No. 22-1165

In the Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORPORATION, ET AL., PETITIONERS

v.

MOAB PARTNERS, L.P., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT MOAB PARTNERS, L.P.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
EPHRAIM A. MCDOWELL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MEGAN BARBERO
General Counsel
MICHAEL A. CONLEY
Solicitor
JEFFREY A. BERGER
Assistant General Counsel
RACHEL M. MCKENZIE
Senior Appellate Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether an issuer's submission of a Form 10-K or Form 10-Q that discloses some but not all of the known trends or uncertainties the issuer was required to disclose under Item 303 of Securities and Exchange Commission (SEC) Regulation S-K, 17 C.F.R. 229.303, can give rise to liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 48 Stat. 891, and SEC Rule 10b-5, 17 C.F.R. 240.10b-5.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws, including the laws at issue in this case. The question presented here can arise in both private suits and government enforcement actions. The United States has participated as amicus curiae in numerous prior cases involving interpretations of the federal securities laws. See, *e.g.*, *Goldman Sachs Grp., Inc.* v. *Arkansas Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

A. Legal Background

The question presented concerns Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 (Exchange Act). 15 U.S.C. 78j(b), 78m(a).

1. Section 10(b) makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security[,] * * * any manipulative or deceptive device or contrivance in contravention of" SEC rules. 15 U.S.C. 78j(b). SEC Rule 10b-5 implements Section 10(b) and makes it unlawful for any person, in connection with the purchase or sale of a security, to (a) "employ any device, scheme, or artifice to defraud"; (b) "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"; or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5. "Section 10(b) is aptly described as a catchall" anti-fraud provision. *Chiarella* v. *United States*, 445 U.S. 222, 234-235 (1980). And "Rule 10b-5 is coextensive with the coverage of § 10(b)." *SEC* v. *Zandford*, 535 U.S. 813, 816 n.1 (2002).

The SEC is charged with enforcing Section 10(b) and Rule 10b-5. Aggrieved private parties may also sue to enforce those provisions under a private right of action that Congress has "ratified." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

To prevail under Section 10(b) and Rule 10b-5, the SEC or a private plaintiff must show (1) a material misrepresentation or omission; (2) made with scienter; (3) in connection with the purchase or sale of a security. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005). A private plaintiff must additionally prove (4) reliance; (5) economic loss; and (6) loss causation. *Id.* at 341-342.

2. In addition to regulating "transactions upon securities exchanges and in over-the-counter markets," the Exchange Act "impose[s] regular reporting requirements on companies whose stock is listed on national securities exchanges." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976). Section 13(a) provides that issuers of registered securities "shall file with the Commission" annual and other periodic reports that contain "such information * * * as the Commission shall require," 15 U.S.C. 78m(a)(1), regarding, *inter alia*, "the organization, financial structure, and nature of the business," 15 U.S.C. 78*l*(b)(1)(A). The SEC enforces Section 13(a), see 15 U.S.C. 78u-2, but there is no private right of action for its violation.

SEC regulations state that issuers "shall" use Form 10-K for annual reports and Form 10-Q for quarterly reports. 17 C.F.R. 249.308a(a), 249.310(a). Those forms identify items that issuers must disclose, corresponding to different categories of information. See SEC, *Form 10-K*, https://www.sec.gov/files/form10-k.pdf; SEC, *Form 10-Q*, https://www.sec.gov/files/form10-q.pdf. As relevant here, both forms contain an item entitled "Management's Discussion and Analysis of Financial Condition and Results of Operations" (MD&A), which mandates that the company must "[f]urnish the information required by Item 303 of Regulation S-K." *Ibid.*;

see 47 Fed. Reg. 11,474 (Mar. 16, 1982) (adopting this requirement).

Regulation S-K provides consolidated instructions for non-financial disclosures in Forms 10-K and 10-Q. See 17 C.F.R. 229.10(a)(2). During the period at issue here, Item 303 of Regulation S-K required issuers' MD&As to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. 229.303(a)(3)(ii) (2018); see 17 C.F.R. 229.303(b) (2018). That requirement applied only to "currently known trends, events, and uncertainties that are reasonably expected to have material effects"—for instance, "the likely non-renewal of a material contract." 54 Fed. Reg. 22,427, 22,429 (May 24, 1989) (emphasis omitted).[1]

The SEC has explained that, without Item 303's required MD&A, a company's numerical financial statements "may be insufficient for an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance." 54 Fed. Reg. at 22,428. Because the Item 303 disclosure "give[s] the investor an opportunity to look at the company through the eyes of management," *ibid.*, it is "[o]ne of the most important elements necessary to an

[1] In 2020, after the time period at issue here, the SEC amended Item 303 to require issuers to disclose "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. 229.303(b)(2)(ii). The updated language "is consistent with longstanding Commission guidance" and reflects existing practice. 86 Fed. Reg. 2080, 2093 (Jan. 11, 2021).

understanding of a company's performance," 68 Fed. Reg. 75,056, 75,061 (Dec. 29, 2003).

B. The Present Controversy

1. Petitioner Macquarie Infrastructure Corporation is an issuer subject to Section 13(a)'s reporting requirements. Pet. App. 16a. Respondent Moab Partners, L.P. is an investor in Macquarie's stock and plaintiff in a putative securities-fraud class action against petitioners Macquarie, certain Macquarie-affiliated entities and persons, and former Macquarie executives. *Id.* at 14a-15a. For purposes of resolving petitioners' motion to dismiss, the factual allegations in respondent's complaint are assumed to be true. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Macquarie's wholly owned subsidiary, International-Matex Tank Terminals (IMTT), stored liquid commodities, including a category of refined petroleum called 6-oil. Pet. App. 16a-17a. In 2008, the International Maritime Organization (IMO) announced new regulations, to take effect in January 2020, that threatened to largely eliminate use of 6-oil in global shipping because of the oil's harmful environmental effects. J.A. 56-57; Pet. App. 18a-19a. In 2012, Macquarie's then-CEO assured investors that IMTT intended to reduce storage of 6-oil. J.A. 60-62. But instead, IMTT secretly remained heavily reliant on 6-oil. J.A. 24-25, 60, 62-66, 97-98.

