No. 22-1165

In the Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORP., JAMES HOOKE, JAY DAVIS, LIAM STEWART, RICHARD D. COURTNEY, ROBERT CHOI, MARTIN STANLEY, NORMAN H. BROWN, JR., GEORGE W. CARMANY, III, HENRY E. LENTZ, OUMA SANANIKONE, WILLIAM H. WEBB, AND MACQUARIE INFRASTRUCTURE MANAGEMENT (USA) INC.,

Petitioners,

v.

MOAB PARTNERS, L.P., ET AL.,
on behalf of itself and all others similarly situated,

Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether the Second Circuit erred in holding—in conflict with decisions of the Third, Ninth, and Eleventh Circuits—that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under § 10(b) of the Securities Exchange Act, even in the absence of an otherwise-misleading statement.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are Macquarie Infrastructure Corporation (MIC); James Hooke, Jay Davis, Liam Stewart, Richard D. Courtney, Robert Choi, Martin Stanley, Norman H. Brown, Jr., George W. Carmany, III, Henry E. Lentz, Ouma Sananikone, and William H. Webb; and Macquarie Infrastructure Management (USA) Inc. (MIMUSA).

Respondent is Moab Partners, L.P., which was the court-appointed lead plaintiff in the district court and the appellant in the Second Circuit.

Barclays Capital Inc.—which, with petitioners, was also a defendant-appellee below—did not participate in the petition for certiorari and is now deemed a respondent under Supreme Court Rule 12.6.

CORPORATE DISCLOSURE STATEMENT

Petitioners filed a corporate disclosure statement in the petition for certiorari. *See* Pet. ii–iii. The information contained in this prior disclosure is accurate, and no amendments are needed at this time.

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INTRODUCTION

This case presents a straightforward question of textual interpretation: Do § 10(b) and Rule 10b-5 provide a claim based solely on a failure to disclose material information? The answer is *no*.

In § 10(b) of the Securities Exchange Act of 1934, Congress outlawed manipulation and deception in the purchase and sale of securities, and it tasked the Securities and Exchange Commission with defining those concepts. *See* 15 U.S.C. § 78j(b). The Commission did so in Rule 10b-5. *See* 17 C.F.R. § 240.10b-5. Rule 10b-5 has three parts, but only one—subsection (b)—applies to claims based entirely on the disclosure or nondisclosure of information. Its scope is clear: liability arises if a speaker "make[s] any untrue statement of a material fact" or "omit[s] 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).

On its face, then, Rule 10b-5 imposes liability for *misrepresentations* and *half-truths*—that is, when a speaker "made" "statements" that are "misleading" by omission. But it does not impose liability for *pure omissions*—that is, when the speaker said nothing on the subject at all.

Comparing Rule 10b-5 with other parts of the securities laws makes this especially clear. Rule 10b-5 does not impose liability for silence, even when the speaker *should* have disclosed the information under SEC regulations. Contrast § 11 of the Securities Act of 1933, which provides for private liability when a registration statement omits "a material fact required to be stated," *as well as* when it omits a material fact "necessary to make the statements therein not misleading." 15 U.S.C. § 77k. In theory, then, a plaintiff

can plead an omission under § 11 by pointing to an SEC regulation that "required" the disclosure. Not so under Rule 10b-5, where the phrase "required to be stated" is conspicuously absent.

Consistent with this language, this Court has read Rule 10b-5 to impose liability for an omission "only when" disclosure of the omitted fact is "necessary 'to make * * * statements made * * * not misleading.'" *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011) (quoting 17 C.F.R. § 240.10b-5(b)). Yes, a failure to disclose can be part of an unlawful "scheme" or "course of business" under the other subsections of Rule 10b-5. That might be the case, for instance, if a defendant actively disseminated someone else's false statements or traded securities based on inside information. But this Court has never applied subsections (a) and (c) to a claim for disclosure or nondisclosure alone—for example, to a dispute about what is or is not in an issuer's financial statements. While Rule 10b-5(a) and (c) may be broad, they necessarily require something more or different than speech or a failure to speak. Any other approach would wipe subsection (b) out of existence.

All this would be clear enough from the text alone. But there is more: This case involves the judicially implied private right of action under § 10(b), which this Court has been loath to expand. Congress effectively froze § 10(b) in place when it passed the Private Securities Litigation Reform Act of 1995 (PSLRA). *See Stoneridge Inv. Partners, LLC* v. *Sci.-Atl., Inc.*, 552 U.S. 148, 166 (2008). We are not aware of *any* case before 1995 that allowed a plaintiff to pursue a claim under § 10(b) based solely on a failure to disclose as required by SEC regulations. Congress did not recognize such a claim in the PSLRA, and this Court must not do so now.

In any event, the disclosure regulation at issue here is a poor candidate for private enforcement under *any* statute. Item 303 of SEC Regulation S-K relates to the management narrative in a company's periodic filings. This provision requires management to disclose "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on the company's financial performance going forward. 17 C.F.R. § 229.303(b)(2)(ii). By its nature, Item 303 does not create a hard-and-fast rule about what to disclose; it requires management to make a series of subjective judgments about what is reasonably likely to happen. At times, disclosure is mandatory; at others, optional. A question about these judgments can give rise to an SEC inquiry and potentially an enforcement action if the Commission finds it warranted. What such a question should *not* do, however, is open the floodgates to potentially crippling private securities fraud liability.

A ruling in MIC's favor would not hamper the Commission's ability to police compliance with Item 303. The Commission has broad power to sanction noncompliance even without § 10(b). Nor would such a ruling immunize misrepresentations or half-truths that relate to "known trends or uncertainties"—the topics that Item 303 addresses. What it would do instead is correct the Second Circuit's erroneous view that Rule 10b-5 gives private plaintiffs a way to enforce SEC disclosure requirements. The Second Circuit's judgment should be vacated, and the case should be remanded for the lower courts to evaluate what should remain of this case.

OPINIONS BELOW

The Second Circuit's decision (Pet. 1a–13a) is not reported but is available at 2022 WL 17815767. The district court's dismissal order (Pet. 14a–48a) is not reported but is available at 2021 WL 4084572.

JURISDICTION

On December 20, 2022, the Second Circuit vacated the district court's dismissal order and remanded the case for further proceedings. Pet. 1a, 4a. MIC timely filed a petition for rehearing on January 3, 2023, and the Second Circuit denied it on January 27, 2023. Pet. 49a–50a. By order dated April 24, 2023, Justice Sotomayor extended the time for the petition to May 30, 2023. The petition was filed on May 30, 2023, and granted on September 29, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit had jurisdiction under 28 U.S.C. § 1291, and the district court had jurisdiction under 28 U.S.C. § 1331.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), as well as Rule 10b-5 (17 C.F.R. § 240.10b-5) and Item 303 of Regulation S-K (17 C.F.R. § 229.303), both promulgated by the Securities and Exchange Commission. These provisions appear in the appendix filed with the petition at Pet. 51a–61a. This brief also refers to many other provisions of the securities laws. For convenience, we provide the following table of the cited sections and their location in the U.S. Code:

Securities Act of 1933	§ 11	15 U.S.C. § 77k
	§ 12(a)(2)	15 U.S.C. § 77l(a)(2)
	§ 12(b)	15 U.S.C. § 77l(b)
	§ 15	15 U.S.C. § 77o
Securities Exchange Act of 1934	§ 10(b)	15 U.S.C. § 78j(b)
	§ 13(a)	15 U.S.C. § 78m(a)
	§ 18	15 U.S.C. § 78r
	§ 20(a)	15 U.S.C. § 78t(a)
	§ 20A	15 U.S.C. § 78t-1
Private Securities Litigation Reform Act	§ 21D	15 U.S.C. § 78u-4
Sarbanes-Oxley Act of 2002	§ 906	18 U.S.C. § 1350

STATEMENT OF THE CASE

I. The Regulatory Scheme

A. Overview of the Federal Securities Laws

In 1929, the American stock market suffered a historic crash. Seeking to address some of its causes and prevent further catastrophe, Congress enacted the Securities Act of 1933 and its successor, the Securities Exchange Act of 1934 ("Exchange Act"). Congress hoped this landmark legislation would "protect investors against fraud" and promote market integrity by regulating the exchange of securities, "impos[ing] regular reporting requirements" on publicly traded companies, and providing consequences when such disclosure is fraudulent, improper, or incomplete. *Ernst &*

Ernst v. *Hochfelder*, 425 U.S. 185, 195 (1976). The Securities Act and Exchange Act form the bedrock of the federal securities laws, serving distinct but complementary roles.

