No. 22-1165

In The Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORPORATION, *ET AL.*,

Petitioners,

v.

MOAB PARTNERS, L.P., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
JOHN M. MASSLON II
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302

LYLE ROBERTS
Counsel of Record
GEORGE E. ANHANG
JACOB M. COATE
SHEARMAN & STERLING LLP
401 9th Street, NW
Washington, DC 20004
(202) 508-8108
lyle.roberts@shearman.com

WILLIAM MARSH
SHEARMAN & STERLING LLP
2601 Olive Street, 17th Floor
Dallas, TX 75201

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a non-profit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law.

To that end, WLF often appears as an *amicus curiae* before this Court in key cases raising the proper scope of the federal securities laws. *See*, *e.g., Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015). And WLF's Legal Studies Division routinely publishes papers by outside experts on federal securities law. Indeed, WLF previously filed a brief in this Court addressing the identical issue that Petitioners raise here. *See* Amicus Br. of Wash. Legal Fund, *Leidos, Inc. v. Ind. Pub. Ret. Sys.*, No. 16-581, 2017 WL 2839268 (June 28, 2017).

WLF believes that the Second Circuit has wrongly expanded liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b–5, 17 C.F.R. § 240.10b–5(b). This Court should intervene.

SUMMARY OF ARGUMENT

Eight years ago, the Second Circuit held that "a failure to make a required Item 303 disclosure" is "an

---

[1] No counsel for a party authored any part of this brief, in whole or in part. No person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Under Rule 37.2, *amicus curiae* notified counsel for all parties on June 15, 2023, of its intent to file this brief.

omission that can serve as the basis for" a violation of Section 10(b) and Rule 10b–5, the primary securities-fraud provisions of the federal securities laws. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100 (2d Cir. 2015).[2] Item 303 is a Securities and Exchange Commission (SEC) rule that requires issuers to disclose certain known trends and uncertainties. Since then, the Second Circuit has repeatedly reaffirmed that holding, including in the decision below and in a prior case in which the Court granted certiorari (but which settled before argument). *See Leidos, Inc. v. Ind. Pub. Ret. Sys.*, 138 S. Ct. 2670 (2018).

The Second Circuit's approach is legally incorrect. As the plain text and this Court's precedent make clear, Rule 10b–5 prohibits only false statements and half-truths. A speaker must make an affirmative statement that is either false or misleading without further disclosure. Rule 10b–5 does not cover pure omissions, nor does it serve as a catch-all for compliance with regulatory disclosure requirements. In holding otherwise, the Second Circuit has defied this Court's guidance and split with every other circuit that has decided the issue. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1055–56 (9th Cir. 2014); *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Alito, J.); *see Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 (11th Cir. 2019). It also has ignored well-established common-law limitations on fraud-by-omission claims.

---

[2] Unless otherwise indicated, all internal quotation marks, alterations, and citations have been omitted.

The Second Circuit's holding that Rule 10b–5 covers alleged omissions under Item 303 also has the worrying result of expanding the accompanying judicially implied private right of action—something this Court has been hesitant to do in other cases. *See, e.g.*, *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Indeed, the Second Circuit's logic arguably opens the door for securities-fraud liability whenever an issuer violates any of the SEC's numerous disclosure requirements. Nothing in the text or judicial interpretation of Rule 10b–5 supports that outcome.

The Second Circuit's approach is not only unlawful, but also counterproductive. It will encourage issuers to bury investors in an avalanche of trivial information to avoid potential federal-securities-fraud liability. This will undermine Item 303's purpose and the SEC's carefully balanced framework that facilitates the flow of useful information to investors. The Second Circuit's approach will also increase the amount of private securities litigation (especially class actions), unduly burdening companies and courts and ultimately harming investors.

This Court should grant Macquarie Infrastructure's Petition for a Writ of Certiorari and resolve a persistent (and important) circuit split that has evaded this Court's review once already.

ARGUMENT

I. The Second Circuit's approach ignores Rule 10b–5's text and this Court's precedent.

A. Rule 10b–5 does not impose liability for pure omissions.

Rule 10b–5 prohibits a securities issuer from "mak[ing] any untrue statement of a material fact" or from omitting "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). In short, it forbids false statements and half-truths. *United States v. Laurienti*, 611 F.3d 530, 539 (9th Cir. 2010). It does *not* prohibit pure omissions. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44–45 (2011). "Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under these provisions by controlling what they say to the market." *Id.* This Court's precedent instructs that, for Rule 10b–5, silence is a safe harbor from liability.