As relevant here, respondent asserted a Section 10(b) claim contending that petitioners had artificially inflated Macquarie's stock price by filing Forms 10-K and 10-Q with misleading MD&As. J.A. 134-137, 154-156. Those MD&As stated that "uncertainty among industry participants" about petroleum prices "ha[d] led to a reduction in the average duration of storage and related services contracts" and to "a modest increase in re-contracting risk," but that "continued strong demand for the products stored [by IMTT] serve[d] to offset this risk." J.A. 134 (emphasis omitted); see J.A. 135 (stating that Macquarie "expect[ed] utilization rates" of IMTT terminals to be at "historical levels of 94% to 96% in the medium term"). But the MD&As failed to disclose an additional known trend or uncertainty that Item 303 required to be disclosed: that the forthcoming IMO regulations could adversely affect IMTT's profits—through lost contracts, poor utilization rates, and expenditures to repurpose the 6-oil tanks—because IMTT still relied so heavily on storage of 6-oil. J.A. 25, 137.

Respondent further alleged that petitioners had acted with scienter in omitting that additional information from the MD&As. See J.A. 138-151. And it alleged that the omitted information was material to investors—as shown by the 41% drop in Macquarie's stock price after the risk posed by the IMO regulations came to light. See J.A. 22, 30, 87-89. Respondent sought to certify a class of all persons who had purchased Macquarie's stock during the two-year period before February 21, 2018, when the relevant risk was disclosed. Pet. App. 15a-16a.

The district court granted petitioners' motion to dismiss the complaint. Pet. App. 14a-48a. The court rejected respondent's Section 10(b) claim, concluding that it had failed to allege that petitioners violated Item 303, that petitioners' omissions were material, or that petitioners acted with scienter. *Id.* at 39a-47a.

2. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-13a. Relying on Second Circuit precedent, the

court of appeals recognized that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis * * * for a claim under Section 10(b) if the other elements have been sufficiently pleaded." *Id.* at 8a. Applying that principle, the court determined that respondent had "adequately alleged a 'known trend[] or uncertaint[y]'"—the forthcoming IMO regulations' "significant restriction of No. 6 fuel oil"—"that gave rise to a duty to disclose under Item 303." *Id.* at 7a, 9a (citation omitted; brackets in original). The court further held that petitioners' failure to disclose that known trend or uncertainty was not "objectively reasonable" and thus violated Item 303. *Id.* at 9a (citation omitted). The court also found that respondent had adequately pleaded materiality and scienter, and that the district court had erred in dismissing respondent's complaint. *Id.* at 10a-12a.

SUMMARY OF ARGUMENT

I. An MD&A that omits information required to be disclosed by Item 303 can give rise to a Section 10(b) violation.

A. An MD&A that makes certain statements but omits information that Item 303 requires to be included is a misleading half-truth. Rule 10b-5(b) covers the failure "to state a material fact necessary in order to make the statements made * * * not misleading." 17 C.F.R. 240.10b-5(b). By filing an MD&A describing certain known trends and uncertainties, an issuer makes statements. If the issuer omits other known trends or uncertainties that meet Item 303's threshold, the MD&A's statements will be misleading to a reasonable investor, who will be aware of Item 303's requirement to list *all* material known trends or uncertainties, and therefore will assume that the MD&A provides a complete list.

B. Even if the omission of particular required information from an MD&A is viewed as silence rather than as a half-truth, it may fall within Section 10(b)'s coverage. Under Rule 10b-5(a) and (c), it is unlawful "[t]o employ any device, scheme, or artifice to defraud," or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5(a) and (c). A defendant can violate Section 10(b) by "fail[ing] to disclose material information" that he is under a "duty to disclose," *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980), and the relevant duty may arise from a statute or regulation that requires disclosure.

Here, Item 303 requires issuers to disclose all material known trends or uncertainties in an MD&A. Even apart from the fact that petitioners' MD&As included explicit statements about *other* known trends and uncertainties, the MD&As' failure to disclose the potential effects of the forthcoming IMO regulations had the potential to mislead investors. Where regulatory disclosure requirements apply, reasonable investors will infer from an issuer's silence that the types of events for which disclosure is required have not occurred. Petitioners' approach would allow unscrupulous parties to exploit the very trust that disclosure requirements are designed to foster by engaging in strategic omissions that they expect investors to misconstrue.

II. Petitioners' contrary arguments lack merit. A violation of Item 303 standing alone will not render an issuer liable under Section 10(b). Rather, for Section 10(b) liability to attach, additional elements (including materiality and scienter) must be established.

Petitioners' speculation (Br. 46) about "extortionate litigation" cannot be squared with experience in the

Second Circuit, where the vast majority of Section 10(b) claims based on alleged Item 303 violations have been dismissed. And petitioners' approach would create a significant loophole in the securities laws for conduct that is plainly fraudulent.

ARGUMENT

I. AN MD&A THAT OMITS INFORMATION REQUIRED TO BE DISCLOSED BY ITEM 303 CAN BE THE PREDICATE FOR A SECTION 10(b) VIOLATION

A reasonable investor, reading an MD&A with an awareness of the applicable legal context, understands it to contain all the information that Item 303 requires. An MD&A that discloses only some of that information therefore is misleading. Such a filing may trigger liability under Section 10(b) if (but only if) the plaintiff proves the additional elements of a Section 10(b) claim.

A. An MD&A That Omits Information Required By Item 303 Is A Misleading Half-Truth That May Violate Rule 10b-5(b) If Other Prerequisites To Liability Are Established

Petitioners repeatedly assert (Br. 1, 16-18, 20-22, 24-25, 29, 31-34, 36, 38) that Section 10(b) liability cannot result from "pure omissions." That assertion is incorrect, as explained below. See pp. 18-23, *infra*. The more fundamental flaw in petitioners' argument, however, is that this case involves half-truths—not pure omissions. And misleading half-truths are plainly actionable under Section 10(b) and Rule 10b-5(b).

