No. 100572-5
(Court of Appeals Case No. 81811-2-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE: FUNKO INC. SECURITIES LITIGATION

FUNKO, INC., et al.

Petitioners,

v.

ROBERT LOWINGER, et al.,

Respondents,

AMICUS CURIAE BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015), the Supreme Court set the requirements for a claim under Section 11 of the Securities Act of 1933 based on omissions from statements of opinion. The Supreme Court's decision is controlling on Section 11 cases filed in both federal and state courts.[1]

This Court should accept review to clarify that plaintiffs alleging such a claim in Washington courts must follow federal law as established in *Omnicare*. Requiring application of this federal standard—regardless of the forum where a Section 11 claim is pending—will benefit U.S. securities markets by providing more consistent and predictable outcomes and will deter forum shopping based on varying pleading standards.

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[1] *E.g.*, *Or.-Wash. R.R. & Navigation Co. v. C. M. Kopp Co.*, 12 Wn.2d 146, 152, 120 P.2d 845 (1942).

II. IDENTITY AND INTEREST OF AMICUS

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of the industry's nearly one million employees, SIFMA advocates on legislation, regulation, and business policies affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA's members frequently serve as underwriters for, or otherwise participate in, securities offerings governed by the Securities Act and will be directly affected by the application of laws at issue in this case.

III. STATEMENT OF THE CASE

SIFMA adopts the Statement of the Case provided by Petitioners Funko, Inc. et al.

IV. ARGUMENT

The standards outlined by the U.S. Supreme Court in *Omnicare* govern a Section 11 claim, regardless of forum. Uniformity in this area of the law is critical, as uncertainty impacts vital capital markets.

A. Uniform Application Of Federal Law In Section 11 Cases Reduces Uncertainty That Negatively Affects U.S. Capital Markets.

"The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006). These markets are "vital elements of our economy." *Id.* Unfortunately, since the 1980s, there has been

a general downward trend in the number of Initial Public Offerings ("IPOs") in U.S. equity markets.[2]

Litigation risk is unquestionably "contributing to the declining attractiveness of U.S. public equity markets."[3] New securities class actions filed across state and federal courts rose to the highest number on record in 2019 (428 cases), nearly double the 1997–2018 average (215 cases).[4] Filings in 2020 and 2021 were similarly higher than the 1997–2018 average.[5]

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[2] *See* Jay Ritter, *Initial Public Offerings: Updated Statistics* 3, 15 (Feb. 21, 2022), https://site.warrington.ufl.edu/ritter/files/IPO-Statistics.pdf; *see also* Committee on Capital Markets Regulation, *U.S. Public Equity Markets are Stagnating* 7 (Apr. 2017), https://www.capmktsreg.org/wp-content/uploads/2018/10/U.S.-Public-Equity-Markets-are-Stagnating.pdf.

[3] Committee on Capital Markets Regulation, *supra* n.2, at 6.

[4] Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* 1 (2020), https://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-YIR.pdf.

[5] *Id.* There were 334 new filings in 2020 and 218 in 2021. Cornerstone Research, *Securities Class Action Filings: 2020 Year in Review* 1 (2021), https://www.cornerstone.com/wp-content/uploads/2021/12/Securities-Class-Action-Filings-2020-Year-in-Review.pdf ("2020 Year in Review"); Cornerstone

Concern over unwarranted securities litigation "keeps companies out of the capital markets"[6] and drives up the cost of taking companies public. "A rise in securities class-action cases involving initial public offerings is spurring IPO insurers to double and triple prices for directors and officers coverage," leading to an increase of "as much as 200% in the last three years."[7] Increasing costs deprives companies of access to capital markets, which then also limits investors' choices and opportunities.

The prevalence of Section 11 cases in state courts, and the attendant risk of inconsistent application of federal securities

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Research, *Securities Class Action Filings: 2021 Year in Review* 1 (2022), https://www.cornerstone.com/wp-content/uploads/2022/02/Securities-Class-Action-Filings-2021-Year-in-Review.pdf ("2021 Year in Review").

[6] H.R. Rep. No. 104-50, at 20 (1995).

