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

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BRIEF OF OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Occupy the SEC ("OSEC") submits this brief in support of Respondents and the holding of the Sixth Circuit in the case below, *Ind. Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013).[1] OSEC is an advocacy group within the New York-based Occupy Wall Street movement. OSEC's mission is to advocate for specific improvements to legislations and regulations governing the financial services industry. We seek to ensure that the nation's laws serve the public interest, and not that of Wall Street and its lobbyists. Our group has previously filed *amicus curiae* briefs in court cases that raise significant issues of concern for financial activists, including the recent Supreme Court cases *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) and *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

The instant case centers on a key provision of the Securities Act of 1933 ("'33 Act"), Section 11, 15 U.S.C. § 77k, which creates an express right of action against issuers and their agents for material misrepresentations contained in the offering materials of registered securities. Shoddy mortgage-backed securities played a pernicious role in the recent financial crisis, which destabilized the capital markets, soured the global economy and jeopardized the financial position of the average person. In the run-up to the crisis, the regis-

[1] The parties have consented to the filing of this brief. Blanket letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court by Petitioners and Respondents. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its members made a monetary contribution to the preparation or submission of this brief.

tration statements of many toxic securities falsely touted these instruments' credit-worthiness, to the financial detriment of investors. Unfortunately, enforcement agencies such as the Securities and Exchange Commission ("SEC") have been of limited effectiveness in adequately addressing these wrongs. Section 11 is an important tool that aggrieved investors can use to seek remedy for misleading statements made by issuers and their agents.

OSEC files this amicus to advocate for the interests of misled investors, like the Respondents in this case, whose access to justice will be severely limited if the Court adopts the Petitioners' position. Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by interpreting the '33 Act in a way that safeguards the right of victims of financial chicanery to seek redress through the courts, free of undue procedural burdens like the subjective falsity requirement under consideration here.

SUMMARY OF ARGUMENT

The Court should affirm the Sixth Circuit by holding that a Section 11 plaintiff is not required to allege that the speaker of a materially misleading statement of opinion actually held a different opinion than the one expressed ("subjective falsity").

Both Supreme Court precedent and the legislative history of the '33 Act support the view that a Section

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[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration/.

11 plaintiff need only allege a material misrepresentation in order to establish a prime facie claim. Once the plaintiff has made such a prima facie showing -- a showing that need not ensnare itself in the thickets of the defendant's subjective knowledge -- the burden shifts to the defendant to disprove liability.

The Petitioners evince a basic misconstrual of what constitutes a statement of opinion. In their view, the only way a statement of opinion can be false is if the speaker did not truly believe the opinion. Pet. Br. 2. This myopic view fails to perceive that statements of opinion, which are inferences based on underlying facts, can prove to be objectively false. The Supreme Court, in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), has previously held that objective falsity is the only required falsity element under Section 11, a strict liability statute.

The Petitioners rely heavily on *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991) even though that decision is inapposite to the case at bar. *Virginia Bankshares* addressed a provision of an entirely separate statute, Section 14(a) of the Securities Exchange Act of 1934 ("'34 Act"), 15 U.S.C. § 78n(a). Section 14(a) seeks to protect sophisticated shareholders, whereas Section 11 safeguards lay investors. Thus, the standard of liability applicable to Section 14(a) is less rigorous than the strict liability required under Section 11 of the '33 Act. It would therefore be erroneous to apply *Virginia Bankshares* to the present matter. In any case, a strong argument can be made that *Virginia Bankshares* did not conclude what the Petitioners claim it did. The Court in that case focused on objective falsity and did not explicitly hold that subjective falsity

was a required element of a Section 14(a) claim. *Virginia Bankshares*, 501 U.S. at 1096.

The legislative history of the '33 Act manifests that Congress never intended for the defendant's state of knowledge to play any role whatsoever in a Section 11 plaintiff's prima facie showing. Indeed, learned members of the bar shared the same understanding of the Act shortly after its promulgation.

The Petitioners advocate an extreme view that would place an almost insurmountable burden on plaintiffs. It is axiomatic that Section 11 has no scienter element. *Herman*, 459 U.S. at 382. Yet, the proposed subjective falsity standard is either practically equivalent to or more burdensome than the scienter element typically required in Section 10(b) claims under the '34 Act.

