No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., *et al.*,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF COMMON LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an objectively incorrect statement of opinion is actionable under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, only if it was subjectively disbelieved by the defendant.

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INTEREST OF *AMICI*

Amici are legal scholars who write and teach about the common law as it bears on issues of current regulation, including issues of misrepresentation and false opinions.[1] They include scholars in the fields of contracts, torts, criminal law, remedies, consumer law, and securities regulation. Samuel W. Buell is Professor of Law at Duke Law School, where his research and teaching focus on criminal law and regulation of corporations and financial markets. James D. Cox is the Brainerd Currie Professor of Law at Duke Law School, where he teaches and writes about corporate and securities law. Deborah DeMott is the David F. Cavers Professor of Law at Duke Law School, where her teaching and scholarship focus on tort and corporate law and the law of agency. She also served as reporter for the Restatement (Third) of Agency, published in 2006. Christopher L. Griffin, Jr., is Assistant Professor of Law at William & Mary Law School, where he teaches and writes about torts and the law of remedies. Ann M. Lipton is a Visiting Assistant Professor at Duke Law School, where she teaches and writes about securities litigation. Lauren E. Willis is Professor of Law at Loyola Law School Los Angeles, where she teaches and writes about consumer law and contracts. She is also an Adviser to the Restatement (Third) of Consumer Contracts.

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1. This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The core of Petitioners' position is that "[t]he only 'fact' conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. It naturally follows that such a statement can be 'untrue' as to a 'material fact' only if the speaker did not actually hold the stated belief." Petitioners' Brief at 11. That is not, however, what this Court said in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1990); it is not even the position taken by the Second and Ninth Circuits. Even those courts that have read *Virginia Bankshares* as requiring *both* subjective and objective falsity have nonetheless presupposed that an opinion statement may be objectively false.

That is also the clear position of the common law, both as it existed at the time the Securities Act was drafted and today. Across a variety of fields—from the torts of misrepresentation and defamation to rules of contract and restitution—the common law acknowledges that opinion statements may be objectively false if they imply underlying facts, and that they may be actionable if made by a person who stands in a relation of trust to the recipient, purports to be an expert, or has special access to facts. The circumstances in which opinion statements triggers liability at common law tracks the circumstances involved in securities litigation under § 11 of the 1933 Act, and the Act is best read as incorporating those exceptions.

Petitioners' position is particularly untenable with respect to statements of law. Petitioners maintain that "[a]n assertion of legal compliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled

on the legality of the issuer's actions." Petitioners' Brief at 34-35. This extraordinary position seems to question the very notion of a rule of law. The common law, however, is far more nuanced. It recognizes that many statements on legal matters imply the existence of underlying facts, such that the legal statements can be actionable as misrepresentations if those facts do not exist. It also acknowledges that lawyers frequently have more information and expertise than the recipients of statements about the law, and that they frequently stand in a relation of trust to those recipients. Moreover, the law has frequently had to confront legal uncertainty on some points, and in many areas—including qualified immunity, Fed. R. Civ. P. 11, and *habeas corpus*—it has developed effective tools to separate opinions about legitimately uncertain legal questions from legal judgments that are simply and objectively wrong. As with opinion statements generally, the circumstances of a securities registration statement under the 1933 Act fit particularly well with the situations in which the common law makes legal judgments potentially actionable.

ARGUMENT

I. The common law provides both the background against which Congress legislated in the Securities Act of 1933 and contemporary insight into the general question of opinion falsity.

This brief focuses on common law principles concerning misrepresentations and opinions, including the special case of opinions about the law. The common law is relevant in two distinct senses. When Congress enacted the Securities Act in 1933, it legislated against a

common law background that informed the content of the Act and continues to provide insight into what Congress had in mind. The common law and federal securities law also continue to share certain basic questions, and the resolution of those questions in one area may shed light as to how to proceed in the other.

Section 11 of the Securities Act imposes liability based on a registration statement's inclusion of an "untrue statement of a material fact or omi[ssion] to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k. Congress enacted this provision against the background of the common law of misrepresentation and deceit. *See, e.g.*, 7 Louis Loss, Joel Seligman, & Troy Paredes, *Securities Regulation* 426, 434 (4th ed. 2012). To be sure, "the courts have repeatedly held that the fraud provisions in the SEC Acts . . . are not limited to circumstances that would give rise to a common law action for deceit." *Id.* at 435. As then-Judge Alito stated, "[i]t is well known that the federal securities laws provide broader fraud protection than the common law, having been enacted in response to the common law's perceived failure at stamping out fraud in the securities markets." *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 218 (3d Cir. 2005). Nonetheless, "conceptions familiar in the common law are retained" in § 11, including the need to identify "a matter of 'fact' as distinguished . . . from one of 'opinion.'" Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227, 249 (1933). How the common law treated that question—and in particular, how it dealt with the sort of circumstances that arise in the context of a securities offering—is instructive as to what Congress intended in the 1933 Act. And because Congress intended to supplement common law liability, "it seems reasonable to assume at the very least that the

most liberal common law views on these questions should govern under the statutes." Loss, *et al.*, *supra*, at 434.