1. Text, precedent, and common-law principles show that incomplete MD&As are misleading half-truths

a. Item 303 of Regulation S-K requires that an issuer's must MD&A disclose "any known trends or uncertainties" that are "reasonably likely" to materially impact the issuer's financial condition. 17 C.F.R. 229.303(b)(2)(ii). Thus, when an issuer discloses certain trends or uncertainties pursuant to Item 303, it represents that those are *all* the trends or uncertainties that meet the regulatory threshold. The issuer's CEO and CFO must certify as much on pain of criminal penalties. 18 U.S.C. 1350; see 15 U.S.C. 7241. If other undisclosed known trends or uncertainties in fact exist, the statements in the MD&A are "half-truths"—that is, "representations that state the truth only so far as it goes, while omitting critical qualifying information." *Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176, 188 (2016).

Rule 10b-5(b) covers half-truths by making it unlawful "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b). Here, Macquarie made "statements": It filed MD&As that provided narrative descriptions of various known trends and uncertainties. *Webster's New International Dictionary of the English Language* 2461 (2d ed. 1942) (defining "statement" as "[t]hat which is stated," such as "a narrative" or "report"). And further disclosure was "necessary" to make those statements "not misleading" "in the light of the circumstances," 17 C.F.R. 240.10b-5(b), because a reasonable investor would understand Macquarie's MD&As as representing that all the information required by Item 303 was being disclosed.

"[W]hether a statement is 'misleading' depends on the perspective of a reasonable investor," and "[t]he reasonable investor understands a statement * * * in its full context." *Omnicare, Inc.* v. *Laborers Dist.*

Council Constr. Indus. Pension Fund, 575 U.S. 175, 186-187, 190 (2015). For instance, a reasonable investor would not "expect opinions contained in [registration] statements to reflect baseless, off-the-cuff judgments" because such statements are in "formal documents, filed with the SEC as a legal prerequisite for selling securities to the public." *Id.* at 190. Here, the full context includes the "background regulatory structure" and "existing federal securities disclosure apparatus." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (Alito, J.).

In *Universal Health Services*, this Court relied in part on the surrounding legal context in holding that a healthcare provider's claims for Medicaid reimbursement were misleading, and thus potentially actionable under the False Claims Act, 31 U.S.C. 3729 *et seq.*, even though the claims contained no affirmative false statement. See 579 U.S. at 189-190. The Court explained that, "by submitting claims for payment using payment codes that corresponded to specific counseling services, Universal Health represented that it had provided" certain "types of treatment." *Id.* at 189. "Anyone informed" of such treatment, the Court observed, "would probably—but wrongly—conclude that the clinic had complied with core Massachusetts Medicaid requirements," including that the provider be licensed and have specialized training. *Ibid.* Accordingly, the Court determined that, "[b]y using payment and other codes that conveyed this information without disclosing [its] many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations." *Id.* at 190.

When an issuer submits a filing in purported compliance with its federal securities-law disclosure obligations, the nature and scope of those obligations likewise will affect the inferences that a reasonable investor draws from the filing. In particular, a reasonable investor knows that issuers file Forms 10-K and 10-Q because Section 13(a) and SEC regulations require them. See 15 U.S.C. 78m(a) ("shall file"); 17 C.F.R. 249.310(a) ("shall" use Form 10-K); 17 C.F.R. 249.308a(a) ("shall" use Form 10-Q). A reasonable investor also knows that issuers include an MD&A disclosing known trends and uncertainties because Forms 10-K and 10-Q mandate such a section "[f]urnish[ing] the information required by Item 303," SEC, *Form 10-K* (Item 7); see SEC, *Form 10-Q* (Part I, Item 2), and because Item 303 requires an MD&A to disclose "any known trends or uncertainties" that qualify, 17 C.F.R. 229.303(b)(2)(ii). A reasonable investor therefore would expect the MD&A section of a Form 10-K or 10-Q to disclose all the information that Item 303 requires. If (as respondent has alleged) Macquarie included some, but omitted other, facts that Item 303 required to be disclosed, Macquarie's MD&As contained misleading half-truths that may constitute actionable securities fraud if respondent can establish the other prerequisites to liability.

b. To illustrate the point, consider a hypothetical SEC regulation requiring a Form 10-K to identify every pending lawsuit against the issuer in which the plaintiff sought more than $10 million in damages. Cf. 17 C.F.R. 229.103 (requiring disclosure of certain legal proceedings). If an issuer filed a Form 10-K listing ten such lawsuits, a reasonable investor would understand the filing to represent that the list was exhaustive. If an additional suit seeking $20 million was pending, the filing would be misleading even though it did not explicitly deny the existence of the eleventh suit. To establish Section 10(b) liability in that circumstance, the SEC or a private plaintiff would be required in addition to prove materiality and scienter; and private plaintiffs would be required to prove reliance, economic loss, and loss causation as well. If the undisclosed eleventh lawsuit sought $20 million in damages but was frivolous and immaterial under the standard set forth in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 230-232, 238-241 (1988), the misleading omission would not be actionable. Similarly, if the issuer omitted the eleventh lawsuit through an innocent mistake, its lack of scienter would prevent the imposition of liability. But in both cases, the company's Form 10-K still would be misleading because it would induce a reasonable investor to believe that only ten such suits were pending.

The same principles apply here. An incomplete MD&A is misleading because a reasonable investor knows that an SEC mandate (Item 303) requires an MD&A to disclose all known trends and uncertainties that meet the regulatory threshold. A reasonable investor therefore understands an MD&A to represent that no additional qualifying trends or uncertainties exist. "[T]he reader of the disclosure sees that the issuer is responding to the disclosure obligation and is entitled to assume that the response is not only accurate but complete as well." Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1680 (2004).

To be sure, unlike the hypothetical requirement that an issuer disclose all pending lawsuits against it seeking more than $10 million in damages, Item 303 establishes a standard ("reasonably likely" to be "material," 17 C.F.R. 229.303(b)(2)(ii)) rather than a bright-line rule.

Thus, in applying Item 303, issuers must exercise judgment to determine whether a given known trend or uncertainty must be disclosed. See 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 9:52 (8th ed. 2023). The need for such judgment calls may make it more difficult for plaintiffs to prove that particular omissions violated Item 303. The absence of a bright-line rule may also make it more difficult to prove that any violations that did occur were committed with scienter. But there is no sound basis for petitioners' proposed categorical rule that incomplete MD&As can *never* give rise to Section 10(b) liability.

c. Longstanding common-law principles reinforce the conclusion that Section 10(b) liability can properly be imposed in these circumstances. It "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) (Alito, J.). Thus, if a course of conduct would have been viewed as common-law securities fraud, it is covered by Section 10(b) too.

