No. 20-678

IN THE SUPREME COURT OF THE UNITED STATES

M&T BANK CORPORATION, ET AL., PETITIONERS

v.

DAVID JAROSLAWICZ, ET AL., RESPONDENTS.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE AMERICAN BANKERS ASSOCATION, AND BANK POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Proposed amici curiae ("Amici") Securities Industry and Financial Markets Association, American Bankers Association, and Bank Policy Institute respectfully move for leave to file the accompanying brief in support of the petition for writ of certiorari in the above-captioned case. Counsel for Amici timely notified all parties of its intention to file this brief on December 7, 2020. Counsel for Petitioner consented, but counsel for Respondent did not.

As set forth in greater detail below, Amici's members, which include securities underwriters, investment banks, commercial and retail banks and other financial institutions that are critical stakeholders in the capital markets industry, will be negatively impacted by the Third Circuit's novel and erroneous interpretation of Item 105 of Regulation S-K. Amici are in a unique position to address the practical impact of the Third Circuit's decision because their members are subject to liability for alleged false and misleading statements in registration statements and prospectuses subject to Item 105, and the novel interpretation of Item 105 adopted by the Third Circuit substantially increases the risk of potential liability for these capital market participants. Amici regularly submit friend-of-the-court briefs in cases that raise issues of critical importance to their members, and believe that this

brief will assist the Court in deciding whether to grant certiorari in this case. For all of these reasons and others set forth below, Amici respectfully request that the Court grant leave to file the brief accompanying this motion.

Respectfully submitted,

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December 17, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE DECISION BELOW WILL HAVE A SIGNIFICANT AND HARMFUL IMPACT ON THE CAPITAL MARKETS INDUSTRY 7

A. The Third Circuit's Interpretation Of Item 105 Will Significantly Expand Underwriter Liability 7

B. The Third Circuit's Interpretation Of Item 105 Undermines The Extensive And Carefully Wrought Web Of Regulations Governing The Assessment And Disclosure Of Risks Affecting The Banking Industry 11

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE THIRD CIRCUIT'S ERRONEOUS INTERPRETATION OF ITEM 105 13

A. The Third Circuit's Novel Interpretation Imposes On Underwriters An Extraordinary Duty To Investigate And Disclose Unknown And Unperceived Risks That Is Inconsistent With SEC Guidance And Is Unworkable In Practice 13

B. The Third Circuit's Interpretation Of Item 105 Violates This Court's Precedent That Implied Private Rights Of Action Should Be Narrowly Construed 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 17

City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG,
752 F.3d 173 (2d Cir. 2014) 16, 17

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501 U.S. 350 (1991) 18

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Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.,
552 U.S. 148 (2008) 17, 18, 19

Va. Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 18, 19

Statutes

15 U.S.C. § 77k(b)(3)(A) 9

15 U.S.C. § 77*l*(a)(2) 9

31 U.S.C. §§ 5311-5330 11

31 U.S.C. § 5318(a) 12

Regulations

12 C.F.R. § 4.6 12

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12 C.F.R. § 163.180 12

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e%20Economic%20Performance%20and
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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and financial institutions. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. Among other things, SIFMA's members underwrite almost every public offering that is subject to Section 11 of the Securities Act of 1933 (the "Securities Act"). SIFMA is the United States regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise matters of vital concern to participants in the securities industry.

The American Bankers Association ("ABA") is the principal national trade association of the

[1] Pursuant to Supreme Court Rule 37.2, counsel for amici timely provided notice to all parties of amici's intention to file a brief on December 7, 2020. Counsel for Petitioner gave consent, while counsel for Respondent withheld consent. Amici's motion for leave precedes this memorandum. Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

financial services industry in the United States. Founded in 1875, the ABA represents the United States' $13 trillion banking industry and its employees. Members of the ABA can be found in all fifty states and the District of Columbia. The ABA includes both large and small financial institutions.

The Bank Policy Institute ("BPI") is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, BPI's members employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine of financial innovation and economic growth.

Amici's members participate as underwriters in a variety of public offerings, including initial public offerings, secondary equity offerings, and registered offerings of debt securities. As such, they are potentially subject to liability under Section 11 of the Securities Act for any false and misleading statements in offering documents issued in connection with those public offerings, which are subject to Item 105 of Regulation S-K. Indeed, amici's members have a vital interest in the issues raised by this petition because the Third Circuit's novel interpretation of Item 105 would substantially increase their cost of doing business and have a harmful impact on the capital markets industry.

