoid
8 liability because of the pressures of settlement in
9 cases of this variety.

10 Unless the Court has any further questions,
11 I'll reserve the balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Goldstein.

14 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

15 ON BEHALF OF THE RESPONDENTS

16 MR. GOLDSTEIN: Mr. Chief Justice, and may
17 it please the Court:

18 The difficult part of this case for the
19 other side is that we all know that opinions, and
20 Virginia Bankshares makes this point, frequently imply
21 facts. The difficult part of this case for our side --
22 and it's important for me to confront the hard part of
23 the case -- is that sometimes they're just state --
24 opinions are just statements of belief. And what you
25 have to figure out, I think, is, A, what is the default

1 rule that you should be looking at a registration
2 statement for; and, B, what is it that the issuer can do
3 to make it clear, no, look, this is just our sense of
4 the matter?

5 They didn't write the registration statement
6 in a bar one night. A registration statement is a very
7 solemn document, and you know that from a variety of
8 things. The first, as Justice Kagan points out, it is a
9 strict liability document.

10 Unlike the great majority of the provisions
11 of the securities laws, Congress said we don't have to
12 prove scienter. Congress said that reliance doesn't
13 matter. Congress said that causation is for the other
14 side to prove. We know that when Congress wrote that
15 statute, it had opinions in mind because Section 11
16 refers to opinions.

17 There are audit opinions, and with respect
18 to an audit opinion, the auditor has to prove that he or
19 she engaged in due diligence.

20 We know that it had forward-looking
21 statements in mind, which are opinions, because it said
22 that forward-looking statements the -- that are subject
23 to section -- that are subject to the exemption, it is
24 the plaintiff that has to prove that they actually knew
25 that the forward-looking statement was false.

1 JUSTICE ALITO: The Sixth Circuit held that
2 once a false statement has been made, a defendant's
3 knowledge is not relevant to a strict liability claim.
4 Was that correct?

5 MR. GOLDSTEIN: It is true with respect to
6 the factual representations that are expressed or
7 implied. The Sixth Circuit was not confronting, I
8 think, an important part of the case because the
9 petitioners had not made the argument, what do we do if
10 the opinion is hedged? What do we do if, instead of
11 just a representation, that -- here is our opinion which
12 carries with it the implication about a certain set of
13 facts, we instead say, we're uncertain?

14 And I think that's an important issue that
15 isn't before you, either. But with respect -- it is a
16 strict liability statute. If the factual
17 representations that are expressed or implied are
18 incorrect, then they are liable. And the reason for
19 that is this is not a securities fraud --

20 JUSTICE ALITO: Since that's the holding of
21 the Sixth Circuit, don't we at a minimum have an
22 obligation to vacate and remand? Because they didn't
23 hold that their reasonable basis standard was satisfied
24 here.

25 MR. GOLDSTEIN: Well, Your Honor, the

1 judge -- as a purely technical matter, I think that's
2 not correct. We don't -- I don't particularly care what
3 the last word in your opinion is. What the Sixth
4 Circuit did is it remanded to the district court. If
5 you refine the rule for applying the -- for applying
6 Section 11, I think what you do is affirm and correct
7 what you regard as the misapprehension of the Sixth
8 Circuit's rule.

9 JUSTICE BREYER: But assuming they're wrong
10 about this, they said the Section 11 does not require a
11 plaintiff to plead a defendant's state of mind, and a
12 statement of opinion is actionable when it is ultimately
13 found to be false.

14 Now, that, I don't think, is what you are
15 arguing, what the SG is arguing. The point is that the
16 statement, it is my opinion that the warehouse will hold
17 up in a 93-mile-an-hour wind for 17 hours as long as the
18 windows are closed. And that statement may be false,
19 but it may also be true that the issuer before issuing
20 the statement performed a variety of tests, in which
21 case you would agree, I think, that it is not
22 actionable.

23 And so -- so it isn't just that it's false,
24 it's that there was no reasonable basis for holding it.
25 Moreover, whether the issuer has a reasonable basis is a

1 fact about the issuer's state of mind. It isn't whether
2 there's a reasonable basis in the world. It is about
3 whether those people who issued this statement had a
4 reasonable basis for issuing it or not. I think that's
5 about their state of mind in a sense. But those two
6 things, I think, do require reversal.

7 MR. GOLDSTEIN: Well, Your Honor, first of
8 all, you have described what the Government has
9 articulated as the rule, and that is the reasonable
10 basis standard. We endorse that test. We have a still
11 broader argument that we would win on, even if you --
12 that we would win the case even if you disagreed with
13 it. And that is this is a strict liability statute.

14 If it turns out that the implied factual
15 representation, or indeed the express factual
16 representation -- that is, that the building will hold
17 up -- turns out to be wrong, and the building will fall
18 down, even though they did their very best to figure it
19 out, this is the hard case, and that is they tried to
20 figure out about the building. They had a structural
21 engineer take a look at it.