The recognition that a misleading half-truth can constitute actionable fraud "recurs throughout the common law." *Universal Health Servs.*, 579 U.S. at 188 n.3. As the Restatement (Second) of Torts (1977) (Restatement) explains, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." *Id.* § 529, at 62 (emphasis omitted); see W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 106, at 738 (5th ed. 1984) ("[H]alf of the truth may obviously amount to a lie, if it is understood to be the whole."). As an illustration of that principle, the Restatement provides the following scenario: "a prospectus that accurately states the assets, bond indebtedness and net earnings of a manufacturing corporation but omits any reference to its floating debt is a false representation of the financial position of the company." § 529, at 63.

The Court in *Universal Health Services* similarly noted that "[a] classic example of an actionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property." 579 U.S. at 188-189 (citing *Junius Constr. Co.* v. *Cohen*, 178 N.E. 672, 674 (N.Y. 1931) (Cardozo, J.)). The Court thus recognized that the disclosure of certain information is often reasonably understood as a representation that no additional information of the same general sort exists. It is particularly reasonable to draw such an inference from a filing submitted in purported compliance with Item 303 or other SEC regulations that require the issuer to disclose all information within specified categories.

2. *Petitioners offer no persuasive critique of respondent's half-truth theory*

Petitioners acknowledge (Br. 22) that Rule 10b-5(b) prohibits "failing to disclose information necessary to make affirmative statements not misleading." But they seek (Br. 33-41) a categorical carveout from that prohibition for failures to include *on SEC disclosure forms* information that is necessary to make affirmative statements on those forms not misleading. Petitioners offer no persuasive rationale for that carveout.

Petitioners observe that Rule 10b-5(b) "imposes no liability on 'a person who does not make a statement.'" Br. 34 (citation omitted). But as already explained, an MD&A *consists of* narrative statements of known trends and uncertainties. Such statements are not "*implied*," Br. 35, but are express representations designed to fulfill an issuer's legal obligations. And they are sufficiently "concrete" (Br. 36) to satisfy the requirement in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, that a plaintiff "specify each statement alleged to have been misleading," 15 U.S.C. 78u-4(b)(1). Here, respondent identified, as allegedly misleading statements, petitioners' assertions in their MD&As that "while 'uncertainty among industry participants generally has led to a reduction in the average duration of storage and related services contracts, * * * continued strong demand for the products stored serves to offset this risk.'" J.A. 134 (emphasis omitted). And respondent alleged that those "statements" were made "misleading" by the "conceal[ment]" of an additional known trend or uncertainty: the forthcoming IMO regulations' impact on IMTT's storage contracts. *Ibid.*; see J.A. 137.[2]

Petitioners also assert (Br. 36) that, to be misleading, the relevant "statement" must address "the same subject as the omitted fact." The link between statement and omission that is required to render the former

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[2] Contrary to petitioners' suggestion (Br. 35), the amicus brief for the United States in *Leidos, Inc.* v. *Indiana Public Retirement System*, 138 S. Ct. 2670 (2018), characterized the relevant "statements" in the same way the government does here. See U.S. Br. at 9, *Leidos*, *supra* (No. 16-581) (observing that "petitioner made 'statements'" by "fil[ing] an MD&A providing a narrative description of various trends and uncertainties").

misleading depends on the context in which the statement is made. In circumstances where no disclosure requirement applies, some judgment may be necessary to determine whether the statement and omission are sufficiently "like in kind" that the statement should be viewed as a misleading half-truth. *Junius Const. Co.*, 178 N.E. at 674. A voluntary statement that two roads bisect a parcel of land, for example, would imply the absence of additional roads, but it would not necessarily imply the nonexistence of a noisy factory nearby, or the absence of a pending proposal to raise property taxes in the jurisdiction where the land is located. But where a statute or regulation defines the class of information that must be disclosed, a statement issued in purported compliance with that requirement necessarily implies the absence of additional information within the class. Because Item 303 requires an issuer to disclose all known trends or uncertainties that satisfy a specified regulatory standard, the identification of some such trends or uncertainties but not others itself makes the MD&A's narrative "misleading" "in the light of the circumstances." 17 C.F.R. 240.10b-5(b).

Finally, petitioners characterize (Br. 38) respondent as seeking a "judicial expansion of § 10(b) liability" through a so-called "implied certification" theory. Like the allegations in *Universal Health Services*, however, respondent's claims "fall squarely within the rule that half-truths * * * can be actionable misrepresentations." 579 U.S. at 188. As an example of that longstanding principle, the Court in *Universal Health Services* quoted with approval a state court's observation in 1931 that "[t]he enumeration of two streets, described as unopened but projected, was a *tacit representation* that the land to be conveyed was subject to no others." *Id.* at 189 (quoting *Junius Constr. Co.*, 178 N.E. at 674) (emphasis added).

Applying that longstanding rule here would not be a judicial expansion of Section 10(b) liability; it would be judicial enforcement of Section 10(b)'s plain language. Petitioners suggest (Br. 33-34) that the "implied certification" theory discussed in *Universal Health Services* does not apply in securities cases. But while the *term* "implied certification" has come to be associated with False Claims Act litigation, the Court in *Universal Health Services* emphasized the established pedigree and broad applicability of the principle that liability can be imposed for "representations that state the truth only so far as it goes, while omitting critical qualifying information." 579 U.S. at 188; see *id.* at 188 n.3 ("This rule recurs throughout the common law."). Indeed, the Court identified "securities law" as a "statutory context[]" in which that principle applies. *Id.* at 189 n.3.

B. An Issuer's Omission Of Required Information From An MD&A Can Support Liability Under Rule 10b-5(a) And (c)

"Silence, *absent a duty to disclose*, is not misleading under Rule 10b-5." *Basic*, 485 U.S. at 239 n.17 (emphasis added). But where a regulated party has a duty to disclose, silence *can* be misleading because a reasonable investor will be aware of the duty and will infer from the party's silence that no circumstance for which disclosure is required is actually present. Even if the omission of required information from an MD&A is viewed as silence with respect to the omitted trends or uncertainties, rather than as the communication of a half-truth, issuance of an incomplete MD&A to accomplish such deception is potentially actionable under Section 10(b) and Rule 10b-5(a) and (c).