The Securities Act regulates the primary securities market—the "initial distributions" in which investors buy securities directly from a primary issuer. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 171 (1994). Among other things, it requires issuers to register their securities (15 U.S.C. § 77e) and comply with certain disclosure requirements (*e.g.*, *id.* § 77j(c)).

While its predecessor concerns the primary market, the Exchange Act mostly "regulates post-distribution trading," or securities trading on the secondary market. *Cent. Bank*, 511 U.S. at 171. The Exchange Act established the Commission itself, giving it broad authority. 15 U.S.C. § 78d. This includes the power to register, regulate, and oversee brokerage firms, clearing agencies, self-regulatory organizations, and transfer agents. And in § 13(a), the Exchange Act empowers the Commission to establish a system of regular public reporting. *See id.* § 78m(a).

The Exchange Act's § 18(a) provides the "principal express civil remedy for misstatements in reports." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 574 (1979). It provides a private right of action for statements that are "false or misleading with respect to any material fact." 15 U.S.C. § 78r(a). The Exchange Act also includes § 10(b), which this Court has called a "'catchall' clause." *Ernst & Ernst*, 425 U.S. at 203. This section makes it unlawful "[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 such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b).

In 1942, wielding its delegated authority under § 10(b), the Commission adopted Rule 10b-5, its primary tool in combating securities fraud. *See* 17 C.F.R. § 240.10b-5. The rule prohibits certain conduct "in connection with the purchase or sale of any security." *Ibid.* Subsection (a) prohibits "any device, scheme, or artifice to defraud." *Id.* § 240.10b-5(a). Subsection (b) prohibits making materially false statements or omitting to state material facts necessary to make the statements made not misleading. *Id.* § 240.10b-5(b). Subsection (c) outlaws "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." *Id.* § 240.10b-5(c).

Neither the text of § 10(b) nor the text of Rule 10b-5 explicitly provides a cause of action for private plaintiffs. But in 1971, this Court implied one. *See Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). In doing so, the Court "acquiesced" to what had become an established practice among lower courts—recognizing a private plaintiff's "implied" right to enforce § 10(b). *Touche Ross*, 442 U.S. at 577 n.19 (examining *Bankers Life*, 404 U.S. at 6, 13 n.9). But this Court's decisions since *Bankers Life* have illustrated the narrow contours of this judicially implied private right. *See, e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 754–55 (1975) (private right of action does not apply to offerees that neither purchased nor sold any of the offered shares); *Cent. Bank*, 511 U.S. at 191 (private right of action does not include a right to sue aiders and abettors of securities fraud).

Congress examined the scope of the private right of action for itself in 1995, when it enacted the PSLRA. Pub. L. 104-67, 109 Stat. 737. "As a check against abusive litigation," Congress crafted the PSLRA to govern private securities fraud class actions, laying out

"[e]xacting pleading requirements" as a "control measure[]" and codifying the private right's essential elements as they were then defined. *Tellabs, Inc.* v. *Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007). The PSLRA's structure demonstrates that Congress "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166. Thus, a plaintiff who could not sue before the PSLRA cannot sue today. *See id.* at 162–63. Similarly, if courts did not recognize a particular "theory of liability" before the PSLRA, that theory cannot be enforced by a private plaintiff today. *Janus Cap. Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 146 (2011). After all, "[t]he § 10(b) private cause of action is a judicial construct," so "[t]he decision to extend [it]" beyond the scope established in 1995 is "for Congress, not [this Court]." *Stoneridge*, 552 U.S. at 164–65. The PSLRA effectively froze the implied private right of action as it was in 1995.

B. The Exchange Act's Disclosure Requirements

Section 13(a) of the Exchange Act authorizes the Commission to demand regular public reporting. *See* 15 U.S.C. § 78m(a). The Commission has the power to impose disclosure requirements that are "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." *Ibid.* The Commission also has broad authority to enforce these requirements. *See, e.g.*, *Sec. & Exch. Comm'n* v. *McNulty*, 137 F.3d 732, 740–41 (2d Cir. 1998) (permanent injunctions); *Sec. & Exch. Comm'n* v. *Teo*, 746 F.3d 90, 109 (3d Cir. 2014) (disgorgement and prejudgment interest); *see also, e.g.*, 15 U.S.C. §§ 78u-2(a)(2) (civil penalties), 78u-3(a) (cease-and-desist orders).

Historically, the Commission limited mandatory disclosures to historical financial information, sometimes called "hard" information. *See* Sec. & Exch. Comm'n, Disclosure to Investors: A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts, at 96 (1969). This information is now encompassed largely by the accounting and disclosure requirements of Regulation S-X, 17 C.F.R. § 210.

It was only in 1977 that the Commission began to require the disclosure of "soft" or qualitative information, adopting Regulation S-K, 17 C.F.R. § 229. *See* Adoption of Disclosure Regulation & Amendments of Disclosure Forms and Rules, Securities Act Release No. 5893, 42 Fed. Reg. 65,554 (Dec. 30, 1977). Today, Regulation S-K is intricate, with hundreds of disclosure requirements.

Among other things, Regulation S-K requires a "narrative description" or analysis by management of the issuer's business operations. *Id.* at 65,558. The requirements for this Management Discussion and Analysis (MD&A) "are intentionally general, reflecting the Commission's view that a flexible approach elicits more meaningful disclosure and avoids boilerplate discussions." Management's Discussion & Analysis of Financial Condition & Results of Operations, Exchange Act Release No. 26831 ("1989 Guidance"), 54 Fed. Reg. 22,427, 22,427 (May 24, 1989). The MD&A section of a financial report is "intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company." *Id.* at 22,428.

Item 303 of Regulation S-K requires information on various topics, including any known trends and uncertainties that are likely to have material future effects on the company's financial position. *See* 17 C.F.R. § 229.303. The language of this requirement has been

amended since this litigation began. The earlier version required management 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) (emphasis added). The current version requires management to "[d]escribe 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." *Id.* § 229.303(b)(2)(ii) (2021) (emphasis added).

With or without the amendment, the question whether a filing complies with Item 303 is complex and judgment-laden. *See* Management's Discussion & Analysis, Selected Financial Data & Supplementary Financial Information, Exchange Act Release No. 90459 ("2020 Release"), 2020 WL 7013369, at *19 (Nov. 19, 2020) ("whether a matter is 'reasonably likely'" to have a material impact is "based on 'management's assessment'"). And compliance still requires management to perform a materiality calculus that does not match the one for private rights of action under the securities laws. *Id.* at *21 ("We are not, as recommended by one commenter, adopting the probability/magnitude test of [*Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)]."). As discussed below, Item 303 was and is a particularly poor candidate for private enforcement.

II. This Litigation

A. Factual Background

MIC was a publicly traded company that owned and operated a portfolio of infrastructure-related businesses. One of these was International-Matex Tank

Terminals (IMTT), which was among the largest providers of third-party bulk-liquid storage services in the United States. IMTT's terminals stored or handled commodity and specialty chemicals, vegetable and tropical oils, and refined petroleum products such as No. 6 oil—a high-sulfur fuel oil sometimes called "black oil." IMTT has been involved in the storage of No. 6 oil since the 1970s—a fact MIC has consistently disclosed (and Moab has conceded). App. 53.

Starting in the 1980s, environmental regulations caused demand for No. 6 oil to decline. But because No. 6 oil is a byproduct of the refining process, it still is produced and must be handled and stored. In fact, as demand for No. 6 oil decreased, the demand for IMTT's storage services for No. 6 oil *increased*. Pet. 18a; App. 76.

In 2008, the International Maritime Organization (IMO)—a United Nations agency charged with regulating global shipping—promulgated "IMO 2020," a proposed regulation that would cap the sulfur content of fuel oil used in shipping at 0.5% by the beginning of 2020. Pet. 18a–19a. This raised questions about No. 6 oil, which contains about 3% sulfur. Some observers predicted that demand for No. 6 oil would be eliminated, but others predicted that emerging technologies could mitigate the excess sulfur. *Ibid.* It also remained possible that IMO 2020 would be revised before it went into effect—or that its effective date would be delayed.

In late 2016—after the beginning of the putative class period—the IMO announced that it had concluded its review of the prospective regulation and "formally fixed" the 0.5% sulfur cap to go into effect in 2020. Pet. 19a. This announcement was "widely reported." *Ibid.* Despite this, IMTT proceeded with business as usual and remained highly successful. Its

No. 6 oil storage tanks remained in demand, with high utilization rates. App. 76.