The common law is also relevant in a second sense. As a leading treatise says, "[i]t is obvious from the language [of the SEC statutes] that some of the basic problems are the same—what is false, what is a fact, what is material." Loss, *et al.*, *supra*, at 434. This case concerns what is false. As Petitioners assert, that is a question under *all* the federal securities laws—under § 11 of the 1933 Act as well as under the antifraud provisions of the 1934 Act and SEC Rule 10b-5. But the same question has required an answer under the common law of torts, contracts, and restitution. The interaction of the First Amendment with the common law of defamation, for instance, has forced courts to distinguish particularly carefully between what is a falsifiable fact and what is a non-falsifiable opinion.

For this latter reason, it is useful to consider not only the common law as it appeared to Congress in 1933, but also contemporary principles and decisions that may shed light on the parallel problems posed by the securities laws. We have accordingly cited decisions and commentary that postdate the 1933 Act alongside materials that would have been available to the Act's drafters. In any event, the law displays considerable consistency over time on the principles relevant to this case.

II. Under the common law and this Court's decision in *Virginia Bankshares*, opinions may be both subjectively and objectively false.

The common law rule, reflected across the spectrum of tort, contract, and related fields, is that "a claim for misrepresentation lies only for misrepresentation of a

fact." 2 Dan B. Dobbs, *The Law of Torts* § 477, at 1364 (2001). But although this rule "is often broadly stated . . . in fact courts recognize a number of undermining exceptions"; hence, "liability may be imposed for false and material misrepresentations of opinion when the defendant is a fiduciary, when he is a disinterested person or an expert upon whom the plaintiff can justifiably rely, when he has special knowledge, and when the opinion implies material facts." *Id.* at 1365. These exceptions presuppose that opinion statements may be objectively—as well as subjectively—false. And they track quite well the circumstances that actually exist in securities transactions. In fact, it makes sense to think of § 11 as codifying not the general rule but rather the exceptions that the common law always recognized for statements of opinion from fiduciaries who possess special expertise and knowledge of the facts, and whose conclusions frequently imply the existence of such facts.

A. *Virginia Bankshares* and the Courts of Appeals requiring subjective falsity presuppose that opinions may be objectively false.

This Court rejected the core of Petitioners' position in *Virginia Bankshares* when it observed that "statements of reasons or belief . . . are factual in two senses: as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed." 501 U.S. at 1092. Much as Petitioners argue here, the defendants in *Virginia Bankshares* argued that opinion statements—such as the claim that the merger price was "high" or its terms were "fair"—are too "indefinite and unverifiable" to be capable of falsification. *Id.* at 1093. But the Court rejected that argument:

> The objection ignores the fact that such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading. Provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox evidentiary process that either substantiates their underlying justifications or tends to disprove their existence.

Id. Immediately following this passage, the Court cited *Day v. Avery*, 548 F.2d 1018 (D.C. Cir. 1976), a common law misrepresentation decision turning not on subjective falsity, but rather on doctrines that recipients of opinion statements may, in certain circumstances, rely on those statements as representations of underlying facts. *See id.* at 1026-27. And the *Virginia Bankshares* Court concluded that "[i]n this case, whether $42 was 'high,' and the proposal 'fair' to the minority shareholders, depended on whether provable facts about the Bank's assets, and about actual and potential levels of operation, substantiated a value that was above, below, or more or less at the $42 figure, when assessed in accordance with recognized methods of valuation." 501 U.S. at 1094.

It is thus simply wrong to attribute to *Virginia Bankshares* the view that "[b]ecause a statement of opinion 'by definition' is a statement about what the speaker believes, the jury could have found the statements

at issue to be false as to a 'material fact' only insofar as the statements falsely conveyed the directors' actual opinion." Petitioners' Brief at 17 (citing *Virginia Bankshares*, 501 U.S. at 1090). This Court clearly did not view opinion statements as only falsifiable in a single sense (subjective falsity). Rather, the Court said that such statements "are factual in *two* senses." 501 U.S. at 1092 (emphasis added). Justice Scalia confirmed this understanding when he read the Court's opinion to require both subjective *and* objective falsity. *Id.* at 1109 (Scalia, J., concurring in part and in the judgment). *Amici* do not agree with Justice Scalia's reading on that point, but for present purposes the critical point is that any notion that both subjective and objective falsity are required presupposes that, even for opinion statements, both subjective and objective falsity are *possible*.

By denying that objective falsity is even possible, Petitioners have cast themselves adrift from the courts of appeals whose reasoning they purport to defend. The Second Circuit explained in *Fait v. Regions Financial Corp.*, 655 F.3d 105, 112 (2d Cir. 2011), that "[r]equiring plaintiffs to allege a speaker's disbelief in, *and the falsity of*, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements" (emphasis added); *see also Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (holding that opinion statements support a § 11 claim only if "the statements were *both objectively and subjectively false* or misleading") (emphasis added). Petitioners' position seems to be that opinion statements can *only* be subjectively false, but no court has adopted that view.

B. The common law of tort likewise treats opinions as objectively false and therefore actionable in a variety of situations.