22 On our broader reading of the statute,
23 Section 11 changes and assigns the risk of error to
24 them.

25 JUSTICE SOTOMAYOR: Sorry, that doesn't --

1 that doesn't make much sense to me. A statement is made
2 truly or falsely at the time it's made.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SOTOMAYOR: So how can you rely on
5 evidence of what happened later?

6 MR. GOLDSTEIN: Okay.

7 JUSTICE SOTOMAYOR: You would never have
8 closure on a securities action if we were to rely solely
9 on the fact that the building fell down 10 years hence.

10 MR. GOLDSTEIN: Fair enough. And that is --
11 that -- Justice Breyer's hypothetical happened to be
12 about what would happen in the future, and that would
13 indicate the forward-looking --

14 JUSTICE BREYER: No.

15 MR. GOLDSTEIN: Can I give you a
16 hypothetical that I think will avoid your problem but
17 still raises the hard case for us?

18 And that is we have a million dollars in
19 inventory today on the day of the registration
20 statement. So the following -- in our view, we have a
21 million dollars in inventory. It's an opinion. It's
22 describing what happens today. We know under
23 Section 11, which talks about the date the registration
24 statement becomes effective, that if the warehouse burns
25 down a week later, they're not responsible.

1 But what about the case in which the day
2 before the registration statement is issued, the
3 warehouse burned down, and they had no way of knowing
4 it? It was in rural India. Their very best efforts
5 wouldn't have disclosed it. Under Section 11, they're
6 responsible. What Section 11 does --

7 JUSTICE BREYER: No, no, I don't see how
8 that could be. They said, in our opinion, we have X
9 amount of inventory. And you're starting out by saying,
10 well, it is an opinion, but an opinion carries the
11 implication that they would have some basis for it. And
12 they did have a basis for it. In fact, they had a
13 reasonable basis. So how there can the plaintiff
14 recover?

15 MR. GOLDSTEIN: This is a problem that the
16 common law confronted, and it's addressed in the
17 restatement first of contracts and of torts in 474 of
18 the Restatement of Contracts and in 542 of the
19 Restatement of Torts.

20 And it says if you get an opinion, if your
21 expert archaeologist or if an art appraiser says this is
22 a Picasso, you're allowed to rely on the truth of the
23 assertion. The reason they say "in our opinion" is not
24 to express doubt.

25 If you go back and look at the transcript

1 today, Mr. Shanmugam will have said "we believe," "we
2 think," or "in our view" 20 times in the first 20
3 minutes of this oral argument. He wasn't intending to
4 express doubt. He was trying to say, Look, I have
5 looked at this problem. Here is our view of the
6 situation as people who are specially involved.

7 Sometimes opinions are intended to invoke
8 certainty, not uncertainty.

9 JUSTICE BREYER: Okay. You've given me
10 those times. What about the other times?

11 MR. GOLDSTEIN: Okay. And that's, I think,
12 the point. And that is, you have to decide which of
13 those things is present in a registration statement.
14 And our view is that, in a registration statement, you
15 are dealing with a circumstance, because it's strict
16 liability, it shifts the risk of error to the issuer
17 because they're collecting the money for when they
18 get --

19 JUSTICE GINSBURG: Mr. Goldstein, can I just
20 clarify what seems to be your point. You do not take
21 the reasonable factual basis. You are saying it's the
22 same thing as if we excised "we believe." That you take
23 that out, and then you have a statement of fact which is
24 false, and then they're responsible. So you're really
25 saying there is no such thing as an opinion versus a

1 fact, that it's just the same as if they left out "we
2 believe."

3 MR. GOLDSTEIN: Two things. The first is,
4 we do believe in the reasonable basis standard; that is,
5 the government has a more modest, what you could call a
6 middle ground. We endorse it. We have a more expansive
7 reading of the statute as well. So that's point 1.

8 Point 2 is we do think absolutely that you
9 can have an opinion in a registration statement that
10 makes clear it is not something on which you should rely
11 on for the ultimate truth. And you could look at some
12 of the statements --

13 JUSTICE KAGAN: Isn't that exactly what you
14 have here? Because if you look at these registration
15 statements, you know, we have been looking at one or two
16 sentences in a vacuum, but, in fact, if you look at the
17 registration statements themselves, they're sort of
18 surrounded by reasons to discount the opinion. It says,
19 you know, CMS, the government might think differently,
20 and if that's so, we're really in bad shape. It says,
21 these laws may be interpreted in the future in a manner
22 inconsistent with our interpretation. I mean, it seems
23 to me that they actually did a pretty good job of
24 saying, look, we think this, but there are -- there are
25 some problems --

1 MR. GOLDSTEIN: Right.

2 JUSTICE KAGAN: -- with this and it could go
3 the other way.

4 MR. GOLDSTEIN: I think this is a really
5 important point. I think the critical thing is to
6 realize that Mr. Shanmugam doesn't. His view is, even
7 if there are no qualifications whatsoever, it is only
8 telling you what is in his client's head. So that's
9 point 1. And they did not make this argument in the
10 district court or the court of appeals here that you
11 have to look at the full context of the opinion and see
12 whether the party is actually fully hedging.

