No. 22-1165

In the Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORP., ET AL.,
PETITIONERS

v.

MOAB PARTNERS, L.P., ET AL.

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

BRIEF FOR RESPONDENT BARCLAYS CAPITAL INC. IN SUPPORT OF VACATUR

SUSANNA M. BUERGEL
ALISON R. BENEDON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

KANNON K. SHANMUGAM
Counsel of Record
WILLIAM T. MARKS
MATTHEW J. DISLER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

QUESTION PRESENTED

Whether a defendant's failure to make a disclosure required under Item 303 of Regulation S-K of the Securities and Exchange Commission can be actionable under Section 10(b) of the Securities Exchange Act of 1934, even absent an otherwise misleading statement.

CORPORATE DISCLOSURE STATEMENT

Respondent Barclays Capital Inc. is a wholly owned indirect subsidiary of Barclays PLC. Barclays PLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT

This Court granted review to decide whether a failure to disclose information required under Item 303 of Regulation S-K of the Securities and Exchange Commission (SEC) can be actionable in a private securities-fraud action under Section 10(b) of the Securities Exchange Act of 1934, even absent an otherwise misleading statement. But the answer to that question may also affect the viability of the claims in this case against respondent Barclays Capital Inc., which are asserted under Sections 11 and 12(a)(2) of the Securities Act of 1933 but premised on the same alleged failures to make disclosures under Item 303.

For that reason, Barclays supports vacatur of the judgment, which would allow the court of appeals to reconsider its decision on the Section 11 and 12(a)(2) claims in light of this Court's decision.

A. Background

1. Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to "use or employ, in connection with the purchase or sale of any security," "any manipulative or deceptive device." 15 U.S.C. 78j(b). SEC Rule 10b-5 implements that provision by making it unlawful for any person to "make any untrue statement of a material fact," or to "omit to state a material fact necessary in order to make the statements made * * * not misleading," in connection with a covered security. 17 C.F.R. 240.10b-5(b).

This Court has recognized an implied private right of action in Section 10(b) and Rule 10b-5. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). To state a claim under that implied right of action, a complaint must allege "a material misrepresentation (or omission)"; scienter; a connection with the purchase or sale of a security; reliance; economic loss; and loss causation. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005) (emphasis omitted).

Sections 11 and 12(a)(2) of the Securities Act of 1933 expressly create private rights of action related to statements in registration statements and prospectuses, respectively. Section 11 imposes liability on enumerated persons, including underwriters, when "any part of the registration statement" for a security "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(a). Section 12(a)(2) imposes liability on any person who offers or sells a security "by means of a prospectus or oral communication" that contains "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. 77*l*(a)(2).

2. SEC Regulation S-K sets forth "the requirements applicable to the content of the non-financial statement portions" of a registration statement under the 1933 Act and other public filings required by federal securities law. 17 C.F.R. 229.10(a). Item 303 of Regulation S-K establishes the particular requirements for management's discussion and analysis of a company's financial condition and results. See 17 C.F.R. 229.303(a). Of particular relevance here, Item 303 requires registrants 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." 17 C.F.R. 229.303(b)(2)(ii).[1]

Under preexisting Second Circuit precedent, the failure to make a disclosure under Item 303 can provide the basis for a claim under Section 10(b), Section 11, or Section 12(a)(2). See, *e.g.*, *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 101 (2015); *Panther Partners Inc.* v. *Ikanos Communications, Inc.*, 681 F.3d 114, 120 (2012); *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706, 716 (2011). Consequently, in that jurisdiction, where a trend or un-

[1] When this suit was filed, Item 303 required registrants 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 change in language between that version and the current version does not affect the question presented. See Pet. Br. 11.

certainty is "known" and "reasonably likely" to have a material impact on a company's sales or revenues, the company's silence on that trend or uncertainty can currently give rise to liability. *Litwin*, 634 F.3d at 716.

B. Facts And Procedural History

1. Petitioner Macquarie Infrastructure Corporation (Macquarie) owned and operated several infrastructure businesses. One of those businesses, International-Matex Tank Terminals (IMTT), operated bulk liquid storage terminals for several types of liquid commodities. As is relevant here, IMTT provided storage services for No. 6 fuel oil, a group of heavy and residual fuels with sulfur content of approximately 3%. Although usage of No. 6 fuel oil has declined for decades because of environmental regulations, IMTT continued to store it as a byproduct of the refining process and as fuel for shipping vessels. Pet. App. 16a-18a.