Virginia Bankshares's holding that opinion statements may be objectively false rested firmly on the common law. The common law deals with misrepresentations and statements of opinion in a number of different areas, including not only the tort of misrepresentation or deceit but also the tort of defamation and the law of contract and restitution. The Securities Act was enacted to go beyond the common law standards of liability for misrepresentations. Nonetheless, as *Virginia Bankshares*'s reliance on *Day v. Avery* attests, the common law sets an important baseline. As to false statements of opinion, the 1933 Act embodies—at a minimum—the particular application of well-established common law doctrine to the context of a registration statement issued to purchasers in the securities markets.

The common law plainly recognized that statements of opinion may be false in a number of ways. *Day v. Avery* recognized that an opinion statement "ordinarily would not be a sufficient predicate for [a tort action for misrepresentation] as between parties truly dealing at arms' length." 548 F.2d at 1025-26.[2] The court noted a number of exceptions, however, based on "circumstances that would lead the reasonable person to believe that implicit in the prediction or opinion is an assertion of fact

2. *See also* Sydney Edward Williams, *Kerr on Fraud and Mistake* 53 (1929) ("A representation, to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion.").

upon which the recipient . . . might prudently rely." *Id.* at 1026. These circumstances include "[w]here the person making the representation occupies a fiduciary or other position of trust"; "where the speaker may reasonably be understood as having based an opinion or prediction on facts that are unavailable to the listener either because he does not have access to them or because he is obviously incapable of interpreting them"; and where "one who asserts that a future event will come to pass impliedly warrants that he knows of no fact that will prevent its occurrence." *Id.* at 1026-27.

Section 539 of the Restatement (Second) of Torts recognizes a similar rule:

> (1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
>
> (a) that the facts known to the maker are not incompatible with his opinion; or
>
> (b) that he knows facts sufficient to justify him in forming it.[3]

3. *See also* Restatement of Torts § 539 (1938) (articulating a similar rule); Williams, *supra*, at 53 ("It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. But if the facts are not equally known to both sides, a statement of opinion by the one who knows the facts best often involves a statement of a material fact, for he implicitly states that he knows facts which justify his opinion.").

This provision confirms the second sense in which *Virginia Bankshares* recognized an opinion may represent falsifiable facts—that is, as "statements about the subject matter of the reason or belief expressed."[4] The commentary to this section emphasizes that opinions imply underlying facts "particularly when the maker is understood to have special knowledge of facts unknown to the recipient." Restatement (Second) of Torts § 539 cmt. b.[5]

The distinction between fact and opinion is most developed in the law of defamation. At common law, "[t]he expression of opinion was . . . actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory." Restatement (Second) of Torts § 566 cmt. a. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), this Court held that "[t]here is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact." That holding did *not*, however, result in all opinions being immune from defamation suits; rather, tort law distinguishes between "pure" and "mixed" expressions

4. *See also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115 (Del. 2006) ("When the recipient does not know the facts, he may justifiability rely upon [the] implied assertions and recover on the basis of a misrepresentation of implied fact.").

5. The Restatement (Second) gives the example that "when an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion. . . . [H]e is subject to liability if he has not made the examination, or if he has not found facts that justify the opinion, on the basis of his misrepresentation of the implied facts." *Id.*

of opinion. Pure statements of opinion occur "when the maker of the comment states the fact on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character," or when "both parties to the communication know the facts or assume their existence"; in each situation, "[t]he statement of facts and the expression of opinion based on them are separate matters." Restatement (Second) of Torts § 566 cmt. b. "Mixed" statements, on the other hand, occur when these conditions are not met; hence, "the expression of the opinion gives rise to an inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant. To say of a person that he is a thief without explaining why, may, depending on the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery." *Id.*

Mixed defamatory statements of opinion are actionable, notwithstanding the First Amendment, because they are treated as including a defamatory statement of fact that, if false, is unprotected. *See* Restatement (Second) of Torts § 566 ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.").[6] Under this rule, "[i]t is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct." *Id.*

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6. *See also id.* cmt. c; *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977).

The critical point is that all of these defamation rules focus on the opinion's *objective* falsity; they thus stand as counter-examples to Petitioners' extraordinary claim that opinions may be false only in a subjective sense. At common law, subjective falsity was irrelevant to defamation; except in peripheral cases, defamation was a strict liability offense. *See id.* § 580B cmt. b. *Gertz* held that the First Amendment requires not only that the defamatory statement be untrue but also that the defendant have some degree of fault, but aside from public figures negligence remains sufficient. *See* 418 U.S. at 346-47; Restatement (Second) of Torts § 580B(c) & cmt. c. The defendant's subjective belief is relevant to this question of fault, but "a mistaken belief in the truth of the matter published is not sufficient to amount to a bar" to liability. *Id.* § 581A cmt. h. Falsity, in other words, is an objective question; subjective belief is relevant only to scienter.

C. The common law of contracts and restitution likewise permit liability even without subjective falsity for misrepresentations of opinion.