In late 2017 and early 2018, IMTT experienced a sudden and unexpected decline in demand for storage at one of its facilities, when a larger-than-expected number of IMTT's customers gave notice of their intent not to renew their contracts for storage of No. 6 oil. App. 88–89. As MIC later explained to the market, the reasons for non-renewal had to do with declining demand and reduced production, as the markets began to favor other fuels. App. 88.

On February 21, 2018, MIC announced its successful fourth quarter and year-end 2017 financial results, showing an 8% increase in cash flow. App. 87–88. At the same time, though, MIC announced that it was reducing its 2018 dividend guidance to retain a greater share of its free cash flow to fund its businesses. On this news, MIC's stock price dropped.

The next day, MIC's then-new CEO explained the factors that led to the Board's decision to lower the anticipated dividend. He mentioned several factors—including issues affecting MIC's access to capital markets, new tax incentives to invest in its own portfolio, and a desire to maintain a more flexible balance sheet. App. 88, 93; 2d Cir. JA702. While he also pointed to the sudden and unexpected decline in demand for storage at IMTT, it was by no means the only reason he gave for the decision. 2d Cir. JA702–03.

B. Legal Claims

This putative securities fraud class action followed, and Moab Partners, L.P.—a sophisticated activist investor—was appointed lead plaintiff. As relevant here, Moab pursued § 10(b) claims against MIC and

certain individuals based on two distinct theories.[1] The first theory—not at issue in this Court—was based on specific affirmative statements made by defendants during the class period (in financial statements, earnings calls, and investor conferences). Moab asserted that these statements were either "materially false" or "omitted material facts" necessary to make the statements not misleading. App. 104–36. The second theory—which *is* at issue here—asserts that MIC breached an obligation under Item 303 to disclose that IMO 2020 was reasonably likely to have a material unfavorable effect on MIC's business overall, if it ultimately went into effect. App. 136–37. The complaint asserted that this omission was actionable under § 10(b) and Rule 10b-5, even though Moab did not identify any specific statement in MIC's public filings that was rendered misleading by the alleged Item 303 omission.

C. Decisions Below

The district court dismissed the complaint in its entirety for failure to state a claim. As relevant here, the court rejected Moab's argument that MIC violated a

[1] Although MIMUSA was originally named as a defendant under § 10(b) directly, that claim was later dropped by stipulation. App. 9. In addition to § 10(b), the complaint asserted Exchange Act claims against certain individuals and MIMUSA under § 20(a) (control person liability, 15 U.S.C. § 78t(a)), as well as under § 20A against MIMUSA alone (insider trading, *id.* § 78t-1). Further, the complaint asserted Securities Act claims against MIC, certain individuals, and Barclays under § 11 (registration statement, *id.* § 77k); against MIC and Barclays under § 12(a)(2) (prospectus, *id.* § 77l(a)(2)); and against MIMUSA and various individuals under § 15 (control person liability, *id.* § 77o).

disclosure obligation under Item 303 because the complaint failed to plead "an uncertainty that should have been disclosed" and "in what SEC filing or filings Defendants were supposed to disclose it." Pet. 39a. The complaint "d[id] not 'allege that' any 'omitted information was material' under the relevant 'probability/magnitude test' for assessing Item 303 violations." *Ibid.* (quoting *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 103 (2d Cir. 2015)). Nor did Moab allege "when Defendants 'actually kn[ew]'" of facts that would have required disclosure. Pet. 40a (quoting *Ind. Pub. Ret. Sys.* v. *SAIC, Inc.*, 818 F.3d 85, 95 (2d Cir. 2016)). The district court also found that even if "Defendants were negligent concerning the risks IMTT faced [regarding] the demand to store No. 6 fuel oil," that was not "sufficient to demonstrate scienter" as required by the PSLRA's heightened standard. Pet. 47a.

The Second Circuit reversed. While "agree[ing] with the district court that the majority of Defendants' alleged misstatements are not actionable," the court concluded that Moab had pleaded actionable omissions. Pet. 7a. As relevant here, the court held that Moab had "adequately alleged a 'known trend[] or uncertain[y]' that gave rise to a duty to disclose under Item 303." *Ibid.* (quoting *Stratte-McClure*, 776 F.3d at 101). This brought the complaint within the line of Second Circuit cases holding that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis for claims under Sections 11 and 12(a)(2), *and for a claim under Section 10(b)* if the other elements have been sufficiently pleaded." Pet. 8a (emphasis added, citations omitted). In the Second Circuit's view, Moab's complaint adequately alleged that "even if Defendants could not determine with certainty that IMO 2020 would be implemented,"

the new regulation's potentially "significant restriction of No. 6 fuel oil use was known to Defendants and reasonably likely to have material effects on MIC's financial condition or results of operation" if it finally went into effect. Pet. 9a. According to the Second Circuit, MIC's alleged failure to make this disclosure constituted an actionable omission under all three statutes, whether or not the disclosure was necessary to make any affirmative statements not misleading. Pet. 5a.

The court also found the same allegations sufficient to establish scienter, concluding that MIC and at least some of its executives were necessarily in the "position of knowing" that "it was likely" that IMO 2020 would reduce revenue and yet made no "corresponding disclosures." Pet. 11a–12a. This was enough, according to the court, to constitute "strong circumstantial evidence of conscious recklessness at least as strong as any opposing inference." Pet. 12a (citation omitted).

Separate from this Item 303 noncompliance theory, the court also found that the complaint had adequately identified certain affirmative statements about MIC's "base of customers," which the court regarded as specific enough to require disclosure of more information on risks relating to that customer base going forward. Pet. 10a–11a.

After this ruling—and an unsuccessful petition for rehearing—MIC, the individual defendants targeted by the § 10(b) claim (either directly or through control-person liability), and MIMUSA sought review in this Court. The petition sought to resolve the persistent split of authority on whether an omission claim can proceed under § 10(b) based solely on the alleged failure to make a disclosure required under Item 303, even if no affirmative statements were rendered misleading by omission.

SUMMARY OF THE ARGUMENT

I. Both standing alone and in context, the plain language answers the question: § 10(b) and Rule 10b-5 do not authorize a private right of action for a pure omission, even if the failure to disclose violated a separate SEC regulation. Rule 10b-5 does not give private plaintiffs the right to sue to enforce SEC regulations adopted under § 13(a).

A. As always, the analysis starts with the language of the statute and applicable rule. And here—in the context of the judicially created private right of action—that is also where the analysis should end.

Subsection (b) of Rule 10b-5 makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made * * * not misleading." 17 C.F.R. § 240.10b-5(b). This rule does not mention pure omissions, nor does it mention failures to comply with other disclosure requirements. Instead, it refers only to omissions that create half-truths—where the issuer affirmatively spoke on the subject, but its statement was rendered misleading because something material was left out. This reading aligns with the purpose of § 10(b) and Rule 10b-5—to crack down on fraud, not to provide a way for private parties to enforce compliance with SEC disclosure requirements.

Private plaintiffs cannot avoid the limits of Rule 10b-5(b) by shoehorning their claims into the more general subsections (a) and (c). Those subsections do not apply in cases that focus entirely on disclosure or nondisclosure. Every time this Court has considered liability under those subsections, something more or different has been involved—like insider

trading, or market manipulation, or the active dissemination of false statements made by others. Any other reading would strip subsection (b) of any function.

B. The statutory context confirms that Congress has never intended § 10(b) and Rule 10b-5 to apply to pure omissions, even if the nondisclosure violates an SEC regulation.

1. In § 11 of the Securities Act, Congress created liability when a registration statement omits a material fact "required to be stated"—*as well as* when it omits a material fact "necessary to make the statements therein not misleading." 15 U.S.C. § 77k. In theory, then, a plaintiff can plead an omission under § 11 just by pleading that the omitted fact is material and an SEC regulation required its disclosure. But Rule 10b-5(b) does not include the key language "required to be stated"; it refers only to the kind of omission that creates a half-truth. Nor does Rule 10b-5 contain the procedural safeguards that apply to omission claims under § 11. This Court has long relied on this kind of textual comparison in limiting the private right of action under § 10(b), and it should do the same here.