1. An issuer's failure to disclose trends or uncertainties that Item 303 requires to be disclosed is misleading and potentially actionable under Section 10(b) and Rule 10b-5(a) and (c)

a. This Court has recognized that a defendant may be liable for violating Section 10(b) where he "fails to disclose material information" that he was "under a duty to * * * disclose." *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980); see *id.* at 228-230; see also, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 652 (1997). In *Chiarella*, for instance, the relevant "duty to disclose" derived from "the common-law rule" that corporate "insiders who have obtained confidential information by reason of their position with [a] corporation" may not "take advantage of that information by trading without disclosure." 445 U.S. at 227-229.

The lower courts have recognized that a "duty to disclose" for purposes of Rule 10b-5 may arise from "a statute requiring disclosure," *Oran* v. *Stafford*, 226 F.3d 275, 285 (3d Cir. 2000) (Alito, J.), or from a valid "regulation requiring disclosure," *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015) (citation omitted). See, *e.g.*, *Gallagher* v. *Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001) (when "positive law creates a duty to disclose").[3] That recognition is correct: Given that the common-law rule in *Chiarella* imposed a duty to disclose that could make silence misleading, a statute or regulation—like Regulation S-K—can also impose

[3] Courts adjudicating state-law tort or similar actions also have recognized that statutes or regulations can impose the "duty to disclose" that underlies this theory of liability. See, *e.g.*, *Rodopoulos* v. *Sam Piki Enters., Inc.*, 570 So.2d 661, 665 (Ala. 1990); *Glazer* v. *Dress Barn, Inc.*, 873 A.2d 929, 961 (Conn. 2005); *Lindner Fund, Inc.* v. *Waldbaum, Inc.*, 624 N.E.2d 160, 161 (N.Y. 1993).

such a duty. If Congress or the SEC required issuers to disclose any tender offer within 24 hours, a reasonable investor would understand an issuer's silence to mean that no tender offers had been made more than 24 hours earlier. Under petitioners' approach, however, an issuer would not commit securities fraud even if it deliberatively deceived potential investors by keeping a tender offer secret, in violation of the applicable statute or rule.

b. The operative terms in Section 10(b) and Rule 10b-5 comfortably encompass filings with omissions in breach of a regulatory duty to disclose. Section 10(b) prohibits "any manipulative or deceptive device or contrivance in contravention of" SEC rules. 15 U.S.C. 78j(b). Subsections (a) and (c) of Rule 10b-5 make it unlawful "[t]o employ any device, scheme, or artifice to defraud," and "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit." 17 C.F.R. 240.10b-5(a) and (c). Within those provisions, a "'device' * * * is simply '[t]hat which is devised or formed by design'; a 'scheme' is a 'project,' 'plan[,] or program of something to be done'; and an 'artifice' is 'an artful stratagem or trick.'" *Lorenzo* v. *SEC*, 139 S. Ct. 1094, 1101 (2019) (citation omitted; brackets in original). "The words 'act' and 'practice' in subsection (c) are similarly expansive." *Ibid.* (citation omitted). "[D]eceit" means "[t]he act of intentionally leading someone to believe something that is not true," and "fraud" means "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Black's Law Dictionary* 510, 802 (11th ed. 2019) (emphasis omitted). An issuer that deliberately files required reports that omit material adverse information, in a legal context where reasonable investors would infer from nondisclosure that no such adverse information exists, engages in acts of "fraud" and "deceit" within the usual meaning of those terms. See *O'Hagan*, 521 U.S. at 654 (validating theory of "[d]eception through nondisclosure").

c. Disclosure requirements under federal securities laws most obviously benefit investors by inducing issuers and other regulated parties to disclose information that is relevant to investment decisions. But those requirements can also benefit investors even where no disclosures are made, by allowing investors to infer with confidence that the types of events for which disclosure is required have not occurred. A reasonable investor thus will view silence differently in a legal context that includes significant disclosure requirements than in an unregulated environment. Yet under petitioners' approach, unscrupulous parties could exploit the very trust that disclosure requirements are designed to foster by engaging in strategic omissions that they expect investors to misconstrue. If that approach were accepted, disclosure obligations "designed to protect investors even when there is no fraud, would afford a shelter or sanctuary for those who defraud investors." *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951) (Frank, J.).

2. *Petitioners offer no sound basis for exempting noncompliance with disclosure duties from potential liability under Section 10(b) and Rule 10b-5*

a. Petitioners contend (Br. 22) that silence can violate Rule 10b-5 *only* when the omitted information is "necessary to make affirmative statements not misleading." Although that condition is satisfied here (see pp. 9-18, *supra*), nondisclosure standing alone can also support Rule 10b-5 liability in appropriate circumstances.

As explained above, the Court recognized in *Chiarella* that silence can be misleading where a duty to disclose exists. 445 U.S. at 228-230. The Court's reasoning is not logically limited to unlawful nondisclosure that *also* renders affirmative statements misleading. *Ibid.*; see *Basic*, 485 U.S. at 239 n.17 ("Silence, *absent a duty to disclose*, is not misleading under Rule 10b-5.") (emphasis added).