Although securities fraud claims generally descend from the common law of misrepresentation and deceit, tort law's concept of fraudulent misrepresentation is not an ideal analog for § 11 of the Securities Act, because tort law requires scienter for fraudulent misrepresentation while § 11 does not. Contract law, by contrast, defines a "misrepresentation" simply as "an assertion not in accordance with the facts." Restatement of Contracts § 470(1) (1932). The commentary makes clear that "[m]isrepresentation of itself implies neither conscious error nor negligence on the part of the person making the misrepresentation. It may be innocent or known to be

false." *Id.* cmt. a.[7] The remedy for misrepresentation in contract—similar to the measure of damages in § 11 cases—is rescission and restitution.[8]

The common law of contracts makes clear that liability for misrepresentations involving statements of opinion is not limited to cases of subjective falsity. The first Restatement of Contract treats matters of opinion in § 474, which says that "[a] manifestation that the person making has no reason to expect to be understood as more than an expression of his opinion . . . is not fraud or a material misrepresentation, unless made by (a) one who has, or purports to have expert knowledge of the matter, or (b) one whose manifestation is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion."

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7. S*ee also id.* § 471 cmt. b ("Misrepresentation without conscious fault, and even without negligence often has the same legal operation as fraud in giving the injured party a power of avoidance . . . ."). Fraud matters for the consequence of a misrepresentation; "materiality of the mistake induced by innocent misrepresentation is essential while materiality is not essential if a mistake induced by fraud produces the intended consequences." *Id.* § 476 cmt. b. Because § 11 of the Securities Act requires materiality as a separate element, misrepresentations that would otherwise support an action under the 1933 Act would generally entitle the purchaser to rescission in contract even without fraud.

8. *See* Restatement (Second) of Contracts § 376 ("A party who has avoided a contract on the ground of . . . mistake [or] misrepresentation . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.").

Id. § 474. This rule parallels the rule in tort, and it plainly does not depend on subjective falsity. [9]

Moreover, although the Restatement of Contracts acknowledges that "[s]tatements that things are 'good,' 'valuable,' 'large,' or 'strong,' necessarily involve an exercise of individual judgment . . . the boundaries of quality asserted by such statements . . . cannot be stretched indefinitely." *Id.* § 474 cmt. c.[10] Opinions are false, in other words, if they fall outside a zone of reasonableness. Finally, comment d specifically deals with misstatements of law. Although the general rule is that "[a] representation of a rule of law . . . is inoperative," the Restatement recognizes exceptions where the statement is made by "a lawyer to a layman, or by a person who may be supposed to have expert knowledge of the special rule to one who is ignorant of the subject." *Id.* § 474 cmt. d.

The common law of restitution is linked to that of contract; rescission and restitution, after all, is the remedy

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9. *See also* Restatement (Second) of Contracts § 168 cmt. d ("In some circumstances the recipient may reasonably understand a statement of opinion to be more than an assertion as to the maker's state of mind. . . . [I]f the statement of opinion relates to facts not known to the recipient, he may be justified in inferring that there are facts that justify the opinion, or at least that there are no facts that are incompatible with it. In such a case, the statement of opinion becomes, in effect, an assertion as to those facts and may be relied on as such.").

10. *See also* Restatement (Second) of Contracts § 168 cmt. d (recognizing that market practice accommodates some degree of adversariness and puffery, but even in arms-length transactions, "the other party is entitled to assume that a statement of opinion is not so far removed from the truth as to be incompatible with the facts known to the maker") .

for misrepresentation in contract. Unsurprisingly, the first Restatement of Restitution includes a similarly capacious concept of misrepresentation. In many circumstances, "there is a right to restitution because of a mistake in the conferring of a benefit. The mistake may be one of law or of fact," and it "may be the result of the fraud or innocent inducement of the other party." Restatement of Restitution, Ch. 2 ("Mistake, Including Fraud"), Introductory Note (1937). Remedies are not, in other words, confined to circumstances involving scienter. Section 28 states a similar rule to the one in contract: "[a] person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake was induced . . . by the fraud of the payee, *or* . . . by his innocent and material misrepresentation." *Id.* § 28 (emphasis added). Likewise, restitution is available in the event of a mistake of law if there is *either* fraud *or* "justifiable reliance upon an innocent misrepresentation." *Id.* § 55(b).

The Restatement of Restitution generally provides that representations of opinions are not fraudulent or material, but excepts situations similar to those in the Restatement of Contracts: "one standing in a fiduciary or confidential relation to the person to whom [the statement] is made"; "one who has, or purports to have, expert knowledge of the matter"; or "one whose manifestation is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion." *Id.* §8(3).

Longstanding rules of both contract and restitution, in other words, make clear that subjective falsity

is not a prerequisite for rescissionary remedies for misrepresentation, even when the misrepresentation concerns a matter of opinion. And, as discussed in the next section, the circumstances in which innocent statements of opinion are actionable track the special obligations that issuers of securities have to purchasers. Even if Congress had meant the Securities Act only to track the common law—rather than impose more rigorous obligations—it would not have not assumed that subjective falsity is required.