2. The Exchange Act's enforcement structure also shows why the violation of a disclosure regulation cannot suffice to plead an omission under Rule 10b-5. The Commission alone has the power to enforce rules and regulations it adopted under the Exchange Act, including disclosure requirements like Item 303. The Commission already has broad enforcement powers; it does not need § 10(b) in this context. Moreover, § 18(a)—the only provision that expressly contemplates a private claim based on periodic public filings—imposes liability only if an investor relied on a "statement" that was "false or misleading." 15 U.S.C. § 78r. It would be passing strange for an implied private right of action to be broader than what Congress provided expressly.

C. Congress revisited the scope of the private right of action in the PSLRA and chose not to expand it. Effectively, the PSLRA froze the private right of action exactly as it was. We are not aware of *any* case before 1995 that allowed a private claim to proceed under § 10(b) based on a pure omission standing alone. Nor did any case allow a private plaintiff to use § 10(b) to enforce the complex SEC regulations that govern public filings. And the PSLRA itself contains no indication that Congress intended to create such a claim.

To the contrary, the PSLRA requires a complaint to "specify each statement alleged to have been misleading"—and why. 15 U.S.C. § 78u-4(b)(1). This forecloses the possibility of a claim based on a pure omission—by definition, the *absence* of a specific statement. For this reason, too, a pure omission cannot be the basis for § 10(b) liability.

II. Nor can a plaintiff transform a pure omission into a half-truth by saying the speaker *implied* that the filing was complete and in compliance with the law. This "implied certification theory," which originated in lawsuits under the False Claims Act, cannot be applied here for several reasons.

First, the implied certification theory would collapse the meaningful distinctions the text makes between pure omissions and half-truths. As the text of § 11 demonstrates, Congress treated these categories as distinct, so this Court must as well.

Second, relaxing the requirement of an express, concrete "statement" would complicate other parts of the § 10(b) analysis. A specific "statement" is an indispensable element of a securities fraud claim, and it forms the foundation for answering several important questions. For example, does the statement convey an

opinion or a fact? Is it too generic to support an inference of price impact? Do its contents match the contents of whatever later disclosure supposedly removed artificial inflation from the price? Answering all these questions starts with examining the statement itself. This is no doubt why the PSLRA requires a complaint to identify the relevant statement with particularity.

Third, recognizing the implied certification theory in this context would do exactly what this Court has said it would never do: expand the implied private right of action under § 10(b) to a new class of claims. An *implied* private right of action based on an *implied* representation is at least one bridge too far.

Finally, even in the context of the False Claims Act, this Court has not adopted the implied certification theory wholesale. Instead, the Court has held that the theory can support a claim only if there were also express representations rendered misleading by omission. *Universal Health Servs.* v. *United States ex rel. Escobar*, 579 U.S. 176, 190 (2016) ("*Escobar*"). And the theory is even less persuasive here, in the context of a judicially implied right of action.

III. In any event, Item 303 is unsuitable for private enforcement under *any* statute. Its materiality standard is lower than the materiality standard this Court has established for claims under § 10(b) and § 11. Moreover, what an issuer must do to comply with Item 303 is subjective and unclear. Management must identify a "trend" or "uncertainty" and then predict how likely it is to materialize—and, if it does, what its impact on the company's overall position will likely be (and whether any business strategies could mitigate that impact). Such prognostications are necessarily a matter of judgment.

For this reason, the Commission has built flexibility into the analysis, and it also provides informal mechanisms to evaluate compliance. But while the Commission can be trusted to take a measured, flexible approach, the private plaintiffs' bar cannot. Private plaintiffs would approach Item 303 claims with 20/20 hindsight and unhelpful economic incentives. It is far better to hold to the enforcement regime prescribed by the Exchange Act, which leaves regulatory compliance in the Commission's hands.

ARGUMENT

I. The statutory and regulatory text shows that there is no Rule 10b-5 liability for an omission absent a misleading statement.

Both standing alone and in context, the text of § 10(b) and Rule 10b-5 makes clear that these provisions do not create liability for a pure omission—that is, an omission in the absence of a misleading statement. The Court need not go any further than that.

A. The text of Rule 10b-5 precludes § 10(b) liability for pure omissions.

The starting point of the analysis should, "as always," be "the language of the statute." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000); *see, e.g.*, *Slack Techs., LLC* v. *Pirani*, 598 U.S. 759, 766 (2023). This is particularly so in the context of the private right of action under § 10(b). As explained below, this Court has long been "mindful that [it] 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*, 564 U.S. at 142 (citing *Stoneridge*, 552 U.S. at 167).

Section 10(b) makes it unlawful "[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 such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). On its face, though, § 10(b) was never self-executing; it delegated authority to the Commission to define what a "manipulative or deceptive device or contrivance" might be. *Ibid.* The Commission carried out that authority by promulgating Rule 10b-5.[2]

Subsection (b) of Rule 10b-5 focuses specifically on fraud through speech: it makes it unlawful "[t]o 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." 17 C.F.R. § 240.10b-5(b). As explained below, this is the subsection that naturally applies to a claim against an issuer of financial statements based solely on the disclosure or failure to disclose information.

On its face, Rule 10b-5(b) does not create liability for pure omissions, either in the abstract or in violation of some other disclosure requirement. Instead, this subsection (and thus § 10(b)) is concerned with nondisclosure "only when" the disclosure is "necessary 'to make * * * statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx*, 563 U.S. at 44 (quoting Rule 10b-5(b)). Even

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[2] SEC Release Notice, Exchange Act Release No. 3230, 1942 WL 34443 (May 21, 1942) (adopting Rule 10b-5 "pursuant to authority conferred upon [the Commission] by the Securities Exchange Act of 1934, particularly Sections 10(b) and 23(a)"); *United States* v. *O'Hagan*, 521 U.S. 642, 651 (1997) (explaining that Rule 10b-5 was adopted "[p]ursuant to [the Commission's] § 10(b) rulemaking authority").

the Second Circuit—the only one to recognize a private cause of action based solely on a violation of Item 303—has acknowledged that "a 'pure omission' theory is * * * not strictly within the letter of Rule 10b-5." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 240 n.9 (2d Cir. 2016).

Put another way, there is no "affirmative duty" enforceable under § 10(b) and Rule 10b-5(b) "to disclose any and all material information." *Matrixx*, 563 U.S. at 44; *see, e.g.*, *Chiarella* v. *United States*, 445 U.S. 222, 231–35 (1980) (reversing conviction under § 10(b) that turned on a failure to disclose material, nonpublic information). Instead, Rule 10b-5(b) is concerned with the "ever-present duty not to mislead," which a speaker breaches by failing to disclose information necessary to make affirmative statements not misleading. *Basic*, 485 U.S. at 240 n.18.

This makes sense, as § 10(b) and Rule 10b-5 are about *fraud*, not disclosure per se. "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." *Chiarella*, 445 U.S. at 234–35. Again, Congress did not flesh out what would be considered deception; it left that responsibility to the Commission. And in exercising that responsibility, the Commission defined deceptive speech as misrepresentations and half-truths—that is, "statements" that are "misleading" because the speaker "omit[ted] to state a material fact." 17 C.F.R. § 240.10b-5(b). If the Commission had wished to treat violations of other disclosure requirements as deceptive, it could have said so in subsection (b). It did not. And as discussed below, neither did Congress when it "revisited the law" after the courts concluded that Rule 10b-5 could be the basis of a private lawsuit. *Janus*, 564 U.S. at 142 (quoting *Stoneridge*, 552 U.S. at 167).

The other two subsections of Rule 10b-5 do not undermine the limits of subsection (b); they apply in cases involving something more or different than speech alone. Subsection (a) bars "any device, scheme, or artifice to defraud." 17 C.F.R. § 240.10b-5(a). Subsection (c) outlaws "any act, practice or course of business which operates or would operate as a fraud or deceit upon any person." *Id.* § 240.10b-5(c). These words are broad, and this Court has found "overlap" between them—and with subsection (b) as well. *Lorenzo* v. *Sec. & Exch. Comm'n*, 139 S. Ct. 1094, 1102–03 (2019) (concluding that the three subsections of Rule 10b-5 are not mutually exclusive).