In 2008, the International Maritime Organization (IMO), a United Nations entity that regulates global shipping, adopted a pending regulation seeking to prohibit the use of fuels with a sulfur content at or above 0.5% by 2020 (leading to the moniker for the regulation of "IMO 2020"). While some observers expected IMO 2020 to reduce demand for No. 6 fuel oil still further, others predicted that demand would continue. In October 2016, the IMO "formally fixed" the limit of 0.5% sulfur in a "widely reported" announcement. Pet. App. 18a-19a (citations omitted).

On November 3, 2016, the entity that manages Macquarie's operations (Macquarie Management (USA) Inc.) held a secondary public offering of Macquarie common stock, underwritten by respondent Barclays Capital Inc. The offering was conducted pursuant to a prospectus supplement filed on the same date, as well as Macquarie's ex-

isting registration statement on file with the SEC. According to the complaint, those documents did not discuss No. 6 fuel oil, the importance of the market for that product to IMTT, or IMO 2020. Pet. App. 21a-22a; J.A. 55-56, 148-155.

IMTT's No. 6 fuel oil storage tanks maintained high utilization rates throughout late 2016 and most of 2017. In late 2017 and early 2018, however, an unexpected number of customers elected not to renew their storage contracts. On February 21, 2018, Macquarie announced that it would be decreasing its dividend guidance, causing its stock price to fall. In subsequent earnings calls, Macquarie's chief executive officer explained that the board considered several factors in making the dividend decision, including the opportunity to make funds available to repurpose tanks designed for the storage of No. 6 fuel oil as a result in the decline in utilization of No. 6 oil. Pet. App. 22a-23a; C.A. App. 702-705, 719.

2. On February 20, 2019, respondent Moab Partners, L.P., an institutional investor, filed the operative complaint on behalf of a putative class of shareholders who either purchased Macquarie shares between February 22, 2016, and February 21, 2018, or purchased shares in connection with the secondary offering. The complaint alleged claims under Section 10(b) and Rule 10b-5 against Macquarie and certain corporate officers; under Section 11 against Macquarie, Barclays, and certain other individual defendants; and under Section 12(a)(2) against Macquarie and Barclays. Pet. App. 15a-16a, 23a-24a; J.A. 139-165.[2]

[2] The complaint also alleged violations of Section 15 of the 1933 Act, 15 U.S.C. 77*o*, and Sections 20(a) and 20A of the 1934 Act, 15 U.S.C. 78t & 78t-1. Those claims are not at issue before this Court.

The "crux" of Moab's Section 10(b) claim was that defendants had "concealed from investors" both IMTT's reliance on No. 6 fuel oil and the likely disappearance of the market for its storage due to IMO 2020. Pet. App. 28a (citation omitted). Moab alleged that Item 303 of Regulation S-K required Macquarie to disclose those facts and that its failure to do so qualified as a material misstatement or omission under Section 10(b) and Rule 10b-5. Moab also contended that the failure to disclose those facts in the documents related to Macquarie's secondary public offering, as allegedly required by Item 303, amounted to actionable misstatements or omissions under Sections 11 and 12(a)(2). J.A. 121-122, 153-155.

3. Defendants moved to dismiss the complaint, and the district court granted the motion. Pet. App. 14a-48a. The court acknowledged that Item 303 requires a company to disclose a known "trend, event, or uncertainty" that is "reasonably likely to have material effects" on the company's performance. Pet. App. 30a-31a (citations omitted). But it concluded that Moab had failed to plead a violation of Item 303, because the complaint did not allege a material omission from Macquarie's SEC filings or that Macquarie knew of any material uncertainties or trends that required disclosure. *Id.* at 39a-40a. And because the claims under Sections 11 and 12(a)(2) depended on the complaint's "having successfully pleaded, at minimum, material misrepresentations or omissions," the court dismissed those claims as well. *Id.* at 47a.