D. Registration statements fit the exceptions in which the common law imposed liability for opinion statements.

The general common law structure we have sketched involves a general principle that mere opinions are not actionable combined with a relatively broad range of exceptions to that principle. If it were generally true that statements involving opinions can be false only in a subjective sense—as Petitioners claim—then there would be only one exception, for opinions not sincerely held. But that is not the law. Rather, there are a number of exceptions that operate where the reasons for the general rule do not apply.

Those reasons are generally of three kinds: plaintiffs do not (or may not justifiably) rely on opinion statements; opinion statements are understood as part of a normal "bargaining game"; and opinion statements are not provably false. Dobbs, *supra*, § 477, at 1365. The established exceptions, on the other hand, capture those situations when reliance on a statement of opinion *is* reasonable because of the relationship between the speaker and the

recipient, the speaker's expertise or access to information, or the implication of underlying facts. [11]

Congress intended the Securities Act to change the rules of the "bargaining game" and to make the statements included in registration materials worthy of reliance. Moreover, by imposing due diligence and disclosure obligations on issuers and associated persons, Congress fostered the strong implication that issuers' statements rested on due investigation of the underlying facts.

First, the conclusions expressed in registration statements imply the existence of underlying facts. *Virginia Bankshares* recognized that this was frequently true of statements in securities documents generally; it is certainly true of Omnicare's broad but conclusory statement of legal compliance at issue here. The business judgment rule includes "a presumption that in making a business decision, the directors of a corporation acted on an informed basis." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Corporate officers and directors, moreover,

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11. *See, e.g.*, 3 Samuel Williston, *The Law of Contracts* 2658 (1929):

> [I]f a misstatement of opinion does not ordinarily amount to actionable fraud it cannot be because the statement is one of opinion merely, for misstatements of opinion may be actionable; but rather because it is unreasonable to place reliance on such statements unless made by one who has, or purports to have, expert knowledge or peculiar means of information not accessible to the other party; and that it is assumed that no reliance was placed on the statements unless made by such a person.

have duties under state corporate law to supervise the corporation's legal and regulatory compliance. *See, e.g.*, *In re Caremark, Inc. Int'l Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).[12] Readers of a registration statement thus may presume its statements, including statements about legal compliance, are informed by an adequate investigation of the facts and law.

Second, issuers of securities do stand in a relation of trust to prospective purchasers. Congress intended the 1933 Act to hold issuers to "high standards of trusteeship." H.R. Rep. No. 73-85 at 3 (1933); *see also* Shulman, *supra*, at 252 (observing that § 11 "has extended the reach of the duty . . . by denying "the defense available at common law that the defendant was under no duty to the plaintiff"). And as the United States points out in its brief, the statute itself adopts common law fiduciary obligations as the standard of reasonableness for the defenses in § 11(b)(3). *See* Brief for the United States as *Amicus Curiae* in Support of Vacatur and Remand, at 28 & n.5 (discussing 15 U.S.C. § 77k(c)).[13]

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12. *See also*, *e.g.*, Charles Hansen, *The ALI Corporate Governance Project: Of the Duty of Due Care and the Business Judgment Rule, a Commentary*, 41 Bus. Law. 1237, 1241 (1986) (noting that "[u]nder corporate law . . . due care must be used in ascertaining relevant facts and law before making the decision").

13. *See also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (stating that under the Investment Advisers Act of 1940, which likewise involves a "fiduciary" standard of care, "it would be logical to conclude that Congress codified the common law 'remedially' as the courts had adapted it to the prevention of fraudulent securities transactions by fiduciaries, not 'technically' as it has traditionally been applied in damage suits between parties to arm's-length transactions involving land and ordinary chattels").

Third, the defendants in § 11 actions necessarily enjoy much broader access to information about the company than do prospective purchasers. That is why the Act imposes broad disclosure obligations on issuers. And people involved in the preparation of the registration statement include not only the company's officers but also lawyers, auditors, and other financial professionals with extensive expert knowledge. This is thus a paradigm case in which recipients of opinion statements are entitled to rely on expert opinion. As one court noted, "[t]he essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do." *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943).

Finally, securities law incorporates principles, such as the good faith and due diligence defenses in § 11(b)(3), that afford breathing room to opinions about valuation, fairness, and other matters. These principles are bounded, however; they refute the notion that there is no such thing as an objective limit to opinions about securities matters. After all, Congress intended the securities laws to tighten the bounds of permissible salesmanship in the registration context. As the leading treatise puts it, "[t]he antifraud provisions are part of a statutory scheme that resulted from . . . a congressional determination that the public interest demanded legislation that would recognize the gross inequality of bargaining power between the professional securities firm and the average investor." Loss, *et. al.*, *supra*, at 434.

The common law background thus strongly suggests that Congress incorporated into the Securities Act the longstanding exceptions to the general rule that opinions

are non-actionable. And the continuing nuanced treatment of opinion statements in common law settings belies Petitioners' categorical insistence that such statements may be false only if they are not subjectively believed.