But this Court has not read subsections (a) and (c) to apply to a claim based entirely on speech—for example, to a claim based solely on what was or was not contained in an issuer's public filings. Instead, these subsections require something more or different. *E.g.*, *Chiarella*, 445 U.S. at 225 n.5, 227–28 (discussing the breach of a disclosure duty as the basis for an (a) and (c) claim only in the context of the "consummation of a transaction"). In every case from this Court considering liability under subsections (a) and (c), the claim has been based on fraudulent *actions*, either alone or combined with fraudulent speech. *See*, *e.g.*, *Lorenzo*, 139 S. Ct. at 1101 (defendant targeted prospective investors by email, "disseminating" false statements made by others and inviting investors to call him with questions); *Salman* v. *United States*, 580 U.S. 39, 42 (2016) (defendant traded on material nonpublic information); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153 (1972) (defendants devised a plan to fraudulently induce vulnerable shareholders to sell their shares); *O'Hagan*, 521 U.S. at 648 (defendant traded based on misappropriated material nonpublic information); *see also Lorenzo*, 139 S. Ct. at 1107–08

(Thomas, J., dissenting) (subsections (a) and (c) are "conduct-based" rather than speech-based).

To hold otherwise would be to wash away the specific requirements of subsection (b) completely. That would contravene "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Lorenzo*, 138 S. Ct. at 1108 (quoting *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012)). Respecting that cardinal rule of construction requires giving effect to the specific over the general, to avoid the "superfluity" that results when "a specific provision * * * is swallowed by the general one." *Id.* at 1108–09 (quoting *RadLAX*, 566 U.S. at 645). Here, the "specific" is subsection (b), which expressly addresses speech—both the disclosure of and the failure to disclose information. Giving effect to the "specific" requires holding that a claim based solely on speech must meet the express limitations of subsection (b). A plaintiff cannot use the more general subsections (a) and (c) as an escape hatch.[3]

In short, the text of Rule 10b-5 itself precludes any claim for a pure omission, at least for purposes of a private lawsuit under § 10(b). *See infra* Part I.B (describing potential omission liability, within limits, under other statutory provisions). Any other reading would do great violence to the language of subsection (b),

[3] *See Lorenzo*, 139 S. Ct. at 1103 (majority's result avoids the problems highlighted by the dissent because the case specifically targeted the defendant's conduct in emailing and thus "disseminating" false statements made by others); *Sec. & Exch. Comm'n* v. *Rio Tinto plc*, 41 F.4th 47, 53–55 (2d Cir. 2022) (even after *Lorenzo*, a claim based on misstatements or omissions alone cannot be reframed as a claim for so-called scheme liability and must satisfy the requirements of Rule 10b-5(b)).

which expressly limits the kind of omission that can support a claim.

B. The statutory context confirms that § 10(b) and Rule 10b-5 cannot be read to penalize pure omissions.

In interpreting a statute or rule, the Court looks not only to the "particular statutory language at issue" but also to "the language and design of the statute as a whole." *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991) (citation omitted); *see also Slack Techs.*, 598 U.S. at 767–68 (recognizing that other provisions of the securities laws can provide important "contextual clues"). Here, the statutory context reveals that Congress is fully capable of providing effective avenues for relief against pure omissions when it wants to. It did so in other provisions—for example, for private lawsuits available in narrow circumstances under § 11 of the Securities Act, and for enforcement actions by the Commission. But it did *not* do so in § 18(a) of the Exchange Act—the only provision that expressly contemplates a private right of action based on periodic public filings. And it also did not do so in § 10(b). Nor did the Commission do so in adopting Rule 10b-5. The textual differences matter, and they block any interpretation of § 10(b) and Rule 10b-5 that would impose liability for pure omissions.

1. Section 11 of the Securities Act does what Rule 10b-5 does not: it creates liability for omitting a material fact that is "required to be stated."

Section 11 of the Securities Act recognizes exactly the kind of pure omission theory asserted here—in text that is conspicuously absent from both § 10(b) and Rule 10b-5. Unlike the fraud-focused § 10(b), § 11 imposes strict liability for 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." 15 U.S.C. § 77k (emphasis added). In other words, in a § 11 case, omitting a material fact supports a claim, not only if it produces a half-truth, but also if the issuer failed to speak on the subject at all, in violation of some other disclosure requirement.

Neither § 10(b) nor Rule 10b-5 includes analogous language. Again, § 10(b) does not mention omissions at all; it was never self-executing, and it delegated definitional responsibility to the Commission. And as for Rule 10b-5, the Commission chose to include only the language that appears in the second half of the omission definition from § 11—the portion that refers to the omission of a material fact "necessary" to make the "statements * * * not misleading." 17 C.F.R. § 240.10b-5(b). Unlike § 11, Rule 10b-5 does not say anything about omissions of facts "required to be stated"—whether by another regulation or otherwise.

This textual difference matters. The text of § 11 demonstrates that when Congress wished to create a remedy for a failure to comply with a disclosure requirement, it "had little trouble in doing so expressly." *Blue Chip Stamps*, 421 U.S. at 734. Yet Congress did not mention the omission of facts "required to be stated" in § 10(b). Nor did the Commission do so in Rule 10b-5(b), despite having § 11 as a model.

This Court has relied on similar textual differences between § 11 and § 10(b) in declining to expand the latter. *E.g., Ernst & Ernst*, 425 U.S. at 208 ("The express recognition of a cause of action premised on negligent behavior in § 11 stands in sharp contrast to the language of § 10(b)[.]"). For one thing, the broader claims that § 11 explicitly recognizes come with "significant procedural restrictions not applicable under § 10(b)."

Id. at 208–09. "[T]hese procedural limitations indicate that the judicially created private damages remedy under § 10(b)—which has no comparable restrictions—cannot be extended, consistently with the intent of Congress, to actions" of a sort that only § 11 explicitly describes. *Id.* at 210. To hold otherwise "would allow causes of action covered by § 11 [among other provisions] to be brought instead under § 10(b), and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions." *Ibid.*

The Second Circuit missed this textual distinction in a pair of decisions in 2011 and 2012—and that error set the court on the wrong track. The Second Circuit's perspective on the issue traces back to two Securities Act cases: *Panther Partners Inc.* v. *Ikanos Communications, Inc.*, 681 F.3d 114 (2d Cir. 2012), and *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011). Both cases focused mostly on § 11, which, again, imposes liability for a registration statement that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." *Panther Partners*, 681 F.3d at 120 (quoting 15 U.S.C. § 77k(a)); *accord Litwin*, 634 F.3d at 715–16. But they also involved claims under § 12(a)(2) of the Securities Act, which frames an omission just like Rule 10b-5(b) does—*without* referring to the omission of any material fact "required to be stated." *See* 15 U.S.C. § 77l(a)(2).[4]

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[4] The "required to be stated" language does appear in subsection *(b)* of § 12. 15 U.S.C. § 77l(b). But it is subsection *(a)(2)* that lays out the elements required to state a claim. Subsection (b) merely describes the affirmative defense of loss causation that can be invoked for an (a)(2) claim.

The Second Circuit glossed over that distinction, saying that § 12(a)(2) "imposes liability under similar circumstances [to § 11] for misstatements or omissions in a prospectus" (rather than in a registration statement). *Panther Partners*, 681 F.3d at 120. The court thus assumed that *both* provisions create liability for omitting a fact required by a regulation. *See id*; *accord Litwin*, 634 F.3d at 715–16. It did not wrestle with the difference in the text.

Later, the Second Circuit compounded its error by extending *Panther Partners* and *Litwin* to a private suit under § 10(b). *See Stratte-McClure*, 776 F.3d at 101–02. The court reasoned that those cases necessarily govern a private § 10(b) claim because § 12(a)(2)'s "prohibition on omissions is textually identical to that of Rule 10b-5." *Ibid.* Again, though, the court glossed over the important difference between § 11, which refers to omissions of facts "required to be stated," and § 12(a)(2) and Rule 10b-5, which do not.

The Ninth Circuit recognized this error and disagreed with the Second Circuit because of it. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1055–56 (9th Cir. 2014) (declining to rely on *Panther Partners* and *Litwin* in the context of § 10(b) and Rule 10b-5). As the Ninth Circuit pointed out, § 11 liability "arises from 'an omission in contravention of an affirmative legal disclosure obligation,'" whereas "[t]here is no such requirement under Section 10(b) or Rule 10b-5." *Ibid.* (quoting *Panther Partners*, 681 F.3d at 120). Rule 10b-5 is concerned with nondisclosure only when it "cause[s] other information that is disclosed to be misleading." *Ibid.* (citing *Matrixx*, 563 U.S. at 44). The Ninth Circuit thus refused to allow a § 10(b) omission claim when the issuer simply failed to make a disclosure required under Item 303. *Ibid.* And the court also emphasized that Item 303's disclosure threshold

differs from Rule 10b-5's "probability/magnitude test for materiality." *Id.* at 1055; *accord Carvelli* v. *Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 (11th Cir. 2019); *Oran* v. *Stafford*, 226 F.3d 275, 287–88 (3d Cir. 2000) (Alito, J.); *see infra* Part III.