Numerous policy considerations also weigh in favor of affirmation of the Sixth Circuit's decision. The recent financial crisis was caused in large part by the proliferation of toxic mortgage-backed securities. The offering materials of many of these registered securities were replete with misrepresentations, as evidenced by the large number of lawsuits successfully alleging Section 11 violations. Under the overbroad interpretation championed by the Petitioners, Section 11 would no longer remain a viable means of redress for aggrieved investors. Such an outcome would frustrate the public interest.

ARGUMENT

The statutory provision at issue in this case, Section 11 of the Securities Act of 1933 ("'33 Act"), imposes civil liability where any part of the registration statement of a securities offering "contain[s] 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). The task before the Court is to determine whether a Section 11 plaintiff must plead that the speaker of an offending statement of opinion actually knew of the falsity of the statement ("subjective falsity"). The Petitioners claim that such a pleading is necessary, Pet. Br. 13, while the Defendants contend that it is not. Opp. Cert. 18-19. The United States, as amicus curiae, proffers a third approach, whereunder Section 11 liability attaches for statements of opinion that either falsely held or unreasonably held. U.S. Am. Br. 5, 9.

I. THE PETITIONERS' ARGUMENT IS PREMISED ON AN INCOMPLETE DEPICTION OF WHAT CONSTITUTES AN OPINION

The Petitioners argue that "a statement of opinion or belief is an 'untrue statement of a material fact' **only if** it misstates the 'fact' that the speaker actually held the stated belief." Pet. Br. 2 (emphasis added). In so arguing, they exhibit a basic misunderstanding of what is an opinion and what is a fact. Critically, Petitioners

ignore the fact that statements of opinion can become objectively true or untrue after the passage of time.

"Opinions" have been long understood in legal tradition to be inferences based on underlying facts.[3] For instance, assume that a representative of an issuer proclaims that the offering price of a particular security presents "high value for the shares." The actual belief and mindset of the speaker in making that statement relates to the separate issue of fraudulent intent, or scienter.[4] The speaker's statement can become objectively true or untrue with the passage of time, regardless of the knowledge of the speaker. Thus in our example, time will reveal whether the price represents "high value" or not. Eventually, the stock will prove to be highly or lowly valued, irrespective of the speaker's original mindset in making the statement. This focus on objective truth versus untruth (i.e., "objective falsity") is at the heart of Section 11.

II. UNDER PRIOR SUPREME COURT PRECEDENT, SUBJECTIVE FALSITY IS NOT A REQUIRED ELEMENT OF A PRIMA FACIE SECTION 11 CLAIM

Prior Supreme Court precedent mandates that the Sixth Circuit's decision be affirmed.

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[3] *See* Black's Law Dictionary 1093 (6th ed. 1990) (defining "opinion evidence" as "[e]vidence of what the witness thinks, believes or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.").

[4] Even Petitioners admit that Section 11 does not require a scienter showing. Pet. Br. 28.

A. In *Herman*, This Court Precluded the Possibility of a Subjective Falsity Requirement Under Section 11

The issue before the Court has already been squarely and forcefully addressed in the case of *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).[5] The Court's decision here should begin and end with a review of *Herman* and that case's posture towards Section 11's pleading requirements.

According to *Herman*, the knowledge or mindset of a defendant is not a relevant inquiry for Section 11 purposes. *See id.* Rather, the only requirement for a prima facie case is showing that the defendant made a material misstatement or omission in a registration statement. *Id.* The *Herman* court recognized that Section 11 was "designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability." *Id.* For example, for issuers, Section 11 liability is "virtually absolute, even for innocent misstatements." *Id.* This recognition is a clear repudiation of the subjective falsity theory propounded by the Plaintiffs. After all, if even innocent misstatements are actionable, the issuer's knowledge and intent can have no bearing on the establishment of a prima facie case.

Underwriters and other agents of an issuer are presumptively liable upon a prima facie showing of a material misrepresentation, but may be able to avail of a "due diligence" affirmative defense depending on the circumstances. *Id.* (citing 15 U.S.C. § 77k(b)). How-

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[5] *Herman* was a unanimous decision of eight justices, with one non-voting Justice.

ever, even for these individuals, the due diligence exemption only serves as a possible affirmative defense, and does not change the equation for what constitutes a sufficient Section 11 pleading.