III. Statements of legal compliance are not matters of opinion in the same sense as other statements.

Much of the discussion in this case has equated statements of opinion in general with the statements of legal compliance at issue in this particular dispute. Statements about legal matters raise particular problems, however, and the law often treats them distinctly. Petitioners assert that "statements about legal compliance are by their very nature statements of opinion," Petitioners' Brief at 35 n.10, and that such statements "are necessarily infused with the issuer's judgment as to uncertain future events," *id.* at 33. Their categorical conclusion is that legal opinions are simply subjective predictions about unknowable future events:

> Legal compliance is undeniably a "matter of judgment." A legal opinion given today could change or be rendered obsolete tomorrow. An assertion of legal compliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled on the legality of the issuer's actions. The ultimate accuracy of the stated belief hinges on future events and the decisions of judges, juries, and regulators. Assessing legal compliance thus calls for an exercise of judgment about unknowable future events.

Id. at 34-35. This is an extraordinary thing for lawyers to say about the law. It takes Justice Holmes' famous assertion that law is simply "the prophecies of what the courts will do in fact"[14] and adds a proposition that Holmes rejected—that is, that what the courts will do is in fact no more predictable than, say, whether the stock market will go up or down.[15]

If Petitioners are right that legal opinions simply cannot be *objectively* false—that they can be false only if they misrepresent the speaker's subjective belief—then it is unclear on what basis they can argue that the Sixth Circuit got the law wrong in this case. But Petitioners are *not* right. There are, to be sure, purely legal questions upon which the currently-existing legal materials do not provide a definitive answer, and there are also questions of the application of law to fact that inevitably involve the exercise of judgment. As scholars, *amici* endeavor to teach our classes in such a way as to identify both those areas where the law is settled and clear and those in which it is open to honest debate. But the existence of gray areas does not establish that gray is all there is.

In this case, Respondents alleged that Petitioners' statements that Omnicare was in compliance with applicable state and federal laws, and that in particular

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14. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897).

15. *See id.* at 461-62 (affirming that "[w]hen we study law we are not studying a mystery but a well known profession" and expressing optimism that legal thought can "make these prophecies more precise, and . . . generalize them into a thoroughly connected system").

its relationships with pharmaceutical companies were legal and valid, were false because Omnicare was in fact providing illegal kickbacks to those companies. Petitioners' statements of legal compliance might be understood as conveying one of three things: (1) that although kickbacks are illegal, Omnicare was not engaged in any version of that practice; (2) that although Omnicare was providing kickbacks, kickbacks are not illegal under the applicable law, or (3) that the relationships Omnicare had with pharmaceuticals did not amount to kickbacks. The first sense would amount to a representation of fact, even though stated as a matter of legal compliance. As such, it would be actionable if objectively false in the same sense as non-legal opinions that imply the existence of particular facts.

The second understanding of Petitioners' statements would be a pure statement about the content of the law, and the third a statement about the application of law to fact. Both (2) and (3) are opinions in the sense that they involve some degree of judgment. But the common law has long allowed reliance on such statements in circumstances analogous to those here. Moreover, doctrines throughout the law—from qualified immunity to Rule 11 of the Federal Rules of Civil Procedure—differentiate between legal opinions that are within the zone of legitimate disagreement and those that fall outside it.

Both the common law and the Securities Act provide specific tools to protect opinions on genuinely uncertain legal matters from incurring liability. But the law's content and its application are often knowable and determinate, and in these cases lawyers and other actors are frequently held liable if they misinterpret or misstate its commands.

It is accordingly open to this Court to decide this case in terms of the proper treatment of *legal* opinions under the Securities Act, without necessarily assimilating those opinions to other sorts of opinions, such as judgments whether a price is "high" or a transaction is "fair."

A. Statements of legal opinion often imply the existence of particular facts, misrepresentations of which may incur liability.

In tort, "the general rule is that, as between parties bearing no fiduciary relation to each other, a mere misrepresentation of law by one party, or a mere mistake of law by the other party, is no ground for relief." *Pieh v. Flitton*, 211 N.W. 964 (Minn. 1927). But like all statements of opinion, statements of legal opinion may imply the existence of certain facts. The statement that "I was in legal compliance with the speed limit on my way to work this morning," for example, would be understood as a statement of fact—that is, that the speaker was driving at a speed lower than the posted limit—rather than an opinion about the law, simply because the legal elements are both obvious and uncontested.[16] If the other elements of a misrepresentation claim were met, the false implication of fact would be sufficient to establish liability.

The common law of torts has long recognized that "[i]f a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the

16. The speaker would not ordinarily be understood to be saying, for instance, that he was in fact driving 100 mph but had a good faith belief that the posted speed limit was invalid under the Due Process Clause of the Fourteenth Amendment.

recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact." Restatement (Second) of Torts § 545; *see also Seeger v. Odell*, 115 P.2d 977, 980 (Cal. 1941) ("If . . . the opinion or legal conclusion misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation.").[17] This section treats statements of law as pure statements of opinion only "if all the pertinent facts are known and there is no misrepresentation of the existence or nonexistence of a pertinent statute or judicial decision." Restatement (Second) of Torts § 545 cmt. a. Courts acting in accord with this rule have held that when one party has special knowledge of the facts not available to the other, it will treat a statement of legal compliance as a representation of fact. *See, e.g.*, *Sorenson v. Gardner*, 334 P.2d 471, 474 (Or. 1959) ("This is not a case to which the maxim that ignorance of the law excuses no one can be applied. The plaintiffs are not relying on their ignorance of the law but of the facts, and the alleged representations carried with them the implication that the facts were otherwise than the evidence shows them to have been."). Contract law applies an identical rule. *See* Restatement (Second) of Contracts § 170 cmt. b (acknowledging that a statement about the law "may, as may any other statement of opinion, carry with it the assertion that the facts known to the maker are not incompatible with his opinion, or that he does know facts that justify him in forming it").