In short, the Second Circuit has not wrestled with the difference in the text of § 11 and Rule 10b-5. If it had, it would have found that a pure omission is *not* actionable under Rule 10b-5 (or under § 12(a)(2) either, for that matter).

2. The enforcement structure of the Exchange Act confirms that § 10(b) cannot be understood to allow private lawsuits to enforce disclosure regulations.

Other provisions of the Exchange Act also counsel against reading § 10(b) and Rule 10b-5 to provide a private right of action for pure omissions—even when the omission violated a regulatory disclosure requirement. The Exchange Act entrusts enforcement of disclosure requirements to the Commission, and the only private right of action Congress created for periodic disclosures does not mention omissions at all.

Congress's charter to the Commission came with "a full panoply of enforcement tools." *Kokesh* v. *Sec. & Exch. Comm'n*, 581 U.S. 455, 459 (2017); *see* 15 U.S.C. § 78u. This includes the power to investigate and bring an action for violations. *Id.* § 78u(a)(1), (d)(3). The Commission's enforcement power does not require a false or misleading statement, nor does it require a showing of scienter. Instead, the Commission may investigate "whether any person has violated * * * any provision of [the Exchange Act]" or the rules or regulations adopted thereunder, including regulations like Item 303. *Id.* § 78u(a)(1).

Thus, the Commission already has the power to enforce disclosure requirements—including to pursue sanctions against issuers for failing to speak when required. These sanctions are significant: the Commission can seek civil penalties (*id.* § 78u(d)(3)), equitable relief (*id.* § 78u(d)(5)), permanent and temporary injunctive relief (*id.* § 78u(d)(1)), and disgorgement (*id.* § 78u(d)(7)). There is no reason to think these kinds of remedies are insufficient—particularly when the Commission also has access to a handful of other remedies under § 10(b) (including disbarment or disqualification) for situations that also involve more serious and broader fraudulent schemes. The Commission does not need additional authority to police noncompliance through an expansion of Rule 10b-5. As former SEC Commissioner Joseph Grundfest has explained, resolving the circuit split relating to Item 303 and Rule 10b-5 "will have no meaningful effect on the Commission's enforcement program." *See* Joseph A. Grundfest, *Ask Me No Questions & I Will Tell You No Lies: The Insignificance of* Leidos *Before the United States Supreme Court*, at 20 (Stanford L. Sch. & Rock Ctr. for Corp. Gov., Working Paper No. 229, 2017).[5]

As for private enforcement, Congress gave it a much more limited role. In § 18(a) of the Exchange Act, Congress allowed purchasers or sellers of securities to sue if they relied on a "statement in any application, report, or document filed" under the Exchange Act, if it was "false or misleading with respect to any material fact." 15 U.S.C. § 78r(a). This provision does not mention omissions at all, and it certainly does not give private plaintiffs the ability to sue to enforce the rules the Commission has created for periodic disclosures.

[5] https://perma.cc/6PEY-8DVQ.

This Court has looked to § 18(a) in divining the scope of private rights of action under the securities laws. It has been "extremely reluctant to imply a cause of action * * * that is significantly broader than the remedy that Congress chose to provide." *Touche Ross*, 442 U.S. at 574; *see also Blue Chip Stamps*, 421 U.S. at 736 ("It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.").

The Court should have same reluctance here. Congress gave private plaintiffs the right to sue only if they relied on and were injured by a false or misleading statement. For regulatory violations, the Commission alone is in charge. This Court should not disturb that balance with an overbroad reading of § 10(b) and Rule 10b-5.

C. The PSLRA did not expand liability for pure omissions; it confirms that an omission under § 10(b) requires a misleading "statement."

If the language of the statutes left any doubt, the PSLRA puts that doubt to rest. This Court has explained that when Congress adopted the PSLRA, it "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166. Particularly given that the private right of action was "a judicial construct" to begin with, this Court has made clear that it "should not be extended beyond its present boundaries." *Id.* at 164–65.

In the decades before 1995—when the PSLRA was enacted—no court had *ever* allowed a plaintiff to pursue a private right of action under § 10(b) based simply on a failure to comply with a disclosure obligation in a public filing. There was certainly no "history of long-

standing lower-court interpretation" that might have supported acquiescence to a pure omission claim at that point. *Touche Ross*, 442 U.S. at 577 n.19. And nothing in the PSLRA would support such a claim. The PSLRA does not import the "required to be stated" language from § 11 into Rule 10b-5, nor does it create a private right of action to enforce regulatory requirements. This is no surprise. Congress enacted the PSLRA in part to mitigate the dangers of placing securities regulation in the hands of the private plaintiffs' bar, recognizing that securities class actions often result in the "extract[ion]" of "extortionate 'settlements'" of questionable claims. H.R. Rep. No. 104-369, at 31–32 (1995).[6] From Congress's perspective, expanding liability for pure omissions—as well as for regulatory violations—would have taken the private right of action in exactly the wrong direction.

Moreover, the PSLRA contains requirements that *underscore* the limited nature of an actionable omission under Rule 10b-5. In any private action alleging "an untrue statement of a material fact" or an omission of "a material fact necessary in order to make the statements made * * * not misleading"—that is, a misrepresentation or half-truth under Rule 10b-5(b)—the PSLRA requires the complaint to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). If the complaint does not meet

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[6] *See generally Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377, 390 (2014) (Congress enacted the PSLRA to "reduce frivolous suits"); Eugene Zelensky, *New Bully on the Class Action Block—Analysis of Restrictions on Securities Class Actions Imposed by the Private Securities Litigation Reform Act of 1995*, 73 Notre Dame L. Rev. 1135, 1136 (2014) (discussing Congress's intent to stop abusive lawsuits).

this "statement" requirement, it must be dismissed. *Id.* § 78u-4(b)(3)(A). This requirement—which otherwise tracks the language of Rule 10b-5(b)—undermines any suggestion that Congress understood Rule 10b-5 to contemplate liability for omissions that do not come with a misleading "statement."

II. A pure omission cannot be transformed into an actionable half-truth by implying a certification of completeness.

At the petition stage, Moab acknowledged that "silence generally is not misleading." Br. in Opp'n at 27 (citing *Basic*, 485 U.S. at 239 n.17). So it hinted at another path to liability. It posited that the requirements of Rule 10b-5(b) would still be met if "a filing *purports to comply with regulatory mandated disclosure* but omits material information." *Ibid.* (emphasis added).

This theory evokes the "implied certification theory" that sometimes arises in cases under the False Claims Act. *See, e.g.*, *Escobar*, 579 U.S. at 190. If this theory applied in the securities context, reasonable investors might "expect the MD&A section of a Form 10-K to disclose all the information that Item 303 requires" and understand the issuer to "implicitly represent[] that no additional qualifying trends or uncertainties exist." Br. of United States as Amicus Curiae at 10, 12, *Leidos, Inc.* v. *Ind. Pub. Ret. Sys.*, No. 16-581 (U.S. 2017) ("*Leidos* U.S. Amicus"). Then, if material information later turns out to have been omitted—the theory goes—the implied certification would become "the sort of misleading half-truth that may constitute actionable securities fraud." *Id.* at 10.

There are many problems with this theory—both legal and practical. *See* Grundfest, *supra*, at 32–36. Neither the text of the securities laws nor this Court's

precedents permit an implied certification theory in this context.

First, the implied certification theory would effectively "eliminate[] all meaningful distinctions between pure omission cases and half-truth cases"—a "real distinction" reflected in the text of the securities laws. *Id.* at 34. As discussed above, § 11 expressly grants private parties the right to sue if a registration statement omits a material fact "required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k. But the first half of that provision would be superfluous if every registration statement carried an actionable implied certification of completeness. In that event, every omission of a fact "required to be stated" would automatically be a half-truth—an omission that makes the implied certification of completeness misleading. The text of § 11 shows that Congress saw half-truths as different from non-compliance with disclosure requirements.

