No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., ET AL.,

Petitioners,

v.

THE LABORERS 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 OF THE CENTER FOR AUDIT QUALITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Audit Quality ("CAQ") is a public policy organization of approximately 750 U.S. public company accounting firms, representing tens of thousands of professionals dedicated to audit quality. Any U.S. accounting firm registered with the Public Company Accounting Oversight Board ("PCAOB") may join the CAQ. The organization strives to increase investor confidence and public trust in the global capital markets by improving the reliability of public company audits and enhancing their relevance for investors. As a part of that effort, the CAQ regularly submits *amicus* briefs in cases concerning legal rules that affect auditors and the audit process, and their broader impact on investors and the capital markets.

This is such a case. The CAQ's member firms audit the financial statements of virtually every public company in the United States, and are often drawn into litigation related to those audits. Claims brought under section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, are no exception. Although this case involves the statement of an issuer, not an auditor, the statute expressly lists "accountants" among the parties subject to liability, *id.* § 77k(a)(4), and auditors are frequently named as defendants in section 11 cases. Auditors' principal task in connection with registration statements is to express an opinion, based on professional judgment, on the issuer's financial

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Petitioners and respondents have filed letters with the Court granting blanket consent to the filing of *amicus curiae* briefs.

statements. The CAQ, therefore, believes that it can provide a valuable perspective on the reach of section 11 and the potential consequences of the Court's resolution of the question presented to the accounting profession.

The issue raised here is fundamental to section 11 litigation and to ensuring that the boundaries of liability under that provision remain where Congress put them. The decision below moved the stakes. Breaking from section 11's text and common-law foundations, the Sixth Circuit erroneously held that a plaintiff can challenge a statement of opinion as an "untrue" statement of material fact without showing that the speaker did not actually hold the opinion expressed—a requirement known as "subjective falsity." This interpretation improperly broadens the scope of liability under section 11 and, if affirmed, would have serious repercussions for the CAQ's members and, ultimately, for users of financial statements and the investing public. The Court should reverse and in the process take care not to disturb case law recognizing that auditors' opinions are precisely that—matters of opinion—and thus cannot be challenged under section 11 absent a showing of subjective falsity.

SUMMARY OF ARGUMENT

Section 11 of the Securities Act creates a cause of action against issuers and other parties based on false statements in, or in connection with, registration statements. Subsection (a) confines liability to "untrue statement[s] of . . . material fact" or omissions. 15 U.S.C. § 77k(a). When a plaintiff targets subjective assertions or statements of opinion, this provision compels every plaintiff to plead and prove that the speaker did not genuinely hold the view expressed, because a subjective statement of opinion

cannot be an "untrue . . . fact" otherwise. Subjective statements of opinion cannot be deemed false statements of fact without proof that they were subjectively false.

This requirement is critical to the auditing profession because the core of an auditor's work is to exercise judgment and express opinions. For registration statements, auditors produce what is called an audit report, the core of which is an opinion about the issuer's financial statements. Embedded within those financial statements and their line items are innumerable estimates, forward-looking projections, and other accounting conclusions that require the exercise of professional judgment. Because numerous material elements of financial statements are inherently judgmental and matters of opinion, in opining that the financial statements taken as a whole are fairly presented in accordance with U.S. generally accepted accounting principles ("GAAP"), an auditor often is effectively expressing an opinion about an opinion. Section 11(a) demands proof of subjective falsity for allegations aimed at such subjective statements.

This conclusion follows not only from the plain text of section 11(a), which demands an "untrue" statement of "fact," but also from the longstanding common-law distinction between fact and opinion. This distinction, which Congress is presumed to have followed in the Securities Act, holds that a statement of opinion may be actionable as a misrepresentation only if the statement misrepresents the speaker's state of mind. A requirement of subjective falsity also is consistent with the approach this Court and others have taken in analogous contexts in which statements of opinion are challenged as false, such as under First Amendment defamation law. And it harmonizes the entire statute, requiring plaintiffs who chal-

lenge a statement of opinion to allege and prove subjective falsity under subsection (a), while requiring professionals sued for objectively false statements of fact to rely on the due-diligence defense in subsection (b)(3).