17. *See also* Restatement of Torts § 545 (articulating an identical rule); Dobbs, *supra*, § 478, at 1368 ("Some statements of law may actually state or at least imply facts that are provably false and if so they are actionable on the same grounds as other factual statements.").

On the facts of this case, Omnicare's statement that it was in legal compliance implied that it was not engaged in any practices that would plainly be illegal. The registration statement did not go into detail concerning Omnicare's relationships with pharmaceutical companies; it did not, in terms of the common law rule, provide a factual basis upon which the recipient of its statement could draw its own legal conclusions. This brings Omnicare within the rule of Restatement § 545—that is, it is liable if the facts implied by its representation of legality turn out to be objectively untrue.

B. Statements about the content or application of the law itself may be actionable under the common law, and they may be objectively false if they fall outside the bound of legitimate disagreement.

The general rule treating statements of law as non-actionable opinions applies more readily where the representation reflects a judgment about the content of the law or the proper application of that law to particular facts. That rule is not without exception, however; in fact, § 545 of the Restatement (Second) of Torts makes clear that "[i]f a misrepresentation as to a matter of law is only one of opinion as to the legal consequences of facts, the recipient is justified in relying upon it to the same extent as though it were a representation of any other opinion." Hence "[i]t is not universally true that a misrepresentation of the law is not binding upon the party who made it. . . . Where one who has had superior means of information professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant and has not been in a situation to become informed, the injured

party is entitled to relief as well as if the misrepresentation had been concerning matter of fact." *Rusch v. Wald*, 232 N.W. 875, 876 (Wis. 1930) (quoting 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 488 (1888)). Likewise, the general exceptions for speakers who stand in special relationships of trust to the recipient apply likewise to statements of law. *See* Bigelow, *supra*, at 488.

Moreover, the common law of torts imposes special obligations on lawyers. The Restatement (Second) of Torts cites *Sainsbury v. Pennsylvania Greyhound Lines, Inc.*, 183 F.2d 548 (4th Cir. 1950), which noted that "[t]he rule is also well established that when a lawyer makes a misrepresentation of law to a layman relief may be afforded, even though the layman knows the lawyer represents an antagonistic interest. Any other rule would be unconscionable." *Id.* at 550-51 (citing *Rusch*, 232 N.W. at 876, and Restatement of Torts § 545 cmt. d (1938)).[18] When a stock registration statement, often written by and certainly reviewed by lawyers, purports to offer a judgment on the legality of the issuing company's activities, laypersons are entitled to rely on that judgment.

Contract law likewise does not distinguish in principle between misstatements of fact and misstatements of law. Section 170 of the Restatement (Second) of Contracts, which is based on § 545 of the Restatement (Second)

18. *See also* Dobbs, *supra*, § 478, at 1368 ("If false and uttered by a lawyer as an expert, [statements of opinions about legal consequences of a given action] may be actionable as false statements of fact because they imply that the lawyer both holds the opinion *and has a basis for it*; uttered by a layman who has no special knowledge or fiduciary obligation it is probably protected as opinion.") (emphasis added).

of Torts, maintains that "[i]f an assertion is one as to a matter of law, the same rules that apply in the case of other assertions determine whether the recipient is justified in relying on it." Contract law, like tort law, imposes special obligations on lawyers and persons purporting to apply legal expertise. *See id.* cmt. b ("[I]f the maker of the representation purports to have special expertise in the law which the recipient does not have, reliance on the opinion may be justified (§ 167(b)). If a lawyer states his opinion of law to a layman, the layman is entitled to assume his professional honesty and may justifiably rely on his opinion even though the two have an adverse relation in negotiating a contract. Even if the maker is not a lawyer, he may purport to have special knowledge that will enable him to form a reliable opinion. . . .").

Courts have been skeptical, moreover, of the proposition that statements of legal compliance amount to statements of opinion at all, at least in ordinary circumstances. In *Municipal Metallic Bed Mfg. Corp. v. Dobbs*, 171 N.E. 75 (N.Y. 1930), for example, the New York Court of Appeals held that a tenant could sue based on a landlord's misrepresentation that manufacturing was a lawful use of the property. In that case, the court wrote, "we have something more than a representation of law which is to be taken as the expression of an opinion only. The landlords assume to guarantee that their building may lawfully be used for the purposes for which it was leased. If any presumption exists, it is that the landlord knows whether his building complies with the zoning laws and factory regulations. The tenant is not left to his own judgment, but may rely on the contract of the landlord." *Id.* at 76. The same court later read this opinion to exemplify "a sharp distinction between a pure opinion of law which

may not, except in unusual circumstances, base an action in tort, and a mixed statement of fact as to what the law is or whether it is applicable." *Nat'l Conversion Corp. v. Cedar Building Corp.*, 246 N.E.2d 351, 355 (N.Y. 1969); *see also Crowther v. Guidone*, 441 A.2d 11, 13 (Conn. 1981) ("To require the representation to be made as a statement of fact . . . is quite different than to require that the statement be factual as opposed to legal.").