13 Now, point 2 is that there are statements
14 that we are relying in our complaint that aren't like
15 that. If I could take you to the Joint Appendix to give
16 you one good example, and I'll take you to page 192.
17 And this is our allegation about therapeutic
18 interchange. We allege -- and they settled a bunch of
19 cases, including with the government over whether they
20 were switching their patients' drugs in order to have an
21 arrangement that was more profitable to them but not
22 good for the patient. And we allege that therapeutic
23 interchange, as implemented by them, was illegal.

24 Here is what they said at the top of 192 :
25 "When required and/or specifically requested by the

1 physician or patient, branded drugs are dispensed and
2 generic drugs are substituted in accordance with
3 applicable State and Federal laws as requested by the
4 physician or resident."

5 So this is an instance in the registration
6 statement where they didn't have any of that hedging.
7 They simply said, we are acting legally. And our point
8 is that either of two things is implied by that. One is
9 that it's legal or at least that no person -- or that a
10 person would reasonably conclude that it's legal.

11 What we want to do on remand is the
12 following: We want to show the actual facts, and we
13 want to show that a person would not reasonably conclude
14 this activity was legal. To the extent they have hedged
15 in the registration statement and said, look, here's a
16 vague law, and we know there are vague laws out there,
17 we know there are vague regulations, and if the
18 registration statement is read to say, look, you could
19 read it as A, as B or C, then we're going to have to
20 prove that the facts are inconsistent with A, B or C.

21 That is to say on the government's
22 intermediate view, that the actual facts don't comport
23 with a reasonable reading of the statutes and
24 regulations that are involved. Remember, that it is
25 very hard to understand why Congress would have written

1 a statute that says you're going to be strictly liable
2 for misrepresentations, and we're going to ignore the
3 fact that the reason you state opinions in a
4 registration statement is precisely so that people will
5 rely on them.

6 The whole point of having these in the
7 registration statement is to persuade people about the
8 state of the company, about the state of what it's
9 doing, about its profitability and the like. And if you
10 announce a legal rule that says we're going -- so long
11 as you put the words "we believe" in front of any of
12 those sentences, then what you're going to have is a
13 situation in which every single time when Congress is
14 trying to make sure that the company speaks truthfully,
15 the plaintiff is going to be held to the burden of
16 proving what's inside people's heads. And I don't think
17 that that is what you would naturally infer from a
18 statute like this.

19 JUSTICE KAGAN: Could I just make sure I
20 understand, Mr. Goldstein? The basis of your argument
21 in the text is not the untrue statement of material
22 facts language, right? Because I would take it that you
23 agree with the government and with Mr. Shanmugam that as
24 to that, the only untrue statement in an opinion is
25 whether you hold it? But the basis of your view, both

1 as to agreeing with the government and also suggesting
2 that a further view is the omissions language; is that
3 right?

4 MR. GOLDSTEIN: That is not quite correct.
5 I think that it's a very subtle difference to say, is
6 what we're holding them liable for the implied
7 statement, which was untrue, or the omission of the fact
8 that makes it non-misleading? I'll tell you -- let me
9 give what you Virginia Bankshares said about this. It
10 spoke -- and this is in the context of Rule 1489, which
11 uses the same language as Section 11, and this is on
12 page 1092.

13 "Such statements are factual," in two
14 sentences, "as statements that the directors do act for
15 the reasons given or hold the belief stated and as
16 statements about the subject matter of the reason or
17 belief expressed." And in that example, the Court
18 understood the statement, we -- you know, we recommend
19 this merger because \$42 is a high price to be an implied
20 statement about the nature of the price and whether it
21 was high or fair.

22 I don't think much matters in the
23 characterization of whether it's an implied statement
24 or, instead, the failure to include a fact that would
25 make it true, but that's how Virginia Bankshares looked

1 at the question. -

2 JUSTICE SOTOMAYOR: Well, there in that case
3 of Virginia Banks, it was a given, it was stipulated or
4 proven already by the jury verdict that they didn't
5 believe what they said.

6 MR. GOLDSTEIN: And I think that's a really
7 important thing about Virginia Bankshares. I think the
8 most that my friend can try and derive from Virginia
9 Bankshares is under that under Section 1489, the Court
10 said you can hold someone liable if you have both
11 subjective and objective disbelief.

12 What they're trying to do is to say that
13 that is not just sufficient, but necessary. And that
14 is, that you -- Virginia Bankshares stands for the
15 proposition that you have to prove subjective disbelief.

16 And let me just point you to the language of
17 the Court's opinion that I think is completely
18 inconsistent with that. There are -- this is going to
19 be on page 1095 of the Court's opinion. The first
20 sentence is going to be from precisely before what Mr.
21 Shanmugam read.

22 Under Section 14-A then, "A plaintiff is
23 permitted to prove a specific statement of reason
24 knowingly false or misleadingly incomplete even when
25 stated in conclusory terms," and that is referring to

1 the following statement that, "However conclusory the
2 director's statements may have been, then it was open to
3 attack by garden-variety evidence, allowing respondents
4 the opportunity for recovery on the allegation that it
5 was misleading to call \$42 high," and the Court said you
6 could recover just on that allegation.