Item 303, as relevant here, requires management to describe, in Form 10-Ks and Form 10-Qs, "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).[3]

---

[3] Item 303 was amended in 2021. Unless otherwise noted, this brief cites the current version.

The differences between Rule 10b–5 and Item 303 are legion. Rule 10b–5 prohibits only false statements and half-truths, while Item 303 requires affirmative disclosures. The SEC promulgated the regulations at different times and under different statutes.[4] The materiality standards for Rule 10b–5 and for Item 303 "differ considerably" and "[m]anagement's duty to disclose under Item 303 is much broader than what is required under [Rule 10b–5]." *NVIDIA*, 768 F.3d at 1055; *see Oran*, 226 F.3d at 288. Indeed, the SEC has long maintained that this Court's materiality jurisprudence for Rule 10b–5 is "inapposite" to Item 303. *See NVIDIA*, 768 F.3d at 1055 (quoting Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 34–26831, 54 Fed. Reg. 22427, 22430 n.27 (May 24, 1989)).[5] Finally, unlike Rule 10b–5, there is no implied private right of action to enforce Item 303. *E.g.*, *Oran*, 226 F.3d at 287 ("Neither the language of [Item 303] nor the SEC's interpretative releases construing it suggest that it was intended to establish a private cause of action, and courts construing the

---

[4] The SEC first issued Rule 10b–5 in 1948 (Employment of Manipulative and Deceptive Devices, 13 Fed. Reg. 8177, 8183 (Dec. 22, 1948)) pursuant to The Securities Exchange Act of 1934 (48 Stat. 881). It first issued Item 303 in 1982 (Adoption of Integrated Disclosure System, 47 Fed. Reg. 11380-01, 11411 (Mar. 16, 1982)) pursuant to the Securities Act of 1933 (48 Stat. 77).

[5] Although the SEC amended Item 303's materiality requirement in 2021, it expressly disclaimed any alignment with this Court's materiality standard for Rule 10b–5. Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, 2094 (Jan. 11, 2021) ("We are not, as recommended by one commenter, adopting the probability/magnitude test of *Basic*.").

provision have unanimously held that it does not do so."). The SEC has sole enforcement authority for Item 303 violations under Section 13(a) of the Exchange Act.

Despite these many differences and the lack of a private action, enterprising plaintiffs have tried to bootstrap Item 303 to Rule 10b–5 by arguing that a failure to disclose "known trends or uncertainties" under Item 303 can support a Rule 10b–5 violation. *See Oran*, 226 F.3d at 287. Unsurprisingly, most other circuits have rejected this argument. *NVIDIA*, 768 F.3d at 1054; *Oran*, 226 F.3d at 286, n.6; *see Carvelli*, 934 F.3d at 1331; *see also Mun. Emps. Ret. Sys. v. Pier 1 Imports, Inc.*, 935 F.3d 424, 436 (5th Cir. 2019) (explaining that "[w]e have never held that Item 303 creates a duty to disclose under the Securities Exchange Act" but ultimately not deciding the issue). Most district courts have come to the same conclusion.[6]

These courts are correct. As the plain text of the rule and this Court's precedent confirm, Rule 10b–5 is not a rule of disclosure.[7] *Matrixx Initiatives*, 563 U.S.

---

[6] *See, e.g.*, *Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 583 (E.D. Va. 2006); *Markman v. Whole Foods Mkt., Inc.*, No. 15-cv-681, 2016 WL 10567194, at *10 (W.D. Tex. Aug. 19, 2016); *In re SCANA Corp. Sec. Litig.*, 17-cv-2616, 2019 WL 1427443, at *10–11 (D.S.C. Mar. 29, 2019).

[7] If there were any doubt about this, other provisions of the securities laws resolve that doubt. Like Section 10(b) and Rule 10b–5, Section 11 of the Securities Act of 1933, which deals with certain registration statements, imposes liability for "an untrue statement of a material fact" in a registration statement or the omission of a material fact "necessary to make the statements therein not misleading." 15 U.S.C. § 77k. But unlike

at 44–45. And Item 303 does not convert it into one. In sum, "Item 303 is not a magic black box in which inadequate allegations under Rule 10b–5 are transformed, by means of broader and different SEC regulations, into adequate allegations under Rule 10b–5." *Ash v. PowerSecure Int'l Inc.*, No. 14-cv-92, 2015 WL 5444741, at *11 (E.D.N.C. Sept. 15, 2015).