Herman is the one and only case in which the Supreme Court has directly addressed the mindset required for a Plaintiff's pleading under Section 11, and this Court need look no further for resolution of the instant matter.

B. *Virginia Bankshares* Does Not Mandate the Pleading of Subjective Falsity in Section 11 Cases

Petitioners and both the Second[6] and Ninth Circuits[7] have cited *Virginia Bankshares*, 501 U.S. at 1095-96 in support of the untenable claim that subjective falsity must be pleaded in Section 11 cases involving a statement of opinion. In actuality, *Virginia Bankshares* did not directly address whether subjective falsity was a required element, and moreover related to a provision of an entirely separate statute, Securities Exchange Act of 1934 ("'34 Act"), Section 14(a), 15 U.S.C. § 78n(a), and its implementing regulation, 17 C.F.R. § 240.14a-9(a).

Virginia Bankshares held that objective falsity is a required element of a misrepresentation claim under Section 14(a) of the '34 Act. 501 U.S. at 1096 ("We therefore hold disbelief or undisclosed motivation,

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

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

standing alone, insufficient to satisfy the element of fact that must be established under § 14(a).") The case raised the issue of subjective falsity in dicta, accepting the prior jury finding that subjective falsity existed in that case. *Id.* at 1090. However, the majority opinion had no discussion of whether subjective falsity is actually a **necessary** element of 14(a) claim. In other words, the Court never decided on whether objective falsity, standing alone, is sufficient for liability.

Thus, *Virginia Bankshares* is uninstructive to the case at bar, because it fails to address whether subjective falsity is a necessary component of a Section 11 pleading. As argued above, the *Herman* case fills that lacuna quite snugly, having recognized that objective falsity and materiality are the only requirements for a prima facie Section 11 claim, even in cases of "innocent" misstatement. *Herman*, 459 U.S. at 382.

Even if the Court interprets *Virginia Bankshares* as explicitly requiring both subjective falsity and objective falsity, it bears emphasis that the case dealt with the limited purview of Section 14(a) of the '34 Act, and not Section 11 of the '33 Act. Not all parts of the federal securities laws seek to address the same problems or achieve the same objectives. Thus, it can be erroneous for the Court to conflate a decision affecting one statutory provision with another. Simply put, applying *Virginia Bankshares* to the Section 11 context would be like comparing apples to oranges. Section 14(a) of the '34 Act deals with proxy solicitations to often-times sophisticated shareholders who are continuing participants in a corporation. *Shidler v. All American Life & Financial Corp.*, 775 F.2d 917, 927 (8th Cir. 1985). In sharp contrast, Section 11 of the '33 Act deals with registration statements open to members of

the general public, virtually all whom are relatively unsophisticated or uninformed about an issuing corporation' inner dealings. *Id.* ("The investors protected by the mechanism of disclosure under section 11 cannot be expected to be well-informed about the corporation's activities when they make their initial investments."). It may be appropriate to place the hurdle of subjective falsity before relatively sophisticated Section 14(a) claimants. However, applying subjective falsity to Section 11 would serve as an unnecessary roadblock for meritorious claims, and would hinder the lay public's ability to seek redress for misleading registration statements. Such a result would run counter to Section 11's broadly remedial objective. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (recognizing that the securities laws should be interpreted "not technically and restrictively, but flexibly to effectuate [their] remedial purposes.").

Another distinguishing factor of *Virginia Bankshares* is that Section 14(a) of the '34 Act applies an entirely different standard of liability than Section 11 of the '33 Act. As explained above, Section 11 involves a strict standard of liability. *See Herman*, 459 U.S. at 382; *see also Shidler*, 775 F.2d at 927 ("Little less than a strict liability standard is capable of affording these new investors the necessary protection."). In sharp contrast, numerous circuit courts concur that strict liability is not the correct standard of liability applicable to Section 14(a) and its corresponding regulation, SEC Rule 14a-9. *See, e.g., Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir. 1980); *Gould v. American Hawaiian S.S. Co.*, 535 F.2d 761, 776-77 (3d Cir. 1976); *Gruss v. Curtis Publishing Co.*, 534 F.2d 1396, 1403 (2d Cir. 1976). Thus, subjective falsity may

be viewed as a necessary element for Section 14(a), but not so for Section 11, which countenances no subjective element.