7 And remember how anomalous it would be to
8 say that Virginia Bankshares holds that you must prove
9 the state of mind of the speaker. This is a strict
10 liability statute. To say you have to prove that the
11 person didn't believe the implied fact is to say it's
12 not a strict liability statute, it's essentially
13 scienter. And why is it, we would ask, that Congress
14 would say, we recognize an implied statement in the
15 opinion, but we're going to require that you prove that
16 they essentially intentionally lied to you. It's just
17 contrary to the entire structure and notion of Section
18 11, which isn't a fraud statute at all. It is derived
19 from principles of common law that said, if you have a
20 even negligent misrepresentation, even an innocent
21 misrepresentation, you just state the facts wrong.

22 Then what you have is effectively
23 rescission. And that is, the issuer got the money from
24 the person who bought the stock. There was a mistake.
25 It went wrong. We're not saying that they're

1 intentional liars, but they got the money on the basis
2 of an incorrect representation. They get the money
3 back. And you can't say that you have a state-of-mind
4 requirement when the statute simultaneously says for
5 auditors, for the lawyer who has to produce a legal
6 opinion with respect to forward-looking statements, then
7 you inquire whether -- and it's going to be on the
8 defendant to prove that they engaged in due diligence.

9 JUSTICE ALITO: Well, if it's not purely
10 subjective, if it's the reasonable basis test, what does
11 that mean? Mr. Shanmugam says that's very open-ended.
12 And I think he has a point. I don't really know what a
13 reasonable basis would be in that situation.

14 MR. GOLDSTEIN: Well, this is something that
15 the common law has employed and utilized for well over a
16 hundred years. In this case, we would be required to
17 prove, with respect to the hedged legal statements, that
18 a reasonable -- or that the legal view of the company is
19 consistent with the facts, and that is, you couldn't
20 reasonably hold this legal view if you were taking
21 kickbacks and you weren't passing the money on to the
22 government. There is --

23 JUSTICE ALITO: But to what degree must the
24 person -- let's just take the CEO who signs on behalf of
25 the corporation. To what degree must he conduct an

1 investigation to determine whether illegality is going
2 on someplace in the company?

3 MR. GOLDSTEIN: If you are making -- if you
4 go out of your way to say what we're doing is legal,
5 then you're going to have to undertake a reasonable
6 investigation. I'm not -- let me just say to you --

7 JUSTICE ALITO: Well, what does that mean?

8 MR. GOLDSTEIN: It means --

9 JUSTICE ALITO: Now, I believe it's -- I
10 believe -- the CES says, I believe that nobody in this
11 company is paying bribes.

12 MR. GOLDSTEIN: Yes.

13 JUSTICE ALITO: And the CEO says no one
14 from -- it's a true statement of belief, and he's
15 received information from certain corporate compliance
16 officers that no bribes are being paid.

17 MR. GOLDSTEIN: Yes.

18 JUSTICE ALITO: How much investigation does
19 he have to go on, does he have to do? Does he have to
20 hire an outside firm to do an investigation to see if
21 maybe somebody is paying bribes?

22 MR. GOLDSTEIN: It depends on whether he has
23 information. The most specific thing that I can help
24 you with your opinion in the case is that, remember,
25 this due diligence standard exists in the statute. Any

1 expert that offers an opinion is going to have to show
2 reasonable investigation. Congress didn't write more
3 into the statute for the defense because it's very
4 contextual.

5 If the CEO knew that there had been claims
6 in the press, for example, there had been allegations,
7 they were facing a qui tam lawsuit, then there would be
8 a heightened obligation to investigate.

9 My point for you is that Mr. Shanmugam
10 thinks none of that's relevant, and that is --

11 JUSTICE ALITO: Well, I understand that. He
12 says it's purely subjective. You say basically, it's
13 the -- state of mind is completely irrelevant. But if
14 we're in the middle someplace?

15 MR. GOLDSTEIN: Right, and the middle ground
16 is that when he makes that statement in the registration
17 statement, he is trying to induce me to believe, at the
18 very least, I wouldn't say this if I didn't have a
19 reasonable basis. We then will have to prove as the
20 plaintiffs that there was not a reasonable set of facts
21 that could lead them to say this. In his view, even if
22 it was completely unreasonable, that is to say the CEO
23 heard these rumors and ignored them --

24 JUSTICE ALITO: But you're not really
25 helping me. But maybe -- all you're saying is

1 reasonable, reasonable, reasonable. I -- I would like
2 some more concrete guidance as to what is reasonable.

3 MR. GOLDSTEIN: I'm sorry, it's just very
4 context-dependent. In your hypothetical, what I would
5 say is that if the CEO knows that there's never been an
6 allegation about this, his general counsel has said, We
7 are complying with the law, I don't think the CEO is
8 going to have to do more.

9 But, in fact, if the contracts by their
10 terms, which is what we allege, involve direct payments
11 for increasing market share, if they are paying --
12 here -- here's another good example. We have in the
13 complaint that their own lawyers told them not to make
14 these purchases with respect to nursing homes because it
15 would amount to an illegal kickback.