SIFMA, ABA, and BPI regularly file amicus briefs in cases with broad implications for financial markets and the nation's banking industry, and frequently have appeared as amicus curiae in this Court. *See, e.g.*, Brief of Amici Curiae, *Goldman Sachs Grp., Inc., et al., vs. Ark. Teacher Ret. Sys., et al.*, Docket No. 20-222 (U.S. Sept. 24, 2020); Brief of Amici Curiae, *Bank of Am., N.A., v. Lusnak*, No. 18-212 (U.S. Sept. 17, 2018).

SUMMARY OF ARGUMENT

The Supreme Court should grant certiorari and reverse the decision below because the Third Circuit's novel interpretation of Item 105 of Regulation S-K is wrong as a matter of law and policy. The Petition should be granted to address the two questions presented: 1) Whether Item 105 requires a company to disclose facts they did not know at the time of disclosure; and 2) whether Item 105 requires acknowledgement of misconduct that the company does not believe themselves to have committed, and which no regulator has accused them of committing.

The Third Circuit in *Jaroslawicz v. M&T Bank Corp.*, 962 F.3d 701 (3d Cir. 2020), ruled that plaintiffs in a securities class action pursuant to Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 14a-9 thereunder may rely on Item 105 of Regulation S-K, 17 C.F.R. § 229.105(a), to hold issuers of publicly traded securities liable for failing to disclose not only known risks, but also risks

that were not known or believed to exist by the issuer. In so ruling, the Third Circuit split from the First Circuit's interpretation of Item 105, which only requires disclosure if there is actual knowledge of the risk, as well as the Second Circuit's interpretation, which is that issuers are not required to confess to potential violations that have not been charged by regulators. These varying interpretations of Item 105 are irreconcilable, thereby creating confusion among securities market participants.

In addition, because Regulation S-K and Item 105 apply to registration statements and prospectuses issued in connection with public offerings of securities governed by Section 11 of the Securities Act, the Third Circuit's ruling constitutes a significant broadening of potential securities liability for underwriters and investment banks (which can be liable for false and misleading statements in registration statements and prospectuses), since it could potentially render them liable to class action plaintiffs for failing to investigate, identify, and disclose risks of the issuer's business that were otherwise unknown or unperceived by the issuer itself. While underwriters, unlike issuers, have the benefit of a due diligence defense, plaintiffs will easily be able to survive motions to dismiss by arguing that the investigation conducted by the underwriters was not reasonable, leading to expensive and onerous discovery and the strong possibility of financial payouts by innocent underwriters.

If left undisturbed, the potential expansion of securities liability marked by the Third Circuit's decision could lead to an explosion of securities class action lawsuits against underwriters and investment banks involved in public offerings of securities in the United States, which would have a negative impact on the process by which public companies access investment capital in the United States. Concerns over expanded securities liability and onerous due diligence requirements could also disincentivize banks from working with businesses perceived as more risky, such as entrepreneurial businesses, start-ups, and issuers from emerging markets, and could chill capital markets in the U.S. in favor of competing foreign markets less burdened by costly private securities class action litigation. Moreover, the Third Circuit's ruling places an unwarranted judicial gloss on top of the already extensive requirements imposed on banks by U.S. law.

In addition, the Third Circuit's novel interpretation of Item 105 is unworkable in practice. According to guidance published by the U.S. Securities and Exchange Commission (the "SEC"), Item 105 is designed to require issuers to describe, in detail, *known* risks to the issuer's business; not risks that are not believed to exist at the time the disclosure is made. And yet such risks are precisely what the Third Circuit's decision would have issuers disclose. This would subject issuers and underwriters to liability for failing to discover and disclose risks that may be purely hypothetical or imagined, or otherwise

effectively require that underwriters, in order to benefit from the due diligence defense, conduct an investigation aimed at uncovering and disclosing risks which the issuers themselves did not perceive.

Finally, the Third Circuit's decision, by expanding the scope of potential liability for claims pursuant to Section 14(a) and Rule 14a-9, contravenes the Court's precedent that judge-made private rights of action be narrowly construed and not expanded.