B. The Second Circuit has extended Rule 10b–5 liability to pure omissions, defying Rule 10b–5's text and this Court's precedent.

Unlike its sister circuits, the Second Circuit has held that the failure to make a disclosure under Item 303 can trigger Rule 10b–5 liability.[8] *Stratte-McClure*, 776 F.3d at 100. In *Stratte-McClure*, the Second Circuit reasoned that a reasonable investor would know that Item 303 requires the disclosure of certain known trends. *See id.* at 102. So, without such disclosures, a reasonable investor would conclude that no known trends exist, thus rendering the report misleading. *Id.* Through this strained logic, the Second Circuit has alchemized an omission under Item 303 into a Rule 10b–5 half-truth.

In substance, though, the Second Circuit's approach imposes liability for a pure omission,

---

Section 10(b) and Rule 10b–5, Section 11 also imposes express liability if the registration statement "omitted to state a material fact required to be stated therein." *Id.* The same is true of Section 12 of the Securities Act of 1933. 15 U.S.C. § 77I. Congress knows how to impose liability for pure omissions when it wants to.

[8] Rule 10b–5's other elements—like materiality, scienter, and reliance—still must be met. Although, as discussed below, these additional requirements do little to mitigate the Second Circuit's error.

something Rule 10b–5, by its plain language, does not do. A pure omission is a complete failure to make a statement, as contrasted with a half-truth, which involves making an affirmative statement that is misleadingly incomplete. *See, e.g., Litwin v. Blackstone Grp. L.P.*, 634 F.3d 706, 718–19 (2d Cir. 2011); *see also* Restatement (Second) of Torts § 551 (1977) (explaining that fraud liability arises from a pure omission where one "fails to disclose to another a fact . . . [in circumstances in which it is] *as though* he had *represented the nonexistence* of the matter that he has failed to disclose") (emphasis added)). The Second Circuit's explanation of Rule 10b–5 liability in *Stratte-McClure* mirrors the concept of a pure omission. Because Item 303 is mandatory, the Second Circuit reasoned, "a reasonable investor would interpret *the absence* of an [Item 303] disclosure *to imply the nonexistence* of known trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenue or income from continuing operations." 776 F.3d at 102 (emphasis added).

The Second Circuit's opinion here removes any doubt about whether *Stratte-McClure* imposed Rule 10b–5 liability for pure omissions. The Second Circuit said (wrongly) that Rule 10b–5 "*prohibit[s] material omissions*" and that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis for claims under [Rule 10b–5]." Pet. App. 8a (emphasis added). Further, the Second Circuit separated out Item 303's disclosure duty and Rule 10b–5's half-truth prohibition as *separate* bases for liability. The Second Circuit reasoned that there were "two" actionable circumstances for omissions: (1) when there is "a statute or regulation requiring disclosure" and (2) when "a company speaks on an issue or topic, there is a duty to tell the whole truth." Pet. App. 6a. And in analyzing this case, the Second Circuit discussed in separate sections Item 303's regulatory duty and Plaintiffs' half-truth theory. *Compare* Pet. App. 7a, *with* 10a. This confirms that, whatever label *Stratte-McClure* may have used, the Second Circuit has expanded Rule 10b–5 to cover pure omissions.

The Second Circuit's approach does not fit with Rule 10b–5's half-truth category. Half-truth liability is imposed only when a declarant speaks on a particular topic but omits information about the same topic, thus making the statement misleading. *See, e.g.*, *In re Pharm., Inc. Sec. Litig.*, No. 04-12581, 2007 WL 951695, at *4 (D. Mass. Mar. 28, 2007). Likewise, the Private Securities Litigation Reform Act of 1995 mandates that a Rule 10b–5 plaintiff identify exactly which specific statements are misleading and the reason each such statement is misleading. 15 U.S.C. § 78u–4(b)(1)(B). The Second Circuit's approach requires none of this. All a plaintiff must do is establish a failure to disclose under Item 303 and then a Form 10-Q or Form 10-K filing somehow becomes misleading, with no specificity as to any particular misstatements required.