16 CHIEF JUSTICE ROBERTS: Yeah, well, that's
17 your -- your case, but I gather your answer to
18 Justice Alito is that the CEO doesn't know about
19 anything, and his lawyer comes in and says, Nope, I
20 don't know about anything, then that cannot be the basis
21 for a suit?

22 MR. GOLDSTEIN: In your hypothetical in
23 which there is no question about the reasonableness, I
24 think that they will have an excellent --

25 CHIEF JUSTICE ROBERTS: No, I'm asking you,

1 is it reasonable for --

2 MR. GOLDSTEIN: Yes.

3 CHIEF JUSTICE ROBERTS: -- him to say, I
4 don't know anything about any bribes.

5 The lawyer comes in, Do you know anything
6 about bribes?

7 No, I don't know anything about any bribes.

8 Is it reasonable for him to say, In our
9 opinion, our employees are not giving bribes?

10 MR. GOLDSTEIN: If that is true across the
11 company, because it's not just the CEO that signs the
12 registration statement, then yes.

13 CHIEF JUSTICE ROBERTS: Okay. Thank you.
14 Ms. Saharsky.

15 ORAL ARGUMENT OF NICOLE SAHARSKY

16 ON BEHALF OF UNITED STATES,

17 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

18 MS. SAHARSKY: Mr. Chief Justice, and may it
19 please the Court:

20 The parties have offered you two extreme
21 positions, and we think that the answer lies in the
22 middle. And this is an answer that comes right from the
23 language of the statute because it's not the case as
24 petitioners suggest that the statute only requires that
25 you make statements that are literally accurate. The

1 statute says that you have to make statements that are
2 both literally accurate and not misleading as to a --
3 that there cannot be a material omission.

4 And this is a -- this is really a standard
5 that makes sense in the context of this particular case
6 where we're talking about whether something in a
7 registration statement has a reasonable basis.

8 And I want to clarify what we mean by
9 reasonable basis. We mean a basis that would be
10 expected under the circumstances, that a lack of a
11 reasonable basis is what makes an omitted fact make the
12 statement about the opinion misleading.

13 So to answer Justice Alito's question, a
14 plaintiff has the burden to come into court and provide
15 an omitted fact that should have been put in the
16 statement of opinion or provided along with it in order
17 to make it not misleading. And that has --

18 JUSTICE KENNEDY: Well, it seem -- it seems
19 to me that you're not in the middle, that you're almost
20 90 percent with the respondent because you -- if -- very
21 little weight to the subjective belief component.

22 MS. SAHARSKY: We think that the -- you
23 could establish liability either way. It's really the
24 Court of Appeals kind of addressed two questions, and we
25 agree with the Court of Appeals halfway. The first

1 question is do you always have to have subjective
2 disbelief to recover under Section 11 for an opinion.
3 The Court of Appeals correctly said the answer to that
4 was no.

5 But then to --

6 JUSTICE SOTOMAYOR: But you -- I -- I -- are
7 you disavowing Virginia Bankers? Virginia Bankers says
8 you need two things, you need subjective disbelief
9 and/or not quite, but you need an objective fact that's
10 not true, meaning you need to prove the falsity of the
11 objective fact?

12 MS. SAHARSKY: Well, with respect, we don't
13 think that the court in Virginia Bankshares held that
14 both were required because as you pointed out before the
15 jury --

16 JUSTICE SOTOMAYOR: No, you're right. It
17 only held that the second was required, so you always
18 have to prove that. So what mental state are you saying
19 has to be proven? Either they didn't believe what they
20 were saying and there was no reasonable, or there was no
21 reasonable basis for what they were saying?

22 MS. SAHARSKY: That's right. Either they
23 didn't believe what they were saying, or there was no
24 reasonable basis for what they were saying. And to --

25 JUSTICE SOTOMAYOR: How do we --

1 CHIEF JUSTICE ROBERTS: You were asking, in
2 Justice Kennedy's, you said it was right and wrong, and
3 then you got the part out about it being right. What --
4 in what way was it wrong?

5 MS. SAHARSKY: The way in which the Sixth
6 Circuit decision was wrong is because it suggested this
7 idea of liability by hindsight, that if there is
8 something that you give an opinion on about legality and
9 it's later proven or later -- later established to be
10 false by a -- untrue by a court, that you could be found
11 liable by hindsight, and we think that's not true.

12 What matters is the state of mind and the
13 basis that you had at the time the registration
14 statements were made. And that's actually directly in
15 the language of the text of the statute which focuses on
16 when the registration statement became effective.

17 But just to make clear, and, again, in
18 response to Justice Alito's question, this is a
19 context-specific inquiry, and the burden is on the
20 plaintiff to come forward with an omitted material fact
21 that should have been stated. And in the context about
22 an opinion, the kinds of things that would be omitted
23 material facts that would matter are things that
24 undercut a basis that you would expect. So it could be
25 a lack of any investigation whatsoever.

1 But it could be, as Justice Kagan said, that
2 you have been sued. And several courts have held
3 against you. Those are the kind of facts.