The usual statutory interpretation tools provide more than enough justification for reversal, but there is another reason to proceed cautiously in the face of the Sixth Circuit's sweeping view of section 11. As this Court has often said, private-plaintiff enforcement of the securities laws imposes significant costs on the economy. That counsels restraint in expanding the scope of section 11 liability here.

Many decisions adjudicating section 11 claims have interpreted the statute correctly. Recognizing the inherently discretionary and judgmental nature of the accounting decisions embedded in financial statements, these courts have required proof of subjective falsity whenever plaintiffs claim that such subjective assertions of judgment are untrue. The Court should not disturb these cases by widening liability beyond what the text of section 11 commands.

ARGUMENT

I. STATEMENTS OF OPINION ARE NOT ACTIONABLE UNDER SECTION 11 UNLESS THE PLAINTIFF CAN PLEAD AND PROVE SUBJECTIVE FALSITY.

1. Section 11(a) provides a private cause of action to certain purchasers of a security sold pursuant to a registration statement that contains "an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Ordinary principles of statutory in-

terpretation make clear that when a plaintiff's claim is premised on subjective statements, the plaintiff must allege and prove subjective falsity—*i.e.*, that the speaker did not genuinely hold the view expressed.

First, that is the plain meaning of the statute's text, which sets forth the dual requirements that there be a statement of "fact" that is provably "untrue." 15 U.S.C. § 77k(a). As this Court has held, subjective beliefs are "open to objection only . . . as a misstatement of the psychological fact of the speaker's belief in what he says." *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1095 (1991). That means that a subjective statement of opinion can be thought of as a "fact" capable of being proven "untrue" only in the sense that "the expression of an opinion is the assertion of a belief, and . . . the expression of a consciously false opinion [is] a consciously false statement of fact." *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (Hand, J.). Subjective falsity, in other words, is a necessary component of any allegation that a subjective statement of opinion was an "untrue . . . fact."

Background principles of common law confirm this reading of the text, and the concomitant scope of the section 11 cause of action. This Court has previously "assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . liability rules and consequently intends its legislation to incorporate those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003); see also *FAA* v. *Cooper*, 132 S. Ct. 1441, 1449 (2012) (when Congress adopts a common law standard, "it presumably knows and adopts the cluster of ideas" associated with it) (internal quotation marks omitted). That presumption applies here.

At the time section 11 was enacted, the common law torts of misrepresentation had long recognized the distinction between "fact" and "opinion." See, *e.g.*, Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 233, 235 (1933); *Legislation*; *Federal Regulation of Securities: Some Problems of Civil Liability*, 48 Harv. L. Rev. 107, 112 n.33 (1934) ("At common law [a misrepresentation] must pertain to existing or past facts, promises as to the future and opinions being insufficient."). In drawing this line, some courts held that statements reflecting the speaker's state of mind could be considered statements of "fact," *but only if* the allegation were itself about that state of mind, like an allegation that the speaker did not "inten[d] to live up to the representations at the appointed time, or . . . did not entertain an opinion of the kind expressed." Shulman, *supra*, at 237 (citing cases). Such statements were treated as "misrepresentations of the defendant's present intention, of his present state of mind—a fact." *Id.* at 237–38; see also *Vulcan Metals*, 248 F. at 856. Today, too, the common law continues to distinguish between fact and opinion. See, *e.g.*, W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 109, at 755 (5th ed. 1984) (a statement of opinion is a statement of "the fact of the belief, the existing state of mind, of the one who asserts it").

Section 11 incorporates these rules. Not only is Congress "understood to legislate against a background of common-law . . . principles," but "courts may take it as given that Congress has legislated with an expectation that the principle[s] will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). No such contrary purpose is evident in section 11: although the statute "departs