The Second Circuit's reliance on this Court's decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) is unavailing. *Stratte-McClure* cites this Court's statement in *Basic* that "silence, *absent a duty to disclose*, is not misleading under Rule 10b–5," reasoning that Item 303 imposed such a duty. 776 F.3d at 100–01 (quoting 485 U.S. at 239 n.17 (emphasis added)). Yet it is implausible that, via footnote *dictum*, the *Basic* Court was rewriting Rule 10b–5 to be a rule of disclosure and simultaneously eviscerating the principle that a company can control its Rule 10b–5 exposure through what it says to the market. And, indeed, the Court has since made clear that it was doing no such thing. In *Matrixx*, the Court relied on the same language from *Basic* while noting that "[e]ven with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under [Rule 10b–5] by controlling what they say to the market." 563 U.S. at 45.

The relied-upon language from *Basic* is better understood as referring to other established duties to disclose. For example, a duty to disclose can arise from a fiduciary relationship. Indeed, earlier in *Basic*, the Court cited *Dirks v. SEC*, 463 U.S. 646 (1983) with an explanatory parenthetical stating: "duty to disclose." 485 U.S. at 231. In *Dirks*, summing up its prior precedent, the Court explained that a "duty to disclose" insider trading under Section 10(b) arises "from the existence of a fiduciary relationship." 463 U.S. at 654. Also, a person who makes an affirmative statement is said to be under a "duty to disclose" the missing information. *See Laurienti*, 611 F.3d at 541. Against this backdrop, *Basic*'s duty-to-disclose language most likely meant the fiduciary duty referenced earlier in the opinion or the duty to clarify half-truths in Rule 10b–5 itself and not—as the Second Circuit reasons—an open invitation to extend Rule 10b–5 liability to *any* of the SEC's numerous regulatory disclosure obligations. *See also Oran*, 226 F.3d at 285–86, n.6 (interpreting *Basic*'s language to include "insider trading, a statute requiring disclosure, or an inaccurate, incomplete or misleading prior disclosure" but *not* Item 303).

To be sure, if an issuer makes an affirmative statement about a specific subject and then omits a material "known trend" relating to that subject, the omission may make the affirmative statement misleading and thus give rise to 10b–5 liability. *See FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1305 (11th Cir. 2011); *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 898 (8th Cir. 2002). But Rule 10b–5 does not expose companies to private liability merely because a company omits information—even material information—required under Item 303. In holding otherwise, the Second Circuit departed from Rule 10b–5's text, this Court's settled precedent, and the view of every other circuit court that has decided the issue.

II. The Second Circuit's approach departs from common-law principles.

This Court repeatedly has said that its Section 10(b) jurisprudence is consciously informed by common-law principles of fraud and has looked to common-law principles in setting the contours of omission liability under the federal securities laws.[9] The Second Circuit's approach, though, cannot be squared with the common law.

[9] *See, e.g.*, *Basic*, 485 U.S. at 244 n.22; *Dirks*, 463 U.S. at 653–54; *Chiarella v. United States*, 445 U.S. 222, 227–28 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198–99 (1976); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) ("Presumption Against Change in Common Law.").

At common law, there generally was no cause of action for the nondisclosure of material facts. *See* Frank Coulom Jr.*, Rule 10b–5 and the Duty to Disclose Market Information: It Takes a Thief*, 55 St. John's L. Rev. 93, 96–97 (2012). This rule, based on the principle of *caveat emptor*, rewarded diligence and business savvy. *Id.* There were, however, certain exceptions. As Section 551 of the Restatement (Second) of Torts explains,[10]

> One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and (e) facts basic to the transaction, if he knows that the

---

[10] This Court and others have relied on this articulation. *E.g.*, *Chiarella*, 445 U.S. at 228 n.9; *Olson v. Major League Baseball*, 29 F.4th 59, 81 (2d Cir. 2022).

> other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

In sum, the common law imposed fraud-by-omission liability only when (1) the challenged omission related to a business transaction to which the litigants were parties, and (2) one of five narrow circumstances were present. This approach tracks with this Court's Section 10(b) fraud-by-omission cases, which have likewise involved (1) a transaction to which the defendant was a party and in connection with which the defendant used the omission for personal gain and (2) where there was a special relationship of trust and confidence between the parties, consistent with the first scenario listed in the Restatement. *See Chiarella*, 445 U.S. at 229; *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

The Second Circuit's approach complies with neither of those requirements. Instead, it allows a plaintiff to bring a Rule 10b–5 claim for a failure to disclose Item 303 "known trends" even if the plaintiff and defendant were not parties to a transaction and even if the omission had no bearing on such a transaction. *Cf. In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1272 (10th Cir. 2019) (rejecting state-law fraud-by-omission claim because the litigants were not parties to a business transaction) (citing § 551)). An issuer is not necessarily part of a transaction when it issues a Form 10-Q or Form 10-K disclosure.