4 JUSTICE ALITO: But this is always going to
5 come up after it's been shown that the statement turned
6 out -- the statement of belief turned out to be
7 incorrect. The registration statements says, We believe
8 X. It turns out X is not true.

9 So it's not going to be very hard in that
10 situation for a plaintiff to allege that he -- that the
11 issuer did not make a reasonable investigation because
12 if -- if they had done a reasonable investigation, they
13 would have discovered that X wasn't true.

14 MS. SAHARSKY: Well, with respect, I'm not
15 sure that that's true because of the stringent pleading
16 standards that are in place. First of all, it's not
17 just that they could allege a conclusion under this
18 Court's decision in Twombly and Iqbal. It's that you
19 have to have facts to support it.

20 Also, there are some courts, like the court
21 in this case, depending on the allegations, that say
22 they need to meet the particularity standard for fraud,
23 a claims that sounds like fraud under Section 9(b). So
24 there is, in fact, a burden on the plaintiffs.

25 And one point that I want to make is that

1 this is the kind of inquiry that comes up in omissions
2 cases all the time. The question is the plaintiff says,
3 and has to say with facts behind it, There's something
4 that was omitted that matters.

5 And the question ultimately for the finder
6 of fact to decide is did it make the statement
7 misleading or not, and that is a very context-specific
8 discussion. But --

9 JUSTICE ALITO: They say, someone pleads
10 that -- they said we believe there were no bribes paid,
11 and then later it's discovered that lots of bribes were
12 being paid off someplace. So they alleged all the
13 things that have turned out to be inconsistent with the
14 statement of belief, and they say had they sent someone
15 there to investigate, they would have found this, they
16 would have found that. So how difficult is that going
17 to be?

18 MS. SAHARSKY: Well, again, I think the
19 depends on the case.

20 You know, one thing that I would suggest to
21 the Court by way of reassurance, is both that the Court
22 has addressed a number of omissions cases and asking,
23 you know, is the kind of information something that
24 should have been included to make the statement not
25 misleading, but also that the standard that we're

1 talking about, the lack of a basis, has deep roots in
2 the common law, it's been the long-standing position of
3 the SEC, and there are numerous courts that have used
4 this standard, including the Third Circuit's decision in
5 the Trump case, the Weiss case that's cited in our
6 brief.

7 JUSTICE KAGAN: Do you think that there are
8 specific omissions in this case?

9 MS. SAHARSKY: Well, the case wasn't really
10 pleaded the way that we conceive of it in terms of the
11 lack of a reasonable basis, so we do think the
12 appropriate thing for the Court to do would be to
13 provide appropriate instructions to the lower courts,
14 send this case back, and potentially allow this case to
15 be repleaded because of the fact that we do think there
16 was a kernel of this lack of reasonable basis idea in
17 two places in the complaint in this case.

18 The one is the relatively conclusory
19 statement in Section 183 of the complaint that there was
20 not a reasonable basis, but then there was also, as
21 Mr. Goldstein noted, paragraphs 89 and 90 of the
22 complaint, which were specific facts that were alleged
23 about the company's attorney saying with respect to one
24 of the specific contracts, this contract has all the
25 kick -- hallmarks of a kickback, an illegal kickback,

1 and that is the kind of thing that potentially is an
2 omission that could be material and could make the other
3 statements in the registration statement misleading if
4 you don't provide such information.

5 JUSTICE ALITO: Well, do you think that
6 Twombly in this -- in this context requires the
7 plaintiff to allege what kind of investigation was
8 conducted before there is discovery?

9 MS. SAHARSKY: I think that that would be a
10 case-specific determination, but I don't think that that
11 under Twombly and Iqbal, that the -- that the plaintiff
12 could just come in and give a very generic, a very
13 conclusory allegation. That's what the Court said is no
14 conclusory allegations.

15 But another -- another point I think that
16 might be helpful to the Court is that this is really --
17 this no reasonable basis standard is really something
18 that polices the egregious cases because it has to be
19 the case that the plaintiff can come forward with
20 information and that the basis that the company had is
21 really outside the bounds of reasonableness, and we need
22 to have it for egregious cases, for example, if there
23 was a company that really did no investigation before
24 putting statements like financial statements or
25 financial predictions in its --

1 JUSTICE BREYER: Well, why wouldn't they
2 just say, Look, the statement turned out to be false, we
3 don't doubt that he did hold that opinion as his
4 opinion, he was sincere, but he had no basis for that
5 whatsoever, period. That's what the complaint says.
6 Now, how can you avoid discovery on that?

7 MS. SAHARSKY: Well, I think the plaintiff
8 has the burden to -- to allege specific omitted facts
9 that should have been given in the registration --

10 JUSTICE BREYER: He never looked into it.
11 He had no basis for it. That's trying to prove a
12 negative. What are they supposed to allege a negative,
13 he didn't go to the law books, didn't go to the library,
14 didn't talk to this, didn't talk to that. I mean, it's
15 pretty hard to do, isn't it?