Petitioners emphasize (Br. 22) this Court's statement that Section 10(b) and Rule 10b-5(b) themselves do not "create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 45 (2011). Rule 10b-5(b) requires disclosure only where nondisclosure would render affirmative statements misleading. See *ibid.* But where some *other* source of law creates a disclosure obligation, noncompliance can deceive investors in the manner described above, by leading them to believe that the events for which disclosure is required have not occurred.

b. Petitioners also observe (Br. 24) that subsection (b) of Rule 10b-5 is the subsection that "expressly addresses speech—both the disclosure of and the failure to disclose information." Invoking the interpretive canon that specific provisions control over general ones, petitioners argue (*ibid.*) that "a claim based solely on speech must meet the express limitations of subsection (b)" and cannot be brought under "the more general subsections (a) and (c)." Petitioners do not dispute, however, that their alleged conduct falls within the literal coverage of subsections (a) and (c). And this Court recently rejected petitioners' premise that each of Rule 10b-5's subsections "should be read as governing different, mutually exclusive, spheres of conduct." *Lorenzo*, 139 S. Ct. at 1102. Instead, "th[e] Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws." *Ibid.*

The employee held liable in *Lorenzo* had sent e-mails containing false information "at the direction of his boss, who supplied the content and 'approved' the messages." 139 S. Ct. at 1099. The Court decided the case on the assumption that the employee was not the "maker" of the statements and therefore could not be held liable under subsection (b) of Rule 10b-5. *Id.* at 1100. The Court held, however, that "dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5" so long as the other prerequisites to liability are established. *Ibid.* Here, respondent alleges a deliberate scheme to prepare and disseminate misleading MD&As to potential investors with the intent to defraud. If liability under subsections (a) and (c) can be premised on the defendant's dissemination of misleading statements made by others (as in *Lorenzo*), it can surely be premised on petitioners' dissemination of their own misleading financial reports.

C. The SEC's Longstanding Position Supports The Availability Of Section 10(b) Liability Here

For decades, the SEC's consistent position in administrative proceedings, judicial proceedings, and regulations has been that a violation of Item 303 or other SEC disclosure obligation can be the predicate for a Rule 10b-5 claim. Regulated parties therefore have long been on notice that Rule 10b-5 liability may attach in the circumstances here. In construing Rule 10b-5, this Court has previously given weight to the SEC's longstanding interpretations. See *Lorenzo*, 139 S. Ct. at 1102; *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002).

In numerous instances, the SEC has instituted administrative proceedings and imposed sanctions under Rule 10b-5 based on omissions from an MD&A in violation of Item 303. For example, in *In re Fitzpatrick*, Exchange Act Release No. 34,865, 57 SEC Docket 2178 (Oct. 20, 1994), the SEC concluded that two executives had violated Rule 10b-5 by recklessly or knowingly filing an MD&A that omitted material information required by Item 303. *Id.* at 2182-2183. See also, *e.g.*, *In re Russell*, Exchange Act Release No. 36,280, 60 SEC Docket 770, 772-773 (Sept. 26, 1995); *In re Valley Sys. Inc.*, Exchange Act Release No. 36,227, 60 SEC Docket 541, 544 (Sept. 14, 1995); *In re Westwood One, Inc.*, Exchange Act Release No. 33,489, 55 SEC Docket 2350, 2359 (Jan. 19, 1994).

The SEC likewise has brought Rule 10b-5 enforcement actions based on violations of other disclosure obligations. For instance, in *In re Ciro Inc.*, Exchange Act Release No. 34,767, 57 SEC Docket 1893 (Sept. 30, 1994), the Commission found that a company had violated Rule 10b-5 by filing Forms 10-K that knowingly "failed to disclose that [the company's president and chief executive officer] had filed for personal bankruptcy in October 1987, as required by Item 401(f) of Regulation S-K." *Id.* at 1896.

The SEC has long taken the same position in court. In *Basic*, the SEC argued that a duty to disclose exists "where regulations promulgated by the Commission require disclosure," giving as an example another provision (Item 504) of Regulation S-K. SEC Amicus Br. at 7, *Basic*, *supra* (No. 86-279); see *id.* at 7 n.3. And in *Leidos*, which settled before oral argument, the United

States filed a brief taking the same position that it advances here. See U.S. Br. at 8-33, *Leidos*, *supra* (No. 16-581).

Similarly, in *SEC* v. *Conaway*, 698 F. Supp. 2d 771 (E.D. Mich. 2010), the SEC brought a successful Rule 10b-5 suit in district court based in part on a company's "fail[ure] to disclose in the MD & A that [it] had experienced a material liquidity event in the third quarter." *Id.* at 822 (citation and emphasis omitted). And in *SEC* v. *Salix Pharmaceuticals, Ltd.*, No. 18-cv-8886 (S.D.N.Y. 2018), the Commission obtained a judgment in a Rule 10b-5 suit based in part on the same basic theory. See D. Ct. Doc. 1, at 26-28, 33 (Sept. 28, 2018); D. Ct. Doc. 5, at 2 (Apr. 4, 2019).

Finally, the SEC has promulgated regulations premised on the understanding that regulatory disclosure requirements impose a duty to disclose for purposes of Rule 10b-5. For example, Regulation FD mandates that an issuer's disclosure of material nonpublic information must be made to all investors simultaneously. See 17 C.F.R. 243.100. In imposing that obligation, the SEC created a safe harbor providing that "[n]o failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of Rule 10b-5." 17 C.F.R. 243.102. That regulation presupposes that, without a safe harbor, a violation of Regulation FD's disclosure requirement could give rise to Rule 10b-5 liability. The SEC explained that it had designed the safe harbor to address concerns about "the prospect of private liability for violations of Regulation FD," and that it intended to distinguish "other reporting requirements under Section 13(a) or 15(d) *which do create a duty to disclose for purposes of Rule 10b-5*." 65 Fed. Reg. 51,716, 51,726 & n.86 (Aug. 24, 2000) (emphasis added).

II. PETITIONERS' ADDITIONAL ARGUMENTS LACK MERIT

Petitioners additionally argue that the duty imposed by Item 303 is incompatible with Section 10(b) claims, and that respondent's position is inconsistent with other securities-law provisions and with public policy. Those arguments lack merit.

A. An Item 303 Violation Is A Suitable Predicate For A Section 10(b) Claim When The Plaintiff Establishes All Other Elements Of A Section 10(b) Violation

Petitioners contend that "Item 303 is particularly ill-suited to enforcement through private litigation." Br. 41 (emphasis omitted). That argument is largely based on the misconception (*ibid.*) that, under the court of appeals' analysis, Section 10(b) liability can be based "solely on a violation of Item 303." In fact, as petitioners elsewhere recognize (Br. 40), a complaint alleging a misleading omission in violation of Item 303 "must still satisfy the other elements" of a Section 10(b) claim to be actionable in the Second Circuit. See *Stratte-McClure*, 776 F.3d at 102 ("The failure to make a required disclosure under Item 303 * * * is not by itself sufficient to state a claim for securities fraud under Section 10(b).").