The Second Circuit's approach also imposes liability even where none of the five scenarios Section 551 identifies are present. The first scenario requires a fiduciary (or similar) relationship between the parties. But no actionable fiduciary relationship exists between an issuer and its shareholders. *See, e.g.*, *In re Wayport, Inc. Litig.*, 76 A.3d 296, 322–23 (Del. Ch. 2013). The second and third scenarios essentially cover half-truths. But as discussed above, the Second Circuit's approach goes well beyond half-truth liability. The fourth scenario covers an unusual situation that is also unrelated to the Second Circuit's standard. The fifth scenario covers only facts "basic to the transaction," cases "in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap." *Olson*, 29 F.4th at 81 (quoting § 551(2)(e) cmt. j). This scenario, too, is a complete mismatch with merely omitting known trends required under Item 303.

In sum, the Second Circuit's approach imposes liability for omissions well outside what is and has been actionable at common law. Consistent with its prior Section 10(b) jurisprudence following the common law, the Court should reject the Second Circuit's approach.[11]

---

[11] Also, the Second Circuit's conclusion that an omission under Item 303 is actionable under Section 10(b)—when such an omission is not even actionable under basic common-law principles—hardly gives the appropriately "narrow dimensions" to Section 10(b) that the Court has mandated. *See Janus Cap.*, 564 U.S. at 142.

III. The Second Circuit's approach has greatly expanded Rule 10b–5's cause of action and threatens further expansions still.

The Second Circuit's approach unilaterally expands Rule 10b–5's judicially created cause of action, flouting this Court's admonitions and long-established limitations on the power and role of federal courts in this area.

"Neither Rule 10b–5 nor § 10(b) expressly creates a private right of action." *Janus Cap.*, 564 U.S. at 142. Yet "this Court has held that a private right of action is implied under § 10(b)." *Id.* This implied right has not been without controversy, with perceived abuses of private securities litigation prompting Congress to pass the Private Securities Litigation Reform Act of 1995.

This Court has consistently declined to expand the Rule 10b–5 private cause of action. "[C]oncerns with the judicial creation of a private cause of action [under Rule 10b–5] caution against its expansion . . . we are mindful that we must give narrow dimensions to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." *Janus Cap.*, 564 U.S. at 142.

The Second Circuit's approach ignores that warning, significantly expanding the scope of Rule 10b–5 to impose private liability for pure omissions, all without a hint of Congressional approval. This expansion is not only unwise, but it is beyond the Second Circuit's authority. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

The Second Circuit's decision to expand Rule 10b–5 to include Item 303 violations is bad enough. But there is every reason to think it may get worse. The Second Circuit offered two explanations in *Stratte-McClure* for its approach: (1) Item 303 imposes a regulatory "duty to disclose," and (2) because there is such a regulatory duty to disclose, the failure to comply with the regulation automatically renders misleading any document an issuer files with the SEC in which the disclosures are required. 776 F.3d at 101–02. This reasoning is not tied to Item 303 alone and might extend equally to many other SEC disclosure requirements.

The risk of further expansions is not just slippery-slope speculation. In the opinion below, the Second Circuit indicated that failures to disclose under Item 105,[12] which requires companies to disclose in a prospectus a "discussion of the material factors that make an investment in the registrant or offering speculative or risky," may also be actionable under Rule 10b–5. *Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, No. 21-2524, 2022 WL 17815767, at *3 n.2 (2d Cir. 2022) (explaining that the Second Circuit had previously assumed as much without deciding the issue, declining to resolve the issue explicitly, and reversing the district court's decision dismissing Plaintiffs' Item 105 claims). Indeed, plaintiffs in other courts have relied on the Second Circuit's approach in trying to bring Rule 10b–5

---

[12] Item 105 was previously called Item 503. *See* Pet. App. 9a n.2.

claims based on Item 105 omissions. *See Nardy v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01760, 2019 WL 3297467, at *9 (D. Colo. Mar. 29, 2019).