III. CONGRESS NEVER INTENDED FOR SUBJECTIVE FALSITY TO SERVE AS A PLEADING ELEMENT UNDER SECTION 11

A plain reading of Section 11 evinces no mention whatsoever of the knowledge or mindset of the defendant. *See* 15 U.S.C. § 77k(a). If Congress intended to predicate liability under Section 11 on a showing of subjective falsity, it could have inscribed such a provision into the statute. The absence of such a provision is telling. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The absence of a subjective falsity requirement in the statute was not an oversight. A review of Congressional records reveals that the legislative intent behind Section 11 was to allow a plaintiff to plead a prima facie case without having to delve into the knowledge or mindset of the defendant. A House Committee Report issued on May 4, 1933 in connection with the bill that became the Securities Act stated the following in connection with Section 11:

> Every lawyer knows that with all the facts in the control of the defendant it is

> **practically impossible for a buyer to prove a state of knowledge** or a failure to exercise due care on the part of defendant. Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. The responsibility imposed is no more nor less than that of a trust. . . . **To impose a lesser responsibility would nullify the purposes of this legislation.**

H.R. Rep. No. 73-85, 73d Cong., 1st Sess. 9-10 (1933) (emphases added).

Congress explicitly rejected the notion that plaintiffs should be required to plead to a defendant's state of knowledge in a Section 11 claim. *Id.* The House recognized the difficulty that plaintiffs would face in having to plumb the depths of a defendant's psyche to reveal culpable knowledge. *Id.* Such knowledge is likely obfuscated by layers of corporate hierarchies, which have only proliferated in the near-century since the passage of the '33 Act.

Instead, Congress intended that a Section 11 plaintiff need only plead a material misrepresentation (or omission) in order to establish a prima facie claim. At that point, the burden would then be placed upon the defendant to "disprov[e] responsibility for reprehensible acts." *Id.* The Petitioners in this case seek to rewrite Congress' allocation of burdens by asking putative Section 11 plaintiffs to plead subjective falsity, in direct contravention of legislative intent. The Court

must not permit the Petitioners to achieve that end. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Indeed, the "subjective falsity" requirement espoused by Petitioners and the Second and Ninth Circuits is a relative novelty. Soon after the passage of the '33 Act, learned members of the bar acknowledged that subjective knowledge is irrelevant for purposes of a prima facie Section 11 claim. For instance, in December 1933, William O. Douglas (an early Chairman of the SEC and a future Supreme Court Justice) co-authored an article in the Yale Law Journal in which he summarized the key provisions of the '33 Act, noting that under Section 11, "[n]either the plaintiff **nor anyone else** need have known of [the untruth or omission.]" William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 176 (1933) (emphasis added).[8] The Court should not permit the Petitioners to upend this long-settled understanding.

The United States, as amicus curiae, argues that courts should impose liability under Section 11 where a statement of opinion is either falsely or unreasonably held. U.S. Am. Br. 5, 9. However, this approach, like that championed by the Petitioners, has been explicitly rejected by Congress. As noted above, the House Report on the eventual '33 Act endorsed an approach

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[8] The Supreme Court has utilized this article as a guidepost to understanding the '33 Act on five prior occasions. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 601 (1995).

to Section 11 that focused solely on objective falsity, given that in registered offering "it is practically impossible for a buyer to **prove a state of knowledge or a failure to exercise due care** on the part of defendant." H.R. Rep. No. 73-85, 73d Cong., 1st Sess. 9 (1933) (emphasis added). Thus, both prongs of the United States' view (subjectively falsity and a reasonableness standard) were considered and rejected by Congress before it passed Section 11 into law.