This skepticism makes sense, because in many instances a statement about the content of the law or its application to particular facts is not a matter of legitimate dispute. The statement "the speed limit on that highway is 55 miles per hour" is a statement of fact notwithstanding that it concerns the content of the law. Likewise, the statement that "the police's warrantless use of thermal imaging to look inside a private residence is unreasonable under the Fourth Amendment" is not simply a statement of opinion, because this Court has settled that question. *See Kyllo v. United States*, 533 U.S. 27 (2001). Before *Kyllo*, however, the same statement might well have been properly viewed as a matter of opinion. The extent to which statements of law should be treated as opinion or fact depends largely on how settled the law and its applications are in particular areas.

Contrary to Petitioners' suggestion, the law does *not* simply throw up its hands in the face of some degree of legal indeterminacy and treat all legal questions as open to dispute. The jurisprudence of qualified immunity, for example, demonstrates the law's ability to distinguish between legitimate legal uncertainty and "clearly established law." *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Likewise, courts impose sanctions

on attorneys for failing to cite controlling adverse precedent under Fed. R. Civ. P. 11 notwithstanding that "attorneys are legitimately entitled to press their own interpretations of precedent, including interpretations which render particular cases inapplicable"; sanctions are justified when these efforts pass the bounds of legitimate argument. *Jorgenson v. Cty. of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988). And Congress has instructed federal courts entertaining habeas corpus petitions to identify state court decisions that "involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 409 (2000) (clarifying that the inquiry is whether the state court's decision was "objectively unreasonable"). Each of these standards requires the courts to respect an area of legitimate disagreement—one in which lawyers may hold differing opinions about the content or the application of the law—but also to police its outer boundaries.

This Court currently has before it a case involving whether a police officer may base "reasonable suspicion" upon a mistake of law. *See Heien v. North Carolina*, No. 13-604. *Amici* express no view on the proper resolution of that case. We note, however, that even North Carolina concedes both that the reasonableness of the officer's mistake is an objective question and that mistakes of law should be excused only within narrow bounds. *See* Brief for the Respondent at 16-17, *Heien v. North Carolina*, No. 13-604 (July 2014). North Carolina does *not* maintain that legal judgments are simply matters of opinion. Judgments about the law can be true, false, or sometimes uncertain, and all across the law—from tort to contract to qualified immunity to *habeas*—courts manage to tell the difference.

C. The securities laws contain ample mechanisms for protecting legal opinions on legitimately contested questions.

The examples given show that courts can determine the existence and boundaries of legitimate legal disagreement. Those examples should not, of course, determine the proper standard for assessing such disagreement under the securities laws. Qualified immunity jurisprudence is quite protective of defendants' erroneous legal judgments for very good reasons: the defendants generally are not lawyers; they must make on-the-spot legal judgments under difficult conditions; and the costs of over-deterrence are high. Likewise, Rule 11 applies a gentle standard in order to encourage vigorous advocacy, and § 2254(d) shields state courts' applications of law to fact for federalism reasons.

Section 11 of the Securities Act, however, exists at the opposite end of the spectrum from these examples. It applies only to statements included in the registration statement—a highly formal document painstakingly prepared and reviewed by numerous professionals, including skilled attorneys. As already discussed, Congress intended to impose a strong obligation of due diligence in the preparation of these statements; hence the imposition of strict liability for erroneous or misleading statements in the registration materials. And state corporate law imposes additional obligations of investigation and oversight. The reasons for according relatively broad leeway for erroneous legal judgments by, say, a cop on the beat do not apply here.

Section 11 also has a built-in mechanism for shielding persons other than the issuer itself from liability based on good-faith judgments about uncertain questions of law. Section 11(b)(3) provides a complete defense to liability for persons who, "after reasonable investigation, have reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true." *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 & n.26 (1976).

This Court need not determine the precise degree of uncertainty necessary to render a statement of legal compliance a non-falsifiable opinion under § 11. Petitioners moved to dismiss on the ground that failure to allege Omnicare's statements of legal compliance were subjectively false disposed of Respondents' claims. *See* Respondents' Brief at 56-58. That is plainly incorrect. The parties have not yet litigated whether the legal compliance issues presented by this particular case fall within a zone of legal ambiguity such that Omnicare's statements amounted to pure opinion. Nor have they litigated whether Omnicare's statements implied certain underlying facts or fell into one of the other well-recognized categories in which even opinion statements are actionable. It is sufficient to resolve this appeal that, contrary to Petitioners' view, statements of legal compliance may involve assertions that are objectively falsifiable.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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