This theory also cannot be reconciled with the text of Rule 10b-5(b). Again, that rule makes it unlawful to "make any untrue statement of a material fact" or omit a material fact necessary to "make the statements made" not misleading. 17 C.F.R. § 240.10b-5(b). It thus imposes liability on those who "make" or have "made" statements. *Ibid.*; *see Janus*, 564 U.S. at 144 (only "the maker of a statement" can be liable). In either tense, the verb "make" entails an affirmative statement. *Make* (I.i), *Oxford English Dictionary*, OED.com[7] ("[t]o bring into existence"); *Make* (2.c) *Webster's Third New International Dictionary* (3d ed. 2002) ("to cause to exist"). The rule imposes no liability on "a person who does not make a statement, or a person

[7] https://perma.cc/M48A-KLWX.

who causes a statement not to be made." Grundfest, *supra*, at 35.[8]

Second, as a practical matter, this theory would strip the "statement" requirement of all meaning and utility. If the statement is only *implied*—a fiction, really—then courts will no doubt struggle to discern exactly what it *is*. And, worse, formulating the statement will become an exercise in creative pleading.

For example, the last time this issue was before this Court, the United States argued that the implied statement in a case involving Item 303 compliance might be something like, "This section discloses all the information required by Item 303." *Leidos* U.S. Amicus at 6. But the Second Circuit looks at the issue differently. According to that court, if an issuer fails to make mandatory disclosures under Item 303 in Form 10-Qs, the relevant "statements" are "the Form 10-Qs" *in their entirety*. *Stratte-McClure*, 776 F.3d at 103.

But which is it? The answer to that question matters a great deal—including because the "statement" is the building block of the analysis for other elements in a securities fraud case, like reliance, loss causation, scienter, and damages. This is no doubt why the PSLRA

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[8] The certification required by § 906 of the Sarbanes-Oxley Act of 2002 does not supply an actionable "statement" either. For periodic SEC filings, § 906 requires the issuer's CEO and CFO to certify that, to the best of their knowledge, the filing "fully complies with the requirements of section 13(a)." 18 U.S.C. § 1350. But § 906 does not itself carry a private right of action. It is not part of the securities laws at all. There is no reason to think Congress intended § 906 to transform all failures to comply with SEC regulations into half-truths subject to private enforcement under Rule 10b-5. Grundfest, *supra*, at 36–41.

requires a complaint to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading"—on pain of dismissal. 15 U.S.C. § 78u-4(b)(1), (b)(3)(A). This "statement" thus has to be "specif[ic]" and concrete—and, in the case of an omission, on the same subject as the omitted fact.

Without a clear statement, this Court's precedents for the other elements of a securities fraud claim become difficult to apply. In *Omnicare*, for example, the Court evaluated what it would take for a statement of opinion to be false or misleading. *See Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 178 (2015). Although *Omnicare* was a § 11 case, it did not involve a pure omission theory. Instead, the complaint identified two specific statements that it alleged were misleading by omission. Those statements said that the issuer believed its contracts were "legally and economically valid" and "in compliance with applicable federal and state laws." *Id.* at 179–80. On their face, these statements were pure legal opinions. *See id.* at 180.[9] By their nature, then, they could not be "untrue statement[s] of material fact" unless the speaker did not hold the stated opinions at the time. *Id.* at 185–86. But the Court held that a plaintiff might be able to plead that such statements are "misleading" by omission. *Id.* at 194. Doing so would require more than just saying the opinion turned out to be "wrong"; the complaint would also need to "call[] into question the issuer's basis for offering the opinion." *Ibid.* This would be "no small task": the complaint "must identify particular (and material)

[9] An implied certification that "this section discloses all the information required by Item 303" would be a statement of opinion, like the express statements at issue in *Omnicare*.

facts * * * about the inquiry the issuer did or did not conduct or the knowledge it did or did not have"—the omission of which "makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Ibid.* This analysis flows entirely from a close examination of the specific statements and what they do or do not convey. Removing or distorting the "statement" requirement would change this analysis dramatically.

Similarly, having a clear and specific "statement" is important for analyzing reliance—which is key to class certification—as well as for the requirement of loss causation. *See* 15 U.S.C. § 78u-4(b)(4). The typical method of establishing reliance starts with identifying a false or misleading statement in a public filing and then showing that the statement caused the issuer's stock to trade at artificially inflated levels. Usually, a plaintiff tries to make this showing by pointing to a downward movement in the price when a new disclosure "corrected" the earlier statement. *See Goldman Sachs Grp., Inc.* v. *Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1961 (2021). But evaluating this kind of price impact requires knowing exactly what the statement *was*. If it is highly generic, for example, that "often will be important evidence of a lack of price impact." *Ibid.* And the inference "that the back-end price drop equals front-end inflation" necessarily "starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Ibid.* Again, this analysis depends on knowing what the statement *is*—and ensuring that it is not too "generic."

In short, the "statement" requirement has important legal and practical implications. Allowing that requirement to be met with inferences or generalizations would complicate the analysis this Court has set forth for securities claims. And even if a plaintiff in a pure

omission case could make the elements fit, it would still be all but impossible to satisfy the PSLRA's requirement to "specify each statement alleged to have been misleading." 15 U.S.C. § 78u-4.

Third, as noted above, Congress's passage of the PSLRA forecloses any judicial expansion of § 10(b) liability beyond where it was in 1995. *Stoneridge*, 552 U.S. at 164–66 (in adopting the PSLRA, Congress "accepted the § 10(b) private cause of action as then defined but chose to extend it no further"). At the time of the PSLRA, neither this Court nor any other had recognized an implied certification of completeness as a "statement" supporting securities fraud liability. Substantively, just as recognizing a § 10(b) claim for pure omissions would impermissibly expand the private right of action (*see supra* Part I.B), so would recognizing an implied certification as a "statement" for purposes of Rule 10b-5(b).

Indeed, even without the PSLRA, this Court's precedents amply support the notion that judicially implied private rights of action—to the extent they are recognized at all—must be construed narrowly. *See Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress"); *Ziglar* v. *Abbasi*, 582 U.S. 120, 133 (2017) ("If the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter'" (quoting *Sandoval*, 532 U.S. at 286–87, and collecting cases)). This approach fueled this Court's § 10(b) jurisprudence even before the PSLRA, as it consistently avoided expanding the judicially implied private right of action. *See, e.g.*, *Cent. Bank*, 511 U.S. at 177–78 (declining to recognize private claim under § 10(b) for aiding and abetting); *Santa Fe Indus.* v. *Green*, 430 U.S.

462, 479–80 (1977) (declining to extend § 10(b) private right of action to breaches of fiduciary duty unrelated to misrepresentation or nondisclosure); *cf. Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1102 (1991) (declining to extend right of action under Exchange Act § 14(a) to certain minority shareholders).

Grafting an implied certification on top of an implied right of action makes all of this even more far-fetched. This "double-implication"—"an *implied* private right of action to enforce an *implied* representation" (Grundfest, *supra*, at 7, 33 (emphases added))—would take the private right of action far beyond the scope Congress reluctantly allowed to survive when it enacted the PSLRA. *See Stoneridge*, 552 U.S. at 164–66. "Having sworn off the habit of venturing beyond Congress's intent" when creating private rights of action, this Court should not "accept [an] invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

Finally, even under the False Claims Act—which features an *express* right of action, not a judicially implied one—this Court has not adopted the implied certification theory wholesale. *Escobar* held that "the implied certification theory can be a basis for liability" only on "two conditions": (1) the defendant's claim for payment must "make[] specific representations about the goods or services provided"; and (2) "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements [must] make[] those representations misleading half-truths." 579 U.S. at 190. But "not every undisclosed violation of an express condition of payment automatically triggers liability." *Ibid.*

In short, *Escobar* holds that a claim based on a material omission requires *more* than just a regulatory violation. Material omissions are actionable only when tied to specific representations. *Id.* at 181. *Escobar*

itself involved claims for Medicaid reimbursement that included "representations about the specific [mental health] services provided by specific types of professionals" but "failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services." *Id.* at 184–85. That is a far cry from the theory posited here—that just by making a public filing that includes a management narrative on any topic, an issuer necessarily guarantees it "compl[ied] with regulatory mandated disclosures." Br. in Opp'n at 27. Such an approach would put regulatory enforcement into the hands of the private plaintiffs' bar and could turn every regulatory violation into a costly class action.