4. The court of appeals vacated and remanded, holding that the complaint adequately alleged violations of Section 10(b) of the 1934 Act and Sections 11 and 12(a)(2) of the 1933 Act. Pet. App. 1a-13a. The court first noted that, under its precedent, the failure to make a "material disclosure required by Item 303" can serve as the basis

for claims under each of those provisions. *Id.* at 8a (citations omitted). Applying Item 303, the court reasoned that the "significant" restriction of No. 6 fuel oil use prompted by IMO 2020 was "known to [d]efendants and reasonably likely to have material effects" on Macquarie's financial condition or results. *Id.* at 9a. Because a reasonable investor would consider that information important, the court further concluded that the complaint sufficiently alleged the element of materiality. *Id.* at 10a.

SUMMARY OF ARGUMENT

The question presented in this case is whether a defendant's failure to make a disclosure required under Item 303 can be actionable under Section 10(b) of the 1934 Act, even absent an otherwise misleading statement. But a decision in petitioner's favor on that question may call into question the availability of private claims for a violation of Item 303 under Sections 11 and 12(a)(2) of the 1933 Act as well. For that reason, Barclays supports vacatur of the judgment below and requests that the case be remanded for the court of appeals to consider the effect of this Court's decision here on the claims against Barclays.

ARGUMENT

After the Court resolves the question presented, the court of appeals should have the chance to apply the Court's decision to the claims against Barclays under Sections 11 and 12(a)(2) in the first instance. The Court's decision may affect the scope of liability under Sections 11 and 12(a)(2) for several reasons.

To begin with, the prohibitions on material misstatements and omissions in Rule 10b-5 and Section 12(a)(2) are "textually identical": "both make unlawful omission of 'material fact[s] * * * necessary in order to make * * * statements, in light of the circumstances under which they were made, not misleading.'" *Stratte-*

McClure v. *Morgan Stanley*, 776 F.3d 94, 104 (2d Cir. 2015) (quoting 15 U.S.C. 77*l*(a)(2)); cf. 17 C.F.R. 240.10b-5. This Court has also analogized to the scope of liability under other private causes of action in the 1933 and 1934 Acts, including Sections 11 and 12(a)(2), when determining the scope of liability under Section 10(b). See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178-179 (1994); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 735-736 (1975).

In addition, preexisting Second Circuit precedent has treated the failure to disclose information under Item 303 as similarly actionable under each of Section 10(b) of the 1934 Act and Sections 11 and 12(a)(2) of the 1933 Act. See, *e.g.*, *Stratte-McClure*, 776 F.3d at 101; *Hutchison* v. *Deutsche Bank Securities Inc.*, 647 F.3d 479, 486 (2d Cir. 2011); *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706, 716 (2d Cir. 2011); see also *Stadnick* v. *Vivint Solar, Inc.*, 861 F.3d 31, 39-40 (2d Cir. 2017). Indeed, the Second Circuit has treated private actions under Section 10(b) for violations of Item 303 as having a "firm footing" precisely because its precedents under Section 12(a)(2) hold that "issuing financial statements that omit elements required by Item 303 can mislead investors." *Stratte-McClure*, 776 F.3d at 104; see *Panther Partners Inc.* v. *Ikanos Communications, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012). And in this case, the court of appeals linked its analysis of the claims under Section 11 and Section 12(a)(2) to its analysis of the claims under Section 10(b) and Rule 10b-5. Pet. App. 8a-9a.

As petitioner explains, moreover, violations of Item 303 are particularly ill-suited to enforcement through private class-action litigation. See Br. 43-48. The standard for materiality under Item 303 is lower than the standard that applies under Sections 10(b), 11, or 12(a)(2). See *id.*

at 44; see also, *e.g.*, *Rombach* v. *Chang*, 355 F.3d 164, 178 n.11 (2d Cir. 2004). And compliance with Item 303 involves complex and subjective judgments by management that should not be subject to Monday-morning quarterbacking in private class-action litigation. See Pet. Br. 44-48.

If this Court holds here that a failure to make a disclosure required under Item 303 cannot support a private action under Section 10(b), or if it limits the circumstances in which such a failure can do so, the decision will likely call into question the circuit precedent on which the court of appeals relied. See Pet. App. 8a. There is thus a "reasonable probability" that the decision will affect the court of appeals' decision with respect to the claims against Barclays. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). If the Court decides the question presented in petitioner's favor, it should thus vacate the judgment below in its entirety and remand the case so that the court of appeals can apply the Court's decision to those claims in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

SUSANNA M. BUERGEL
ALISON R. BENEDON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

KANNON K. SHANMUGAM
WILLIAM T. MARKS
MATTHEW J. DISLER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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