16 MS. SAHARSKY: Well, I think it depends in
17 the context of the entire complaint, whether there's
18 sufficient factual matter there or not. But again, what
19 I would tell the Court is that this kind of issue, not
20 with respect to opinions specifically, but in general,
21 arises in omissions cases, and there are many omissions
22 cases under Section 11, which is not surprising when you
23 think about it because these registration statements are
24 so carefully vetted. It's not often the case that you
25 find facts that are stated that are actually untrue.

1 And that's really the key point that I want
2 to make when you are thinking about Petitioner's
3 statement, is the SEC does really view this as a problem
4 to say that the Petitioner's idea that you can just put
5 "we believe" in front of something and then not have any
6 need to make an investigation into it or see whether it
7 has a basis.

8 CHIEF JUSTICE ROBERTS: Why can't that be
9 submitted to the jury? In other words, you can look,
10 not to see if in fact it has a reasonable basis, but to
11 use the evidence about how unreasonable the basis must
12 be to suggest that the belief was not sincere?

13 MS. SAHARSKY: Well, Congress made --

14 CHIEF JUSTICE ROBERTS: If someone comes in,
15 in Justice Breyer's hypothetical, and there's no basis
16 at all and says, "I believe that this," and the evidence
17 shows he had no basis at all, a jury can easily
18 determine, we don't think he really believed it.

19 MS. SAHARSKY: You're right that that's
20 probative evidence. But I think the key point is the
21 language Congress enacted, that Congress did not limit
22 liability to statements that are literally true or
23 false. There could be statements that are literally
24 true, like he had the belief, but were misleading, and I
25 think that's the situation. There are places where you

1 could have something that is subjectively believed, the
2 company in litigation, and the company lawyer thinks
3 we're going to win this, we can, but they haven't been
4 winning it, and they don't disclose the fact that there
5 are some serious risks there.

6 And that's the kind of thing that really
7 shouldn't be put in registration statements without
8 qualification.

9 JUSTICE KAGAN: Ms. Saharsky, does this
10 affect not only the private right of action? I was
11 uncertain whether it also affected the SEC's ability to
12 stop a registration statement which it thought had a
13 misleading statement of opinion. If we come out the way
14 Mr. Shanmugam says, is the SEC's ability to do that
15 severely compromised?

16 MS. SAHARSKY: Yes. The language, the
17 operative language, is nearly identical. This is
18 between Section 8, which is about the SEC stop orders,
19 and Section 11, and the key language is that there has
20 to be the misstatement of material fact or the omission
21 that makes the -- because the omission is present makes
22 this statement not misleading.

23 So this is nearly identical language, and
24 the SEC has taken the position for many years that in
25 fact a lack of a reasonable basis is a serious problem

1 even if the person sincerely believes it. Those are the
2 cases cited in our brief, and the reason we're here
3 today is it will severely hamper the SEC's authority, as
4 well as the authority of private persons to recover, if
5 you can just put things in registration statements
6 without even having a basis for them.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Shanmugam, you have seven minutes
10 remaining.

11 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
12 ON BEHALF OF THE PETITIONERS

13 MR. SHANMUGAM: Thank you, Mr. Chief
14 Justice.

15 This is the rarer case in which none of the
16 parties is defending the reasoning of the court of
17 appeals below. And just to reiterate, the court of
18 appeals in this case held that the falsity requirement
19 in Section 11 operates differently because Section 11 is
20 a strict liability statute, and that's the reasoning at
21 page 47 of the Joint Appendix.

22 So the real question before this Court is
23 whether to reverse outright, as we submit this Court
24 should do, or to vacate and remand for application of a
25 somewhat different legal standard such as the reasonable

1 basis standard.

2 I want to really set out three reasons in
3 this rebuttal why we believe that the Court should
4 reverse outright.

5 First of all, I want to focus on the text of
6 the statute. And to go to the colloquy, Justice Kagan,
7 that you and I were having, and the similar colloquy
8 that you also had with my colleagues at the bar, whether
9 or not there is a reasonable basis is not a fact that
10 can be said to be omitted, and that is for the precise
11 reason that this test is not simply a "some basis"
12 standard. This is a reasonable basis standard that
13 requires some evaluation of whether the basis is
14 sufficient.

15 And so that is really a judgment. It is
16 really a matter of opinion, and I don't think that it
17 can be fairly said to be a fact that is omitted. And
18 again, as I suggested earlier --

19 JUSTICE KAGAN: But there might be omitted
20 facts, such as I didn't check with any of my lawyers, or
21 I checked with my lawyers and they told me the opposite.
22 I mean, those are facts, and that's the thing that makes
23 the statement in the registration statement itself
24 misleading.

25 MR. SHANMUGAM: And so the only point I

1 would add is the point that I think I made in my opening
2 argument, which is that the statement of material fact
3 here is still the statement of the opinion, and there is
4 nothing misleading about that statement as to that
5 stated fact. That is to say, either that is the opinion
6 of the issuer or it isn't. And I think it was telling
7 that Mr. Goldstein in his argument --

8 JUSTICE KAGAN: But I think what
9 Ms. Saharsky is saying, maybe not Mr. Goldstein, is that
10 there's another part of the statute which is omissions,
11 and that those omissions of facts -- I didn't check with
12 anybody or I checked with everybody and they said the
13 exact opposite -- that's the thing that makes my own
14 statement misleading, and that's why it fits within the
15 statute.