[7] Suzanne Barlyn, *D&O Insurance Costs Soar as Investors Run to Court Over IPOs*, Insurance Journal (June 18, 2019), https://www.insurancejournal.com/news/national/2019/06/18/529691.htm.

law, contributes to these fears and costs.[8] After the *Cyan* decision—which confirmed concurrent jurisdiction for some securities cases, *see Cyan*, 138 S. Ct. 1061—there was a significant increase in state Section 11 cases that was "not explained by an increase in public offerings. This suggests that the increase may have been driven by an increase in low-merit cases that are attracted to state courts by lenient procedural rules."[9]

A substantial percentage of Section 11 class actions continue to be filed either exclusively in state court or in conjunction with parallel filings. Including cases in which there was a parallel federal filing, in 2020, over half of federal Section

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[8] *See* Michael Klausner et al., *State Section 11 Litigation in the Post*-Cyan *Environment (Despite* Sciabacucchi*)*, 75 Bus. Law. 1769, 1770, 1771–74, 1777 (2020); Barlyn, *supra* n.7 (the "market has gotten absolutely more challenging" since *Cyan, Inc. v. Beaver County Employees Retirement Fund*, __ U.S. __, 138 S. Ct. 1061, 200 L. Ed. 2d 332 (2018) (internal quotation marks omitted)).

[9] Klausner, *supra* n.8, at 1776.

11 and state 1933 Act cases were filed in state court; in 2021, more than one-third were filed in state courts.[10]

Permitting an expansion of federal liability for Section 11 cases will adversely affect the securities markets by subjecting issuers, underwriters, and other participants in the public offering process to an increased risk of securities litigation and the expense of meritless cases moving forward.[11] In contrast, consistent application of the narrow scope of Section 11 omission liability mandated by *Omnicare* will provide a measure of certainty in an otherwise tumultuous environment.

B. State Courts Must Apply *Omnicare*'s Declaration Of Federal Substantive Law.

In *Omnicare*, the Supreme Court established the boundaries of Section 11 liability for an opinion in a registration statement that is false or misleading because of an omission of

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[10] 2020 Year in Review, *supra* n.5, at 5; 2021 Year in Review, *supra* n.5, at 4.

[11] *See* Klausner, *supra* n.8, at 1789.

information from the statement. 575 U.S. at 178, 181. Washington courts must adhere to those substantive limitations.

Section 11 permits a stock purchaser to sue if a registration statement "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). In defining this cause of action, the Supreme Court first recognized that "whether a statement is 'misleading' depends on the perspective of a reasonable investor: The inquiry (like the one into materiality) is objective." *Omnicare*, 575 U.S. at 186–87. A reasonable investor "expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time." *Id.* at 188–89. Section 11's omissions clause creates liability "if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself." *Id.* at 189.

This potential liability, however, is tightly circumscribed. "Section 11's omissions clause . . . is not a general disclosure requirement." *Id.* at 194. "An opinion statement . . . is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way." *Id.* at 189. "A reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement." *Id.* at 190.

Moreover, reasonable investors understand opinion statements in context, looking at the surrounding text, hedges, disclaimers, apparently conflicting information, and the relevant industry's customs and practices. *Id.* Section 11 "creates liability only for the omission of material facts that cannot be squared with such a fair reading." *Id.* at 190–91.

With this lens, the *Omnicare* Court explained that to be actionable under Section 11, an incorrect opinion must be objectively misleading because the issuer failed to include "particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct

or knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id.* at 186–87, 194. This is a high hurdle for liability. *See id.* at 194.

There is no question that state courts may address Section 11 omission claims. But they must do so within the framework set forth by the Supreme Court. This Court should accept review to clarify that Washington courts must adhere to *Omnicare*'s holding, defining actionable Section 11 omissions under federal law. *See, e.g.*, *Or.-Wash. R.R.*, 12 Wn.2d at 152 (decisions of U.S. Supreme Court are controlling on issues of federal law); *Noble v. Dibble*, 119 Wash. 509, 511, 205 P. 1049 (1922) (highest court of a state is bound by U.S. Supreme Court on issues of federal law).

C. The Principles Of The Reverse-*Erie* Doctrine Support Washington Courts Applying *Omnicare*'s Standard.

Omnicare set forth the substantive requirements of Section 11 opinion omission cases. To the extent that Respondents—or the Court of Appeals—view Washington's procedural standard

under CR 12(b)(6) as permitting a more lenient standard for *alleging* Section 11 omission claims, they are incorrect. The principles of the reverse-*Erie*[12] doctrine support the conclusion that Washington courts must apply *Omnicare*'s strict pleading requirements to Section 11 opinion omission cases. *See* Jeffrey Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 Neb. L. Rev. 412, 435 (1999) (where federal court "adopts special substance based pleading requirements for federal claims which can be present in state courts, the potential for a reverse-Erie analysis arises").

"The primary concerns of the *Erie* and Reverse-*Erie* doctrines are threefold: encouraging judicial economy, deterring forum shopping, and protecting principles of federalism." *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 191 Wn.2d 392, 445, 423 P.3d 223 (2018), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). *Erie*

[12] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

requires that when federal courts are applying state law, they must determine the outcome of a claim as it would be decided in state court. *Id.* at 446. "The converse of that rule applies under the Reverse-*Erie* doctrine. Just as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Id.* (alteration in original) (internal quotation marks omitted).