IV. A SUBJECTIVE FALSITY REQUIREMENT IN SECTION 11 WOULD BE AT ODDS WITH FIRMLY ESTABLISHED PRECEDENT ON SCIENTER

No circuit court has ever held that a prima facie Section 11 case requires a showing of scienter.[9] However,

[9] *See, e.g.*, *Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013) ("[U]nlike § 10(b) of the Securities and Exchange Act, § 11 does not have a scienter or reliance requirement...."); *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 484 (2d Cir. 2011) (holding that a Section 11 plaintiff "need [not] plead scienter, reliance, or loss causation."); *In Re Constar International Securities Litigation*, 585 F.3d 774, 782 (3rd Cir. 2009) ("A prima facie case under § 11 is straightforward, requiring only a showing of a material misrepresentation or omission from a defendant's registration statement."); *Cozzarelli v. Inspire Pharmaceuticals Inc.*, 549 F.3d 618, 628 (4th Cir. 2008) (noting that for Section 11 "proof of scienter is not required."); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495 (5th Cir. 2005) ("Section 11's liability provisions are expansive - creating virtually absolute liability for corporate issuers for even innocent material misstatements...."); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986) (observing that that Section 11 imposes "liability without fault"); *Carlon v. Thaman (In re NationsMart Corp. Sec. Litig.)*,

the Petitioners' theory, if accepted, could change this well-settled precedent. Black's Law Dictionary defines scienter as "knowingly" and "knowledge…with an intent to deceive." Black's Law Dictionary 1345 (6th ed. 1990). This definition is virtually indistinguishable from the standard of subjective falsity espoused by the Petitioner. If a speaker states an opinion that materially misrepresents some underlying fact, with knowledge that the underlying fact is untrue, that mental state logically correlates to an intent to deceive. The claimed distinction between these mental states is too nice to be practicable in the real world.

In fact, the proposed subjective falsity standard could render Section 11 – a strict liability provision – even more difficult to plead than traditional fraud-based claims, like § 10(b) of the '34 Act, 15 U.S.C. § 78j(b), that have an explicit scienter requirement. Every Court of Appeals that has considered the issue has held that a plaintiff can meet the scienter requirement in securities law cases by showing that the defendant acted recklessly. *Tellabs, Inc. v. Makor Issues &*

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130 F.3d 309, 315 (8th Cir. 1997) ("To establish a prima facie § 11 claim, a plaintiff need show only that he bought the security and that there was a material misstatement or omission. Scienter is not required for establishing liability under this section."); *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 860 (9th Cir. 2013) ("This court, among several, has also noted that Section 11 lacks a scienter requirement."); *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1251 (10th Cir. 1997) (recognizing that a Section 11 plaintiff need only show a material misstatement or omission to establish a prima facie case); *APA Excelsior III LP v. Premiere Technologies*, 476 F.3d 1261, 1271 (11th Cir. 2007) (observing that Section 11 liability will attach even for "innocent misstatements."); *Wachovia Bank & Trust Co. v. Nat. Student Marketing Corp.*, 650 F.2d 342, 356 (D.C. Cir. 1980) ("Under [Section 11], a defendant may be held liable even for negligent misstatements.").

Rights, Ltd., 551 U.S. 308, 319 n.3 (2007). *In Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. ___, 131 S. Ct. 1309, 1324-25 (2011), the Court declined to define scienter for securities law purposes, but also declined to overturn the lower court's conclusion that the scienter requirement can be met by showing "deliberate recklessness." *Id.*

Proving that a Section 11 defendant actually knew about the falsity of a stated opinion is a much more difficult task than merely demonstrating objective recklessness. Indeed, in enacting Section 11, Congress explicitly acknowledged that proving a defendant's culpable state of knowledge can be "practically impossible." H.R. Rep. No. 73-85, 73d Cong., 1st Sess. 9 (1933). A subjective falsity requirement would effectively neuter Section 11 as a viable option for duped investors, as it would render that claim even more burdensome than a standard Section 10(b) fraud claim. This reversal is contrary to the very purpose behind these statutory provisions. Section 11 is intended to "place[] a relatively minimal burden on a plaintiff" in comparison to Section 10(b). *Herman*, 459 U.S. at 382.

Petitioners advocate for an extreme deviation from the basic purpose of Section 11, a cause of action that for many decades has been understood to be a strict liability provision devoid of any pleading requirement relating to the defendant's state of mind.

V. PUBLIC POLICY CONSIDERATIONS MILITATE AGAINST THE PETITIONERS' PROPOSED SUBJECTIVE FALSITY REQUIREMENT UNDER SECTION 11

Civil liability provisions like 15 U.S.C. § 77k(b) serve a vital function in promoting fair and equitable conduct in the marketplace. The subjective falsity standard promoted by Petitioners, if adopted, would severely inhibit aggrieved investors from seeking redress for material misrepresentations contained in offering documents. Section 11 was intended to apply an exacting standard of liability that vigorously protects investors in registered securities, and the proposed subjective falsity requirement flies in the fact of that intent.