ARGUMENT

As argued by M&T Bank Corporation, Inc. ("M&T") in its Petition, this Court should grant certiorari and overturn the Third Circuit's decision below, because its novel interpretation of Item 105 would submit issuers to liability for failing to disclose otherwise unknown and unperceived risks and would significantly expand potential class action securities liability, leaving otherwise blameless issuers exposed to expensive and wasteful litigation.

In addition, because Regulation S-K and Item 105 are applicable to registration statements and prospectuses prepared in connection with the public offering of securities pursuant to the Securities Act, the Third Circuit's novel interpretation of Item 105 will also greatly expand potential securities class action liability for underwriters and banks involved in public securities offerings, imposing significant additional litigation costs, and discouraging

underwriters and investment banks from raising capital for entrepreneurial and start-up businesses perceived as posing greater litigation risks, as well as driving public securities offerings into foreign markets, all to the detriment of the U.S. capital markets.

Finally, the Third Circuit erred as a matter of law by adopting an interpretation of Item 105 that is: (i) inconsistent with SEC guidance as well as unworkable in practice, and (ii) violates the Court's precedent requiring that judge-made private rights of action, such as that under Section 14(a) of the Exchange Act and Rule 14a-9 thereunder, be narrowly construed and not expanded. The Court should grant certiorari to correct the Third Circuit's erroneous interpretation of Item 105.

I. THE DECISION BELOW WILL HAVE A SIGNIFICANT AND HARMFUL IMPACT ON THE CAPITAL MARKETS INDUSTRY.

A. The Third Circuit's Interpretation Of Item 105 Will Significantly Expand Underwriter Liability.

The capital markets industry comprises a significant portion of the U.S. economy. "In 2019, the securities industry raised $2.1 trillion of capital for businesses through debt and equity issuance activity in the United States." SIFMA, 2020 Capital Markets Fact Book, at 8 (Sept. 2020), https://

www.sifma.org/wp-content/uploads/2020/09/US-Fact-Book-2020-SIFMA.pdf. The capital markets industry, as one study concluded, has led to increased productivity in the American economy, which in turn has produced lower unemployment, higher real wages, and a less volatile economy where (the current coronavirus pandemic aside) "[r]ecessions are less frequent and milder when they occur" and "upward spikes in the unemployment rate have occurred less frequently and have become less severe." William C. Dudley & R. Glenn Hubbard, HOW CAPITAL MARKETS ENHANCE ECONOMIC PERFORMANCE AND FACILITATE JOB CREATION, at 3 (Nov. 2004), https://www.gsb.columbia.edu/faculty/ghubbard/Articles%20for%20Web%20Site/How%20Capital%20Markets%20Enhance%20Economic%20Performance%20and%20Facilit.pdf. Access to investment capital will undoubtedly be especially critical in 2021 and beyond, as the economy seeks to recover from the intense disruption caused by the pandemic.

By imposing upon underwriters a duty to investigate and disclose unknown risks, the Third Circuit's novel interpretation of Item 105 significantly expands the potential securities liability of underwriters and investment banks based on allegedly false and misleading statements in registration statements and prospectuses issued in connection with the public offering of securities.

Among other things, the Third Circuit's decision will likely impose a costly and

counterproductive diligence burden on underwriters which, in turn, will depress the market for public offerings in the United States. Underwriters and investment banks play a critical role in the process by which publicly held corporations raise capital in the financial markets. Section 11 of the Securities Act subjects underwriters to potential liability for material misstatements or omissions contained in a registration statement or prospectus issued in connection with the public offering of securities. However, Section 11 permits underwriters to assert a due diligence defense, pursuant to which underwriters that conduct a "reasonable investigation" that supports "a reasonable ground to believe" that the issuer's challenged statements "were true" may avoid liability. 15 U.S.C. § 77k(b)(3)(A) (quoting affirmative defense). Similarly, under Section 12(a)(2) of the Securities Act, an underwriter can avoid liability upon a showing that it did not know of the misstatements or omissions prior to the offering and could not have known about them through the exercise of "reasonable care." *Id.* § 77*l*(a)(2).

Under the Third Circuit's novel interpretation of Item 105, underwriters will have the burden of establishing that their investigation was reasonable and adequate even if it fails to uncover unknown risks that, plaintiffs will argue, could have been discovered with a more rigorous investigation. Such an assessment is a fact-intensive inquiry that is ripe for second-guessing by plaintiff's counsel armed with 20/20 hindsight. At best, the Third Circuit's decision

will lead to increased litigation costs as underwriters undertake to demonstrate a sufficiently rigorous investigation under this new and aggressive liability standard. At worst, underwriters could face billion-dollar verdicts for failing to uncover and disclose risks of which their own clients were unaware.