"Whenever the Constitution, Congress (either explicitly or implicitly), or a federal court mandates that a certain federal procedure must be used when adjudicating a federal substantive claim, a state court is bound to apply that particular procedure." Philip Tarpley, *The Doctrine in the Shadows: Reverse-Erie, Its Cases, Its Theories, and Its Future with Plausibility Pleading in*

Alaska, 32 Alaska L. Rev. 213, 225 (2015).[13] In *Omnicare*, the Supreme Court established that Section 11 omission claims must be pleaded with specificity. 575 U.S. at 194. If they are not, the claims must be dismissed. A state procedural rule cannot "interfere with a substantive federal right" or the ability of "a party to raise or defend against the federal claim *as if in federal court*." *Maytown*, 191 Wn.2d at 447 (emphasis added). Yet that is precisely what permitting notice pleading for Section 11 omission claims would do.

Under reverse-*Erie*, "it should follow that defendants, as well as plaintiffs, are entitled to the benefit of all federal court procedural rules that are 'outcome determinative.'" *Felder v. Casey*, 487 U.S. 131, 161, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (O'Connor, J., dissenting); *see Davis v. Wechsler*, 263 U.S. 22, 24–25, 44 S. Ct. 13, 68 L. Ed. 143 (1923) (rejecting state

[13] *See* Kevin Clermont, *Reverse-Erie*, 82 Notre Dame Law Rev. 1, 32 (2006) ("state courts are under a duty to follow what the U.S. Supreme Court has decided").

pleading rule under which official waived federal venue defense, explaining state practice cannot defeat assertion of federal rights, including defenses). This is particularly true here, where the application of *Omnicare*'s pleading standard is grounded in the contours of the substantive claim. *See* Tarpley, *supra* at 226 (strong presumption federal procedure applies in state court for federal claim where procedure grounded in "claim's text, purpose, or legislative history").

If the Court permits the expansion of Section 11 claims beyond those properly pleaded under *Omnicare*, the "desirable uniformity in adjudication of federally created rights [cannot] be achieved." *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 299, 70 S. Ct. 105, 94 L. Ed. 100 (1949); *see* Clermont, *supra* n.13, at 36. Section 11 cases are regularly filed in state courts across the country. A search of pleadings on Westlaw reveals that since *Omnicare*, they have been filed in at least 18 states.

Courts in sister states—including those with liberal pleading standards—have recognized the importance of

uniformity in 1933 Act cases. For example, in *Labourers' Pension Fund of Central & Eastern Canada v. CVS Health Corp.*, the New York Supreme Court, Appellate Division concluded that plaintiff failed to plead an actionable claim under *Omnicare*. 192 A.D.3d 424 (N.Y. App. Div. 2021); *e.g.*, Klausner, *supra* n.8, at 1772 (New York's pleading standard more lenient than federal standard). Similarly, in California, a Superior Court judge recognized that *Cyan*'s "confirmation of concurrent jurisdiction would appear to call for some consistency and uniformity in the handling of [1933 Act] cases between Federal and State courts." *In re Natera, Inc. Sec. Litig.*, No. CIV 537409, at 4 (Cal. Super. Ct. Aug. 7, 2018), *aff'd, City of Warren Police & Fire Ret. Sys. v. Natera Inc.*, 259 Cal. Rptr. 3d 890 (Cal. Ct. App. 2020). In that case, the court "follow[ed] Federal Rule 12(b) motion procedure" to conclude that plaintiffs did not state an actionable 1933 Act claim. *Id.* at 6; *see* Klausner, *supra* n.8, at 1772 (noting California has permissive pleading standard).

To be clear, SIFMA is not suggesting that the Court generally adopt the *Iqbal-Twombly* pleading standard applied in federal courts. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101–03, 233 P.3d 861 (2010). This case presents a narrow issue. If the Court views *Omnicare* as establishing a pleading standard, the Court should accept review and hold that plaintiffs alleging a Section 11 opinion omission claim in Washington courts must plead those claims with *Omnicare*'s required specificity. This is a unique set of circumstances and does not undermine Washington's general pleading standard.

V. CONCLUSION

For the reasons stated above and those presented in Petitioners' briefs, the Court should accept review.

Respectfully submitted this 14th day of March, 2022.

I certify that this brief contains 2,496 words in compliance with RAP 18.17.

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DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on March 14, 2022, I caused to be served this document as follows:

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