To be sure, a complaint must still satisfy the other elements of a securities claim—including materiality and scienter. But if the Second Circuit's decision is any indication, those elements do not always provide meaningful pleading-stage limitations on claims like the one asserted here. The court found that Moab had pleaded a violation of Item 303—and thus an actionable omission—simply by alleging that MIC and its executives knew their business and also (along with everyone else in the industry) knew about a still-not-finalized regulation set to go into effect several years later. Pet. 9a. There was no allegation that MIC's leadership had concluded that there would be a material adverse effect on its financial position—or even that MIC knew with certainty that the regulation would ultimately be implemented. *See ibid.* Nor was there any allegation that MIC had concluded that disclosure was required under Item 303 and yet failed to provide it. Still, Moab persuaded the court of a negative: that "it would not have been 'objectively reasonable' for Defendants to determine that IMO 2020 would not likely have a ma-

terial effect on MIC's financial condition or operations." *Ibid.* On this basis alone, the Second Circuit found that Moab had sufficiently alleged all three elements: actionable omission, materiality, *and* scienter. Pet. 7a–12a.

In any event, the fact that there are other pleading requirements is not a reason to take away the requirement of a clear and specific false or misleading "statement." For all these reasons, this Court should reject any attempt to import the implied certification theory into the private right of action under § 10(b).

III. Item 303 is particularly ill-suited to enforcement through private litigation.

The Second Circuit's reasoning is not limited to Item 303. Presumably, it would allow a § 10(b) claim based on a violation of *any* of the plethora of SEC disclosure requirements. But as applied to Item 303, the Second Circuit's approach is particularly problematic.

Substantively, Item 303 is incompatible with a private right of action because its materiality standard is different from the materiality standard this Court established for claims brought under § 10(b). The Commission has acknowledged that the test for materiality approved by this Court in *Basic* "is inapposite to Item 303 disclosure." 1989 Guidance, 54 Fed. Reg. at 22,430 n.27; *see also* 2020 Release, 2020 WL 7013369, at *21 ("We are not, as recommended by one commenter, adopting the probability/magnitude test of *Basic*."). The Third, Ninth, and Eleventh Circuits have all recognized the same, and they relied on that fact in holding that § 10(b) does not allow a claim based solely on a violation of Item 303. *Carvelli*, 934 F.3d at 1331 ("The disclosure obligations imposed by Item 303 and Rule 10b-5 are materially (no pun intended) different[.]"); *NVIDIA*, 768 F.3d at 1055

("[T]hese two standards [of materiality] differ considerably."); *Oran*, 226 F.3d at 288 ("This [Item 303] test varies considerably from the general test for securities fraud materiality set out by the Supreme Court in *Basic*[.]"). In fact, the incompatibility between Item 303 and *Basic* materiality should block *any* private claim based on a violation of Item 303—including claims under §§ 11 and 12(a)(2).

Moreover, compliance with Item 303 is often a matter of judgment, so handing enforcement of Item 303 to the private plaintiffs' bar seems especially unwise. Under Item 303, an issuer must 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). This requires management to first identify a "trend" or "uncertainty" and then evaluate both the likelihood that it will come to fruition and, assuming it does, the likelihood that it will have a material effect on the issuer's financial position. *See* 1989 Guidance, 54 Fed. Reg. at 22,430. If an uncertainty is reasonably "likely" to come to fruition, then it must be disclosed unless management determines that it is "not reasonably likely" to have a material effect. *Ibid.*; *see also* 2020 Release, 2020 WL 7013369, at *19–21 (extensive discussion of what this might mean).

Determinations like these require inherently subjective, "open-ended[,] and exceedingly complex" judgments that vary greatly from industry to industry, company to company, and over time. Mark S. Croft, *MD&A: The Tightrope of Disclosure*, 45 S.C. L. Rev. 477, 478 (1994). Even the Commission itself has acknowledged that "good MD&A disclosure for one registrant is not necessarily good MD&A disclosure for another," or even for the same registrant in a different

year. 1989 Guidance, 54 Fed. Reg. at 22,436. Indeed, "[d]etermining a discrete probability of some unique kind of business event occurring is an intellectual challenge that few humans are likely to confront consistently or coherently." Donald C. Langevoort, *Toward More Effective Risk Disclosure for Technology-Enhanced Investing*, 75 Wash. U. L.Q. 753, 775 (1997). This makes Item 303 disclosures "[t]he most significant and challenging public disclosures." 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 9:50 (7th ed. 2016). Recognizing these challenges, the Commission acknowledges that Item 303 was designed to be "intentionally flexible and general." 1989 Guidance, 54 Fed. Reg. at 22,436.

Moreover, while the Commission *requires* issuers to disclose "currently known" trends and uncertainties that are reasonably likely to have material effects, it made it "optional" for issuers to disclose information that "involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty." *Id.* at 22,429. As many commentators have recognized, there is no clear line between when a known trend is "reasonably likely" to have a material effect and when that effect is "less predictable."[10] And both types of disclosures—required

[10] *See, e.g.*, 2 Hazen, *supra*, § 9.52 ("The line between those MD&A disclosures which are required and those which may be avoided is far from a clear one."); 3 Bromberg & Lowenfels on Securities Fraud § 6:13 (2d ed. 2023) ("[T]he distinction [between required and voluntary disclosures] is not easy for companies deciding what to disclose."); Suzanne J. Romajas, Note, *The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A*, 61 Fordham L. Rev. S245, S286 (1993) ("[T]he distinction that the SEC has

and optional—are necessarily "opinions," which do not "express certainty" in any event. *Omnicare*, 575 U.S. at 183.

Complicating the matter is the Commission's directive that issuers "avoid[] unnecessary information overload * * * where disclosure is not required and does not promote understanding." SEC Guidance Regarding Management's Discussion & Analysis of Financial Condition & Results of Operations, Exchange Act Release No. 48960, 68 Fed. Reg. 75,056, 75,060 (Dec. 29, 2003); *see also id.* at 75,057 (urging issuers to avoid including "immaterial information that does not promote understanding of companies' financial condition"). Issuers are not told exactly what to disclose—but they should not disclose too much either.

The facts here illustrate the problem. Global demand for No. 6 oil had been declining even before IMO 2020 was announced in 2008, and yet demand for storage of No. 6 oil at IMTT's facilities *increased* over that same period. *See* App. 55, 76. And while some experts predicted that the entire supply chain for No. 6 oil would be impacted by IMO 2020, others—including MIC—saw opportunity: either they could use scrubbers to make No. 6 oil compliant, or they could use No. 6 oil for purposes that IMO 2020 did not cover. App. 82–83. It is no wonder that the Second Circuit panel appeared to struggle with whether disclosures

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drawn between required and optional disclosures is so subtle that corporations and courts alike find Item 303 of Regulation S-K difficult to apply.").

relating to the potential effects of IMO 2020 were required or optional. *See* Oral Argument at 18:30–21:15 (2d Cir. No. 21-2524).[11]

The lack of a clear boundary between what is "reasonably expected" and what is "less predictable" would make it easy for plaintiffs' counsel to use 20/20 hindsight to frame the issue in whatever manner suits them—motivated by a potentially lucrative payout. The Commission is far better suited to evaluate compliance with this flexible requirement. It can do so both informally and, in egregious circumstances, through its express statutory enforcement power.

Through its informal comment-letter process, the SEC Division of Corporate Finance reviews public company filings and engages in a dialogue with issuers to address perceived deficiencies (including in MD&A), thus helping them comply with Item 303. *See* Sec. & Exch. Comm'n, Filing Review Process (Jan. 19, 2017).[12] This process seems to be working, at least as to Item 303. The SEC has brought relatively few enforcement actions relating to Item 303—and "only in extreme or egregious cases." *See* Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, 63 Fordham L. Rev. 1953, 1972 (1995). Yet when the facts warrant an action, the Commission has the power to take it. *See, e.g.*, *Sec. & Exch. Comm'n* v. *Ronson Corp.*, 1983 WL 1357 (D.N.J. Aug. 15, 1983).

The infrequency of Item-303-related enforcement actions suggests that the Commission appreciates the judgment involved in anticipating the effect of future events. It seems unlikely that the private plaintiffs'

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[11] https://perma.cc/G88P-MNXY.

[12] https://perma.cc/R2MW-ZG84.

bar will show the same restraint. Allowing private enforcement of such a judgment-laden requirement would open issuers up to the risk of expensive and potentially extortionate litigation, based just on a lack of clairvoyance. For this reason, too, the Court should be particularly reluctant to throw open the courthouse doors for private enforcement of Item 303.

CONCLUSION

The judgment of the Second Circuit should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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