Materiality and scienter are particularly significant requirements. A plaintiff cannot establish materiality under Section 10(b) simply by identifying an Item 303 violation because Item 303's mandate is distinct from the Section 10(b) materiality standard established in *Basic*. See *Oran*, 226 F.3d at 288. Under *Basic*, the materiality of "contingent" events depends on "'a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" 485 U.S.

at 238 (citation omitted). For Item 303, however, the SEC has declined to "adopt[] the probability/magnitude test of *Basic*." 86 Fed. Reg. 2080, 2094 (Jan. 11, 2021); see 54 Fed. Reg. at 22,430 n.27. Instead, the SEC has required issuers to first determine whether a particular known trend or uncertainty is "reasonably likely to occur" and, if so, to disclose the trend or uncertainty if it is "reasonably likely" to have "a material effect on the registrant's financial condition or results of operations." 54 Fed. Reg. at 22,430; see 86 Fed. Reg. at 2093-2094.

Contrary to petitioners' submission (Br. 41), that difference in standards does not make Item 303 "incompatible" with Section 10(b) claims. To prevail on a Section 10(b) claim premised on an Item 303 violation, a plaintiff must prove *both* that Item 303 required disclosure *and* that the omitted information was material under *Basic*. While some omissions will violate Item 303 without satisfying *Basic*—and therefore will not give rise to a meritorious Section 10(b) claim—others will meet both thresholds. See Langevoort & Gulati 1651.[4]

Likewise, a plaintiff cannot establish scienter simply by identifying an Item 303 violation. As petitioners emphasize (Br. 42), because Item 303 does not require disclosure of every known trend or uncertainty, "compliance with Item 303 is often a matter of judgment." For that reason, even when a plaintiff establishes that the

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[4] In *Oran*, the Third Circuit explained that, because Item 303's standard differs from *Basic*, an Item 303 violation "does not *automatically* give rise to a material omission under Rule 10b-5." 226 F.3d at 288 (emphasis added). The court did not address the question presented here—whether an omission that violates Item 303 *and* satisfies *Basic*'s materiality standard can be actionable under Rule 10b-5—because the plaintiffs there had "failed to plead" such an omission. *Ibid.*

defendant's failure to disclose a particular trend or uncertainty violated Item 303, the plaintiff may be unable to show that the violation was committed with scienter, *i.e.*, "intent to deceive, manipulate, or defraud." *Tellabs*, 551 U.S. at 319 (citation omitted); cf. *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 650 (2010) (explaining that "the relation of factual falsity and state of mind" under Section 10(b) is "context specific," and that some false statements will leave it uncertain "whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error"). In private suits, the PSLRA provides additional protection by requiring plaintiffs to plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. 78u-4(b)(2)(A).

Petitioners therefore are wrong in asserting that materiality and scienter do not "provide meaningful pleading-stage limitations." Br. 40. As petitioners recognized (Pet. 21) in their petition for a writ of certiorari, the Second Circuit has dismissed Item 303-based Rule 10b-5 claims in "all but one" post-*Leidos* case (other than this one) because "either the facts did not establish an Item 303 violation in the first place, or the plaintiff could not plead scienter." District courts within the Second Circuit likewise have regularly dismissed such claims for failure to state an Item 303 violation. See Br. in Opp. 16-17 & n.7 (citing cases). This case is the exception, not the rule.

B. The Decision Below Is Consistent With The PSLRA, Section 11 Of The Securities Act, And Section 18 Of The Exchange Act

1. Petitioners contend (Br. 31-33, 38) that the decision below subverts Congress's determination, in enacting the PSLRA in December 1995, to "accept[] the

§ 10(b) private cause of action as then defined" but "to extend it no further." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008). But while this case involves a private suit, the gravamen of petitioners' arguments is that their conduct did not violate Section 10(b) and Rule 10b-5. For that reason, as petitioners acknowledge (Br. 30), their proposed categorical bar against Rule 10b-5 claims based on material MD&A omissions would apply equally to SEC enforcement actions.

Contrary to petitioners' implication, the theory of liability here long predates the PSLRA's enactment. Misleading half-truths were treated as actionable misrepresentations even before the SEC promulgated Rule 10b-5 in 1942. See 7 Fed. Reg. 3799, 3804 (May 22, 1942); *Universal Health Services*, 579 U.S. at 188 (citing a 1931 decision as a "classic example" of that principle). And the Court's 1980 decision in *Chiarella* made clear that Rule 10b-5 reached fraud committed by silence in breach of a duty to disclose. 445 U.S. at 228. Accordingly, in numerous pre-PSLRA cases, the SEC imposed penalties under Rule 10b-5 based on violations of a duty to disclose in Regulation S-K (including Item 303). See p. 24, *supra* (citing cases). Recognizing that an Item 303 violation can give rise to a Rule 10b-5 claim thus "does not alter the elements of the Rule 10b-5 cause of action" but instead "maintains the action's original legal scope." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

In any event, nothing in *Stoneridge* suggests that a private Section 10(b) plaintiff must identify a pre-PSLRA proceeding in which liability was premised on the same legal theory that the plaintiff seeks to advance. In *Stoneridge*, the Court "declined to extend

Rule 10b-5 liability to entirely new categories of defendants"—aiders and abettors—"who themselves had not made any material, public misrepresentation." *Halliburton*, 573 U.S. at 275; see *Stoneridge*, 552 U.S. at 158. The Court did not suggest that a primary actor (here, the issuer) could escape liability for securities fraud, either in a private suit or in a government enforcement action, simply by establishing that the precise fact pattern involved had not arisen in pre-PSLRA cases. That rigid approach would contradict post-PSLRA decisions in which the Court has recognized Rule 10b-5 liability based on new fact patterns that implicate established principles. See, *e.g.*, *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (holding that "[t]o sell an option while secretly intending not to permit the option's exercise is misleading" under Rule 10b-5, without suggesting the need for a pre-PSLRA case with similar facts).

2. Petitioners' argument based on Section 11 of the Securities Act of 1933, 15 U.S.C. 77k(a), is likewise misconceived. Section 11 imposes liability on various persons who are associated with a registration statement that "contained an untrue statement of a material fact *or omitted to state a material fact required to be stated therein* or necessary to make the statements therein not misleading." *Ibid.* (emphasis added). Petitioners contend (Br. 25-29, 34) that Congress's failure to include the italicized (or similar) language in Section 10(b) undermines respondent's theory of liability here.