from the common-law civil liability" in "several important particulars," the contours of liability for "untrue" statements of "fact" is not one of them. Shulman, *supra*, at 248–49. Myriad contemporaneous authorities recognized as much. See, *e.g.*, William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 190 n.97 (1933) (listing among the defenses to an alleged section 11 violation that the untruth or omission "involved opinion rather than facts"); *Legislation*, 48 Harv. L. Rev. at 112 n.33 ("[t]he [common-law] definition of a misrepresentation seems to remain unchanged"); Emily Marx, Comment, *Civil Liability for Misstatements in Documents Filed Under Securities Act and Securities Exchange Act*, 44 Yale L.J. 456, 458 (1935) ("Section 11(a) retained several defenses familiar to the common-law deceit action[, including] that the untruth related not to 'fact' but to 'opinion'"); Comment, *Civil Liability Under the Federal Securities Act*, 50 Yale L.J. 90, 93 (1940) ("while the Act has modified or eliminated certain of the prerequisites to recovery at common law, the prospective plaintiff must still be able to show . . . that [the representation] is of fact rather than an opinion").

The scope of liability for allegedly "untrue" statements of material "fact" under section 11(a) thus extends only to factual averments that the plaintiff can prove to be untrue. For allegations that concern the speaker's subjective state of mind, such proof must include a contention that the speaker did not genuinely hold the belief or opinion expressed.

2. This reading of section 11 is also consistent with the law in other contexts. The First Amendment, for example, demands that certain plaintiffs prove that an allegedly defamatory statement was materially false. *E.g.*, *Air Wis. Airlines Corp.* v. *Hoeper*, 134 S.

Ct. 852, 861 (2014); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988); *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986). An action cannot proceed based on an allegedly false "statement of opinion" because subjective assertions are not statements of defamatory fact that can be proven false. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 19–22 & n.7 (1990). Rather, liability may attach only if the speaker's statement "contain[s] a provably false factual connotation," *id.* at 20, and thus is in effect a false statement of fact.

Case law interpreting the False Claims Act, 31 U.S.C. §§ 3729–3733, is similar. The Act attaches liability to certain "false or fraudulent claim[s] for payment or approval," or to "false record[s] or statement[s] material to a false or fraudulent claim." *Id.* § 3729(a)(1)(A)–(B). Courts have repeatedly held that "'[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false.'" *United States ex rel. Jones* v. *Brigham & Women's Hosp.*, 678 F.3d 72, 87 (1st Cir. 2012); see also *United States ex rel. Riley* v. *St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). Likewise, to be actionable, the "facts" underlying subjective assertions like estimates must be "reasonably classif[iable] as true or false," rather than unverifiable assertions like "legal argumentation and possibility." *United States ex rel. Siewick* v. *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000); see also *United States ex rel. Yannacopoulos* v. *Gen. Dynamics*, 652 F.3d 818, 833–34 (7th Cir. 2011); *United States ex rel. Owens* v. *First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 732–33 (4th Cir. 2010); *Luckey* v. *Baxter Healthcare Corp.*, 183 F.3d 730, 732 (7th Cir. 1999);

United States ex rel. Lamers v. *City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999).

In both the First Amendment and False Claims Act contexts, therefore, a plaintiff's ability to allege that subjective assertions are "false" is sharply limited. If liability is to attach at all, subjective falsity is required. The same is true under section 11.

3. That section 11 is in certain respects a strict liability provision does not undermine this interpretation, and the Sixth Circuit was wrong to hold otherwise. Pet. App. 15a–19a. As already explained, the speaker's subjective state of mind goes to the truth or falsity of the statement itself—that is what makes it a "fact" that can be proven "untrue." Scienter is a separate requirement. See, *e.g.*, *Fait* v. *Regions Fin. Corp.*, 655 F.3d 105, 112 n.5 (2d Cir. 2011) (the need for subjective falsity under section 11(a) "does not amount to a requirement of scienter"); *Hustler Magazine*, 485 U.S. at 52 (public figure defamation plaintiffs must "prove *both* that the statement was false and that the statement was made with the requisite level of culpability"); 15 U.S.C. § 78u-4(b)(1)–(2) (listing separate pleading requirements for an alleged untrue statement of material fact and required state of mind).