The increased risk of liability and the expanded due diligence investigation demanded of underwriters by the Third Circuit's decision would have other unintended but harmful consequences, such as discouraging underwriters and banks from raising investment capital for new and entrepreneurial businesses and emerging markets that are deemed to be likely to have unknown risk factors which could subsequently expose underwriters to securities liability. Such businesses will have to pay more to hire underwriters to raise needed capital, which will discourage innovation and economic growth and will drive issuers out of the United States and into foreign capital markets. *See, e.g.*, Comm. on Capital Mkts. Reg., U.S. Public Equity Markets Are Stagnating, at 6 (Apr. 2017) ("Over the past ten years the attractiveness of U.S. public equity markets to private U.S. companies has deteriorated, whereas the public equity markets of foreign countries, particularly China, have become increasingly attractive to private foreign companies"); PricewaterhouseCoopers, Which Market? An Overview of London, New York, Hong Kong and Singapore Stock Exchanges, at 1 (Sept. 2013) ("As the financial markets become increasingly global, companies have more options available to

them."); Jonathan Macey, *What Sarbox Wrought*, WALL ST. J., Apr. 7, 2007, at A9 ("All of a sudden it is no longer fashionable to be a U.S. public company: It's for suckers who can't access the piles of sophisticated 'global' capital available elsewhere. . . . If the U.S. is to regain its former position in the world capital market, much more will have to be done. Massive litigation risk remains . . . .").

B. The Third Circuit's Interpretation Of Item 105 Undermines The Extensive And Carefully Wrought Web Of Regulations Governing The Assessment And Disclosure Of Risks Affecting The Banking Industry.

In addition, the Third Circuit's decision threatens to undermine the extensive and carefully wrought network of supervisory regulation and oversight affecting the banking industry in the United States. In the areas of Bank Secrecy Act ("BSA") and anti-money laundering ("AML") compliance alone, banking institutions are subject to significant legal and regulatory requirements under the BSA. 31 U.S.C. §§ 5311–5330. For example, banks are required to maintain a compliance program including internal controls, procedures for independent testing of the bank's BSA and AML requirements, designated personnel responsible for coordinating and monitoring the compliance program, training for company personnel, and a customer identification program. 12 C.F.R. § 21.21; 31 C.F.R. § 1020.220.

There are also recordkeeping and reporting requirements imposed by the regulatory regime. 12 C.F.R. § 21.11; *id.* § 163.180. The Secretary of the Treasury and designated banking regulators have the authority to "examine any books, papers, records, or other data of domestic financial institutions or nonfinancial trades or businesses relevant to the recordkeeping or reporting requirements of this subchapter" and to order a "financial institution or nonfinancial trade or business," current or former employees of such entities, and any other person in possession of relevant records to "produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation" of BSA violations. 31 U.S.C. § 5318(a). The Financial Crimes Enforcement Network of the U.S. Treasury, in addition to the nation's banking regulators, investigates BSA/AML violations. *See, e.g.*, Press Release, Office of the Comptroller of the Currency ("OCC"), Federal Bank Regulatory Agencies and FinCEN Improve Transparency of Risk-Focused BSA/AML Supervision (Jul. 22, 2019) (detailing agencies involved in regulatory working group).

Periodic reviews of a regulated bank's BSA/AML compliance practices are required by statute. For example, the OCC is "required to conduct a full-scope, on-site examination of every national bank and federal savings association at least once during each 12–month period"; that period is 18 months for certain smaller institutions. 12 C.F.R. § 4.6. "The OCC is required to review the BSA

compliance program of each bank during every supervisory cycle." Office of the Comptroller of the Currency, COMPTROLLER'S HANDBOOK: EXAMINATION PROCESS LARGE BANK SUPERVISION at 49 (Sept. 2019) (citing 12 U.S.C. § 1818(s)). This review "must include a conclusion about the adequacy of the bank's BSA program," and include "[r]isk-based transaction testing." *Id.* Due to the variety of regulators tasked with periodically assessing the risk assessment and disclosure of regulated banks, it is inevitable that a bank's good faith risk assessment will occasionally be second-guessed by regulators. Under the Third Circuit's decision, even good faith disagreements between a bank and its regulators could result in securities class action liability for issuing banks since plaintiffs will be able to argue that an issuing bank should be strictly liable under Section 11 for failing to anticipate and disclose the regulator's opinion regarding the bank's compliance efforts.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE THIRD CIRCUIT'S ERRONEOUS INTERPRETATION OF ITEM 105.