As explained above, an issuer that deliberately discloses some but not all required information on its MD&A engages in "deceptive," "fraud[ulent]," and "misleading" conduct within the plain terms of Section 10(b) and Rule 10b-5, whether the MD&A is viewed as a misleading half-truth or as silence in breach of a duty to disclose. 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. That Section 11 uses somewhat different language in the more specific context of registration statements accompanying initial offerings provides no basis to decline to give Section 10(b) and Rule 10b-5—"'catchall' anti-fraud provision[s]," *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983)—their natural reading.

Precedent also forecloses petitioners' attempt to limit Section 10(b)'s scope through a comparison with Section 11. This Court has found "no reason to carve out an exception to § 10(b) for" forms of "conduct [that] may also be actionable under § 11." *Huddleston*, 459 U.S. at 382-383. "It would be anomalous indeed if the special protection afforded to purchasers in a registered offering by the 1933 Act were deemed to deprive such purchasers of the protections against manipulation and deception that § 10(b) makes available to all persons who deal in securities." *Id.* at 383.

Nor would giving Section 10(b) its natural reading allow evasion of Section 11's "procedural restrictions." Pet. Br. 27 (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 (1976)). "[A] § 10(b) plaintiff carries a heavier burden than a § 11 plaintiff" because "he must prove that the defendant acted with scienter." *Huddleston*, 459 U.S. at 382. The requirement that a Section 10(b) plaintiff prove that additional element ensures that "§ 10(b) actions" do not risk "circumvention" of Section 11. *Id.* at 384.

Petitioners' reliance (Br. 26-27) on *Hochfelder* is misplaced. There, the Court rejected the SEC's argument that Section 10(b) applies to negligent conduct, explaining that "the language of § 10(b)" itself "clearly connotes intentional misconduct." *Hochfelder*, 425 U.S. at

201. The Court then observed that "[t]he express recognition of a cause of action premised on negligent behavior in § 11 stands in sharp contrast to the language of § 10(b), and significantly undercuts the Commission's argument." *Id.* at 208. That reasoning provides no support for petitioners' attempt to read Section 10(b) *contrary* to its plain "language." *Ibid.*

3. Petitioners' invocation (Br. 30-31) of Section 18 of the Exchange Act fares no better. Section 18(a) imposes liability on any person who makes a materially "false or misleading" "statement" "in any application, report, or document filed pursuant to" a regulatory obligation. 15 U.S.C. 78r(a). Petitioners contend (Br. 30) that, because Section 18(a) addresses regulatory disclosures and "does not mention omissions at all," there can be no Section 10(b) liability for material omissions that violate disclosure regulations.

That argument is unpersuasive. Petitioners' invocation of Section 18 is yet another attempt to read into Section 10(b) implicit limits that the statutory text does not contain, even though the Court has consistently recognized the "considerable overlap" between Section 10(b) and "related provisions of the securities laws." *Lorenzo*, 139 S. Ct. at 1102. Indeed, the Court has rejected previous requests to restrict the scope of Rule 10b-5 based on Section 18(a)'s elements. See *Halliburton*, 573 U.S. at 270. Contrary to petitioners' suggestion (Br. 31), the Court in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), relied on Section 18(a) when refusing to imply a "cause of action for damages under § 17(a)," *id.* at 562—not in construing Rule 10b-5.

C. Petitioners' Policy Arguments Provide No Basis For Exempting This Form Of Securities Fraud From Section 10(b) And Rule 10b-5

Petitioners' various policy arguments (Br. 30, 40, 45-46) "are more appropriately addressed to Congress." *Halliburton*, 573 U.S. at 277. They are also unpersuasive on their own terms.

Petitioners contend (Br. 30) that, because the SEC "has the power to enforce disclosure requirements" through 15 U.S.C. 78u-2, there is no "need" for Rule 10b-5 suits—whether by private plaintiffs or the SEC—in cases like this one. But "meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions." *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 478 (2013). And the SEC has additional sanctions at its disposal when it pursues an action under Section 10(b). *E.g.*, 15 U.S.C. 78u(d)(2) (bar on serving as officer or director); 17 C.F.R. 230.405 (loss of regulatory benefits of being a "well-known seasoned issuer"); 17 C.F.R. 230.262(a)(5) and 230.506(d)(1)(iv) (disqualification from certain securities offerings). Where the SEC can prove all elements of a Section 10(b) violation, including scienter, it may have good reason to proceed under Section 10(b) and seek additional penalties.

Petitioners also speculate that affirming the decision below will "turn every regulatory violation into a costly class action," Br. 40, leading to "extortionate litigation," Br. 46. But since 2015, the Second Circuit—a hub for securities litigation—has embraced the position that respondent takes here. See *Stratte-McClure*, 776 F.3d at 101-104. And as explained above, the vast majority of

Item 303-based claims brought within that interval have been dismissed. See p. 28, *supra*.

Accepting petitioners' position would create a significant loophole in the federal securities laws by exempting from Section 10(b)'s coverage conduct that is "plainly fraudulent." *Lorenzo*, 139 S. Ct. at 1102. Under petitioners' approach, an issuer could deliberately omit information required by Item 303 to dupe investors into believing that the security was less risky than it actually was. And petitioners' theory would logically extend to *every* violation of periodic disclosure rules. That result would contradict "the basic purpose behind [securities] laws: 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.'" *Id.* at 1103 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MEGAN BARBERO
General Counsel
MICHAEL A. CONLEY
Solicitor
JEFFREY A. BERGER
Assistant General Counsel
RACHEL M. MCKENZIE
Senior Appellate Counsel
Securities and Exchange Commission

ELIZABETH B. PRELOGAR
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
EPHRAIM A. MCDOWELL
Assistant to the Solicitor General

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APPENDIX

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1. 15 U.S.C. 78j provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropri-

[1] So in original. Probably should be followed by a comma.

ate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk. Paragraph (1) of this subsection shall not apply to security futures products.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rule promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

2. 17 C.F.R. 240.10b-5 provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.