Thus, under the Second Circuit's approach, each new disclosure requirement from the SEC risks further expanding Rule 10b–5's cause of action. To cite just one current example, the SEC has proposed a complex rule requiring companies to include certain climate-related disclosures in their registration statements and annual reports. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022). Under the Second Circuit's approach, issuers could be tagged with private securities fraud litigation for alleged failures to comply with these new and evolving disclosure requirements.

Finally, by tying the scope of Rule 10b–5 to regulatory disclosures, the Second Circuit's approach effectively gives the SEC the unilateral ability to change the scope of the private right of action. In this way too, the Second Circuit's approach is out of step with this Court's Rule 10b–5 precedent, which has "expressed skepticism over the degree to which the SEC should receive deference regarding the private right of action." *See Janus Cap.*, 564 U.S. at 145 n.8 (collecting cases where the Court had "disagreed with the SEC's broad view of § 10(b) or Rule 10b–5").

Despite this Court's instruction that the Section 10(b) and Rule 10b–5 judicially implied private right of action must be construed narrowly, the Second Circuit's approach broadens the right of action and threatens to broaden it further still, seizing a power to create causes of action that belongs rightly with Congress.

IV. The Second Circuit's approach will harm investors and issuers, as well as undermine the SEC's approach to Item 303.

The Second Circuit is not only wrong as a matter of law, but its decision will harm both investors and issuers.

First, the Second Circuit's approach undermines the reasonable application of Item 303, thus harming investors. As this Court has cautioned, an overbroad view of Rule 10b–5's private right of action encourages over-disclosure, "lead[ing] management simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Basic*, 485 U.S. at 231–32. The Second Circuit's approach leads to precisely that result. By imposing private liability for a pure omission—something Section 10(b) and Rule 10b–5 do not otherwise do—the Second Circuit has all but guaranteed that companies will err on the side of disclosing all "known trends," regardless of relevance. There is no consequence for over-disclosure. But the consequence for under-disclosure could be a securities class action that at best will absorb years of a company's time and resources and at worst could impose significant financial liability.

The risk of over-disclosure is enhanced by Item 303's nature. Complying with obligations under securities disclosure laws is always a challenge. *See SEC v. Bausch & Lomb Inc.*, 565 F.2d 8, 9 (2d Cir. 1977) (comparing it to "a fencing match conducted on a tightrope"). And, as the SEC has said, complying with Item 303 "may be particularly challenging." Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295 (Feb. 8, 2010); *see In re Canandaigua Sec. Litig.*, 944 F. Supp. 1202, 1210 (S.D.N.Y. 1996). That is because "Item 303 is broad and ambiguous" and "intentionally general." *See Diehl v. Omega Protein Corp.*, 339 F. Supp. 3d 153, 167 (S.D.N.Y. 2018).

There is a reason for this. The SEC has concluded that this "flexible approach" elicits "more meaningful disclosure and avoids boilerplate discussions." *Id.*; *see* 86 Fed. Reg. 2080, 2094 (emphasizing that the SEC specifically crafted Item 303's requirements to avoid "voluminous disclosures or unnecessarily speculative information"). So, it makes sense that the SEC is Item 303's sole enforcer. The SEC can calibrate its enforcement efforts to promote Item 303's goals—in part by using less draconian measures than litigation to ensure necessary disclosures. Deputizing the plaintiffs' bar to enforce Item 303 will have the opposite effect, turning Item 303's flexible approach in on itself. Again, faced with the specter of pure-omission liability for Rule 10b–5 claims, companies will offer a deluge of information as management seeks to avoid an omission claim by disclosing every conceivable trend.

Second, the Second Circuit's approach will invite more private securities suits. As this Court has recognized, these types of suits "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007). This Court has further acknowledged the risk that "broadly expand[ing] the class of plaintiffs who may sue under Rule 10b–5" enhances the risk that private securities litigation will be used to coerce an "*in terrorem*" settlement. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).[13] Allowing suits to proceed on a pure-omission theory under Item 303 will only exacerbate this problem. Given Item 303's deliberately vague and forward-looking standard, plaintiffs will have little difficulty claiming, with the benefit of hindsight, that an issuer missed a "trend" that later harmed its business.[14]

Third, the Second Circuit's approach injects undue uncertainty. Rule 10b–5's relevant text has remained unchanged since the SEC promulgated it nearly 75 years ago. *Compare* 13 Fed. Reg. 8177, 8183 (Dec. 22, 1948), *with* 17 C.F.R. § 240.10b–5(b). The same cannot be said of the many regulatory securities disclosure requirements. Indeed, the SEC amended Item 303 just two years ago. And the SEC will sometimes shift regulatory disclosure requirements with changes in administration. The practical import is that the Second Circuit's approach makes Rule 10b–5 liability a moving target, further encouraging over-disclosure.