A. The Third Circuit's Novel Interpretation Imposes On Underwriters An Extraordinary Duty To Investigate And Disclose Unknown And Unperceived Risks That Is Inconsistent With SEC

Guidance And Is Unworkable In Practice.

In the decision below, the Third Circuit found that, although M&T disclosed it would need to jump through "regulatory hoops" to obtain merger approval, it failed to "discuss just how treacherous jumping through those hoops would be." *Jaroslawicz*, 962 F.3d at 715. Later in the opinion, the court made clear that plaintiff did not need to allege that M&T was aware of the "treacherous" path to approval, holding that "whether M&T had actual knowledge of the shortcomings in its BSA/AML compliance or its consumer checking practices *is of no moment*; it is the risk to the merger posed by the regulatory inspection itself that triggered the need for disclosures under Item 105." *Id.* at 716 (emphasis added). The crux of the Third Circuit's rule, therefore, is that to avoid potential liability M&T should have disclosed any compliance deficiencies that could be challenged by its regulators, even though it was completely unaware of those deficiencies itself. This extraordinary duty of disclosure, particularly as it would be applied to underwriters of securities offerings, is absent from the text of Item 105, inconsistent with SEC guidance, and unworkable in practice.

The text of Item 105 directs issuers to:

> [w]here appropriate, provide under the caption "Risk Factors" a discussion of the material factors that make an

> investment in the registrant or offering speculative or risky. This discussion must be organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk . . . .

17 C.F.R. § 229.105.[2] Although Item 105 imposes an affirmative obligation to disclose material risk factors, it does not require the disclosure of risks that the issuer does not actually believe to exist. Specifically, the SEC's guidance on Item 105 notes that the risk disclosed "must [be] clearly explain[ed]" and include "specific details." SEC Division of Corporation Finance: Updated Staff Legal Bulletin No. 7, "Plain English Disclosure," Release No. SLB-7, 1999 WL 34984247, at *14 (June 7, 1999). This guidance cannot be applied to risks that an issuer does not believe are extant. Indeed, the SEC has recently modified Item 105 in order to, among other things, "reduce the disclosure of generic risk factors," "help investors navigate lengthy risk factors," and "enhance the readability and usefulness of the disclosure for investors." Modernization of Regulation S-K, Items 101, 103, and 105, 85 Fed. Reg. 63726, 63727, 63744 (Oct. 8, 2020). The Third Circuit's interpretation of Item 105, by requiring the disclosure of unknown and unperceived but possible risks, encourages the kind of

[2] As will be discussed subsequently, the text of the regulation has changed since the Third Circuit's decision.

lengthy boilerplate disclosure that the SEC seeks to avoid.

The Third Circuit's interpretation of Item 105 is also unworkable since it would require underwriters seeking to avail themselves of a due diligence defense to undertake an extraordinary, costly, and burdensome investigation into an issuer's business in order to uncover risks to the business that the issuer itself may not have perceived. The cost of such an exercise would ultimately be passed on to the issuer, making entry to the capital markets an even more daunting undertaking for businesses and further chilling the economy in the time of a pandemic, when investment capital is needed more than ever.

As described more fully in M&T's brief in support of certiorari, the Third Circuit's decision is in conflict with both the First and the Second Circuits, which is another factor weighing in favor of granting certiorari. The First Circuit has held that, among other requirements, "to withstand dismissal at the pleading stage, a complaint alleging omissions of . . . risks needs to allege sufficient facts to infer that a registrant knew, as of the time of an offering, that . . . a risk factor existed." *Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 103 (1st Cir. 2013). Meanwhile, the Second Circuit has held that disclosure requirements do not require the disclosure of "uncharged, unadjudicated wrongdoing," noting that "[d]isclosure is not a rite of confession." *City of*

Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 184 (2d Cir. 2014) (internal quotation marks omitted). The latter split is particularly significant as it means that federal courts in the Second Circuit, where much of the nation's securities activity takes place, and the Third Circuit, where many U.S. businesses are incorporated, will apply different standards of liability, leading to both uncertainty among issuers and underwriters and to forum-shopping. To resolve those issues, this Court should grant certiorari to resolve the circuit splits.