If the Court endorses the Petitioners' position, a deleterious signal will be sent to the public: that a malefactor can expect to escape Section 11 liability, despite the utterance of material misrepresentations that hurt investors, so long as that malefactor is ignorant about the truth of her statements. The mere absence of subjective falsity in such a scenario should not absolve an issuer or its agent of liability under Section 11.

The Petitioners' view creates perverse incentives that are anathema to fairly functioning capital markets. If adopted, the subjective falsity standard would incentivize issuers and their agents to avoid conducting proper due diligence to apprise themselves about the facts surrounding an offered stock. After all, would-be plaintiffs would not be able to sue under the Petitioners' vision of Section 11 if a defendant opining on behalf

of the issuer lacked a factual basis to support that opinion.

Issuers would be encouraged to have ignorant employees state outlandish (though firmly held) opinions on registered offerings, comforted by the fact that the speaker would eschew liability even if those opinions turned out to be wildly untenable. Figureheads and neophytes could be recruited to sign off on registration statements, and prospective investors suffering losses because of misrepresented opinions would be left out in the cold.

The area of financial malfeasance is of particular concern to OSEC given the catastrophic impact that excesses on Wall Street have had on the global economy in the last few years. Both investors and the public at large have a compelling interest in the reduction of material misrepresentations made in connection with registered securities.

The recent financial crisis is testament to the dire need for aggressive civil liability provisions under the securities laws. While recessions are cyclical in nature, securities misconduct played a significant role in propelling the onset and exacerbating the severity of the recent financial crisis. The government has recognized the causative role that toxic mortgage-backed securities played in the 2008 financial crisis, which devastated the economic position of multinational conglomerates and poor individuals alike. *See* The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xviii (2011). In the run-up to the crisis, securitized offerings flourished in an environment of collapsing lending standards and lax regulation. The Financial Crisis Inquiry Com-

mission ("FCIC"), which was charged with investigating the causes behind the recession, observed that:

> major financial institutions ineffectively sampled loans they were purchasing to package and sell to investors. They knew a significant percentage of the sampled loans did not meet their own underwriting standards or those of the originators. Nonetheless, they sold those securities to investors. The Commission's review of many prospectuses provided to investors found that this critical information was not disclosed.
> *Id.* at xxii.

Further, the FCIC estimated that the total economic loss attributable to mortgage malfeasance between 2005 and 2007 was $112 billion. *Id.* During this time, the SEC proved to be eminently ineffective in uncovering dangers hidden in registered offering materials. "'The elephant in the room is that we didn't review the prospectus supplements,' the SEC's deputy director for disclosure in corporation finance, Shelley Parratt, told the FCIC." *Id.* at 169.

Private actions under Section 11 have the capacity to step up where the SEC has failed, by serving as a secondary source of market enforcement. Indeed, the dockets of numerous federal courts bear witness to the fact that Section 11 has been used with some success against purveyors of falsely touted securities. *See, e.g.*, Brian Mahoney, *Goldman Sachs in Talks to Settle FHFA Suit Over MBS Losses*, Law360, July 28, 2014, http://www.law360.com/articles/561418/goldman-sachs-

in-talks-to-settle-fhfa-suit-over-mbs-losses. The Court must ensure the continued vitality of Section 11. Issuers and agents faced with the possibility of strict liability under that statute would remain circumspect about misleading investors through offering materials. In contrast, the interposition of a subjective falsity requirement would severely undermine Section 11's capacity to serve as a viable tool in the aggrieved investor's tool-belt.

The Great Recession of 2008, borne largely of acquisitive speculation, mismanagement, and malfeasance at financial institutions, extinguished nearly 40% of family wealth from 2007 to 2010. Jesse Bricker, *et al.*, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* 17, Federal Reserve Bulletin (June 2012). The inflation-adjusted median household net worth actually regressed back to 1992 levels. *Id.* Strong civil liability provisions like Section 11 are necessary to help the nation avoid similarly gargantuan public losses in the future.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondents and hold that that a Section 11 plaintiff is not required to allege subjective falsity.

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Respectfully submitted,

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