16 MR. SHANMUGAM: Right, but it still has to
17 be an omission that is, in the words of the statute,
18 "necessary to make the statements therein not
19 misleading." And again, we think that the statements
20 therein are really the statements of material fact.

21 Now, Mr. Goldstein made a somewhat different
22 textual argument, and I want to address that, too, just
23 to kind of lay all our cards on the table. He argued
24 that, in essence, because this concept of due diligence,
25 this concept of having a reasonable belief, exists in

1 the affirmative defense, that this Court can somehow
2 just import that concept into the affirmative falsity
3 requirement.

4 To me, that really illustrates why this is a
5 profoundly atextual view, because in essence what he is
6 saying is that, although Congress incorporated a
7 reasonableness standard in certain specific contexts
8 with regard to defenses for persons other than the
9 issuer, you should impose it as an affirmative
10 requirement with regard to statements of opinion whoever
11 the speaker is.

12 And again, we simply don't think that can be
13 squared with the text of the statute.

14 I would note a couple of further things in
15 response to Ms. Saharsky's argument as to the text here.
16 First of all, as I said in my opening, if Congress
17 wanted to specifically impose liability in the absence
18 of a reasonable basis, it certainly could have done so.
19 There are statutes outside the securities context that
20 use that phrase in order to impose liability.

21 But second, to the extent that the SEC views
22 this as a massive problem, the SEC certainly could
23 promulgate a rule under its authority under Section 19
24 of the Securities Act, which allows the SEC to specify
25 what should be included in a registration statement.

1 And the SEC in fact has somewhat broader power than
2 Ms. Saharsky suggests because, while it is true that the
3 SEC stop order power under Section 8(d) uses similar
4 language, the SEC also has the power to prevent a
5 registration statement from going into effect under
6 Section 8(b) where that statement is inaccurate or
7 incomplete in any respect.

8 In our view, that is broader language that
9 would give the SEC somewhat more expansive authority if
10 it believed that a statement of opinion is objectively
11 false.

12 With regard to Virginia Bankshares, I would
13 just note one thing in response to Justice Sotomayor's
14 question, and that is that, as we point out at page 10
15 of our reply brief, there was no jury finding in
16 Virginia Bankshares on the issue of subjective
17 disbelief. This Court was instead characterizing the
18 jury's finding precisely because this Court believed
19 that what it meant for a statement of this variety to be
20 false was for the speaker to have acted with subjective
21 disbelief. And again, I would point the Court to what
22 we said in our reply brief. We cite the verdict form as
23 confirmation of that proposition.

24 Third, I want to say just a word about the
25 policy considerations here, pro and con a reasonable

1 basis standard. As I pointed out earlier, we believe
2 that that standard is amorphous, and I don't think that
3 anything that's taken place in the intervening half an
4 hour has dispelled that proposition.

5 Ms. Saharsky says that whether or not the
6 basis is reasonable is whether or not the basis is one
7 that would be expected under the circumstances, and I
8 would respectfully submit that that really doesn't
9 provide much more by way of clarity, and it certainly
10 would make it very easy for a plaintiff to plead a claim
11 under this legal standard because all they would
12 presumably have to say is that the basis is not that
13 that was expected under the circumstances.

14 And as Mr. Goldstein said, this inquiry
15 would be very context specific, and again in a context
16 where issuers really require predictability and
17 certainty, we believe that that is cold comfort.

18 There is one other policy consideration,
19 however, which I didn't mention earlier that I just want
20 to mention very briefly. There are very few statements
21 of opinion that are required to be included in
22 registration statements. There is the statement of the
23 auditor, statement of the lawyer that the issuance of
24 these securities is valid. But beyond that, the statute
25 and the regulations really do not require very many of

1 these statements. And we, therefore, believe that a
2 standard -- an amorphous liability standard like the
3 reasonable basis standard will really have a chilling
4 effect in cases of this variety.

5 And I would note, as was illustrated in the
6 discussion with Mr. Goldstein, that in this case most of
7 the statements at issue were accompanied by cautionary
8 language, and I think that the reason why that is so is
9 that the reason why companies like Omnicare make
10 disclosures like this is precisely to warn about the
11 risks of doing business. If you take a look at --

12 JUSTICE KENNEDY: What would be your
13 position if those qualifying statements that do appear
14 just before and just after the belief statement were
15 omitted?

16 MR. SHANMUGAM: Well, our view would be the
17 same in the sense that we certainly think that
18 subjective disbelief would still be required, and of
19 course we believe that that is the holding of this
20 Court's decision in Virginia Bankshares as it has been
21 understood.

22 But I make the point for a somewhat
23 different reason, which is simply to illustrate why
24 issuers believe that it is desirable to make statements
25 of this variety, and if issuers are subject to liability

1 under an amorphous standard they will simply omit to do
2 so.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:05 p.m., the case in the
7 above-entitled matter was submitted.)

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