Indeed, common-law principles incorporated into the statute lay bare the error below. "[L]iability under Section 11 is modelled after that in rescission." Shulman, *supra*, at 250. And even though "[s]cienter . . . is foreign to the vocabulary of § 11 [and] common law rescission," a rescission action still "distinguish[es] between a statement of 'fact' on the one hand and an expression of 'opinion' or a 'forecast' or a statement of 'law' or 'value' on the other." 9 L. Loss & J. Seligman, *Securities Regulation* 4119, 4267 (3d ed. 2004); see also Shulman, *supra*, at 231–33. The ab-

sence of a scienter requirement thus says nothing about whether and when a section 11 plaintiff must plead and prove subjective falsity.

II. RECOGNIZING THE NEED TO PROVE SUBJECTIVE FALSITY FOR MATTERS OF OPINION IS CONSISTENT WITH THE HISTORICAL ROLE OF AUDITORS AND WITH SECTION 11.

Auditors issue opinions. In registration statements, those opinions reflect the auditor's judgment about the issuer's financial statements and about the sufficiency of the audit procedures performed and the audit evidence gathered. The financial statements about which auditors opine contain not only assertions of objective fact, but also innumerable estimates, projections, and other subjective accounting conclusions that are matters of opinion based on the exercise of professional judgment and discretion. Thus, in opining that the audit client's financial statements as a whole are fairly presented in accordance with GAAP, auditors are required to form their own opinions regarding management's opinions. In other words, application of accounting principles to line items within the financial statements is inherently a matter of judgment and opinion, and then auditors apply their own judgment and issue their own opinion on those financial statements. The form of the auditor's report as that of an opinion reflects this relationship.

Section 11 accounts for the difference between fact and opinion, setting out different pleading requirements and burdens of proof for each. When the alleged untrue statement of material fact identified by the plaintiff pertains to a matter of judgment and opinion, as it often does, the plaintiff must allege and prove subjective falsity. When the alleged untrue statement of material fact pertains to a matter that is

nonjudgmental and objectively determinable, subjective falsity need not be shown to state or prove a claim, but an auditor may still have a due-diligence defense under subsection (b)(3). Many courts have correctly interpreted section 11 to enforce this distinction, and their decisions should not be disturbed.

A. The Bulk Of Auditors' Work In Connection With Registration Statements Is And Always Has Been To Issue Opinions Based On Their Exercise Of Professional Judgment.

A company seeking to offer securities for public sale generally must file a registration statement with the Securities and Exchange Commission. 15 U.S.C. §§ 77e, 77f. Registration statements, in turn, must include certain financial statements "certified by an independent public or certified accountant." *Id.* §§ 77g(a)(1), 77aa(25)–(27). That independent assessment serves a critical function, telling investors that, among other things, the company's financials are presented fairly in all material respects in conformity with GAAP. *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 811, 817–19 (1984). Importantly, though, the market knows and expects that the accountant or auditor carries out this function by furnishing an "opinion." *Arthur Young*, 465 U.S. at 811; see also 17 C.F.R. § 210.1–02(f) ("certified" "means examined and reported upon with an opinion expressed by an independent public or certified public accountant"); *Bily* v. *Arthur Young & Co.*, 834 P.2d 745, 750–51 (Cal. 1992).

This understanding of the auditor's role predates section 11. In the early 1930s, at the same time the Securities Act was being debated and drafted, accountants and regulators came together to develop a standardized way of reporting auditors' work to in-

vestors. See Am. Inst. of Accountants, *Audits of Corporate Accounts: Correspondence between the Special Committee on Co-operation with Stock Exchanges of the American Institute of Accountants and the Committee on Stock List of the New York Stock Exchange*, at 2 (1932–1934). Throughout the process, accountants consistently "emphasize[d] the fact that accounts, and consequently any statements or reports based thereon, are necessarily in large measure expressions of opinion" and thus that "the words 'in our (my) opinion' should always be embodied" in any audit report. *Id.* at 25; see also *id.* at 5 (financial statements "are largely the reflection of individual judgments"). Regulators were "heartily in favor" of a proposal making that clear. *Id.* at 27–31. The upshot was an agreed-upon declaration of opinion from accountants—known as an audit report—which became a mandatory part of companies' stock market filings. *Id.* at 2, 12; see also, *e.g.*, 17 C.F.R. §§ 210.1–01, 210.1–02.