B. The Third Circuit's Interpretation Of Item 105 Violates This Court's Precedent That Implied Private Rights Of Action Should Be Narrowly Construed.

Claims pursuant to Section 14(a) of the Exchange Act of Rule14a-9 thereunder, such as those at issue here, are judge-made implied private rights of action and should accordingly be narrowly construed under this Court's precedent. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 201 (1994) ("[W]e are now properly reluctant to recognize private rights of action without an instruction from Congress"); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 149 (2008) ("The Court's precedents counsel against petitioner's attempt to extend the . . . private cause of action"). By adopting an expansive interpretation of Item 105 and then applying it via a cause of action

pursuant to Section 14(a) and Rule 14a-9, the Third Circuit takes an expansive view of the private right of action that is inconsistent with the Court's precedent.

Claims under Section 14(a) and Rule 14a-9 arise not under a cause of action explicitly established in the Exchange Act, but rather under a judge-made implied right of action. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1086-87 (1991) ("In *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), we first recognized an implied private right of action for the breach of § 14(a) as implemented by SEC Rule 14a–9, which prohibits the solicitation of proxies by means of materially false or misleading statements.") The Third Circuit's decision below expands the scope of an issuer's potential liability under the implied right of action pursuant to Section 14(a) and Rule 14a-9 by positing that issuers may be liable, not only for failing to disclose known risks, but also for failing to disclose unknown and unperceived risks.

This is wrong as a matter of law. The private right action is a "judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge*, 552 U.S. at 164 (citation omitted); *see also Lampf, Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991) ("[W]e have made no pretense that it was Congress' design to provide the remedy afforded."). Accordingly, "[t]he decision to extend the implied cause of action is for Congress," not for the courts. 552 U.S. at 165; *see also Va.*

Bankshares, 501 U.S. at 1102 ("[T]he breadth of the [implied private] right once recognized should not, as a general matter, grow beyond the scope congressionally intended.")

The *Stoneridge* Court, in the context of rejecting an expansion of the implied private right of action under Section 10(b), cautioned against expanding the implied private right of action, out of concern that "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies," 552 U.S. at 163, and that contracting against these risks would "rais[e] the costs of doing business," and ultimately "shift securities offerings away from domestic capital markets," *id.* at 164. Those concerns are palpable here, because the Third Circuit's novel interpretation of Item 105 will cause uncertainty and unpredictability in the capital markets by introducing a new and potentially onerous duty to investigate and identify all possible risks and will "allow plaintiffs with weak claims to extort settlements from innocent companies." *Id.* at 149 (citation omitted).

Even the Third Circuit, in its opinion, confessed to "worry over the many well-argued doubts about" the recent expansion of securities class actions. *Jaroslawicz*, 962 F.3d at 718. The court further explained that "the number of securities class actions continues to rise each year," and whether that increase is the result of "muddled logic and armchair

economics . . . deserves a more searching inquiry." *Id.* (internal quotations omitted).

Under the decision below, each time a harmful event occurs subsequent to a securities offering, plaintiffs need not plead that underwriters were actually aware of the risk the harm would occur, but merely that they failed to undertake a sufficiently rigorous investigation to discover the possibility that the harm could occur. As in this case, securities class action plaintiffs could readily state a claim simply by second-guessing an issuer's risk disclosures with the benefit of 20/20 hindsight. This expansion of securities liability will lead to an explosion in class action lawsuits that, as one article cited by the Third Circuit noted, do little more than "'produce wealth transfers among shareholders that neither compensate nor deter'" wrongdoing. *Id.* (quoting John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536 (2006)).

* * *

In the alternative and in the event that the Court is not inclined to grant certiorari at this time, the Court should request that the U.S. Solicitor General provide the views of the United States government on the questions presented. The Third Circuit's ruling, as discussed above, adopts a novel and expansive interpretation of a regulation promulgated by the executive branch, and that branch

should have an opportunity to opine on whether the Third Circuit's interpretation is in accordance with its views and with the U.S. government's regulatory priorities.

CONCLUSION

The Court should grant the petition for certiorari regarding both questions presented for review or, in the alternative, request that the United States Solicitor General set forth the views of the United States government on the questions presented.

Respectfully submitted,

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