---

[13] Stanford Law School's Securities Class Action Clearinghouse aggregates all securities class actions and reports that nearly half of all securities class actions settle and estimates that such settlements total over $112 billion. SECURITIES CLASS ACTION CLEARINGHOUSE: FILINGS DATABASE, https://securities.stanford.edu/stats.html (last visited June 28, 2023).

[14] It is no answer to say that the Second Circuit's approach still requires a plaintiff to show materiality and scienter. *See In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) ("Materiality and scienter are both fact-specific issues which should ordinarily be left to the trier of fact.").

V. The Court already granted review of this issue once, and the need for review has only increased since then.

Macquarie Infrastructure's petition raises an issue that is both ready for and deserving of this Court's review. In fact, this Court granted review of this precise issue in 2016 but was deprived of the opportunity to provide much-needed clarity by a last-minute settlement before oral argument. *See* Joint Stipulation, *Leidos, Inc.*, 138 S. Ct. at 2670. The last seven years have only reinforced the need for this Court's guidance.

The Second Circuit has doubled down on its approach, firmly entrenching its departure from every other circuit. *See* Pet. 20 (collecting cases). Indeed, as its decision here shows, the Second Circuit has moved even further from this Court's precedent. *See* Pet. App. 6a (suggesting that Item 105 might also support Rule 10b–5 liability); *id.* at 4a–7a (confirming that the Second Circuit's approach is a pure-omission theory of liability).

The circuit split also has deepened, with the Eleventh Circuit joining the Third and the Ninth Circuits on the other side.[15] Yet the split remains clean and uncomplicated: no court of appeals has

---

[15] The split encourages forum shopping, which can be easily done considering that the Second Circuit will be a proper venue for most securities case. Indeed, it has already begun. As the petition notes, the Second Circuit is the preferred destination for Item 303 plaintiffs even as the Ninth Circuit becomes a more popular destination for securities cases more generally. Pet. 13.

sided with the Second Circuit and there remain only two views.[16]

Finally, this issue tends to evade review. Again, the last time the Court granted review of this issue the parties settled before the Court could issue an opinion—allowing the circuit split to persist and deepen in the intervening years. And as Macquarie Infrastructure's petition explains, the posture of other Second Circuit decisions has prevented the issue from returning to this Court. Pet. 21. This Court now has a chance to resolve this critical issue—it should take it.

CONCLUSION

This Court should grant Macquarie Infrastructure's petition and hold that the Second Circuit's approach cannot be reconciled with controlling law.

---

[16] The circuit split is also unlikely to meaningfully develop further. Other courts of appeal have acknowledged the split but declined to take a position. *E.g.*, *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1270 (10th Cir. 2022); *Mun. Emps.*, 935 F.3d at 436; *Gallagher v. Abbot Labs*, 269 F.3d 806, 810 (7th Cir. 2001); *see also In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 402–03 (6th Cir. 1997). But, in any event, the four circuits with the highest volume of securities class actions are the same four circuits who have already taken a position. SECURITIES CLASS ACTION CLEARINGHOUSE: FILINGS DATABASE, https://securities.stanford.edu/stats.html (last visited June 28, 2023); Janeen McIntosh *et al.*, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review* 5 (Jan. 24, 2023), https://bit.ly/3Nyrso6.

Respectfully submitted,

CORY L. ANDREWS
JOHN M. MASSLON II
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302

LYLE ROBERTS
Counsel of Record
GEORGE E. ANHANG
JACOB M. COATE
SHEARMAN & STERLING LLP
401 9th Street, NW
Washington, DC 20004
(202) 508-8108

WILLIAM MARSH
SHEARMAN & STERLING LLP
2601 Olive Street, 17th Floor
Dallas, TX 75201

Counsel for Amicus Curiae

July 3, 2023