Still today, registration statements and other SEC filings include audit reports, and the fundamentally subjective nature of those reports remains unchanged. The end product of the auditor's work is, first and foremost, "an expression of opinion" as to whether the company's "financial statements, taken as a whole," are in material compliance with GAAP. PCAOB AU §§ 110.01, 508.04 (interim audit standards); *Arthur Young*, 465 U.S. at 811. In addition, since the enactment of the Sarbanes-Oxley Act, audit reports now express the auditor's opinion that the audit of an issuer was conducted in accordance with PCAOB auditing standards, which adopted and since modified generally accepted auditing standards ("GAAS"). *E.g.*, PCAOB AU § 150; 17 C.F.R. §§ 210.1–02, 210.2–02. These core statements about compli-

ance with GAAP and GAAS each reflect the exercise of professional judgment, both as to the ultimate conclusions and as to the innumerable discretionary accounting and auditing judgments that underlie those conclusions.

As for GAAP, this Court has acknowledged the complexity of accounting principles and the professional judgment needed to apply them: "Financial accounting is not a science. It addresses many questions as to which the answers are uncertain and is a 'process [that] involves continuous judgments and estimates.'" *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); see PCAOB AU § 342.16 (appendix listing "examples of accounting estimates that are included in financial statements"). Many of those financial statement estimates made under GAAP are forward-looking in nature. To take a seemingly simple example, a seller of products with a right of return may recognize revenue at the time of sale of its products only if, among other things, "[t]he amount of future returns can be reasonably estimated." Fin. Accounting Standards Bd., *Accounting Standards Codification* § 605-15-25-1(f) (2014). Whether and when an estimate of future returns is reasonable is a matter of judgment. At bottom, "'[g]enerally accepted accounting principles' . . . tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co.* v. *Comm'r*, 439 U.S. 522, 544 (1979). Even respondent realizes that "[a]ccounting rules often require the exercise of judgment," and that auditors present their work in an "'audit opinion.'" Br. in Opp. to Pet. for Cert. at 20.

Likewise, the auditor's statement that an audit complies with GAAS is an inherently subjective representation infused with the exercise of professional

judgment, predictions of future events, and concepts of reasonableness. "The auditor must plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a *reasonable basis* for his or her opinion." PCAOB AS No. 15.4 (emphasis added). Because of the nature of audit evidence, an audit provides reasonable, not absolute, assurance that financial statements are free of material error. For example, auditors often engage in sampling as part of their test work, examining less than 100 percent of the transactions that comprise a particular financial statement line item. PCAOB AU § 350. But sampling "require[s] that the auditor use professional judgment in planning, performing, and evaluating a sample and in relating the evidential matter produced by the sample to other evidential matter when forming a conclusion." *Id.* § 350.03. Likewise, many of the judgments made and procedures performed by auditors under GAAS are forward-looking in nature. When auditing revenue of a seller of product with a right of return, an auditor may "[d]evelop an independent expectation of the estimate [of future returns] to corroborate the reasonableness of management's estimate." *Id.* § 342.10. Overall, whether the auditor has "obtain[ed] sufficient appropriate evidential matter to provide him or her with a reasonable basis for forming an opinion" is a subjective determination that fundamentally "involves judgment." *Id.* § 230.11; see also PCAOB AS No. 15. Assessments like these permeate PCAOB auditing standards and GAAS. See, *e.g.*, *In re Lehman Bros. Sec. & Erisa Litig.*, 799 F. Supp. 2d 258, 299–303 (S.D.N.Y. 2011).

For as long as the Securities Act has been in force (and before), the accounting profession, the financial markets, and the law have all recognized the judg-

mental and discretionary nature of audit work. That understanding should not be unsettled now.

B. Section 11 Protects Auditors' Historical Responsibility To Issue Opinions.

Although this case involves the statement of an issuer about legal compliance, and not an auditor's report on its client's financial statements, the Court's interpretation of section 11 should be informed by the fact that auditors are often sued based on matters of accounting and auditing judgments that, like assertions of legal compliance, ultimately are subjective statements of opinion resting on the exercise of professional judgment.

Section 11 protects auditors' historical responsibility to issue opinions without exposing them to expansive liability risks for the inherently subjective judgments they are required to make. Subsection (a) supplies a cause of action for "an untrue statement of a material fact" in a registration statement. 15 U.S.C. § 77k(a). Accountants are implicated if they are named with their consent as having "prepared or certified" any part of the registration statement, or any report or valuation used in connection with it, that contains such an alleged untrue statement. *Id.* § 77k(a)(4). Auditors make such statements through their audit reports. 17 C.F.R. §§ 210.1–02(d), 210.2–02. Subsection (b)(3) then provides an affirmative defense if the auditor "had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true." 15 U.S.C. § 77k(b)(3).

Read together, these two provisions both play an important role in addressing potential liability under the Act. Initially, subsection (a) ensures that the

plaintiff's allegations concern "facts" that can be proven "untrue," and screens out claims that fail to meet that threshold requirement. When the alleged untrue statement of material fact identified by the plaintiff concerns subjective opinions and matters of judgment—as it frequently does—those prerequisites necessitate an allegation of subjective falsity in order to move forward.

Subsection (b)(3), in turn, requires an auditor or other expert who certified a part of the registration statement to prove due diligence as an affirmative defense when the alleged untrue statement of material fact concerns a nonjudgmental, objectively determinable fact. That is, if the plaintiff can demonstrate the falsity of the alleged untrue statement through "[p]rovable facts," *Va. Bankshares*, 501 U.S. at 1093, and "objective evidence" "susceptible of being proved true or false," *Milkovich*, 497 U.S. at 21, the plaintiff need not plead and prove subjective falsity under subsection (a). See *Fait*, 655 F.3d at 110 (plaintiffs need not allege subjective falsity when they can prove that a complained-about statement was false by reference to "an[] objective standard" because in that case the statement is one of fact).

The Sixth Circuit misconstrued the statute, however, by in effect holding that subsection (b)(3) is the only mechanism for considering the defendant's state of mind. That categorical view must be rejected. Properly construed, subsections (a) and (b)(3) both play an important and distinct role, with subsection (a) maintaining the distinction between fact and opinion, and thus weeding out challenges to statements of opinion unless the plaintiff can allege and prove subjective falsity, and subsection (b)(3) affording an affirmative defense when the allegedly false statement is one of objective fact. See Shulman, *supra*, at 251

(recognizing that the "defense[] that the statement referred to opinion rather than fact" (subsection (a)) is separate from the ability to "avoid liability by showing that they had a reasonably grounded belief in the truth of the statement" (subsection (b))).

C. Courts Have Correctly Interpreted Section 11 This Way.

Courts confronting section 11 claims have frequently interpreted the statute in the manner described above. First of all, they have understood that audit work "addresses many [accounting] questions as to which the answers are uncertain and is a 'process [that] involves continuous judgments and estimates.'" *Shalala*, 514 U.S. at 100. Estimates of goodwill, for instance, depend on a "determination of the 'fair value' of the assets acquired and liabilities assumed, which are not matters of objective fact." *Fait*, 655 F.3d at 110. Likewise, "determining the adequacy of loan loss reserves" reflects an "opinion or judgment about what, if any, portion of amounts due on the loans ultimately might not be collectible." *Id.* at 113. Whether a concentration of credit risk is "significant," or whether a contract qualifies as a "guarantee" requiring disclosure of the "'maximum potential amount of future payments,'" are also matters of complex judgment. *In re Am. Int'l Grp., Inc., 2008 Sec. Litig.*, No. 08-4772, 2013 WL 1787567, at *4–5 (S.D.N.Y. Apr. 26, 2013). So is the recognition of other-than-temporary impairment in a security. *MHC Mut. Conversion Fund, L.P.* v. *United W. Bancorp, Inc.*, 913 F. Supp. 2d 1026, 1033–35 (D. Colo. 2012). The list is endless, as respondents themselves recognize. See Br. in Opp. to Pet. for Cert. at 20 ("[a]ccounting rules often require the exercise of judgment").

Not only have courts appreciated the subjective determinations that underlie an audit report, they have also correctly applied section 11 to claims based on those determinations, requiring plaintiffs to allege and prove subjective falsity. *Fait*, 655 F.3d at 110; *Am. Int'l Grp.*, 2013 WL 1787567, at *4–5; *MHC*, 913 F. Supp. 2d at 1033–37. That is exactly what section 11(a) demands: when a plaintiff cannot prove the falsity of the alleged untrue statement through objective evidence, but instead challenges a statement that expresses a subjective judgment, the plaintiff needs to show subjective falsity in order to proceed with an allegation that the statement is "untrue." The Court should not disturb this sound precedent.

III. THIS INTERPRETATION OF SECTION 11 IS CRITICALLY IMPORTANT FOR THE NATIONAL ECONOMY AND FOR THE AUDITING PROFESSION.

The Sixth Circuit's erroneous interpretation of section 11 portends dangerous risks for the national economy and for the auditing profession in particular. To begin with, the extension of private-plaintiff enforcement of the securities laws is costly to everyone. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452–53 (1st Cir. 2010) (Boudin, J., concurring). "[I]ncreased civil exposure must ultimately raise the price of accounting services," *Baena* v. *KPMG LLP*, 453 F.3d 1, 9 (1st Cir. 2006), and those costs "get[] passed along to the public," *Tambone*, 597 F.3d at 453 (Boudin, J., concurring).

This Court has been persistently mindful of these concerns. Securities cases are often brought as class actions, and they "presen[t] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v.

Manor Drug Stores, 421 U.S. 723, 739 (1975). The massive exposure companies face and the high cost and disruption of the litigation "allow plaintiffs with weak claims to extort settlements." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Given this nuisance value, many defendants "find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). As a result, "[p]rivate securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). In addition, abusive securities litigation "introduces an element of uncertainty into an area that demands certainty and predictability." *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988).

Auditors, moreover, "face[] catastrophic litigation risk different from that of other businesses." Dep't of Treasury, *Advisory Committee on the Auditing Profession: Final Report*, at VII:27 (Oct. 6, 2008) (citing Ctr. for Audit Quality, *Report of the Major Public Company Audit Firms to the Department of Treasury Advisory Committee on the Auditing Profession* 45 (Jan. 23, 2008)). Among other concerns, audit firms' potential exposure—which can include the entire drop in market capitalization for public company clients—"dwarfs audit fees," *id.*, and "far exceeds the firms' current financial ability to withstand liability from such exposure," Ctr. for Audit Quality, *Comment Letter to the Advisory Committee on the Auditing Profession* 5 (June 26, 2008). Such vulnerabilities ampli-

fy the need to police carefully the reach of a statute that directly implicates auditors.

These considerations only bolster the case against the Sixth Circuit's flawed reading of section 11. All of the familiar economic risks associated with broad liability standards reverberate loudly here, and yet the decision below adopted a construction that threatens to spur just the sort of meritless suits that this Court has cautioned against in the past. Indeed, it practically goes without saying that eliminating an element of proof—*i.e.*, the need to show subjective falsity in order to allege that a subjective assertion of opinion or judgment was untrue—makes it easier to bring suit, easier to get past a motion to dismiss, and easier to prevail.

Overly expansive liability under section 11 has potentially far-reaching ramifications for the audit profession in other ways, too. For example, audit opinions in registration statements are generated using the same PCAOB auditing standards that apply to other facets of audit work, including opinions that may appear in other SEC and regulatory filings. And those documents may be covered by other statutes or regulations that govern auditors' conduct. See, *e.g.*, 15 U.S.C. § 78j; 17 C.F.R. § 240.10b–5. The ruling here thus has the potential to affect how auditors approach every aspect of the job, and an interpretation like the Sixth Circuit's could "inhibit[] the use of professional judgment, imped[e] the evolution of more useful audit reports, and caus[e] overly cautious audits or 'defensive' auditing." Dep't of Treasury, *supra*, at VII:28. Construing the statute as written, by contrast, would permit auditors to make the subjective judgment calls that are the bread-and-butter of their work without undue fear of litigation and the risks of ruinous liability.

CONCLUSION

The judgment of the court of appeals should be reversed. Regardless of the ultimate disposition, however, the CAQ urges the Court not to disturb existing precedent holding that challenges to an auditor's exercise of professional judgment require an allegation of subjective falsity to be actionable under section 11.

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